No.

In the Supreme Court of the United States

MOSTAFA R. AHSAN,
PETITIONER

v.

STAPLES THE OFFICE SUPERSTORE EAST, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Gasperini* v. *Center for Humanities, Inc.*, this Court held 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." 518 U.S. 415, 436 (1996) (internal quotation marks, citation, and footnote omitted)). As the Court noted, appellate review to ensure that the weight of the evidence supports the damages awarded "is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice." *Ibid.*

The question presented is:

Whether, as the Second Circuit holds, the Seventh Amendment categorically bars review of district court denials of motions for a new trial made on the ground that the weight of the evidence does not support the verdict or whether, as all other geographic circuits hold, such denials are reviewable.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is not published in the Federal Reporter but is reprinted at 710 Fed. Appx. 31. The district court's memorandum and order (App., *infra*, 7a-34a) are not published in the Federal Supplement but are available at 2017 WL 1082404.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2018. Petitioner timely filed a petition for rehearing en banc, which was denied on March 23, 2018. App., *infra*, 35a-36a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND FEDERAL RULE PROVISIONS

The Seventh Amendment to the Constitution of the United States provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

Rule 59 of the Federal Rules of Civil Procedure provides in pertinent part that "[t]he [district] court

may, on motion, grant a new trial * * * after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A).

STATEMENT

A. Legal Background

The Reexamination Clause of the Seventh Amendment provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. Appellate review of a district court's denial of a new trial motion "was once deemed inconsonant with the Seventh Amendment's Reexamination Clause." *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 434 (1996). As early as 1838, this Court considered it "a point too well settled, to be now drawn in question, that the effect and sufficiency 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." *United States* v. *Laub*, 37 U.S. 1, 5 (1838). This understanding of the Seventh Amendment prevailed for the next hundred years. See, *e.g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 247-248 (1940) (reaffirming "the well established rule that neither this Court nor the Circuit Court of Appeals will review the action of a federal trial court in granting or denying a motion for a new trial for error of fact[.] * * * Certainly, 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.").

Times have changed. In *Gasperini*, this Court held 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." 518 U.S. at 436 (alteration in original) (quoting *Grunenthal* v. *Long Island R.R., Co.*, 393 U.S. 156, 164 (1968) (Stewart, J., dissenting)). Whether a trial judge abused his discretion in denying such a motion is simply "not a question of fact with respect to which reasonable men might differ, but a question of law" that does not implicate the Reexamination Clause. *Id.* at 435 (quoting *Dagnello* v. *Long Island R.R. Co.*, 289 F.2d 797, 806 (2d Cir. 1961)).

All but one of the federal geographic courts of appeals hold that the Reexamination Clause allows appellate weight-of-the-evidence review of district courts' denials of motions for a new trial. 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2819 (3d ed. 2017) (citing *Taylor* v. *Washington Terminal Co.*, 409 F.2d 145, 147 (D.C. Cir. 1969)) (recognizing that "it is by now standard doctrine that such orders may be reviewed for abuse of discretion"). The Second Circuit does not. It holds the opposite: that the clause categorically prohibits appellate review of such denials. *Binder* v. *Long Island Lighting Co.*, 57 F.3d 193, 201 (2d Cir. 1995) (insisting that review would "run[] contrary" to the Seventh Amendment).

B. Factual And Procedural Background

In 2011, Petitioner Mostafa Ahsan was hit by boxes that fell from a shelf while he was shopping at a store operated by Staples The Office Superstore East, Inc. (Staples). App., *infra*, 3a. "Staples concede[d] that its

negligence caused one or two boxes to fall from a shelf * * * but it dispute[d] * * * whether its negligence proximately caused [Ahsan] to sustain any injuries." App., *infra*, 8a. A jury trial ensued, which largely involved a debate among expert medical witnesses over the cause of Ahsan's injuries. See App., *infra*, 13a-28a (describing trial testimony). At the conclusion of the trial, the jury returned a special verdict. The first question stated, in relevant part: "Defendant has conceded that if you find any box or boxes fell on plaintiff, it was negligent in allowing them to do so. Did defendant's negligence proximately cause any of plaintiff's injuries arising out of the incident on September 2, 2011?" Case 1:13-cv-05929-SMG Document 113 Filed 11/21/16, at 1. The foreperson indicated "No." *Ibid.*

Ahsan moved for a new trial pursuant to Federal Rule of Civil Procedure 59, claiming that the verdict was contrary to the weight of the evidence. App., *infra*, 8a-9a. The district court denied the motion. App., *infra,* 33a. After reviewing the evidence, the court acknowledged that "the jury might have credited [Ahsan]'s version of events and accepted the opinions of the expert treating physicians he called as witnesses." App., *infra*, 30a. But the court held that the jury "certainly was not required to do so," App., *infra*, 30a, as it "reasonably may have concluded that the injuries complained of by plaintiff were the result of pre-existing conditions that had worsened over time," App., *infra*, 29a. Although the jury had deliberated for only "a short period of time," App., *infra*, 30a, after a six-day trial, App., *infra*, 8a, the court maintained that "that fact alone does not lead to

the conclusion that [the jury] failed to dutifully consider the evidence presented," App., *infra*, 30a.

Ahsan appealed the district court's denial of his new trial motion. App., *infra*, 3a. While the court of appeals agreed that it could generally "review a district court's denial of a Rule 59(a) motion for a new trial for abuse of discretion," App., *infra*, 4a (citing *Baker* v. *Dorfman*, 239 F.3d 415, 422 (2d Cir. 2000)), it also "recognize[d] an exception to this rule," *ibid.* "[W]here a district court denies a motion for a new trial made on the ground that the verdict was against the weight of the evidence," the panel held, "the ruling is not reviewable on appeal." *Ibid.* (citing *Stonewall Ins. Co.* v. *Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1199 (2d Cir. 1995). Even if it were to treat the appeal as a challenge based on the sufficiency rather than on the weight of the evidence, the court held, it would uphold "the District Court's denial of Ahsan's motion [ ]as not clearly erroneous." *Ibid.* The court of appeals thus affirmed the judgment of the district court. App., *infra*, 5a.

Ahsan sought rehearing en banc, urging the court to "conform its rule to that of all the other circuits," which permit appellate weight-of-the-evidence review. Pet. for Reh'g En Banc 5. The Second Circuit summarily denied the petition. App., *infra*, 36a.

REASONS FOR GRANTING THE PETITION

I. There Is A Deep And Acknowledged Conflict Among The Courts Of Appeals Over Whether They Can Review Decisions Denying Motions For A New Trial Made On Grounds Of The Weight Of The Evidence

There is an acknowledged circuit split over whether a court of appeals can review a district court's denial of a motion for new trial made on grounds of the weight of the evidence. The Second Circuit holds that such denials are categorically unreviewable. Every other geographic circuit reviews such denials for abuse of discretion.

Multiple courts of appeals have noted the split. See, *e.g.*, *Green* v. *American Airlines, Inc.*, 804 F.2d 453, 455 (8th Cir. 1986) (indicating that although the courts of appeals generally review such denials "[t]he Second Circuit * * * has denied that it has the power to set aside a trial judge's determination that the verdict was not against the weight of the evidence"); *Valm* v. *Hercules Fish Prods. Inc.*, 701 F.2d 235, 237 (1st Cir. 1983) ("*Compare Portman* v. *Am. Home Products Corp.*, 201 F.2d 847, 848 (2d Cir. 1953) (L. Hand, J.) (no review of denial of motion for new trial based on weight of evidence) *with Borras* v. *Sea-Land Service, Inc.*, 586 F.2d 881, 887 (1st Cir. 1978) (limited review of denial of new trial motion based on weight of evidence)") (Breyer, J.).

The academic literature and leading civil procedure treatises both recognize that the Second Circuit stands in conflict with the others in holding that denials of such motions are categorically unreviewable. "[T]he

Second Circuit," one commentator notes, "is the most restrictive [circuit]. It will review only decisions granting new trials and will not review the denial of a new trial on weight of the evidence grounds at all." Cassandra B. Robertson, *Judging Jury Verdicts*, 83 Tul. L. Rev. 157, 194 (2008). Another commentator notes that "[t]he circuit courts of appeals have been divided on the fundamental question of whether weight of the evidence review extends to the courts of appeals." William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. Rev. 1695, 1724 (2001). As this commentator outlines the split, "[t]he Second Circuit will not review a district court's determination that a jury's liability findings are not supported by the weight of the evidence," *ibid.*, while every other circuit will do so under "an abuse of discretion standard," *id.* at 1724-1725 (citing 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2820 (2d ed. 1995); 6A James Wm. Moore et al., *Moore's Federal Practice* § 59.08[6] (2d ed. 1995)).

A. The Second Circuit Holds That Denials Of Motions For A New Trial Based On The Weight of the Evidence Are Categorically Unreviewable

The Second Circuit holds it cannot review—at all—district court denials of motions for new trials made on the ground of the weight of the evidence. *Stonewall Ins.* v. *Asbestos Claim Mgmt. Co.*, 73 F.3d 1178, 1199 (1995). The court acknowledges that litigants are "entitled to argue to the trial judge that the verdict is against the weight of the evidence[.]" *Ibid.* But when the trial judge denies the motion, the "loser[]" has no

"appellate recourse." *Ibid.* "[T]he denial of that challenge is one of those few rulings that is simply unavailable for appellate review." *Ibid.*

The Second Circuit originally justified this position on an understanding of the Seventh Amendment. In its view, appellate weight-of-the-evidence review would "run[] contrary" to the "role of the jury, as envisioned by the Seventh Amendment." *Binder* v. *Long Island Lighting Co.*, 57 F.3d 193, 201 (1995) (internal quotation marks omitted). For this reason, it held "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. * * * [The rule] is too well established to justify discussion." *Portman* v. *American Home Prods. Corp.*, 201 F.2d 847, 848 (2d Cir. 1953) (L. Hand, J.).

The Second Circuit has relied more recently on a very different justification. In *Stonewall Insurance*, it recognized that the Seventh Amendment landscape had changed and that it should "therefore * * * consider[] anew" "[w]hether a denial ruling is reviewable." 73 F.3d at 1199. In a paragraph of the opinion "circulated to all of the active judges of the Court," *id.* at 1199 n.13, it continued to reject such review but offered a new reason: because it would be too "burdensome," *id.* at 1199. In reaching this conclusion, the Second Circuit compared reviewing such motions to reviewing denials of similar motions made on grounds of evidentiary insufficiency, which it does routinely review. The full paragraph argued:

> Review of a trial court's ruling assessing the weight of the evidence imposes on an appellate

> court far more of a burden than arises from review of a ruling rejecting a challenge to the sufficiency of the evidence. The latter ruling can be readily affirmed as soon as the reviewing court identifies adequate evidence in the record that permits the disputed issue to go to the jury, despite the existence of significant opposing evidence. Such review does not require an assessment of all the evidence. Reviewing a ruling on a "weight of the evidence" challenge, however, obliges a reviewing court to examine in some detail all of the evidence. That burdensome review is warranted in the rare case where a trial judge rejects a jury's verdict as against the weight of the evidence * * * but is not warranted in the far more frequent circumstance where a trial judge denies a "weight of the evidence" challenge and leaves in place a jury verdict supported by legally sufficient evidence. In the latter circumstance, the loser's only appellate recourse is to challenge the legal sufficiency of the evidence. The loser is also entitled to argue to the trial judge that the verdict is against the weight of the evidence and to obtain a new trial if the judge can be persuaded, but the denial of that challenge is one of those few rulings that is simply unavailable for appellate review. *See Portman v. Am. Home Prods. Corp.*, 201 F.2d 847, 848 (2d Cir.1953) (L. Hand, J.).

Stonewall Ins., 73 F.3d at 1199.

Since *Stonewall Insurance*, in fact, the Second Circuit has invoked only judicial convenience, not the Seventh Amendment, to justify its unique position. In *Lightfoot* v. *Union Carbide Corp.*, for example, the

Second Circuit justified its rule of categorical nonreviewability *solely* by the "burden" such review would cause. 110 F.3d 898, 910 (1997). It reasoned that

> [t]he task of reviewing and weighing all of the evidence presented at trial simply imposes too great a burden on the appellate court. Accordingly, while defendants [a]re entitled to argue to the trial judge that the verdict [was] against the weight of the evidence ... the denial of that challenge is one of those few rulings that is simply unavailable for appellate review.

Ibid. (citations and internal quotation marks omitted). The Seventh Amendment has since *Stonewall Insurance* made no appearance at all.

B. Every Other Geographic Circuit Holds That Such Denials Are Reviewable For Abuse Of Discretion

Every geographic circuit other than the Second reviews denials of motions for new trials based on weight of the evidence for abuse of discretion.[1] *Ahern* v. *Scholz*, 85 F.3d 774, 780 (1st Cir. 1996) ("Our review is circumscribed: we will disturb the district court's [denial of] appellant's motion for a new trial only where there has been a clear abuse of discretion."); *Leonard* v. *Stemtech Int'l Inc.*, 834 F.3d 376, 386 (3d Cir. 2016) ("[W]e review the grant or denial of a motion for a new trial for abuse of discretion."); *Gentry* v. *East*

[1] The Federal Circuit's review of grants or denials of new trials is governed by the law of the regional circuit from where the case originated. See, *e.g.*, *Whitserve, LLC* v. *Computer Packages, Inc.*, 694 F.3d 10, 18 (2012).

W. Partners Club Mgmt. Co., 816 F.3d 228, 241 (4th Cir. 2016) ("We review for abuse of discretion a district court's denial of a motion for new trial.") (internal quotation marks omitted); *Industrias Magromer Cueros y Pieles S.A.* v. *Louisiana Bayou Furs Inc.*, 293 F.3d 912, 918 (5th Cir. 2002) ("[A] trial judge's ruling on a motion for new trial is reviewed for an abuse of discretion."); *Morales* v. *American Honda Motor Co.*, 151 F.3d 500, 506 (6th Cir. 1998) ("We review a denial of a motion for a new trial for an abuse of discretion.") (internal quotation marks omitted); *M.T. Bonk Co.* v. *Milton Bradley Co.*, 945 F.2d 1404, 1407 (7th Cir. 1991) ("A new trial may be granted only if the verdict is against the clear weight of the evidence, and we will reverse the district judge's [denial] only where there is a clear abuse of discretion."); *Nanninga* v. *Three Rivers Coop.*, 236 F.3d 902, 908 (8th Cir. 2000) ("We review the district court's denial of a motion for a new trial under Fed. R. Civ. P. 59 for abuse of discretion."); *Landes Constr. Co.* v. *Royal Bank of Canada*, 833 F.2d 1365, 1372 (9th Cir. 1987) ("We review the trial court's decisions on motions for a new trial on the grounds that the verdict is against the clear weight of the evidence for an abuse of discretion."); *Woolard* v. *JLG Indus., Inc.*, 210 F.3d 1158, 1168 (10th Cir. 2000) ("On review, the trial court's decision to deny a motion for new trial will stand absent a showing of a manifest abuse of discretion.") (internal quotation marks omitted); *Blu-J, Inc.* v. *Kemper C.P.A. Grp.*, 916 F.2d 637, 643 (11th Cir. 1990) ("Absent an abuse of discretion, the district court's disposition of a motion for a new trial will not be disturbed on appeal."); *Eastern Air Lines, Inc.* v. *Union Trust Co.*, 239 F.2d 25, 30 (D.C. Cir. 1956) (holding that when "verdicts [are]

clearly against the weight of the evidence * * * the trial judge can be said to have abused his discretion in refusing to grant a new trial").

These circuits hold that such review does not violate the Seventh Amendment because it concerns a question of law, not fact. As early as 1948, for example, the Fourth Circuit held that "[t]he power of th[e] court to reverse the trial court for failure to [grant a new trial], where such failure * * * amounts to an abuse of discretion, is * * * clear." *Virginian Ry. Co.* v. *Armentrout*, 166 F.2d 400, 408 (1948). It explained that

> where the verdict is so manifestly without support in the evidence that failure to set it aside amounts to an abuse of discretion[,] reversal is no more based on "error in fact" than reversal for refusal to direct a verdict for insufficiency of evidence. Whether there has been an abuse of discretion is a question of law in the one case, just as is the legal sufficiency of the evidence in the other. An appellate court is not required to place the seal of its approval upon a judgment vitiated by an abuse of discretion.

Ibid. The Sixth Circuit has reasoned similarly:

> Another way of stating [why appellate courts can engage in such review] is that where the verdict is manifestly without support in the evidence failure by the trial judge to set it aside amounts to an abuse of discretion. Thus, the question becomes one of law rather than one of fact and is reviewable on appeal.

Hoskins v. *Blalock*, 384 F.2d 169, 171 (1967) (citing *Armentrout*, 166 F.2d 400). More recently, some courts have reasoned that this Court itself adopted this view in *Gasperini* v. *Center for Humanities*, *Inc.*, 518 U.S. 415 (1996). That decision, they believe, "h[e]ld [that] appellate review [of district courts' decisions of weight-of-the-evidence motions for new trials] for abuse of discretion does not violate part[ies'] Seventh Amendment right to a trial by jury." *E.g.*, *Evans* v. *Fogarty*, 241 Fed. Appx. 542, 549-550 (10th Cir. 2007) (citing *Gasperini*, 518 U.S. at 433-435).

II. Appellate Review Of District Court Denials Of Motions For New Trials Made On Weight-Of-The-Evidence Grounds Does Not Violate The Seventh Amendment

A. This Court Has Held That Appellate Weight-Of-The-Evidence Review Poses A Question Of Law, Not Fact, And Thus Does Not Trigger The Seventh Amendment's Reexamination Clause

In *Gasperini*, this Court addressed whether or not appellate review of motions for a new trial on the grounds that the verdict was excessive complies with the Seventh Amendment's demand that, "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." 518 U.S. at 431-432 (citing U.S. Const. amend. VII). The Court reaffirmed that the trial judge's "discretion to grant a new trial if the verdict appears * * * to be against the weight of the evidence" includes the authority to overturn verdicts for excessiveness. *Id.* at 433 (quoting *Byrd* v. *Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 540 (1958)). The

Court acknowledged, however, that the power of the courts of appeals to review such decisions by the trial judge was "less secure." *Id.* at 434.

Although such review "was once deemed inconsonant with the Seventh Amendment's Reexamination Clause," the Court recognized that the courts of appeals then regularly engaged in such review, "applying 'abuse of discretion' as their standard." *Gasperini*, 518 U.S. at 434-435. Noting that "surely there must be an upper limit" to valid verdicts, the Court reasoned that "whether that [upper limit] has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law." *Id.* at 435 (quoting *Dagnello* v. *Long Island R.R. Co.*, 289 F.2d 797, 806 (2d Cir. 1961)). As a result, the Court concluded that such review "is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice." *Ibid.*; see also *id.* at 436 ("[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.") (alteration in original) (quoting *Grunenthal* v. *Long Island R.R. Co.*, 393 U.S. 156, 164 (1968) (Stewart, J., dissenting)).[2]

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[2] The view that appellate weight-of-the-evidence review poses a question of law, not fact, enjoys a long historical pedigree. As early as 1812, for example, the Tennessee Supreme Court upheld such review on the ground that "[f]rom facts found or established, legal inferences may be drawn, but these inferences should be consistent with the nature of things. The powers of court and jury in this respect are believed to be the same, and whether such inference be correct, is matter of law." *Kelton* v. *Bevins*, 3 Tenn. 90, 103 (1812).

To be sure, *Gasperini* addressed the Seventh Amendment question within the context of a motion for a new trial made on the ground that the verdict was excessive. The Court, however, described the power to review verdicts for excessiveness as "include[d]" within the more general power to review verdicts as against the weight of the evidence. 518 U.S. at 433 ("[The] discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence * * * includes overturning verdicts for excessiveness.") (quoting *Byrd*, 356 U.S. at 540 and citing *Dimick* v. *Schiedt*, 293 U.S. 474, 486-487 (1935)). As a result, those courts of appeals that have considered *Gasperini* have held that it allows appellate courts to review denials of motions for a new trial on the ground that the verdict is against the weight of the evidence. See, *e.g.*, *Arnez* v. *TJX Cos.*, 644 Fed. Appx. 180, 183 (3d Cir. 2016); *Hampton* v. *Dillard Dep't Stores, Inc.*, 247 F.3d 1091, 1110 (10th Cir. 2001); *Stebbins* v. *Clark*, 5 Fed. Appx. 196, 201 (4th Cir. 2001); *McClain* v. *Owens-Corning Fiberglas Corp.*, 139 F.3d 1124, 1126 (7th Cir. 1998); *Mejias-Quiros* v. *Maxxam Prop. Corp.*, 108 F.3d 425, 427-428 (1st Cir. 1997). The Second Circuit itself, moreover, has noted that its categorical bar to review is "arguably inconsistent" with *Gasperini*. *Hughes* v. *Town of Bethlehem*, 644 Fed. Appx. 49, 50 n.1 (2016). Nevertheless, it has failed to resolve "this apparent discrepancy," *ibid.*, refuses to reconsider its position en banc, App., *infra*, 36a, and continues to decline review of weight-of-the-evidence denials, App., *infra*, 4a.

B. Even If It Were To Trigger The Reexamination Clause, Such Review Would Pass Constitutional Muster Since It Would Reexamine Jury Findings Of Fact "According To The Rules Of The Common Law"

Even if appellate weight-of-the-evidence review were to implicate the Reexamination Clause, it would be permissible under the Seventh Amendment because it complies with the established rules of the common law. The custom of "setting aside the verdict of a jury and granting a new trial * * * is of a date extremely ancient." 3 William Blackstone, *Commentaries on the Laws of England* 387 (1768). As early as Magna Carta, litigants could obtain a new trial by proving jury misconduct on a writ of attaint. John M. Zane, *The Attaint*, 15 Mich. L. Rev. 1, 3 (1916). By at least the mid-seventeenth century, it was settled law that the court could order another trial to remedy a "verdict without or contrary to the evidence." 3 Blackstone 387; see also 2 William Tidd, *The Practice of the Court of King's Bench in Personal Actions* 814-815 (1807) (similar). The procedure for awarding a new trial at common law bears striking resemblance to appellate weight-of-the-evidence review today. Because the en banc court at Westminster could review the trial judge's denial of a new trial motion, federal appellate courts may do likewise "according to the rules of the common law." U.S. Const. amend. VII.

Indeed, given the inconvenience of having jurors and witnesses travel to the central courts at Westminster, the vast majority of civil cases were tried at *nisi prius* before a single, itinerant judge near the

locale of the controversy. 3 Blackstone 352-353; William Renwick Ridell, *New Trial at the Common Law*, 26 Yale L.J. 49, 51-52 (1916). Much like the federal system today, the *nisi prius* court constituted a separate and subordinate tribunal to the common-law courts at Westminster. William Wirt Blume, *Review of Facts in Jury Cases—The Seventh Amendment*, 20 J. Am. Judicature Soc'y 130, 131 (1936); John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 Am. J. Legal Hist. 201, 214 (1988) ("*Nisi prius* trials were considered subordinate proceedings over which the court *en banc* could exercise special supervisory powers."); see also 6 Matthew Bacon, *A New Abridgement of the Law* 658-659 (5th ed. 1798) (noting that a trial at bar in Westminster, "by reason of its greater solemnity, is of much more authority than a trial at *nisi prius*"). Trial at *nisi prius* concluded upon delivery of the jury's verdict. 3 Blackstone 378 ("When the jury have delivered in their verdict, and it is recorded in court, they are then discharged. And so ends the trial by jury."). The case was then returned to the court in Westminister for further proceedings. *Corcoran* v. *City of Chicago*, 27 N.E.2d 451, 455 (Ill. 1940) ("When the judge at *nisi prius* had received the verdict and returned the papers to Westminster his office as nisi prius judge in that case was functus officio, and his commission was exhausted.").

All subsequent proceedings—including weight-of-the-evidence review via a motion for a new trial—occurred before the court at Westminster prior to the entry of final judgment. 3 Blackstone 386-387 ("[I]f

any defect of justice happened at the trial, by surprise, inadvertence, or misconduct, the party may have relief in the court above, by obtaining a new trial."). The reviewing court sat in panels, comprised of judges who generally had no prior exposure to the case. 1 W.S. Holdsworth, *A History of English Law* 281-282 (3d ed. 1922). Since the panel could not summon witnesses or elicit new evidence, the court relied solely on the argument of counsel and review of the record of the *nisi prius* proceedings, *ibid.*, just as appellate courts do today.

Also as in appellate practice today, the en banc court reviewed the trial record with great deference. The court could not grant a new trial "where the scales of evidence h[u]ng nearly equal," but required "strong probable grounds to suppose that the merits ha[d] not been fully and fairly discussed" at *nisi prius*. 3 Blackstone 392. Often, the court simply accepted the trial judge's certification of whether the verdict accorded with the weight of the evidence. Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 327 (5th ed. 1790) ("If the Judge declare himself satisfied with the Verdict, it hath been usual not to grant a new Trial on Account of its being a Verdict against Evidence. On the other Hand, if he declare himself dissatisfied with the Verdict, it is pretty much of Course to grant it."); 2 Tidd 818 ("[W]here there is evidence on both sides, it is not usual to grant a new trial, unless the evidence for the prevailing party be very slight, and the judge declare himself dissatisfied with the verdict."). But the en banc court was not bound by the certification of the *nisi prius* judge. Rather, it possessed the authority to

order a new trial if it found the verdict against the evidence. *Bright* v. *Eynon* (1757) 97 Eng. Rep. 365, 368; 1 Burr. 390, 394 (Denison, J., concurring) ("[T]he granting a new trial, or refusing it, must depend upon the legal discretion of the Court; guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice."). Hence, the court in some cases refused a new trial "notwithstanding the verdict was, in the opinion of the judge before whom the cause was tried, contrary to the weight of evidence." 6 Bacon 664; see also *Ashley* v. *Ashley* (1740) 93 Eng. Rep. 1088; 2 Str. 1142 (similar); *Smith* v. *Huggins* (1740) 93 Eng. Rep. 1089; 2 Str. 1142 (similar).

Notably, the reviewing court could also award a new trial despite the trial judge's refusal to certify the verdict as against the weight of the evidence. Thus, in *Norris* v. *Freeman*, the court ordered a new trial even though the *nisi prius* judge "ha[d] not reported, that the verdict [wa]s contrary to evidence." (1769) 95 Eng. Rep. 921, 921; 3 Wils. K.B. 38, 39. Similarly, the court in *Goodtitle* v. *Clayton* held that the case warranted "re-consideration" even though the trial judge was "not * * * dissatisfied with the verdict, as there was evidence on both sides." (1768) 98 Eng. Rep. 159, 160; 4 Burr. 2224, 2224. Recognizing that a new trial could be granted without certification from the *nisi prius* judge, Lord Chief Justice Holt maintained:

> In granting a new trial we ought not altogether to rely on the certificate of the Judge who tried the Cause, but upon the reason of the thing; and sometimes I would grant a new trial against the

> certificate of a Judge, if in my judgment and conscience the matter deserves a re-examination.

88 Eng. Rep. 1362, 1362; 12 Mod. 336, 336 (no case name or year provided; case 582); see also 6 Bacon 656 (similar).

The en banc court's discretion to award a new trial was essential to preserving the fundamental right to a jury. *Bright* v. *Eynon* (1757) 96 Eng. Rep. 1104, 1105; 2 Keny. 53, 57 ("[I]f the Courts of Common Law had not power to grant new trials * * * trials by juries would never have subsisted so long as they have done; so necessary is this power to the attainment of justice—so beneficial is it to the people."); 2 Tidd 814-815 (similar). Especially in cases involving "large questions of commercial property" where the "facts [we]re complicated and intricate," the jury was susceptible to human errors resulting from surprise, hurry, or "artful impressions * * * made on their minds by learned and experienced advocates." 3 Blackstone 390. By granting a new trial, the court could "cure[] all these inconveniences," thereby sustaining public confidence in the jury system and "render[ing] perfect that most excellent method of decision, which is the glory of the English law." *Id.* at 390-391.

The strong parallels between the en banc panels at Westminster and the appellate courts in America were widely recognized in the founding era. 2 Reg. Deb. 874 (1826) (statement of Rep. Daniel Webster) ("The Courts, indeed, were called Circuit Courts; which seemed to imply an itinerant character; but, in truth, they resembled much more, in their power and jurisdiction, the English Courts sitting in bench, than the Assizes."). Since the Westminster court could

grant a new trial even when the *nisi prius* judge had failed to certify the verdict as contrary to evidence, the "rules of the common law" clearly permitted American appellate courts to do likewise. U.S. Const. amend. VII. Thus, near the time of the Founding, state appellate courts often reversed trial judges' denial of new trial motions when the verdict was against the weight of the evidence in the belief that doing so respected the common law. See, *e.g.*, *Bybee* v. *Kinote*, 6 Mo. 53, 54 (1839) (reversing denial of new trial on grounds that the weight of the evidence did not support limiting damages to only those injuries that "had accrued * * * subsequent to a specified time"); *Governor* v. *Vanmeter*, 36 Va. 18 (9 Leigh), 18 (1837) ("[I]n reviewing * * * an opinion [of a court refusing a new trial], * * * the appellate court inquires, whether the verdict conforms with the fair inferences of fact from the facts stated; and if it sees that it does not, reverses the judgment, and directs the new trial."); *Furman & Smith* v. *Peay*, 18 S.C.L. (2 Bail.) 394, 397 (1831) ("But if a jury find a verdict without evidence, the certificate of the presiding Judge that he has 'no reason to find fault with it,' cannot sustain it."); *Goldsby* v. *Robertson*, 1 Blackf. 21, 21-22 (Ind. 1818) (holding that where "the jury have found a verdict without evidence," "a new trial is a matter of right" and "a refusal of that right may be assigned for error"); *Kelton* v. *Bevins*, 3 Tenn. (Cooke) 90, 105 (1812) ("[T]his Court possesses the power to revise the opinion of the Circuit Court, either in granting or refusing a new trial."); *Maxwell* v. *McIlvoy*, 5 Ky. (2 Bibb) 211, 215 (1810) ("If [the jury's] verdict were clearly contrary to evidence, it was the duty of the Court before whom the cause was tried to have granted

a new trial; and if that Court improperly refused to do so, * * * we should feel it a duty to reverse the judgment and direct a new trial.").

Even when American appellate courts affirmed the trial judge's denial, they often claimed authority to reverse it. See, *e.g.*, *Sanchez* v. *Gonzales*, 11 Mart. (o.s.) 207, 207-208 (La. 1822) ("The power given by law to the court of appeals, to order new trials in the courts of original jurisdiction, ought not to be considered as conferring a discretion without rules or limits."); *Cain* v. *Henderson*, 2 Binn. 108, 108 (Pa. 1809) ("When the judge who tried the cause is not dissatisfied with the verdict, it must be a very strong case that will induce this court to grant a new trial."). Indeed, the founding era realized that—just "like the certificate of a judge at *nisi prius*"—a trial judge's refusal of a new trial motion occasionally required "corrective interposition" to avoid "injustice." *Gist* v. *Higgins*, 4 Ky. (1 Bibb.) 303, 304 (1808).[3]

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[3] Some appellate courts at this time did refuse to review trial court decisions to grant or deny new trial motions but they did so for a different, technical reason. These courts held that the writ of error, the specific procedural mechanism through which such appeals were effected in their jurisdictions, limited appellate review to matters within the record, which did not include motions for a new trial. See, *e.g.*, *Barr* v. *Gratz's Heirs*, 17 U.S. (4 Wheat.) 213, 220 (1819); *Anderson* v. *State*, 5 H. & J. 174, 175 (Md. 1821); 1 W.S. Holdsworth, *A History of English Law* 214-215 (3d ed. 1922). But as this Court recognized in *Fairmount Glass Works* v. *Cub Fork Coal Co.*, this "historical limitation" of the writ of error no longer impedes weight-of-the-evidence review in federal courts because the record of appeal now contains the trial judge's ruling on new trial motions. 287 U.S. 474, 482 (1933).

C. The Second Circuit Itself Has Acknowledged That The Scope Of The Reexamination Clause And Common Law Practice At The Time Of Its Adoption Undermine Any Bar To Appellate Review

Even before *Gasperini*, the Second Circuit recognized that the traditional arguments against reviewing district court denials of motions for new trials had little validity. In *Dagnello* v. *Long Island Railroad Co.*, the court reexamined its traditional rule that it could never review district court denials of motions for new trials based on the weight of the evidence supporting the size of a verdict and held that it did have "the power to review the order of a trial judge refusing to set aside a verdict as excessive." 289 F.2d 797, 806 (1961).

Acknowledging that it had previously been a "'most adamant expounder[]' of the 'old doctrine of non-reviewability of decisions on motions for a new trial,'" the Second Circuit overturned that traditional rule for three reasons. *Dagnello*, 289 F.2d at 800 (quoting 6 James Wm. Moore et al., *Moore's Federal Practice* ¶59.08(6) (2d ed. 1948)). First, the court emphasized that if "a trial judge may set aside a verdict for excessiveness * * * without infringing the Seventh Amendment, it should follow that an abuse of discretion in failing to take such action can be reviewed on appeal without doing violence to the Amendment," *id.* at 804, because that "is not a question of fact * * * but a question of law." *Id.* at 806.

Second, the court reasoned that, "[i]f it is deemed necessary to find English precedent prior to 1791 for appellate review of excessiveness, * * * the practice at

Westminster * * * furnishes such precedent, as it was * * * a group of judges sitting en banc and exercising functions analogous to those of an appellate tribunal[] who determined the question." *Dagnello*, 289 F.2d at 804-805.

Third, the court found most compelling the argument that while the "Seventh Amendment guarantees * * * the benefits of trial of issues of fact by a jury," it does not "prescribe any particular procedure by which these benefits shall be obtained." *Dagnello*, 289 F.2d at 804. Because appellate review of the trial judge's denial of a motion for a new trial "preserve[s] the essentials of the jury trial" without "curtail[ing] the function of the jury to decide questions of fact as it did before the adoption of the Amendment," the court concluded that "the Seventh Amendment is no bar" to such review. *Id.* at 804-805.

But that is not all. Having determined that the Seventh Amendment does not bar appellate excessiveness review, the Second Circuit went on to reject the precise policy justification it would later rely on in *Stonewall Insurance* and later cases to bar weight-of-the-evidence review: that it was too "burdensome." Pp. 8-10, *supra*. That view, it found, was "conclusively disproved by the fact that appellate courts throughout the nation perform this function daily and with satisfaction to the public." *Dagnello*, 289 F.2d at 806. Even more importantly, the court found such review necessary to serve the ends of justice, for "[w]ithout judicial supervision over what Blackstone called the 'misbehavior' of juries, a trial by jury would lack one of the 'essentials of the jury trial as it was known to the common law before the adoption

of the Constitution.'" *Id.* at 805 (citing 3 William Blackstone, *Commentaries* *388). In light of these arguments, the court noted, "[i]t is strange that the rule of non-reviewability should have hung on so long." *Id.* at 806.

In spite of *Dagnello*, the Second Circuit continues to apply its "old doctrine of non-reviewability of decisions on motions for a new trial," *Dagnello*, 289 F.2d at 800 (quoting 6 James Wm. Moore et al., *Moore's Federal Practice* ¶59.08(6) (2d ed. 1948), to denials of motions for a new trial made on the ground that the verdict is against the weight of the evidence. App., *infra*, 4a. The Second Circuit provides no explanation for drawing such a significant distinction based on the grounds for the new-trial motion. As this Court noted in *Gasperini*, the power to overturn verdicts for excessiveness is just an instance of weight-of-the-evidence review. 518 U.S. at 433 ("[The] discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence * * * includes overturning verdicts for excessiveness."). The leading treatise agrees: reviewing the size of a verdict "is merely a special application of the general power of the trial court to set aside a verdict that is against the weight of the evidence." 11 Wright & Miller, Federal Practice & Procedure § 2807 (3d. ed 2017). To be sure, the former goes to damages and the latter to liability, but no court, including the Second Circuit, has suggested that that distinction makes a constitutional difference.[4]

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[4] The Second Circuit's categorical bar to review also conflicts with the federal rules. Federal Rule of Civil Procedure 50(c) provides as follows:

III. This Case Provides An Ideal Vehicle For Resolving This Recurring And Important Conflict

In *Gasperini*, this Court recognized the importance of the question whether "the Seventh Amendment allows appellate review of a district court's denial of a motion to set aside an award as excessive." 518 U.S.

> **(1)** ***In General.*** If the [district] court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.
>
> **(2)** ***Effect of a Conditional Ruling.*** * * * If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

In other words, whenever a district court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial. Fed. R. Civ. P. 50(c)(1). If it conditionally denies the new trial motion, "the appellee may assert error in that denial," *id*. 50(c)(2), which the court of appeals must rule on if it reverses the district court's grant of judgment as a matter of law. The availability of appellate review, in fact, explains why the district "court must state the grounds for conditionally * * * denying the motion for a new trial." *Ibid*. Otherwise, no meaningful review would be possible.

Needless to say, the Second Circuit's bar to review of weight-of-the-evidence denials makes all this impossible. Although an "appellee may assert error in [the district court's conditional] denial" of its weight-of-the-evidence motion, under the Second Circuit's rule, the court of appeals simply cannot consider it. The appellee's right to "assert error" is completely empty and can have no effect.

at 434 (quoting *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 279, n.25 (1989)). "[I]n successive reminders that the question was worthy of this Court's attention, [we have previously] noted, without disapproval, that courts of appeals engage in review of district court excessiveness determinations, applying 'abuse of discretion' as their standard." *Id.* at 434-435 (citing *Grunenthal* v. *Long Island R.R. Co.*, 393 U.S. 156, 159 (1968)). If the question in *Gasperini* was so important when all the courts of appeals agreed, the nearly identical question of whether the Seventh Amendment allows appellate weight-of-the-evidence review is *a fortiori more important* when the circuits disagree.

This case presents an ideal vehicle for resolving this single, discrete issue of federal law. All geographic circuits have weighed in and the issue is ripe. There are no procedural or jurisdictional issues counseling against review and the case presents at this stage a pure question of law.

Although the Second Circuit alone holds that such district court decisions are categorically unreviewable, it will not resolve the conflict on its own. Ahsan sought rehearing en banc, urging the Second Circuit to "conform its rule to that of all the other circuits," which permit appellate weight-of-the-evidence review, Pet. for Reh'g En Banc 5, and the Second Circuit summarily denied his petition, App., *infra*, 36a. Only two years earlier, a party in another case made a similar request for en banc review, see Appellant's Pet. For Reh'g *En Banc* at 1-2, *McKinney* v. *Cent. Hudson Gas & Elec. Corp.*, 632 Fed. Appx. 37 (2d Cir. 2016) (No. 15-1188) (noting that the Second "Circuit is the

only one that precludes any level of appellate review of a district court's denial of a weight-of-the-evidence-based new trial motion[, which] puts our Circuit in direct conflict with all our sister circuits"), which the court also summarily denied, Order of March 29, 2016, *McKinney*, *supra* (No. 15-1188).

In *Stonewall Insurance*, moreover, when the Second Circuit "considered anew" "[w]hether a denial ruling is reviewable," 73 F.3d at 1199, it "circulated to all of the active judges of the Court," *id.* at 1199 n.13, the two paragraphs of its opinion reaffirming its unique view. It has thus already considered and confirmed its holding through the informal equivalent of an en banc proceeding. The Second Circuit will not change.

The conflict over threshold reviewability will not go away. It is fully developed and this vehicle squarely presents the issue free from any threshold questions or issues of fact. The issue warrants this Court's immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2018

APPENDIX

16-4263-cv
Ahsan v. *Staples the Office Superstore East, Inc.*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of January, two thousand eighteen.

PRESENT: Pierre N. Leval,
Guido Calabresi,
Jose A. Cabranes,
Circuit Judges.

MOSTAFA R. AHSAN,

Plaintiff-Appellant,

v. 16-4263-cv

STAPLES THE OFFICE SUPERSTORE EAST, INC.,

Defendants-Appellee,

MCO Staples, Inc.,

Defendant.

FOR PLAINTIFF-APPELLANT:
Michael H. Zhu
Michael H. Zhu, PC
New York, New York

FOR DEFENDANTS-APPELLEES:
Jeffrey L. O'Hara
Matthew W. Bauer
Justin M. Vogel
LeClairRyan
Newark, New Jersey

Appeal from a judgment of the United States District Court for the District of New York (Steven M. Gould, *Magistrate Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the November 23, 2016 judgment of the District Court be and hereby is **AFFIRMED**.

Plaintiff-Appellant Mostafa Ahsan ("Ahsan") appeals from a judgment of the District Court following a trial on damages in which the jury found for the Defendant-Appellee Staples, the Office Superstore East, Inc. ("Staples"). Ahsan seeks reversal and remand to the District Court for a new trial. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

Ahsan claims that, while shopping in Staples, boxes fell off a shelf and hit him, causing various head, neck, and shoulder injuries. Staples concedes that its negligence caused the one or two boxes to fall from a shelf on the date of Ahsan's accident, but it disputes the nature and extent of his injuries and whether its negligence proximately caused them. Following a jury trial, the jury returned a verdict for Staples. Ahsan moved for a new trial pursuant to Federal Rule of Civil Procedure 59, and also asserted that an exemplar of the plastic file folders contained within the type of boxes that fell on him was improperly received in evidence. The District Court denied the motion. Ahsan raises several issues on

appeal: 1) whether the District Court erred in denying Ahsan's motion; 2) whether the District Court erred in admitting certain items into evidence; and 3) whether the District Court erred in rejecting Ahsan's proposed jury instructions.

Ahsan moved for a new trial on the contention that the jury's finding of no proximate cause was based on insufficient evidence and was otherwise against the weight of the evidence. We review a district court's denial of a Rule 59(a) motion for a new trial for abuse of discretion. *See Baker v. Dorfman*, 239 F.3d 415, 422 (2d Cir. 2000). We recognize an exception to this rule: where a district court denies a motion for a new trial made on the ground that the verdict was against the weight of the evidence, the ruling is not reviewable on appeal. *See Stonewall Ins. Co. v. Asbestos Claims Mgmnt. Corp.*, 73 F.3d 1178, 1199 (2d Cir. 1995). Even if we accept Ahsan's assertion that his motion for a new trial and his argument on appeal challenges not only the weight of the evidence but also its sufficiency, substantially for the reasons cited by the District Court, we conclude that the District Court's denial of Ahsan's motion was not clearly erroneous.

Ahsan contends that the District Court improperly admitted exemplar file folders and photographs into evidence. We review the District Court's evidentiary rulings for abuse of discretion. *See, e.g., Abascal v. Fleckenstein*, 820 F.3d 561, 564 (2d Cir. 2016). District courts have broad discretion over the admission of evidence, and "unless it is likely that in

some material respect the factfinder's judgment was swayed by the error," no substantial right is affected and a new trial is not warranted. *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 150 (2d Cir. 1997) (internal quotation marks omitted). Substantially for the reasons cited by the District Court, we conclude that the District Court's admission of the evidence in question was not clearly erroneous, nor did it affect any substantial right.

Finally, Ahsan argues that the District Court erred in refusing his request to instruct the jury that Staples' liability had already been established. We review a district court's jury instruction *de novo*. *LNC Invs., Inc. v. First Fid. Bank,* 173 F.3d 454, 460 (1999). "A jury charge is erroneous if it misleads the jury as to the correct legal standard, or if it does not adequately inform the jury of the law." *Hathaway v. Coughlin*, 99 F.3d 550, 552 (2d Cir. 1996). Upon review of the record, we conclude that the District Court did not err in issuing its jury instruction.

CONCLUSION

We have reviewed all of the arguments raised by plaintiff on appeal and find them to be without merit. Accordingly, we **AFFIRM** the November 23, 2016 judgment of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MOSTAFA R. AHSAN,	:	
	:	
Plaintiff,	:	
	:	MEMORANDUM
-against-	:	& ORDER
	:	13-CV-5929 (SMG)
STAPLES, INC., and STAPLES THE OFFICE SUPERSTORE EAST, INC.	:	
	:	
Defendants.	:	

STEVEN M. GOLD, U.S. Magistrate Judge

Presently before the Court is plaintiff's motion for a new trial pursuant to Federal Rule of Civil Procedure 59(a)(1)(A). *See* Docket Entry 118. For the reasons set forth in this Memorandum and Order, plaintiff's motion is denied.

Background

This personal injury action arises out of events that took place on September 2, 2011, in a store operated by defendant Staples The Office Superstore East, Inc. ("Staples").[5] *See* Compl., Docket Entry 1.

[5] Although Staples, Inc. was named in the complaint as a co-defendant, the parties have since stipulated that all claims

Plaintiff Mostafa R. Ahsan ("Ahsan") claims that, while shopping in the Staples store, he was hit by boxes that fell from a shelf, causing him to sustain a traumatic brain injury ("TBI"), as well as neck and shoulder injuries. Declaration of Durga P. Bhurtel at 16-17, dated December 21, 2016, Docket Entry 118-1; Tr. 17-20.[6] Staples concedes that its negligence caused one or two boxes to fall from a shelf on the date of plaintiff's accident, but it disputes the nature and extent of plaintiff's alleged injuries and whether its negligence proximately caused plaintiff to sustain any injuries at all.[7] Defendant's Memorandum in Opposition ("Def.'s Mem.") at 1, Docket Entry 122; *see also* Stipulation, dated April 14, 2016, Docket Entry 80. After a six-day jury trial, the jury returned a verdict for Staples, finding that its negligence did not proximately cause any injury to plaintiff. *See* Docket Entry 113.

Plaintiff now moves for a new trial pursuant to Federal Rule of Civil Procedure 59, claiming that the verdict was "contrary to the weight of the credible evidence." Plaintiff's Memorandum in Support ("Pl.'s

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against that defendant be dismissed without prejudice. *See* Docket Entry 33.

[6] "Tr." refers to the trial transcript, Docket Entries 118-2, 122-3, and 122-4.

[7] As discussed below, the evidence at trial was somewhat inconsistent with respect to whether one or two boxes fell from the shelf in the Staples store. For purposes of convenience only, I refer to boxes in the plural, without making any finding that two boxes rather than one fell on plaintiff in the store.

Mem.") at 4, Docket Entry 118-3. Plaintiff also asserts for the first time in his reply that an exemplar of the plastic file folders contained within the type of boxes that fell on plaintiff was improperly received in evidence.[8] Plaintiff's Reply Memorandum ("Reply

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[8] Defendant's opposition responds to an additional claim that the Court does not discern from plaintiff's papers: that the Court erred in failing to instruct the jury (i) on *res ipsa loquitor*, and (ii) that it had to award plaintiff some measure of damages because defendant conceded liability. Def.'s Mem. at 13-15. As an initial matter, it is not entirely clear that plaintiff even raises these claims. The only reference to them is in plaintiff's reply memorandum of law, wherein he simply states that "there is no merit to the argument raised by defendant ... regarding our failure to preserve and object [to] the jury charge issue because it is belied by the record." Reply Mem. at 8. Plaintiff notes further that "[i]n the end, the jury may have been misled or confused because this Court denied our request to charge." *Id.* at 9.

To the extent plaintiff does seek to challenge the jury charge, his contention lacks merit. First, as the Court explained during the charge conference, a *res ipsa* charge was not warranted simply because defendant stipulated that, if any boxes fell on plaintiff, it was negligent in allowing them to do so. Tr. 795. After this was explained to plaintiff, he agreed that a *res ipsa* charge was not necessary. Tr. 796. Second, plaintiff's assertion at the charge conference that "since the defendant admitted liability, the plaintiff is entitled [to] damages" reflected a misunderstanding of defendant's position in the case. Tr. 797. The stipulation entered into by the parties provides that "defendants are liable for the happening of the September 2, 2011 accident at issue only. Defendants will continue to defend the disputed issues related to damages, including whether and to what extent the accident at issue caused the injuries claimed." Stipulation, dated April 14, 2016. As I explained during the charge conference, pursuant to this stipulation, "the defendant

Mem.") at 7-8, Docket Entry 125. For the reasons that follow, plaintiff's motion is denied.

Discussion

I. Legal Standards

A court may grant a new trial where the "jury's verdict is against the weight of the evidence." Fed. R. Civ. P. 59(a)(1)(A); *Crews v. County of Nassau*, 149 F. Supp. 3d 287, 292 (E.D.N.Y. 2015) (quoting *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 133 (2d Cir. 1998)). While a court may grant a motion for a new trial "even if there is substantial evidence supporting the jury's verdict," the Second Circuit has made it clear that such a motion may be granted only "when the jury's verdict is egregious." *DLC Mgmt.*, 163 F.3d at 134 (citation omitted). Accordingly, a motion for a new trial should be denied "unless the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004) (citations omitted); *Depascale v. Sylvania Elec. Prods., Inc.*, 710

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has admitted that its negligence caused a box or boxes to fall off a shelf. It has not admitted that those boxes ... proximately caused the plaintiff [ ] any injury at all." Tr. 798. Accordingly, a charge instructing the jury that it must award some measure of damages would have been improper; the jury first had to decide whether plaintiff sustained any injuries that were proximately caused by defendant's conceded negligence. By answering this question "no," the jury determined that plaintiff was not entitled to recover any damages at all.

F. Supp. 2d 275, 285 (E.D.N.Y. 2010).

In contrast to the standard applicable to a motion for judgment as a matter of law, a court deciding whether to grant a motion for a new trial "is free to weigh the evidence [itself] and need not view it in the light most favorable to the verdict winner." *Song v. Ives Labs., Inc.*, 957 F.2d 1041, 1047 (2d Cir. 1992) (quoting *Bevevino v. Saydjari*, 574 F.3d 676, 684 (2d Cir. 1978)). Nevertheless, "[w]here the resolution of the issues depended on assessment of the credibility of the witnesses, it is proper for the court to refrain from setting aside the verdict and granting a new trial." *Metromedia Co. v. Fugazy*, 983 F.2d 350, 363 (2d Cir. 1992), *abrogated on other grounds as noted in Yung v. Lee*, 432 F.3d 142 (2d Cir. 2005); *see also DLC Mgmt.*, 163 F.3d at 134 ("[A] court should rarely disturb a jury's evaluation of a witness's credibility."); *Dunlap-McCuller v. Riese Org.*, 980 F.2d 153, 158 (2d Cir. 1992) ("[W]e caution that the jury is empowered and capable of evaluating a witness's credibility, and this evaluation should rarely be disturbed.").

Where, as here, a party seeks a new trial based in part upon an evidentiary ruling, Federal Rule of Civil Procedure 61 provides the applicable standard. *See Kogut v. County of Nassau*, 2013 WL 3820826, at *2 (E.D.N.Y. July 22, 2013). Under Rule 61,

> [u]nless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside

> a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

Fed. R. Civ. P. 61. Thus, even if evidence has been admitted in error, a new trial may not be granted unless the error affected a litigant's "substantial rights." *Stowe v. Nat'l R.R. Passenger Corp.*, 793 F. Supp. 2d 549, 568 (E.D.N.Y. 2011). "[A] substantial right has been affected only where a jury's judgment was likely to have been 'swayed by the error.' " *Parrish v. Sollecito*, 280 F. Supp. 2d 145, 165 (S.D.N.Y. 2003) (quoting *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 150 (2d Cir. 1997)). Relevant to the analysis is "whether or not the evidence bears on an issue that is plainly critical to the jury's decision" and "whether or not the evidence was emphasized in arguments to the jury." *Hynes v. Coughlin*, 79 F.3d 285, 291 (2d Cir. 1996) (citations omitted).

II. Analysis

A. Weight of the Evidence

As noted above, Staples stipulated prior to trial that it was negligent in allowing boxes to fall from a shelf. It remained for the jury to decide, though, whether defendant's conceded negligence proximately caused any of the injuries claimed by plaintiff. Ultimately, the jury found that plaintiff did not sustain any injuries that were caused by the boxes

that fell in the Staples store. Jury Verdict, Court Ex. 1, Docket Entry 113. Plaintiff claims that, in reaching that verdict, the jury disregarded the "overwhelming proof of causation" presented at trial. Pl.'s Mem. at 3. On plaintiff's Rule 59 motion, the only question before the Court is whether the jury's verdict was "so against the weight of the evidence as to constitute a seriously erroneous result, or a miscarriage of justice." *Depascale*, 710 F. Supp. 2d at 285 (citation and quotation marks omitted). Having presided over the trial, and having carefully reviewed the evidence presented, I conclude that it was not.

As described in greater detail below, the jury was presented with conflicting evidence at trial. Plaintiff and the treating doctors he called to testify described a variety of injuries suffered by plaintiff and attributed them to the accident in the Staples store. Plaintiff's claims of injury were impeached, however, with his own inconsistent statements about how the accident occurred, his repeated failures to provide treating physicians with complete and accurate accounts of his pre-existing conditions, and evidence of his post-accident activities that seemed inconsistent with the injuries and limitations he described. The doctors who treated plaintiff and testified on his behalf at trial were cross-examined about plaintiff's prior injuries and complaints and ultimately acknowledged at least some uncertainty about the degree to which plaintiff's injuries were caused by the accident in the Staples store. Finally, defendant's medical experts testified that plaintiff's medical records did not include any objective findings

indicating that plaintiff suffered traumatic, as opposed to degenerative or age-related, injuries. Defendant's experts also called into serious question the theory proposed by plaintiff's expert to explain how plaintiff sustained a brain injury as a result of the falling boxes. The jury apparently chose to credit the testimony and other evidence indicating that any injuries plaintiff sustained or symptoms he suffered were caused by circumstances other than the falling Staples boxes, and it was reasonable and within its province to do so.

1. Plaintiff's Case

Plaintiff claimed in his trial testimony that he sustained injuries to his head, neck, and left shoulder as a result of the accident at the Staples store on September 2, 2011. Plaintiff was 56 years old at the time of the accident. Tr. 22, 291-92. Plaintiff testified that, after the accident, he experienced "constant pain" in these areas and that he was prescribed pain medication as a result. Tr. 610-13, 619-23, 630, 633-34. Plaintiff also described attending physical therapy, taking medication, and receiving multiple injections to relieve pain in his cervical spine and left shoulder. Tr. 611-12, 614-15, 619-21, 634-37, 640-46. In December 2014, plaintiff underwent surgery to repair a partial tear in his left shoulder revealed by an MRI. Tr. 623-24. After the surgery, plaintiff testified, he "had so many pains" that he could not work or perform basic functions like taking a shower. Tr. 629. Around the same time, plaintiff testified, he experienced "headache[s], dizziness[,] ... blurry

vision[,] [a]nd ... double vision," as well as short-term memory loss. Tr. 648, 665. In 2015, while receiving epidural injections, plaintiff testified that he could not "twist [his] head left to right or right to left." Tr. 645.

Finally, plaintiff testified that, as early as 2008, well before the accident in the Staples store, he experienced neck and shoulder pain and a months-long headache, but that the neck pain was usually relieved with physical therapy. Tr. 651-53. Plaintiff also acknowledged seeing a pain management doctor because of the discomfort he felt in his neck even before the Staples accident. Tr. 653. With respect to the impact of the accident on his ability to engage in various activities, plaintiff described being an avid painter and working as a graphic designer and testified that, while he was able to continue painting and working at graphic design after the Staples accident, he could do so only with some difficulty. Tr. 655-58.

A somewhat different picture of the extent of plaintiff's injuries emerged, however, on cross-examination. Among other things, counsel for Staples introduced and published to the jury one picture from plaintiff's Facebook page taken at some point after the accident but before September 2012, showing plaintiff gazing upwards at signs in Times Square, and a second taken in August 2015 showing plaintiff with his arm raised and taking a "selfie" picture with some friends in Alexandria, Virginia, both of which cast at least some doubt on plaintiff's claims of limited

range of motion of his neck and left shoulder. Tr. 709-12, 716-18. Plaintiff also acknowledged on cross-examination that, since the Staples accident, he has engaged in various business dealings requiring focus, attention to detail, and long-distance travel, such as amending his company's corporate documents in September 2013, and traveling to Bangladesh in March 2014, where he met with a seafood vendor "to make some business." Tr. 713-15, 731. A picture from plaintiff's Facebook page, which was entered into evidence and published to the jury, showed plaintiff visiting a fish factory in Bangladesh in March 2014. Tr. 715-16.

Plaintiff also acknowledged on cross-examination that, since the accident, he has painted elaborate works of art and presented his work at several exhibitions, including one in New York in November 2015 where 32 of his paintings were featured. Tr. 708-09, 719-21, 724-30. A picture from plaintiff's Facebook page showed plaintiff at one of the art exhibitions using his left arm to point at some of his paintings that were on display. Tr. 729. Plaintiff also testified on direct examination that when he paints, he relies on his memory, explaining that "[w]henever I see something good, I just kind of memorize it and come home and do it." Tr. 566. This evidence may have led the jury to doubt plaintiff's claim that he suffered from short-term memory loss and limited range of motion in his left shoulder after the accident.

Further questions about whether plaintiff sustained cognizable injuries as a result of the

Staples accident were raised during the testimony of the various treating doctors he called to testify on his behalf. Plaintiff first called Dr. Ranga Krishna, a board-certified neurologist who serves as the chief of neurology at New York Presbyterian Community Hospital in Brooklyn. Tr. 41-42. Dr. Krishna testified that he began seeing plaintiff in June 2014 and continued to treat him until November 2016. Tr. 45. Referring to a report of a visit in February 2015, Dr. Krishna testified that plaintiff presented with complaints of headaches and pain in his neck, shoulder, arm, and leg. Tr. 46. Dr. Krishna also testified that plaintiff complained of difficulty focusing, concentrating, and performing repetitive tasks such as "bending, pushing[,] and pulling." Tr. 47. Dr. Krishna performed a neurological exam and made a number of findings including that plaintiff was suffering from short-term memory loss, muscle weakness and limited range of motion in his neck, and diminished reflexes and sensitivity in his upper left arm, as well as a diminished sense of smell. Tr. 47-49. Dr. Krishna also conducted an electromyogram that revealed nerve damage in plaintiff's cervical spine causing neck pain, and an MRI of plaintiff's head that revealed "findings of a subdural hygroma, and signs of a traumatic brain injury." Tr. 56-57, 70. Dr. Krishna described a subdural hygroma as "a collection of fluid between the brain and the skull." Tr. 70.

Dr. Krishna concluded from the history plaintiff provided to him that "the neck injury was related to the accident in question." Tr. 69. Dr. Krishna also

attributed the apparent brain injury to the accident in the Staples store. Tr. 73. During his visits with Dr. Krishna, plaintiff reported that the boxes that fell on him in the Staples store struck him on the shoulder and never told Dr. Krishna that he thought the boxes hit him in the head. Tr. 86-88. Dr. Krishna nevertheless concluded that the falling boxes caused plaintiff to sustain a brain injury, opining that the injury resulted from whiplash rather than a direct blow to plaintiff's head. Tr. 71-73, 109-10, 112. He explained:

> Any time a sudden activity occurs, such as in this case when a box falls on top of your head or neck or one side of your body, the natural response for us is to move fast and furious to the other side to try to evade the problem with our head.... And that movement is usually a forward and backward movement. So it moves to one side and, unfortunately, it also moves backwards. That movement results in the brain, which is encased by the skull, to move in the exact opposite direction. So that if you move your head to the right, the brain moves to the left against the skull, and then when the head moves back, the brain moves to the opposite direction because it's sort of free-floating in a bag of water. That ... process is, essentially, a whiplash or a coup/contrecoup-type of injury to the head.

Tr. 71-72.

On cross-examination, Dr. Krishna acknowledged

that the medical history plaintiff provided to him was inaccurate in several respects. Indeed, counsel for Staples brought out that plaintiff never informed Dr. Krishna about his pre-accident history of headaches and shoulder and neck pain, which, it turned out, was quite extensive. Tr. 91-92. Dr. Krishna further acknowledged that the diagnostic reports relating to plaintiff's cervical spine revealed many degenerative changes unrelated to trauma, and that the particular part of the cervical spine where plaintiff's discs were herniated was the area that is most commonly associated with degenerative changes. *Id.* As noted above, plaintiff was 56 years old on the date of his accident, and was thus approaching 60 years of age by the time of his first visit with Dr. Krishna in 2014. Tr. 22.

With respect to plaintiff's claimed brain injury, Dr. Krishna noted on cross-examination that the "most common" recovery period for a mild or moderate traumatic brain injury is two years from the date of the injury, and that when he saw plaintiff for the first time in June 2014—almost three years after the accident in the Staples store—his neurological mental status was normal. Tr. 93-94. Indeed, during multiple office visits from June 2014 through February 2015, Dr. Krishna repeatedly assessed plaintiff's neurological mental status as normal. Tr. 94-96. Only in February 2015—three and a half years post-accident and after approximately eight office visits—did plaintiff first complain to Dr. Krishna about dizziness and cognition problems. Tr. 93-96. The repeated normal assessments and the lapse of time

between the accident and when plaintiff first complained of dizziness and cognition problems were not the only facts elicited on cross-examination raising questions about whether plaintiff actually sustained a brain injury as a result of the accident in the Staples store. Dr. Krishna also acknowledged that, since at least June 2014, plaintiff has been taking multiple medications prescribed to him for high blood pressure, high cholesterol, rhinitis, acid reflux and osteoarthritis, and that the combined side effects of these medications include dizziness, forgetfulness, and headaches. Tr. 96-100.

Plaintiff also called as an expert Dr. Harold Parnes, a board-certified neuroradiologist who conducted MRI studies of plaintiff's brain, cervical spine, and left shoulder between June 2014 and May 2015. Tr. 134-136, 140-41, 147. Dr. Parnes opined that an initial MRI of plaintiff's brain revealed a left frontal subdural hygroma, while a follow up MRI using diffusion tensor imaging ("DTI") technology revealed "some impairment" on the left frontal portion of plaintiff's brain. Tr. 150, 154-58. But when asked whether the impairment revealed on the DTI scan was caused by the subdural hygroma, Dr. Parnes responded that "[i]t's hard to tell." Tr. 159. Dr. Parnes was also asked to opine on the cause of the subdural hygroma, to which he responded "[i]t would appear to be trauma," although he conceded later that the hygroma may have existed prior to the accident in the Staples store on September 2, 2011. Tr. 180-81, 264-65. Dr. Parnes further stated that "it would be very difficult to tell" whether the hygroma was caused by

a recent or long past trauma. Tr. 185. Later, during cross-examination, Dr. Parnes again conceded that "[i]t's possible" the findings on the DTI scan may have predated the September 2, 2011 accident. Tr. 255.

In addition to describing his own radiological studies, Dr. Parnes testified that plaintiff had a brain MRI that was performed by Apollo Imaging Diagnostic Radiology ("Apollo") in February 2014. Tr. 189-93. Parnes acknowledged on cross-examination that, according to the doctor who performed the Apollo tests, "every single finding [was] normal." Tr. 235-36. Dr. Parnes later added, though, that he considers most films and radiological reports from other imaging facilities "garbage." Tr. 243. Dr. Parnes wrote in his own reports that his findings were consistent with a "direct impact, traumatic event ... to the head," Tr. 236-37, apparently contradicting Dr. Krishna's earlier testimony that plaintiff's brain injury resulted from a whiplash-like back-and-forth movement with no direct impact to plaintiff's head.

Dr. Parnes testified further that the MRI he took of plaintiff's cervical spine revealed a number of herniated discs. Tr. 199, 209-10. But when asked if he could identify the cause of the herniations, Dr. Parnes testified that "if it was acute, then we would be concerned about some type of traumatic event. I mean he does have some degenerative changes, so depending on when the trauma was, these could be resulting from whatever happened to him previously.... I can't tell you if it's caused by trauma. It would be difficult to say." Tr. 199-200. Ultimately,

Dr. Parnes acknowledged that many of the findings revealed by the MRI studies of plaintiff's neck and spine could be attributable to degeneration and the normal aging process rather than trauma. Tr. 268-74.

Dr. Parnes also testified that an MRI of plaintiff's shoulder revealed a "partial tear of the glenoid [labrum]," which he attributed to a "significant ... traumatic event." Tr. 205-07. But on cross-examination, Dr. Parnes was asked about a November 2012 test, referenced in his reports, performed on plaintiff's left shoulder by Dr. Choy, another radiologist. Tr. 242-246. Where Dr. Parnes found a partial tear in plaintiff's shoulder, Dr. Choy found only "mild tendinopathy," which Dr. Parnes described as a "degenerative finding." Tr. 247-48. To explain the apparent inconsistency, Dr. Parnes offered that "sometimes it may be difficult to distinguish between those two[,]" Tr. 248, casting doubt on his earlier testimony about the extent of injury to plaintiff's left shoulder.

Plaintiff also called Drs. Ajoy Sinha, an orthopedic surgeon, and Sebastian Lattuga, a board-certified orthopedic spinal surgeon. Tr. 288, 363-64. Dr. Sinha performed arthroscopic surgery on plaintiff's shoulder in December 2014 to repair a labral tear, resulting from what he described as a "traumatic injury." Tr. 294-95, 310-11. Dr. Sinha explained that his opinion was based, at least in part, on the medical history provided to him by plaintiff. Tr. 310. On cross-examination, however, it was elicited that, as with Dr. Krishna, plaintiff did not reveal his pre-accident

history of left shoulder pain to Dr. Sinha. Tr. 328. It was also elicited on cross-examination that plaintiff told Dr. Sinha that the Staples boxes hit him in the *head*, neck, and shoulder. Tr. 329-30. This description of the accident was inconsistent with plaintiff's report to Dr. Krishna, discussed above, that the boxes struck him only in his shoulder and not his head. Finally, Dr. Sinha conceded that labral tears can result from degeneration and the normal aging process. Tr. 337-38.

Dr. Lattuga, who first saw plaintiff in September 2014 and observed a similarly limited range of cervical spine motion as described by Dr. Krishna, recommended that plaintiff be treated with physical therapy and epidural injections for herniated discs and radiculopathy. Tr. 367, 371-72, 377. When asked to comment on the cause of plaintiff's injury, Dr. Lattuga opined "if the history given to me is accurate and I believe it to be accurate ... it related to [a] box falling on [plaintiff's] shoulder back in 2011." Tr. 418. It was elicited on cross-examination, however, that plaintiff initially reported that he was struck by the falling boxes on his left shoulder, but that on subsequent visits, he stated that the boxes struck him on his head. Tr. 439-40. When asked on cross-examination whether plaintiff's complaints can be attributed to degenerative changes rather than a traumatic incident, Dr. Lattuga offered "it can be very difficult to make a distinction between an age-related change and a herniated disc" caused by trauma. Tr. 432-33. He agreed further that it is "fair" to say that, in plaintiff's case, "there's nothing that you can look

at and say this is specifically related to the trauma as opposed to the natural degeneration that's ongoing in [plaintiff's] spine." Tr. 433. In addition, it was elicited on cross-examination that plaintiff is a smoker and that smoking can accelerate the pace of degenerative changes to the soft tissues and bony structures of the body. Tr. 435.

Plaintiff's final expert witness was Dr. Guha, an internist who was plaintiff's primary care physician. Tr. 451, 453. Dr. Guha saw plaintiff on September 2, 2011, shortly after the accident in the Staples store. Tr. 453. According to Dr. Guha, plaintiff indicated that boxes fell on his head—which, as noted above, is not what he later reported to Drs. Krishna and Lattuga—and that he had a headache and felt pain in his neck and shoulder. Tr. 453-54. After plaintiff's condition had not improved following several physical therapy sessions, Dr. Guha referred plaintiff to Drs. Sinha, Krishna, and Lattuga. Tr. 464-65. Dr. Guha also testified that, despite plaintiff having had complaints of neck and left shoulder pain in March 2008 and then again in February 2009, he attributes plaintiff's current complaints to the accident in the Staples store. Tr. 477, 489, 498.

On cross-examination, Dr. Guha stated that, when he saw plaintiff in 2009 for complaints about his neck and left shoulder, he observed that plaintiff's range of neck motion was limited. Tr. 499-501. Dr. Guha further acknowledged that he saw plaintiff in August 2010—about one year before the Staples accident—and that plaintiff was complaining at that time of a

headache that had persisted for two months. Dr. Guha diagnosed plaintiff as suffering from hypertension. Tr. 505. Plaintiff visited Dr. Guha's office again in August 2011—a month before the accident in the Staples store—and again registered complaints of a persistent headache. Tr. 507-08. According to Dr. Guha's office records, plaintiff conceded at that visit that he had not been taking the blood pressure medication Dr. Guha prescribed for him a year earlier. Tr. 508, 515. Dr. Guha further acknowledged on cross-examination that, according to his office records, plaintiff complained of persistent left shoulder pain that was "severe in intensity" as early as January 2011—eight months prior to the Staples accident. Tr. 533-35.

2. Defendant's Case

The defendant's case consisted primarily of testimony from its experts, Drs. William Brian Head and Andrew Bazos. Tr. 813, 899. Dr. Head is board-certified in psychiatry, neurology, neuropsychiatry, neuroimaging, and most recently, brain injury medicine—one of less than 500 people in the United States to hold that certification. Tr. 818-19. Dr. Head testified that he reviewed all the medical records and reports in the case, including the various diagnostic films, as well as transcripts of testimony from earlier in the trial. Tr. 820-22. He also conducted a physical, neurological, and mental status examination of plaintiff in June 2015. Tr. 822, 827. While examining him, Dr. Head asked plaintiff whether he had any pre-accident medical history with respect to his head,

neck, or left shoulder; plaintiff responded that he did not. Tr. 825-26. Dr. Head also opined that, when he reviewed plaintiff's medical records, he saw "no evidence of cervical radiculopathy ... [or] nerve damage in [plaintiff's] neck." Tr. 829. When he reviewed the various radiological studies of plaintiff's cervical spine, Dr. Head did not observe any acute disc herniations, but instead saw bulging discs, which he explained were "a sign of chronic illness, [or] chronic deterioration." Tr. 830-31. Dr. Head also observed "a completely normal range of motion" in plaintiff's neck. Tr. 831.

Dr. Head also offered expert testimony in response to plaintiff's claim that he sustained a brain injury. Dr. Head described his findings with respect to plaintiff's mental status as follows:

> He was alert, oriented, able to do calculations. He had a friendly affect, which is to say, he was a friendly person. He was pleasant. He was outgoing. He showed no word finding difficulty. He spoke English. No slurred speech was noted. He was able to concentrate. He was able to process his thoughts quickly and he was able to render a fairly detailed history, and his immediate recall was intact. His overall memory was within normal. There was no evidence of impairment of concentration, no evidence of impairment of comprehension. There was no evidence of any concentration difficulties, as I indicated, and that I concluded, therefore, that his mental status,

> neurologically mental status examination failed to reveal any evidence of any cognitive impairment.

Tr. 828. Dr. Head testified further that he found "no evidence of any trauma" to plaintiff's brain. Tr. 836. He questioned the finding made by plaintiff's experts that plaintiff had a subdural hygroma, and suggested that the irregularities in plaintiff's MRI results relied upon by plaintiff's experts could reflect atrophy due to plaintiff's age. Tr. 839. Finally, Dr. Head testified that it is not medically possible for a whiplash injury of the sort described by Dr. Krishna to produce a TBI. Tr. 844. Dr. Head testified that, since beginning to practice medicine in 1971, he has never once seen or heard of a diagnosed TBI caused by the back-and-forth motion described by Dr. Krishna. Tr. 845.

Dr. Bazos, a board-certified orthopedic surgeon, obtained his medical degree from Yale University School of Medicine, completed an internship and four years of orthopedic surgery training at Columbia Presbyterian Hospital, and a one-year fellowship in knee and shoulder surgery at New York University Hospital for Joint Diseases. Tr. 899-902. Dr. Bazos, who also reviewed all of plaintiff's relevant medical records, conducted a physical examination of plaintiff in February 2015. Tr. 903-06. At that time, according to Dr. Bazos, plaintiff reported that he "never had a prior injury or problem with his neck or his shoulder before the Staples episode." Tr. 907. Dr. Bazos also testified that, during his physical examination of plaintiff, the range of motion demonstrated in his left

shoulder was "inconsistent." For example, once when Dr. Bazos asked plaintiff to raise his left shoulder, he raised it to 90 degrees, but later, he was able to raise it to 160 degrees, or "almost all the way up." Tr. 920. Dr. Bazos testified that there was no mechanical explanation for why that would happen. *Id.*

Dr. Bazos opined that the MRIs of plaintiff's shoulder revealed "tendinopathy," which he described as "wear and tear of a muscle" that "virtually everybody with any activity level over the age of 35 is going to have." Tr. 912-14. He further explained that, according to plaintiff's medical records, plaintiff first complained of shoulder pain weeks after the Staples accident, and that, absent immediate pain at the time of the trauma, "there's absolutely nothing indicative of acute trauma" in the MRI of plaintiff's shoulder. Tr. 913-14. Dr. Bazos also opined that the dislocation observed when plaintiff had shoulder surgery could not have been caused by an impact from above, such as from a falling object, but could only have been caused by repetitive motion or a blow from behind. Tr. 919.

Finally, with respect to plaintiff's neck, Dr. Bazos opined that the MRI he reviewed revealed "longtime wear and tear." Tr. 924. He also concurred with Dr. Head's opinion that the tests performed on plaintiff's neck did not reveal any cervical disc herniations. Tr. 927. Dr. Bazos concluded his testimony by stating that he saw no objective evidence to corroborate plaintiff's claims of a neck injury in plaintiff's medical records. Tr. 931.

3. The Verdict Was Not Against the Weight of the Evidence

Based on the evidence presented at trial, the jury may have reasonably concluded that the injuries complained of by plaintiff were the result of pre-existing conditions that had worsened over time, perhaps compounded by medication plaintiff had been prescribed to treat high blood pressure and cholesterol. The jury may have chosen to credit the testimony of the defense experts who opined that it was medically "impossible," given the mechanics of how and where the boxes fell on plaintiff, for them to have caused the injuries plaintiff claimed he sustained. It may have also chosen to credit the testimony of the expert witnesses—on both sides—that the findings in the diagnostic tests of plaintiff's head, neck, and left shoulder reflected degenerative changes attributable to the natural aging process rather than the results of a traumatic event. The jury's evaluation of plaintiff's claimed brain injury may also have taken into account plaintiff's business trips and the intricate paintings he produced even after the September 2, 2011 accident, as well as the manner in which plaintiff testified, which revealed him as someone able to comprehend and answer complex questions in a clear and coherent manner. Finally, the jury may have chosen not to credit much or any of plaintiff's testimony, in light of the testimony of his own doctors that he repeatedly failed to provide them with accurate information about his pre-accident symptoms and complaints, and provided

inconsistent information about whether the boxes struck him on his head when they fell.

Although the jury deliberated for only a short period of time, that fact alone does not lead to the conclusion that it failed to dutifully consider the evidence presented. *See Wilburn v. Eastman Kodak Co.*, 180 F.3d 475, 476 (2d Cir. 1999) ("A jury is not required to deliberate for any set length of time. Brief deliberation, by itself, does not show that the jury failed to give full, conscientious[,] or impartial consideration to the evidence.").

Finally, while the jury might have credited plaintiff's version of events and accepted the opinions of the expert treating physicians he called as witnesses, it certainly was not required to do so. The verdict reflected the jury's assessment of the credibility of the witnesses, and was not against the weight of the evidence, egregious, or a miscarriage of justice. Plaintiff's motion for a new trial based upon his contention that the verdict was against the weight of the evidence is accordingly denied.

B. The File Folder Exemplars

Plaintiff, in an argument raised for the first time in his reply papers, asserts that two packages of plastic file folders of the type that were inside the boxes that fell in the Staples store were improperly received in evidence. Plaintiff argues that these exemplar exhibits were not disclosed to plaintiff "in a timely fashion in accordance with this Court's express instructions." Reply Mem. at 7. Plaintiff's argument

is without merit.

At trial, defendant presented two exemplar packages of plastic file folders that it claimed were similar to the contents of the boxes that fell in the Staples store. Tr. 677-78, 745-46, 758-59. Defendant first made use of the exemplars while cross-examining plaintiff. Tr. 677. Plaintiff objected to defendant's use of the plastic file folders during cross-examination on the ground that they were not disclosed in discovery. Tr. 684. Defense counsel responded that he showed the exemplars to plaintiff's counsel earlier in the day before using them and that plaintiff's counsel did not object at that time. Tr. 684. Although I overruled plaintiff's objection, I also offered plaintiff's counsel the opportunity to examine the exemplars and prepare responsive testimony overnight, and to conduct a re-direct examination of the plaintiff on the following day. Tr. 686.

Later, defendant moved the exemplars into evidence, and plaintiff's counsel objected, arguing that receiving the file folders in evidence could confuse the jury. Tr. 960-61, 964. I overruled plaintiff's objection, noting that a proper foundation had been laid through a Staples employee,[9] and that any possible confusion could be avoided with a proper limiting instruction. Tr. 965. I gave the jury such an instruction, explaining that the exemplar exhibits "are not the folders that were inside any box that may have fallen on September 2, 2011 while the plaintiff

[9] *See* Tr. 758-59.

was in a Staples[ ] aisle" and that they were received in evidence "because there is some indication in the record that the box that fell contained folders like that, not because those are the folders that were recovered on September 2nd, 2011." Tr. 971.

The exemplars were not improperly admitted into evidence. The testimony of Carlos Urena, the general manager of the Staples store where plaintiff's accident took place, provided an adequate foundation for receiving the exemplars. Tr. 749-51. Urena testified that he responded to the scene of plaintiff's accident and observed one or two boxes on the floor. Tr. 755-57. He also determined that the boxes contained the same type of folders as those comprising defendant's exemplar exhibits. Tr. 758-59.

It is well-settled that the admissibility of demonstrative evidence rests within the discretion of the trial judge. *See, e.g.*, *Veliz v. Crown Lift Trucks*, 714 F. Supp. 49, 51 (E.D.N.Y. 1989). Perfect identity between the actual item involved in the case and the demonstrative evidence is not required. *Id.* Here, assuming Urena's testimony was accurate, the contents of the boxes involved in plaintiff's accident were virtually identical to the exemplars offered at trial. The exemplars were relevant because they could help the jury evaluate plaintiff's testimony by providing a sense of the size and weight of the boxes that may have fallen on him. Moreover, any prejudice from defendant's failure to produce the exemplars to plaintiff's counsel earlier in the case was addressed by allowing plaintiff overnight to examine the

exemplars and prepare responsive testimony.

Even if receiving the exemplars in evidence had been error, no adverse effect on plaintiff's "substantial rights" ensued. Fed. R. Civ. P. 61. The exemplars were not used, for example, to conduct a demonstration, and the expert witnesses were not asked to consider them when rendering their opinions. Finally, an appropriate limiting instruction was given to the jury. *See United States v. Downing*, 297 F.3d 52, 59 (2d Cir. 2002) (noting that juries are presumed to understand and abide by limiting instructions); *Stowe*, 793 F. Supp. 2d at 574 (denying motion for new trial where limiting instructions were given "since jurors are presumed to follow the court's instructions"). Therefore, plaintiff's motion for a new trial on this ground is denied as well.

Conclusion

For the foregoing reasons, plaintiff's motion for a new trial pursuant to Federal Rule of Civil Procedure 59 is denied.

SO ORDERED.

/s/
STEVEN M. GOLD
United States Magistrate Judge

Brooklyn, New York

March 21, 2017

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of March, two thousand eighteen.

Mostafa R. Ahsan,

Plaintiff - Appellant,

ORDER

v.

Docket No.: 16-4263

Staples The Office Superstore East, Inc.,

Defendant - Appellee,

MCO Staples, Inc.,

Defendant.

Appellant, Mostafa R. Ahsan, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk