4-1-1998

Re-Examination Clause Re-Examined: The Supreme Court Removes Seventh Amendment's Re-Examination Protection in Diversity Cases in *Gasperini v. Center for Humanities, Inc.*

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CASENOTE

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I. INTRODUCTION

The Re-Examination Clause of the Seventh Amendment states: "In [s]uits at common law, . . . no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."[1] Until *Gaspeprini v. Center for Humanities, Inc.*,[2] the Supreme Court had interpreted the Seventh Amendment to allow federal *trial* judges to use remittitur when a jury's verdict was excessive,[3] but the Court had not allowed federal *appellate* courts to question trial judges' refusals to exercise this power.[4] Such appellate review, after the trial judge's decision to allow the verdict to stand, would amount to actual review of the verdict. Because the Seventh Amendment does not apply to state courts, state *appellate* courts *can* review trial judges' refusals to exercise remittitur,[5] a process by which the plaintiff is forced to select between an award that is less than the jury's

1. U.S. CONST. amend. VII.

2. 116 S. Ct. 2211 (1996).

3. *See, e.g.*, Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69 (1889) (right of trial by jury not impaired by requiring prevailing party to remit portion of jury verdict as condition of court's refusing new trial motion).

4. *See* Railroad Co. v. Fraloff, 100 U.S. 24 (1879):

> Whether [the refusal to exercise remittur] was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties.

Id. at 31-32.

5. *See* Edwards v. Elliott, 88 U.S. 532 (1874).

verdict or a new trial.[6] Therefore, the Court's post-*Erie* decisions raised the issue of what to do when a federal diversity case is governed by the laws of a state that would allow a federal appellate court to review a trial judge's refusal to reduce an excessive jury verdict.

In previous cases raising this issue, the Court based its decisions on other grounds.[7] However, in *Gasperini*, five U.S. Supreme Court justices determined that the Seventh Amendment Re-Examination Clause does not apply in diversity cases.[8] This Note illustrates how a majority of the Court misapplied the *Erie*[9] doctrine to conclude that the Seventh Amendment protection against re-examination does not apply to federal appellate courts in diversity cases.

The *Gasperini* case was brought by a well-regarded journalist, William Gasperini, who contracted with the Center for the Humanities (the "Center") to supply the Center with original color transparencies of photographs that he took.[10] Gasperini delivered the 300 transparencies to the Center.[11] The Center incorporated the transparencies into a videotape and was obligated to pay a royalty to Gasperini.[12] The Center was to return the transparencies once the video was completed, but could not locate them.[13]

Gasperini brought a diversity action in the United States District Court for the Southern District of New York.[14] The Center admitted its liability. Thus, only the issue of damages was tried to a jury.[15] Gaspirini presented an expert witness who testified that the industry standard within the photographic publishing community valued lost transparencies at $1,500 each.[16] The jury returned a verdict of $450,000, an amount equal to $1,500 for each of the 300 transparencies.[17]

After trial, the Center moved for a new trial pursuant to Rule 59 of

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6. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

7. *See id.*:

> We have never held expressly that the Seventh Amendment allows appellate review of a district court's denial of a motion to set aside an award as excessive. Although we granted certiorari in two cases in order to consider the issue, in both instances we found it unnecessary to reach the question when we decided the case.

Id. at 279 n.25.

8. 116 S. Ct. 2211 (1996).

9. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

10. *See* Gasperini v. Center for Humanities, Inc., 66 F.3d 427, 428 (2d Cir. 1995).

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.*

the Federal Rules of Civil Procedure.[18] The Center argued that the verdict exceeded the amount that a New York state court would have awarded.[19] Nonetheless, the district court denied the motion without comment.[20] The U.S. Court of Appeals for the Second Circuit reversed, holding that the trial court had an "obligation to patrol the outer bounds of what damages a jury may reasonably award, and to offer a choice between remittitur and a new trial when those bounds have been exceeded."[21] On *certiorari*, the Supreme Court vacated the judgment of the Second Circuit and remanded the case to the district court so that the trial judge could test the jury's verdict against the state standard, subject to appellate review for abuse of discretion.[22]

II. HISTORY OF THE SEVENTH AMENDMENT

The Re-Examination Clause of the Seventh Amendment historically limited courts by applying the rules derived from English common law. "[W]hen a trial by jury has been had in an action at law, . . . the facts there tried and decided cannot be reexamined in any court of the United States, otherwise than according to the rules of the common law of England."[23] In the eighteenth century, England had three common law courts of record with original jurisdiction: the Exchequer, the King's Bench, and the Court of Common Pleas.[24]

Although all three courts sat at Westminster, legal actions were rarely tried there.[25] Instead, judges from all courts travelled to different circuits and tried cases in individual circuits under the *nisi prius* system.[26] Many cases were tried in the litigant's county. The judges returned the verdicts from the various circuits to Westminster, where the full court entered the respective judgments.[27]

The English common law system restricted post-trial review. At common law, an appeal and a motion for a new trial "were mutually exclusive remedies."[28] Appeal took the form of a "writ of error," which

18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.* at 431.
22. *Gasperini*, 116 S. Ct. at 2225.
23. Capital Traction Co. v. Hof, 174 U.S. 1, 13 (1899).
24. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 56 (3d ed. 1990).
25. *See* W.R. CORNISH & G. DE N. CLARK, LAW AND SOCIETY IN ENGLAND 1750-1950, at 23 (1989); G.R.Y. RADCLIFFE & GEOFFREY CROSS, THE ENGLISH LEGAL SYSTEM 90, 183-84 (3d ed. 1954).
26. *See* CORNISH & CLARK, *supra* note 25, at 23; RADCLIFFE & CROSS, *supra* note 25, at 91, 186.
27. *See* RADCLIFFE & CROSS, *supra* note 25, at 91, 186.
28. Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 482 n.9 (1933).

was heard by a different and higher court.[29] Review under the "writ of error" was limited to errors of law appearing in the record of process, pleadings, verdict, and judgment.[30] Errors of law included "discrepancies between the amounts claimed and those awarded, irregularities in the panel of jurors, failure to notify parties of adjournments, and so on."[31]

A motion for new trial, on the other hand, "was addressed to the discretion of the court [en] banc" at Westminster.[32] The plaintiff or defendant moved for a new trial before judgment was entered by the full court, and the motion was not an appellate procedure. The motion was filed after the jury reached its verdict, and judgment was not entered until the motion was denied.[33] The en banc court based its decision on information provided by the trial judge. The decision was final and not subject to further review as to factual matters.[34] In other words, the motion was passed upon by the same court in which the action was brought and tried, not by a different court of appeal.[35]

Moreover, "no English court ever set aside . . . a verdict, except with the concurrence of the judge, or judges, who sat with the jury, saw the witnesses and heard them testify."[36] Thus, the verdict stood unless the judge who "presided at the trial and heard the witnesses deemed the verdict to be unjustified and, even then, only if he could persuade his

29. The system of review was complicated by the fact that the same court might sit at different times in a trial or review capacity. *See* BAKER, *supra* note 24, at 158; A.T. CARTER, A HISTORY OF ENGLISH LEGAL INSTITUTIONS 88 (1902); RADCLIFFE & CROSS, *supra* note 25, at 212-13.

30. *See* BAKER, *supra* note 24, at 157; WILIAM BLACKSTONE, COMMENTARIES 1158, 1161 (Thomas M. Cooley 4th ed. 1899); RADCLIFFE & CROSS, *supra* note 25, at 211; Note, *Appealability of Rulings on Motion for New Trial in the Federal Courts*, 98 U. PA. L. REV. 575, 575 (1950).

31. A.K.R. KIRALFY, POITER'S OUTLINES OF ENGLISH LEGAL HISTORY 68 (5th ed. 1958).

32. *Fairmount Glass Works*, 287 U.S. at 482 n.9.

33. *See* RADCLIFFE & CROSS, *supra* note 25, at 186-87.

34. "[O]ne could not appeal against a refusal of the court en banc to grant a new trial." *Id.* at 211-12. *See also* BLACKSTONE, *supra* note 30, at 447-48, 883-88, 897-98. In 1854, the Common Law Procedure Act allowed the Exchequer Chamber to review a refusal to grant a new trial in a limited class of cases, but it maintained an important restriction: "where the application for a new trial is upon Matter of Discretion only, as on the ground that the Verdict was against the Weight of Evidence or otherwise, no such Appeal shall be allowed." *Fairmount Glass Works*, 287 U.S. at 482-83 n.9.

35. The power to grant a new trial was "exercised before judgment, and not by a court of appeal. Once the court en banc had given judgment, the only redress was of the limited kind provided by writ of error." BAKER, *supra* note 24, at 159. *See also* Metropolitan R.R. Co. v. Moore, 121 U.S. 558, 573 (1887) (noting similar practice in trial courts of District of Columbia); KIRALFY, *supra* note 31, at 56 (*nisi prius* judge recorded the verdict, but judgment was entered at Westminster).

36. Maxfield Weisbrod, Note, *Limitations on Trial by Jury in Illinois*, 19 CHI. KENT L. REV. 91, 92 (1940).

brethren at Westminster to this view."[37] The en banc court generally followed the trial judge's recommendation.[38] "The [en banc] court would not . . . order a new trial simply because it did not agree with the verdict. If there was no misdirection [of the jury] and there was some evidence on which the verdict could be supported, [the verdict] must stand."[39]

Following the mandate of the Re-Examination Clause of the Seventh Amendment, the United States Supreme Court relied on the English common law principles at least twenty times to bar federal appellate court review of verdicts, which did not exist in the common law.[40]

> It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.[41]

Until *Gasperini*, the Court had uniformly held that the Seventh Amendment prohibited federal appellate courts from reviewing any finding of fact made by a jury and approved by the trial court. In *Parsons v. Bedford*, a nineteenth century diversity case, Justice Story found that the district court did not err by refusing the defendant's request to transcribe testimony, because the request was made "in order to establish the error of the verdict in matters of fact."[42] Justice Story further explained that the Seventh Amendment's prohibition on appellate review of factual questions rendered the application for a transcript immaterial.[43]

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37. 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2819 (2d ed. 1995).

38. *See* BAKER, *supra* note 24, at 101.

39. RADCLIFFE & CROSS, *supra* note 25, at 187. *See also* Honda Motor Co. v. Oberg, 512 U.S. 415, 424 (1994) (recognizing "the deference ordinarily afforded jury verdicts" at common law and in early American courts).

40. *See, e.g., infra* notes 42-49. None of these cases presented the precise issue decided in *Gasperini*: whether a federal appellate court can review a federal trial court's refusal to exercise remittitur in a diversity case where a state appellate court would be able to do so.

41. Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29, 35 (1944).

42. 28 U.S. 433, 445 (1830).

43. *See id.* at 447-48. *See also* Hansen v. Boyd, 161 U.S. 397, 402 (1896) ("[A]sk[ing the Court] to determine the weight of proof [would] usurp the province of the jury"); Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 91 (1891) ("We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted."); Kennon v. Gilmer, 131 U.S. 22, 29 (1889) ("this court has no authority to pass upon any question of fact involved in the consideration of the motion for a new trial."); Insurance Co. v. Folsom, 85 U.S. 237, 248-49 (1873) ("Facts found by a jury could only be re-examined under the rules of the common law . . . . Nothing, therefore, is open to re-examination in this case. . . ."); Barreda v. Silsbee, 62 U.S. 146, 166 (1858) ("Whether the jury were warranted in so finding or not, is not a question for an appellate tribunal. That question cannot be re-examined by this court."); United States v. Laub, 37 U.S. 1, 5 (1838) ("[I]t is a point too well settled, to be now drawn in question, that the effect and sufficiency

In *Railroad Company v. Fraloff*, another nineteenth century case, the Court addressed the question of whether an allegedly excessive verdict could be reviewed on appeal when the defendant did not raise an issue of faulty jury instructions or other trial error.[44] Justice Harlan, writing for the Court, held that appellate review was unavailable:

> [T]his court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. . . . Whether [the trial court's refusal to disturb the verdict], in that particular, was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties.[45]

Subsequently, the Court has repeatedly reaffirmed the rule that "a case of mere excess upon the evidence is a matter to be dealt with by the trial court [and] does not present a question for re[-]examination" in appellate courts.[46] This century, Justice Brandeis stated that:

> The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact

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of the evidence, are for the consideration and determination of the jury; and the error is to be redressed, if at all, by application to the court below for a new trial . . . ."); Marine Ins. Co. of Alexandria v. Young, 9 U.S. 187, 191 (1809) (It is improper for an appellate court to re-examine a denial of a motion for a new trial "upon the ground that the verdict was contrary to evidence.").

44. 100 U.S. 24 (1879).

45. *Id.* at 31-32.

46. Southern Ry. v. Bennett, 233 U.S. 80, 87 (1914) (jurisdiction based on federal question tried in and appealed from a state court). *See also* St. Louis, Iron Mountain & S. Ry. Co. v. Craft, 237 U.S. 648, 661 (1915) (excessiveness of verdict "involves only a question of fact and is not open to reconsideration here."); Texas & Pac. Ry. Co. v. Hill, 237 U.S. 208, 215 (1915) (Whether "the trial court [erred] in not directing a remittitur because of the assumed excessive amount of the verdict is not open" to review.); Herencia v. Guzman, 219 U.S. 44, 45 (1910) ("As there was evidence proper for the consideration of the jury the objection that the verdict was against the weight of evidence or that the damages allowed were excessive cannot be considered."); Lincoln v. Power, 151 U.S. 436, 437 (1894) (the Court cannot re-examine excessiveness of verdict where "damages have been fixed by the verdict of a jury . . . [and] where the complaint is only of the action of the jury."); New York, Lake Erie & W. R.R. v. Winter's Adm'r, 143 U.S. 60, 75 (1892) (Excessiveness of jury verdict is not reviewable on appeal, and "correction of [the jury's] error, if there were any, lay with the court below upon a motion for a new trial, the granting or refusal of which is not assignable for error here"); Wabash Ry. Co. v. McDaniels, 107 U.S. 454, 456 (1883) (Court is "without authority to disturb the judgment upon the ground that the damages are excessive . . . [w]hether the order overruling the motion for a new trial based upon that ground was erroneous or not."). Consider also *Wilson v. Everett*:

> [The excessiveness of the verdict] was a question to be reached only through a motion for a new trial; and we cannot, on this writ of error, review any error committed in that respect by the jury, if there were one. Nor can we take cognizance of the complaint that the court overruled the motion for a new trial . . . . The case was fairly submitted to the jury, and the issues involved were passed upon by them.

139 U.S. 616, 621 (1891).

> has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals.[47]

A few years after Justice Brandeis' statement, the Court reaffirmed that "denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review."[48] As late as 1954, the Court, in a diversity case, again declared that "[a]ppellate review in the federal courts is, of course, limited ultimately by the Seventh Amendment."[49]

> Until recently, the lower federal courts followed the same rule that the power to set aside a verdict as against the weight of the evidence "belongs exclusively to the trial judge," whose action on a motion of this kind "is not the subject of review," and that the appellate court is "without power" to order a new trial on this ground.[50]

Judge Learned Hand stated, "A motion for a new trial, though very ancient, was never regarded as part of the bill [of exceptions], but rather as an independent method of review, and there was no review of that review."[51] In 1953, Judge Hand again stated that the rule "is too well established to justify discussion" that "there may be errors that are not reviewable at all, and among those that are not are erroneous orders granting or denying motions to set aside verdicts on the ground that they are against the weight of the evidence."[52]

Some of the federal courts of appeals changed their approach, however, after the revision and recodification of the Judicial Code in 1948. This revision removed the explicit statutory ban on reversals "for any error in fact" that had existed since 1789. Some federal appellate courts believed that this revision and recodification was intended to work a radical alteration in federal appellate practice. These courts gradually began to assert the authority to grant a new trial, or a remittitur, on grounds of excessiveness of a trial verdict.[53] The Supreme Court

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47. Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481 (1933) (footnotes omitted) (jurisdiction based on diversity).

48. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 248 (1940) (jurisdiction based on federal question).

49. Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 53 n.5 (1954).

50. WRIGHT ET AL., *supra* note 37, § 2819, at 199 (footnotes omitted).

51. Miller v. Maryland Cas. Co., 40 F.2d 463, 464 (2d Cir. 1930) (citation omitted) (jurisdiction based on diversity).

52. Portman v. American Home Prods. Corp., 201 F.2d 847, 848 (2d Cir. 1953) (jurisdiction based on diversity).

53. *See, e.g.*, Dagnello v. Long Island R.R. Co., 289 F.2d 797, 800 (2d Cir. 1961) (asserting their power to review in a federal question case, but affirming).

implicitly approved of that trend in 1950 with the dictum in a federal question case: "We agree with the Court of Appeals that the amount of damages awarded by the District Court's judgment is not monstrous in the circumstances of this case."[54]

Since then, the appellate courts have interpreted the Court's dictum as implicitly authorizing appellate review of the weight of the evidence under an abuse-of-discretion standard. This expansion of appellate power drew criticism.[55] The Eighth[56] and Second[57] Circuits continued to question whether such authority existed in federal question or diversity cases.

The Supreme Court subsequently encountered three opportunities to address this issue directly, but the Court instead decided each case on other grounds. In the first of these cases, the Court reviewed a Fourth Circuit decision granting a new trial on the grounds that the jury awarded excessive damages.[58] Instead of addressing the constitutional authority for the appellate court's action, the Court held that the trial court did not abuse its discretion by sustaining the jury verdict because the verdict had sufficient "support in the record."[59] In the second of these cases, the plaintiff sought *certiorari*, claiming that the court of appeals could not constitutionally reverse the district judge's refusal to set aside a verdict for excessiveness.[60] However, the Court refused to address the constitutional question, and instead held that the trial court properly sustained the original jury verdict.[61]

In the last of these three cases, the Court observed that:

> We have never held expressly that the Seventh Amendment allows appellate review of a district court's denial of a motion to set aside an

54. Affolder v. New York, Chicago & St. Louis R.R. Co., 339 U.S. 96, 101 (1950).

55. Judge Blackmun expressed some reservations about the constitutionality of allowing appellate courts to review the denial of new trial motions based on excessiveness of the verdict. *See* Solomon Dehydrating Co. v. Guyton, 294 F.2d 439, 446-48 & n.3 (8th Cir. 1961) (jurisdiction based on diversity).

56. *See* Thongvanh v. Thalacker, 17 F.3d 256, 259-60 (8th Cir. 1994) (federal question); Czajka v. Black, 901 F.2d 1484, 1485 (8th Cir. 1990) (federal question); Green v. American Airlines, 804 F.2d 453, 455 (8th Cir. 1986) (diversity).

57. *See, e.g.*, Dunlap-McCuller v. Riese Org., 980 F.2d 153, 157-58 (2d Cir. 1992) (federal question); Newmont Mines Ltd. v. Hanover Ins. Co., 784 F.2d 127, 133 (2d Cir. 1986) (diversity); Compton v. Luckenbach Overseas Corp., 425 F.2d 1130, 1132 (2d Cir. 1970) (federal question). Denial of a new trial motion "is one of those few rulings that is simply unavailable for appellate review." Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1199 (2d Cir. 1995) (diversity).

58. Neese v. Southern Ry. Co., 350 U.S. 77 (1955) (per curiam) (jurisdiction based on federal question).

59. *Id.* at 77.

60. *See* Grunenthal v. Long Island R.R. Co., 393 U.S. 156 (1968) (jurisdiction based on federal question).

61. *See id.* at 157-58.

> award as excessive. Although we granted certiorari in two cases in order to consider the issue, in both instances we found it unnecessary to reach the question when we decided the case.[62]

The Court then stressed that "federal courts operate under the strictures of the Seventh Amendment. As a result, we are reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury."[63]

III. ANALYSIS OF *GASPERINI V. CENTER FOR HUMANITIES, INC.*

In *Gasperini*, Justice Ginsburg, writing for the majority, began by stating that New York law allows appellate courts to review jury verdicts for excessiveness and "to order new trials when the jury's award 'deviates materially from what would be reasonable compensation.'"[64] She further explained that in order to "determine whether an award 'deviates materially from what would be reasonable compensation,' New York state courts look to awards approved in similar cases."[65] After establishing state law, Justice Ginsburg addressed the issue of how, if at all, New York's rule for reviewing a judge's denial of a request for remittitur should be applied in diversity cases based on New York law, given that "[p]arallel application of § 5501(c) at the federal appellate level would be out of sync with the federal system's division of trial and appellate court functions, an allocation weighted by the Seventh Amendment."[66]

The Court proceeded to summarize the *Erie* doctrine,[67] "and deci-

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62. Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 279 n.25 (1989) (jurisdiction based on diversity and federal question, but appealed on a divesity issue).

63. *Id.* at 280 n.26.

64. *Gasperini*, 116 S. Ct. at 2215 (quoting N.Y. C.P.L.R. § 5501(c) (McKinney 1995)).

> The appellate division shall review *questions of law and questions of fact* on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal. In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate *if it deviates materially* from what would be reasonable compensation.

N.Y. C.P.L.R. § 5501(c) (McKinney 1995) (emphasis added). With this rule, the legislature "installed a standard 'invit[ing] more careful appellate scrutiny.'" *Gasperini*, 116 S. Ct at 2218 (alteration in original) (quoting Ch. 266, 1986 N.Y. Laws 470 (McKinney)). Previously, review in New York appellate courts was limited to a "shock the conscience" test which gave greater deference to the trial court. *See id.* at 2218.

65. *Gasperini*, 116 S. Ct. at 2218.

66. *Id.* at 2219.

67. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

sions in *Erie*'s path."[68] The Court concluded that "[t]he dispositive question [in the *Erie* analysis] is whether federal courts can give effect to the substantive thrust of [N.Y. C.P.L.R.] § 5501(c) without untoward alteration of the federal scheme for the trial and decision of civil cases."[69] "Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law."[70] The Court found that for *Erie* purposes, "[N.Y.] CPLR § 5501(c) . . . is both 'substantive' and 'procedural.'"[71]

In order to answer this question, the *Gasperini* Court first applied the "outcome-determinative" test of *Guaranty Trust Company v. York*.[72] Under *Guaranty*'s "outcome-determinative" test, the question is whether "it significantly affect[s] the result of a litigation for a federal court to disregard a law of a state that would be controlling in an action upon the same claim by the same parties in a State court?"[73]

The *Guaranty* Court stated that "where a federal court is exercising jurisdiction solely because of [diversity], the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."[74] To prevent the "outcome-determinative" test from "be[ing] applied mechanically to sweep in all manner of variations,"[75] the *Gasperini* Court read *Hanna v. Plumer*[76] as imposing the additional requirement that "application [of the 'outcome-determinative' test] must be guided by 'the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.'"[77]

Pursuant to these three decisions, Justice Ginsburg attempted to determine "whether New York's 'deviates materially' standard . . . is outcome-*affective*."[78] In doing so, Justice Ginsburg started with the

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68. *Gasperini*, 116 S. Ct. at 2219.

69. *Id.*

70. *Id.*

71. *Id.*

72. 326 U.S. 99 (1945) (requiring a federal court to impose a state's statute of limitations to an equity proceeding in diversity).

73. *Id.* at 109.

74. *Id.*

75. *Gasperini*, 116 S. Ct. at 2220.

76. 380 U.S. 460 (1965).

77. *Gasperini*, 116 S. Ct. at 2220 (quoting Hanna v. Plumer, 380 U.S. 460, 468 (1965)).

78. *Id.* (emphasis added). The test as set forth in *Guaranty Trust*, 326 U.S. 99, is whether it is outcome-*determinative*, not the lesser standard of outcome-*affective*. The Court seems to base the "outcome-affective" terminology on *Hanna v. Plumer*, which stated the issue as "Whether application of the [state law] would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would [unfairly discriminate against citizens of the forum State, or] be likely to cause a plaintiff to choose the federal court." 380 U.S. 460, 468 n.9 (1965). However, as the *Gasperini* Court points out, the purpose of *Hanna* was to add additional standards to ensure that the "outcome-determinative" test would "not be applied mechanically to sweep in

assumption "that a *statutory cap* on damages would supply substantive law for *Erie* purposes."[79] The Court then concluded that although "[N.Y.] CPLR § 5501(c) differs from a statutory cap principally 'in that the maximum amount recoverable is not set by statute, but rather is determined by case law.' . . . [T]he State's objective is manifestly substantive."[80]

If the law is considered substantive, *Erie* analysis focuses on whether application of the state law meets the "twin aims" set out in *Hanna*.[81] The *Gasperini* Court found "that if federal courts ignore the change in the New York standard and persist in applying the 'shock the conscience' test to damage awards on claims governed by New York law, 'substantial' variations between state and federal [money judgments] may be expected."[82] The Court then concluded that the possibility of variations in awards was enough to satisfy the *Erie* "outcome-determinative" test as well as the "twin-aims." However, the Court only addressed one of the aims.[83]

After the Court resolved the *Erie* issue, it continued its analysis by examining whether the application of the state's law would violate the Seventh Amendment.[84] The Court began its Seventh Amendment analysis by discussing *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, a diversity case in which federal procedural rules required an issue to be resolved by a jury and state law required it to be resolved by a judge.[85] In *Byrd*, the Court held that the first clause of the Seventh Amendment prevented federal courts from applying state law in that situation.[86]

In *Gasperini*, Justice Ginsburg distinguished *Byrd* by pointing out

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all manner of variations," not to lower the standard to that which the Court seems to be establishing as its measuring stick in *Gasperini*. *Gasperini*, 116 S. Ct. at 2220.

79. *Id.* (emphasis added).

80. *Id.* (citation omitted) (quoting Brief for City of New York as *Amicus Curiae*, at 11). The Court makes this classification with little explanation or support for its conclusion.

> There is an absolutely fundamental distinction between a *rule of law* such as [a statutory cap on damages], which would ordinarily be imposed upon the jury in the trial court's instructions, and a *rule of review*, which simply determines how closely the jury verdict will be scrutinized for compliance with the instructions.

Id. at 2238 (Scalia, J., dissenting).

81. "[T]he twin aims of the *Erie* rule [are to discourage] forum-shopping and [avoid] inequitable administration of the laws." *Hanna*, 380 U.S. at 468.

82. *Gasperini*, 116 S. Ct. at 2221 (alteration in original) (quoting *Hanna*, 380 U.S. at 467-68).

83. *See id.* at 2221. The Court fails to discuss whether the possibility of variations in awards would lead to forum-shopping. "The Court commits the classic *Erie* mistake of regarding whatever changes the outcome as substantive. That is not the only factor to be considered." *Id.* at 2238 (Scalia, J., dissenting) (citation omitted).

84. *See id.* at 2221.

85. 356 U.S. 525 (1958).

86. *See id.* at 537-39. The first clause in the Seventh Amendment reads: "In Suits at common law, . . . the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII.

that "*Byrd* involved the first clause of the Amendment, [while] . . . [t]his case involves the second."[87] Furthermore, Justice Ginsburg wrote that the Court has not insisted that juries be all male, or consist of twelve jurors, as was the case at common law.[88] She also stated that "appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive is a relatively late, and less secure, development . . . once deemed inconsonant with the Seventh Amendment's re-examination clause."[89] The Court then briefly reviewed its earlier cases and hinted that it would be willing to allow appellate review, as well as appellate decisions allowing appellate review.[90]

Ultimately, the Court held that "appellate review for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice."[91] The Court based this holding not only on the Court's own statements, but also on the "relatively late" practice of the appellate courts, seemingly allowing the tail to wag the dog.[92] However, the Court's holding is limited by its instruction to appellate courts: "give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law."[93]

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87. *Gasperini*, 116 S. Ct. at 2222.

88. *See id.* at 2224 n.20. "This is a desperate analogy, since there is of course no comparison between the specificity of the command of the Reexamination Clause and the specificity of the command that there be a 'jury.' The footnote abandonment of our traditional view of the Reexamination Clause is a major step indeed." *Id.* at 2236 (Scalia, J., dissenting).

89. *Id.* at 2223.

90. *See id.* The Court does not state a reason for departing from its historical finding that:

> No error of law appearing upon the record, this court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefore rested with the court below, under its general power to set aside the verdict. . . . Whether [the trial court's refusal to exercise that power] was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties.

Railroad Co. v. Fraloff, 100 U.S. 24, 31-32 (1879).

91. *Gasperini*, 116 S. Ct. at 2223. The Court rationalizes that "New York's dominant interest can be respected, without disrupting the federal system, once it is recognized that the federal district court is capable of performing the checking function." *Id.* at 2224. However, the Court ignores that it requires more than the district court's application of the state law by permitting appellate review of its decision, which is inconsistent with the federal system.

92. *See id.* at 2223. Not all of the circuits embraced appellate review of a trial court's refusal to set aside a jury verdict as excessive. For example, the Eighth Circuit questioned whether the Seventh Amendment permits appellate review of such determinations. Thongvanh v. Thalacker, 17 F.3d 256, 259-60 (1994).

93. *Gasperini*, 116 S. Ct. at 2223 (quoting Dagnello v. Long Island R.R. Co., 289 F.2d 797,

Justice Ginsburg also relied heavily on *Browning-Ferris Industries v. Kelco Disposal* as precedent, and quoted the following passage: "[T]he role of the district court is to determine whether the jury's verdict is within the confines set by state law . . . . The court of appeals should then review the district court's determination under an abuse-of-discretion standard."[94] However, Justice Ginsburg's reliance seems misplaced given that in the *Browning-Ferris* opinion, the Court acknowledged that it "never held expressly that the Seventh Amendment allows appellate review of a district court's denial of a motion to set aside an award as excessive."[95] Justice Ginsburg's *Gasperini* opinion took this one step further and concluded that, "[N]othing in the Seventh Amendment precludes appellate review of the trial judge's denial of a motion to set aside a jury verdict as excessive."[96]

Finally, the Court held that "[d]istrict court applications of the 'deviates materially' standard would be subject to appellate review under the abuse of discretion standard."[97] Thus, the Court ordered that the case be remanded back to the district court to measure the verdict against the New York standard subject to appellate review for abuse of discretion.[98]

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806 (2d Cir. 1961)). By adopting the abuse-of-discretion standard, the *Gasperini* Court is allowing review, but not with the same standard that state appellate courts would use. This result seems to be in conflict with the "twin-aims" required by the *Erie* doctrine, because the use of a different standard of review still leaves a disparity between results that a federal court would reach and those that a state court would reach.

94. *Id.* at 2223 (first alteration in original) (quoting *Browning-Ferris*, 492 U.S. at 279). The Court's interpretation contradicts the principle that "[t]he proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law." Donovan v. Penn Shipping Co., 429 U.S. 648, 649 (1977) (per curiam).

95. *Browning-Ferris*, 492 U.S. at 279 n.25. The *Browning-Ferris* Court did not have to decide that issue because it held that even if it applied the abuse-of-discretion standard, the district court's order would be upheld. *See id.* at 280. "Nor can any weight be assigned to our decision in *Browning-Ferris*." *Gasperini*, 116 S. Ct. at 2235 (Scalia, J., dissenting).

96. *Gasperini*, 116 S. Ct. at 2224 (quoting Grunenthal v. Long Island R.R., 393 U.S. 156, 164 (1968)). While this is dicta, it appears to suggest that the majority of the Court is stating a willingness to find *any* review, whether in diversity cases or not, to be consistent with the Seventh Amendment. If this is true, then the Seventh Amendment's re-examination clause seems to have been deflated, applying only to *res judicata* notions that would preclude another jury from retrying a case in which a jury verdict has become a final judgment.

97. *Id.* at 2225.

98. *See id.* Justice Stevens, in his dissent, states that he would affirm the appellate court's decision and not give the district court judge a second chance to apply the New York standard. *See id.* Justice Scalia, with whom Chief Justice Rehnquist and Justice Thomas join, believes that neither the district court nor the federal appellate courts have the power to re-examine the jury's verdict under the New York law. *See id.* at 2230-40.

IV. COMMENT

The notion that a requirement of parity between state and federal proceedings must be established in order to avoid forum-shopping drove the *Gasperini* Court towards its holding. However, this rule should not be so broadly applied. In fact, the Court previously stated that Congress has the "power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."[99]

Under this power, Congress enacted Rule 59 of the Federal Rules of Civil Procedure, which provides that following a jury trial, "[a] new trial may be granted . . . for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States."[100] This language appears to echo the Seventh Amendment by requiring that courts base their actions on common law. Yet, the Court seems to follow those cases that ignore common law precedent and turn these inapposite cases *into* the common law.

Furthermore, the Court appears to establish only partial parity. Following *Gasperini*, *federal* appellate courts clearly have the authority to exercise *abuse-of-discretion* review, while *state* appellate courts can review under the lesser *deviates materially* standard. Thus, in close cases, a judge's decision would be reversed under the state standard, while it would be affirmed under the federal standard.

The *Gasperini* Court could have reached a similar conclusion without disregarding hundreds of years of precedent, the Federal Rules of Civil Procedure, and the Constitution. Namely, the Court could have, and in this author's view should have, held that the district court shall apply the state standard—as it held—subject to review as a matter of law if it failed to apply the law. Oddly enough, the Court seems to have intended this result, because it remanded the case back to the trial court to give it the opportunity to apply the state standard, instead of affirming the Second Circuit's reversal. By contrast, Justice Stevens would have simply affirmed the Second Circuit.

Since *Gasperini*, the circuit courts have been asked to review district judges' refusals to remit excessive verdicts. Yet, in all but one case, the courts have either held that the district court did not abuse its discretion or remanded the case so that the district court could apply the state standard.[101] Therefore, the standard most circuits may, in fact, be apply-

99. Hanna v. Plumer, 380 U.S. 460, 472 (1965).

100. FED. R. CIV. P. 59(a).

101. *See* Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568, 576-78 (8th Cir. 1997) (holding that the trial court abused its discretion); Imbrogno v. Chamberlin, 89 F.3d 87, 90 (2d Cir. 1996) ("On remand, the district court should follow Connecticut law and determine if the jury verdict . . . was

ing looks only at whether the district court applied the right law, not whether the court's decision is such that no reasonable judge could have reached it. So long as only one district court decision has been overturned under *Gasperini*, the actual standard remains unclear. Until more district court decisions are overturned, many hours will be spent litigating whether federal trial judges abused their discretion, and federal jury verdicts will lack the protection that our forefathers intended when adopting the Seventh Amendment.

Additionally, in a case where the *Gasperini* abuse of discretion standard would not allow the circuit court to overturn a district court's refusal to grant remittitur, the Tenth Circuit found that the "award was so excessive [that] it violated the substantive element of the Due Process Clause of the Federal Constitution."[102] The Tenth Circuit then explains that it "do[es] not believe *Gasperini* prevents [the court] from determining in the first instance the amount of remittitur, because the issue of how much of the . . . award the United States Constitution allows is one of constitutional fact that the appellate courts have the power to decide."[103] At first glance, this case seems to be moving in a direction opposite to *Gasperini*, but if one looks at the policy behind *Gasperini* to prevent forum-shopping, this case is actually consistent, as the substantive due process requirements are identical in both federal and state courts. Furthermore, the Supreme Court would have jurisdiction to review both federal and state court decisions for substantive due process violations. Thus, this ruling is actually consistant with the anti-forum-shopping policy behind *Gasperini*, yet it may prove to lower the standard of review.

Finally, the bold step the Court takes in *Gasperini* leaves several other issues to be resolved. Does the *Gasperini* holding give federal appellate courts the power to review a judge's denial of remittitur in a diversity case where state law would not allow any appellate review? The Court seems to be moving that way and did not limit its holding to apply only to diversity cases. Does the *Gasperini* holding call into question the Court's holding regarding the first clause of the Seventh Amendment where the Court refused to keep issues from the jury that would be tried by a judge in a state court? If so, the Court would be

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excessive as a matter of state law."); Consorti v. Armstrong World Indus., Inc., 103 F.3d 2, 5 (2d Cir. 1996) (remanding for reconsideration under state's "deviates materially" standard); Steinke v. Beach Bungee, Inc., 105 F.3d 192, 197-98 (4th Cir. 1997) (same). For examples of cases finding that the district judges did not abuse their discretion, see Pescatore v. Pan American World Airways, Inc., 97 F.3d 1, 19 (2d Cir. 1996) (concluding "that the district court did not abuse its discretion in denying Pan Am's motion for a new trial").

102. Continental Trend Resources, Inc. v. Oxy USA Inc., 101 F.3d 634, 642 (10th Cir. 1996).

103. *Id.* at 643.

reversing itself in a very short period of time. If not, why is one clause of the Seventh Amendment given less protection against state actions than another? Certainly, the Court will be asked to face these issues in the future, but until they do, they leave the law in a turbulent state.

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