OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: WILLIAM GASPERINI, Petitioner v. CENTER FOR HUMANITIES, INC.

CASE NO: 95-719

PLACE: Washington, D.C.

DATE: Tuesday, April 16, 1996

PAGES: 1-57

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM GASPERINI, :

Petitioner :

v. : No. 95-719

CENTER FOR HUMANITIES, INC. :

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Washington, D.C.

Tuesday, April 16, 1996

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

JONATHAN S. ABADY, ESQ., New York, New York; on behalf of the Petitioner.

THEODORE B., OLSON, ESQ., Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 95-719, William Gasperini v. The Center for Humanities, Inc.

Mr. Abady. Is that the correct pronunciation of your name?

MR. ABADY: Yes, it is, Mr. Chief Justice.

CHIEF JUSTICE REHNQUIST: You may proceed.

ORAL ARGUMENT OF JONATHAN S. ABADY

ON BEHALF OF THE PETITIONER

MR. ABADY: Mr. Chief Justice, and may it please the Court:

This case presents the question of whether a Federal appellate court, sitting in diversity, may apply a highly invasive State standard of review to overturn a jury's findings on compensatory damages in the absence of any error at trial, and after the district court judge has considered and denied a Rule 59 motion.

This Court must reverse the Second Circuit's decision for three principal reasons. First, the Second Circuit's decision to apply a State rather than Federal standard of review violates the Seventh Amendment, the Rules of Decision Act, and this Court's precedent, most recently reaffirmed in a unanimous opinion in Browning-

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Ferris, where it was expressly held that in a diversity suit it is Federal and not State law that governs the standard of review.

QUESTION: Mr. Abady, I guess you agree that the Federal district court had to look to New York substantive law --

MR. ABADY: Well --

QUESTION: -- for the cause of action and what recovery was allowed.

MR. ABADY: Yes. Yes. State law controlled the substantive law which governed the cause of action and the elements that the jury could consider.

QUESTION: Has the law in New York been determined to limit tort recovery to amounts that are reasonable?

MR. ABADY: Not --

QUESTION: It's my understanding that that's the case law in New York.

MR. ABADY: Not as a matter of substantive law at least with respect to --

QUESTION: Well, why isn't that a matter of substance?

MR. ABADY: Well, at least as to the --

QUESTION: I mean, if New York said, no tort recovery can exceed $100,000, would that be a substantive

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MR. ABADY: Yes, that would --

QUESTION: -- requirement?

MR. ABADY: That would be a substantive --

QUESTION: And what if the New York law says it has to be reasonable? Is that not a substantive requirement?

MR. ABADY: Not if the determination of reasonableness is a judicial determination by a reviewing court, as it is in New York under CPLR 5501(c). 5501(c) is a standard of review. It is not a substantive --

QUESTION: Okay, but what if it is coupled with New York cases that say it must be reasonable --

MR. ABADY: Well --

QUESTION: -- as a matter of substantive law?

MR. ABADY: Well, I think that the critical issue there is who defines what is reasonable. I think that if, as in this case, it is a reviewing court that is making the determination of what is reasonable --

QUESTION: I suppose initially the trial court judge has to review that question and decide it.

What is the normal Federal appellate court standard of review, do you think?

MR. ABADY: Well, under the Seventh Amendment, a Federal appellate court is not permitted to reexamine facts found by --

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QUESTION: That doesn't answer my question. What is the standard of review? Is it no reasonable juror could have reached the verdict, or is it -- in this case do they -- they were looking at a motion for a new trial. Is it whether the trial court abused its discretion in denying the new trial?

MR. ABADY: Well, most of the circuits are -- many of the circuits are employing an abuse-of-discretion standard, but the Seventh Amendment does not permit a Federal appellate court from exercising review where the claim is that the jury's verdict was excessive, or --

QUESTION: Mr. Abady, do you know of any State that does not have a rule that damages must be reasonable? In other words, is the New York rule something distinctive about New York law?

MR. ABADY: Well, there is something distinctive about 5501(c) in New York law --

QUESTION: What is that?

MR. ABADY: -- and that is that under New York law as articulated by the New York court of appeals, which is the highest court in the State of New York --

QUESTION: Right.

MR. ABADY: The appellate division has the "final word" on --

QUESTION: I understand, but that is a question

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of how the New York law rule of law is enforced. It can be enforced at the appellate level as well as by the trial judge, but as far as the substantive rule of New York law is concerned, namely that damages must be reasonable, is that at all distinctive?

MR. ABADY: No --

QUESTION: It was my impression that every State has such a rule of law.

MR. ABADY: I think -- I think --

QUESTION: And the Federal Government as well, and all causes of action under Federal law. Do you know any cause of action in which the damages can be unreasonable?

MR. ABADY: I think that the substantive law in most States, without knowing it precisely and exactly in every State, I presume that the --

QUESTION: You're not willing to say in all States?

MR. ABADY: I'm sure it is in all States.

QUESTION: But Mr. Abady, didn't New York specifically change its law for the express purpose of getting a lid on damages?

MR. ABADY: Well, not a lid, and that's I think a critical distinction. In 1986, the legislature enacted 5501(c) of the CPLR, which provided an appellate court

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with the opportunity not to impose a lid, but to make a determination of what it believed was reasonable compensation, and to move the award up or down, and --

QUESTION: In this very field, what we've seen is a lowering of excessive verdicts, and what's startling to me about this case is going back to guarantee the basic Erie message that you are not to get dramatically different outcomes in State and Federal courts. That's core Erie, and here you have the possibility of getting verdicts that are widely out of line with what you could hope to get if you went into State court.

MR. ABADY: Well, I mean, I think you're raising an interesting point. The Erie analysis that the Consorti court, the Second Circuit engaged in, which was the decision that the Gasperini court relied on, did, in fact, under an Erie analysis indicate that its decision to apply State law was a function of the Erie test, but there is a threshold question that must be addressed before one can proceed to the Erie considerations, and that is, is there a constitutional provision at play here?

QUESTION: Mr. Abady, is this a State-created right?

MR. ABADY: Is what a State-created right?

QUESTION: The suit, the claim in suit is based on State law.

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MR. ABADY: That's correct. That's correct, but --

QUESTION: And yet you're arguing that because of Federal procedure, you can get a remedy in the Federal court much larger than you could get in State court on the State-created right?

MR. ABADY: No. What I'm saying is that because the Seventh Amendment applies, the Supremacy Clause prevents application of the State standard of review, not the substantive law. The substantive law which determines the cause of action, and which determines the elements that the jury may consider in arriving at their determination is a function of State law, but the standard of review, as this Court held in Browning-Ferris, in Donovan v. Penn Shipping, and in Byrd v. Blue Ridge, is a function of fundamental Federal policy and the Seventh Amendment.

QUESTION: Mr. Abady, you never got a chance, really, to answer Justice O'Connor's question. What is the Federal standard of review?

MR. ABADY: Well, the -- what I'm saying is, where a new trial motion has been based on a claim for excessiveness or weight of the evidence, the Seventh Amendment prevents a Federal appellate court from reviewing that determination.

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QUESTION: Your point is that as a matter of constitutional law there is no -- the Federal appellate court has no power to set aside the --

MR. ABADY: That is correct. The Reexamination Clause of the Seventh Amendment says specifically no fact --

QUESTION: Do you think that's what Browning-Ferris held?

MR. ABADY: Well, I think Browning-Ferris addressed a slightly different issue, but interestingly, Browning-Ferris did indicate that this Court has never held expressly that a Federal appellate court can exercise review where weight of the evidence and excessiveness is the claim and, in fact, it's been the precedent of this Court for more than a century and a half, and a precedent that has never been repudiated, that a Federal appellate court cannot exercise that type of review.

QUESTION: And what precedent is that you're referring to?

MR. ABADY: Specifically the cases begin with Parsons v. Bedford up through Fairmount Glass. There are dozens of decisions which are collected in our brief on page 35 in footnote 36 --

QUESTION: Well, Mr. --

QUESTION: Do they really -- what proposition

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are you citing them for? I know they're collected in your brief, but are you saying there's simply no possible review of a jury verdict under the Seventh Amendment?

MR. ABADY: Not "no possible review," but the Seventh Amendment imposes a division on the review responsibilities of the district court and the court of appeals. The district court under the Seventh Amendment is entrusted with responsibility for reviewing factual issues and therefore for determining excessiveness and weight of the evidence claims. The court of appeals remains available to review and supervise questions of law.

QUESTION: But there's nothing in the Seventh Amendment that says the district court, the trial court shall do one thing and the appellate court shall do another.

MR. ABADY: Well, I actually think that there is.

QUESTION: Well --

MR. ABADY: The Seventh -- the Reexamination Clause says, states, no fact found by a jury may be otherwise reexamined than according to the rules of the common law. The Seventh Amendment is a very unique amendment. It commands that we must look to the common law for the meaning of the scope of that reexamination.

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If there was reexamination at common law by appellate courts over excessiveness and weight of the evidence claims, then contemporary American jurisprudence can exercise --

QUESTION: Well, Mr. Abady, you do agree that at common law there was a group of judges that reviewed the trial court -- trial jury's findings.

MR. ABADY: But it's important to look precisely at what that -- what --

QUESTION: But that is true. There was some form of judicial review.

MR. ABADY: There was judicial review at the trial level.

QUESTION: Right.

MR. ABADY: The only way that a new trial motion, where excessiveness or weight of the evidence was the claim, could be granted was with the authorization of the nisi prius judge, who was the judge present during the trial proceedings. That judicial review was exercised --

QUESTION: But sometimes that review was conducted without the judge who was present at the trial.

MR. ABADY: No. No. Historically and factually incorrect, Justice O'Connor. There is no case, and no case has been cited by respondent, where a new trial motion was granted by the court at Westminster without the

express certification of the nisi prius judge. There --

QUESTION: Let me ask you this. On the Federal standard of appellate review, if the court of appeals determined that no reasonable juror could have awarded the amount of damages that it awarded at the trial, you say the appellate court could not, based on that determination, upset the verdict?

MR. ABADY: A court of appeals is --

QUESTION: No reasonable juror could have done it?

MR. ABADY: A court of appeals is not in a position, based on the restrictions of the Seventh Amendment, to exercise that type of review --

QUESTION: Mr. Abady, the district judge is, however, and if you're stressing Federal procedure and the Seventh Amendment, we have a tension here between the award one can get in a State court and Federal procedure. Isn't the logical answer to say, you have to take the State law, but fit it into Federal procedure, and that means the district judge has an obligation to do in the Federal courts exactly what the appellate division would do in the New York State courts.

MR. ABADY: A district court judge is empowered to review that claim for excessiveness, and may look to State law for guidance. There is no --

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QUESTION: This district judge wasn't aware that he was to take as his standard for reviewing the verdict what the appellate division would have done in a similar case. He certainly didn't indicate any such awareness.

MR. ABADY: I don't think that's necessarily true. The Rule 59 motion was fully briefed by both parties. Arguments were made by both parties before Judge Brieant. Judge Brieant considered the Rule 59 motion. He had a liberal standard that he could employ in deciding that motion. He considered it, and he denied it.

What Judge Brieant recognized, what he must have recognized when he considered that Rule 59 motion, was that this verdict was fully supported by the record at trial. Even respondent's own expert in this case at trial provided testimony --

QUESTION: Is there anything to indicate that he compared, as the Second Circuit did, this verdict with the cut-down that the appellate division had done in similar cases?

MR. ABADY: No, because Judge Brieant didn't issue a formal written opinion, but the case was --

QUESTION: So at least it's possible that he didn't know he had the obligation, in effect, to take the place of the appellate division when he reviewed that

verdict for excessiveness.

MR. ABADY: Well, Judge Brieant's a very experienced Article III judge. We don't know exactly what --

QUESTION: He might have thought, just as you did, that everything that has to do with judge and jury is Federal procedure. Never mind the State. We don't -- Seventh Amendment, we don't look to see what the State does. He might have thought that. We don't know what he thought because he didn't write anything.

MR. ABADY: Well, that's correct, he might have, but there's no indication that he exercised his discretion and authority in reviewing the new trial motion improperly.

What we have to look to is the record, to see if the record actually supports his determination, and when we look to the record in this particular case, what we see is that even respondent's own expert at trial provided a basis for the valuation that the jury arrived at in this case.

QUESTION: Mr. -- do I understand your argument -- are -- is it your argument that what the Seventh Amendment prohibits is only appellate review, and you concede, it seems to me, in this colloquy with Justice Ginsburg that the Seventh Amendment does not prevent the

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trial judge from being more liberal in setting aside a jury verdict than the common law would be --

MR. ABADY: No --

QUESTION: -- simply because New York decides that judges should be more interventionist than the common law has allowed them to be.

MR. ABADY: No, I don't want to be misunderstood for saying that --

QUESTION: Well, I thought --

MR. ABADY: -- exactly, Justice Scalia.

QUESTION: Isn't that the premise of the question, though, that Justice Ginsburg was asking you, that if New York chooses to allow its judges to be more interventionist than the common law allowed judges to be with regard to jury verdicts, Judge Brieant, here, must follow New York law, regardless of the Seventh Amendment.

MR. ABADY: Judge Brieant is free to look to New York law to some extent in exercising his discretion under --

QUESTION: Why?

MR. ABADY: -- the Rule 59 motion, but he is --

QUESTION: It seems to me he must look to the common law.

MR. ABADY: He is constrained, in fact, by the

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common law, and this standard of a district court judge in reviewing a Rule 59 motion is a properly deferential standard.

QUESTION: Mr. Abady, there's no general common law here. The common law that is applied is the law of New York State, and suppose New York State court should clarify? This change that our legislature made is in effect a soft cap on damages, not just a general reasonableness that always prevails, but we have in effect a soft cap, and we regard it as highly substantive. Suppose that's what New York courts --

MR. ABADY: I'm not sure, Justice Ginsburg, what your question to me is.

QUESTION: My question is, suppose that is the New York law. Then we have your case, so it's clear that New York regards this as a matter of substance, that it is a soft cap. Instead of being no more than $500 per transparency, it's this standard that the appellate division is to use. New York labels it substantive. Then we're in Federal court with your case. What must the trial judge do?

MR. ABADY: Well, I think the determining factor is not how it's labeled but what, in fact, is the actual nature of a substantive law. If it is, in fact, substantive law, if there is a limit imposed as a matter

of State substantive law, that is controlling in a diversity suit.

QUESTION: Suppose that that limit required either the trial judge and the appellate court to look at verdicts in order to make them comparable, including verdicts that have been rendered after the verdict in question.

That is to say, if it comes to the court of appeals of New York under New York procedure, they look, in order to determine comparability, at what juries have been doing within a period, reasonable period of time both before and after this jury has entered its verdict.

MR. ABADY: That cannot be squared with the Reexamination Clause of the Seventh Amendment. The Seventh Amendment says the facts --

QUESTION: So then you would have a substantive standard that could not be implemented in the district court.

MR. ABADY: I -- the Seventh Amendment requires, I think, that the jury's findings of fact be accorded great deference, and that they cannot be altered based on an assessment of what other juries have done in other cases where the parties in this particular proceeding have not been a party to.

QUESTION: We use comparable sales all of the

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time in condemnation suit. Why can't you use comparable verdicts and determine whether or not there's a certain amount of uniformity based on an after-the-fact examination of the verdicts?

MR. ABADY: Because the Reexamination Clause of the Seventh Amendment imposes a powerful and definitive restriction on how a jury's findings of fact --

QUESTION: So then there are certain substantive standards that cannot be implemented in the Federal system?

MR. ABADY: Not substantive State law standards. The States are free to pass --

QUESTION: This -- in fact, the question I put is very close to, is it Cortini, Corsini?

MR. ABADY: Consorti, I believe.

QUESTION: Yes, Consorti. In fact, isn't that what the Court held in Consorti that it was required to do, to look at verdicts, including verdicts --

MR. ABADY: Yes.

QUESTION: -- that were rendered after the date of the verdict in question?

MR. ABADY: Yes, and I think that's incorrect. It's --

QUESTION: Let's assume that it's correct as a matter of State law. Let's assume it's correct as a

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matter of State law.

MR. ABADY: But not as a matter of State substantive law. The key question here for a Federal court sitting in diversity is, what is the State substantive law? That applies, and the jury is bound by State substantive law that determines the cause of action, determines --

QUESTION: But Mr. Abady, for Erie purposes a lot of things that are categorized as procedural in other contexts are substantive for Erie purposes.

MR. ABADY: Yes.

QUESTION: Because the idea is, you're not supposed to have a different outcome in the Federal court on a State-created right. That has constitutional dimensions, too, doesn't it?

MR. ABADY: Yes. Yes, Justice Ginsburg, but --

QUESTION: So the statute of limitations, which sometimes is typed procedural --

MR. ABADY: But -- but Justice Ginsburg, no Erie analysis, no policy analysis under Erie and Hanna v. Plummer can displace a constitutionally mandated allocation of responsibilities between judge, jury, and an appellate court.

QUESTION: Mr. Abady, your position, I take it, would apply equally to punitive damages.

MR. ABADY: Yes.

QUESTION: And how do you reconcile it with our decision in Honda that due process required excessiveness review? Do you think we were wrong?

MR. ABADY: No. I think our position is fully consistent with this Court's decision in Honda.

In Honda, this Court held that a provision of the Oregon State constitution which prevented judicial review violated procedural due process.

QUESTION: Right.

MR. ABADY: In this case there was judicial review at the district court level. There's no constitutional right to an appeal. The Court holding in Honda didn't say that there was a right to appellate review, and how could it be a matter of procedural due process to require appellate review when there's no right to an appeal?

Judicial review was exercised in this case by the district court.

QUESTION: So that you're saying the appellate jurisdiction of this Court is limited by the Seventh Amendment.

MR. ABADY: Yes.

QUESTION: How is it --

QUESTION: So that there could not be -- as I

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understand it, if the district judge said the motion to set aside is denied, there could not, in your view, be an abuse-of-discretion review in an appellate court.

MR. ABADY: Not consistent --

QUESTION: And if the standard that we established for Federal review were no reasonable juror could find -- could have reached this verdict, would that be reviewable?

MR. ABADY: The only review that is consistent with the Seventh Amendment by a Federal appellate court is review that goes to a legal issue.

QUESTION: Well, but that's, I think, what I'm getting at, because I would have thought that the abuse-of-discretion standard, and review of a rule which pegs the permissible amount to, or limits the permissible amount to what a reasonable juror could have found, raised issues of law, rather than the kind of issues of fact which the New York rule does issue -- does raise.

I mean, I concede the New York rule as being a rule of factual review, but abuse of discretion, no reasonable juror could -- those, I would suppose, were limits of law, and I think you're telling me that there could not even be appellate review on those grounds.

MR. ABADY: I believe, Justice Souter, that the Seventh Amendment, the Reexamination Clause of the Seventh

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Amendment is saying exactly that.

QUESTION: I thought the point -- I'm sorry. Go ahead.

MR. ABADY: Well, because ultimately an abuse-of-discretion standard would require a Federal appellate court to engage in de novo for review of facts found by the jury --

QUESTION: Well, but only --

MR. ABADY: -- in order to make the determination.

QUESTION: Only in the limited sense, I suppose, that we engage, or an appellate court engages in a review of the facts on a directed verdict motion.

MR. ABADY: Well, again --

QUESTION: They can do that.

MR. ABADY: Again, this issue --

QUESTION: I mean, you -- they can do that under the Seventh Amendment, and I'm not -- I don't see the essential difference between doing that and engaging in either of the two avenues of review that I've thrown out as hypos here.

MR. ABADY: Well, the key in the command is contained in the Reexamination Clause, and the --

QUESTION: Mr. Abady, does the Reexamination Clause speak to punitive damages? Aren't you biting off

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more than you have to chew here? Does any of the cases at common law that you cite involve punitive damages?

MR. ABADY: Some of them do, yes. Yes, Justice Scalia.

QUESTION: They do involve punitive damages?

MR. ABADY: Yes, some of them involve exemplary damages.

QUESTION: Can you explain a little -- I'm not certain how you -- at the district court level, everybody agrees it's up to the jury to decide reasonableness, right? Everybody's agreed on that.

Okay. Then, if New York were to have a law saying, and no jury verdict, no damages will exceed $1 million, and the jury gave them $2 million, everybody agrees that the district judge in a Federal case would have to follow New York law, set it aside over the million. That's a legal question.

MR. ABADY: A district court?

QUESTION: Yes. A district judge. A district judge.

MR. ABADY: Yes.

QUESTION: And everybody also agrees that if New York is doing the same thing here, the district judge should do the same. So that's a question of, if this is a substantive cap like the million dollars, the district

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judge should do the same.

MR. ABADY: If there is a State substantive cap --

QUESTION: Which says that no jury will be -- no -- which says that no plaintiff can get more than what materially deviates from what is reasonable.

MR. ABADY: No, I think that --

QUESTION: If that -- if I believe that that's like saying, no plaintiff gets more than a million, I know there's disagreement on that, but if I were to think you'd lose on that, and it is substantive, then you would say that the district judge is supposed to decide whether that's so.

MR. ABADY: Well, I want to be clear that there's a distinction between an authentic State substantive cap which is binding in a diversity action and which is actually reviewable by a Federal appellate court as a matter of law not only by a district court judge, but this standard that we're talking about which requires an appellate court to substitute its judgment for that of the jury, which is not --

QUESTION: I think they made a mistake in thinking that the comparable thing was the Federal appellate with the State appellate. If I think that, the comparable thing might have been the district judge with

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the State appellate. I'm trying to get that out of it. I'm saying, suppose I thought that it's the district court here that should have applied the cap. Then what I want to know, if that's so, what should the review have been in the Federal appeals court? Why shouldn't it be de novo, or abuse of discretion, or nothing? What is your view on that?

MR. ABADY: If I understand your question correctly, if there is a State substantive cap, and if we assume for the sake of argument that what we're dealing with is actually a State substantive provision, a State, for example, that the cause of action, that under New York law on a particular cause of action a plaintiff is not entitled to more than $200,000 and the jury awards $500,000, and for some reason the district court judge is asleep at the wheel and he lets that verdict go through, a Federal appellate court would have as a matter of law review power to overturn that verdict because it is a question of law.

QUESTION: The reason, then, that that is not this case is because you think it isn't a soft cap. You think that the State court provision is totally -- the State law provision is totally a procedural matter.

MR. ABADY: On its --

QUESTION: Is that the --

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MR. ABADY: On its face, it is clear that 5501(c) is a mode of appellate review, and in People v. Bleakley, the highest court in the State of New York, the court of appeals, have specifically said that 5501(c) is the provision that gives appellate courts the final word on factual issues, and they describe 5501(c) as "the linchpin of the constitutional scheme in New York that allows every litigant an opportunity of at least one review by an appellate court."

QUESTION: So for Erie purposes it's procedural, not substantive, is your --

MR. ABADY: Absolutely.

QUESTION: Mr. Abady -- Mr. Abady, you're urging upon us very strictly the words of the Constitution, but they only apply to review of jury determinations of fact. How is a jury determination concerning punitive damages a determination of fact?

Compensatory I can understand. This person has been injured so much. That's a question of fact. But punitive damages, this person deserves to be punished to a certain degree. Is that a question of fact?

MR. ABADY: I believe it is a question of fact --

QUESTION: It is.

MR. ABADY: -- Justice Scalia, yes. The law is

given to the jury on what punitive damages, what the elements of punitive damages are --

QUESTION: Punitive damages is an issue of fact?

MR. ABADY: Yes, Judge Scalia, I believe it is.

QUESTION: Mr. Abady, I'm not sure that I understand the relationship between your answer to Justice Breyer's questions and your answer to mine. You said in his case that if there were a kind of a simple dollar cap, nobody gets more than a million, the district judge is asleep at the wheel and does not vacate the excessive verdict, the appellate court may do so on review of law.

MR. ABADY: That's correct, Justice Souter.

QUESTION: Okay, or may reverse him and remand --

MR. ABADY: Yes, Justice Souter.

QUESTION: -- on review of the law.

Why may the appellate court not do the same thing on abuse of discretion? That's an issue of law, isn't it?

MR. ABADY: Well, this Court has indicated that if there is any standard consistent with the Seventh Amendment, it would be an abuse-of-discretion standard.

QUESTION: Okay, but why shouldn't your answer, then, be the same on abuse of discretion as it was to Justice Breyer's question?

MR. ABADY: Well, because I think the strict, proper correct reading of the Reexamination Clause is one that precludes any review by a Federal appellate court of issues of fact.

QUESTION: All right, but my premise was, and maybe this is where we disagree, my premise was that review for abuse in effect is review for an error of law. You were saying on an abuse-of-discretion standard in effect no reasonable district court could have found this anything but excessive, or that's your question, could a reasonable --

MR. ABADY: I --

QUESTION: -- and that is, it seems to me is an issue of law, isn't it?

MR. ABADY: At best, I believe that an abuse-of-discretion standard is a mixed question of law and fact, and insofar as it requires an appellate court to engage in a reexamination of the facts, it is --

QUESTION: Okay.

MR. ABADY: -- inconsistent with the Reexamination Clause.

QUESTION: Well, let me go to the other example I tried. Let's assume that the substantive rule in New York is no verdict may exceed the verdict that a -- may exceed the range that a reasonable juror would -- that a

juror -- that a reasonable juror would find appropriate, and the district judge is asked to remit or vacate because the verdict exceeds whatever that amount is claimed to be, and it, in effect it's a reasonable juror standard, and the district judge does not do so.

That is appealed. Is your answer the same, that that is really a mixed question, and because it's a mixed question, it cannot be reexamined?

MR. ABADY: Yes. I think to the -- I think the answer to that is yes, Judge. To the extent that that review requires an assessment of the facts found by the jury, it's precluded by the Reexamination Clause of the Seventh --

QUESTION: So the Seventh Amendment precludes any appeal, any litigation of a legal issue on appeal which arises out of a mixed determination, then. That's your rule.

MR. ABADY: I think that any time the appellate court is required to engage in factual review, the Seventh Amendment does not permit that.

QUESTION: Thank you, Mr. Abady.

MR. ABADY: Thank you.

QUESTION: Mr. Olson, we'll hear from you.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE RESPONDENT

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MR. OLSON: Mr. Chief Justice, and may it please the Court:

The Second Circuit in this case performed essentially the same supervisorial function as the courts at Westminster had performed beginning in 1655, under the rules of common law, to protect against exorbitant judgments, and it performed the supervisorial function required by Erie since 1938.

QUESTION: They weren't supervising anybody. They -- unless you say somebody supervises himself. Those courts were trial courts.

MR. OLSON: Those -- in fact, the -- Blackstone discusses this process in extensive detail in Chapter 24 of Volume 3 of his Commentaries. What that was, en banc courts sitting to review the decision of the trial and the trial court.

QUESTION: There was no judgment entered by the trial court.

MR. OLSON: That's --

QUESTION: Judgment was entered by the court at Westminster, and the closest analog to current practice is that of a master.

MR. OLSON: I submit, Your Honor, that a review en banc by the court above -- Blackstone referred --

QUESTION: Courts review judgments, Mr. Olson.

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There was no judgment to review.

MR. OLSON: Of course, the entry of the judgment occurred later. When the judiciary Act of 1789 was adopted, it's very interesting that the new trial motion occurred after the entry of the judgment. The entry of the judgment made no difference.

What is functionally equivalent to what happened in the second circuit today is what was happening in the courts of Westminster at the time the Constitution was adopted, a review by judges other than the trial judge of the reasonableness of the jury's verdict.

QUESTION: But they were not appellate judges. These were all trial -- they were all nisi prius judges.

MR. OLSON: As Blackstone points out both in Chapter 23 and Chapter 24 of Volume 23, they were interchangeably trial judges, judges of appeal, and judges who would communicate with one another to perform a supervisorial function.

When they were reviewing motions for a new trial, Blackstone makes it very clear that the purpose was to preserve the jury trial itself, because if aberrational judgment, errors in the instruction, errors performed by juries, excessive judgments, and so forth, could not be corrected. The faith that existed in the jury trial would vanish, and the jury trial system would go away.

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QUESTION: I take it that they could order that the trial be -- that the case be retried before a group of judges, like all of them, or an en banc panel.

MR. OLSON: What was done was a retrial at the place at which the case was tried initially, unless the case was tried originally at Westminster. Then it could be tried there.

The same essential function.

QUESTION: Would then three judges go out and retry it, or --

MR. OLSON: No. If it was tried originally in a county some place by one judge, it would be sent back. As I understand, that's the process that would work.

In other words, it is very much functionally equivalent to what we have today, separate judges, and the trial judge may have been a part of that review, or he may not have been a part of the review.

QUESTION: According to your opponent, he was always a indispensable part of the review if it was to be set aside. You do not have a single case in which it was set aside without the recommendation to do so by a nisi --

MR. OLSON: In fact --

QUESTION: -- by the nisi prius judge.

MR. OLSON: In fact, as -- Justice Scalia, as you are aware, those decisions are very short, very

abbreviated. Some of them refer to the trial judge. Some of them do not refer to the trial judge at all. There is no statement in any of those cases that say that we could not consider the motion for a new trial without the trial judge.

QUESTION: Do you have a single case in which it is clear that the nisi prius judge did not recommend the setting aside, and yet it was set aside. Do you have one case?

MR. OLSON: The cases are not clear either way.

QUESTION: I think that can be answered yes or no.

QUESTION: You can answer that yes or no.

MR. OLSON: I answer that question yes, but I also say that --

QUESTION: What is that case? I'll write it down.

MR. OLSON: I said I don't have a case that --

QUESTION: You don't.

QUESTION: Well, then the answer is no.

MR. OLSON: -- answers it. Clearly, I should have said no. I misunderstood the phrasing of the question.

The fact is that if you review those cases as we have carefully reviewed them, there is no -- first of all,

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Blackstone does not say that it required a certificate by the trial judge to review possible errors made by the trial judge.

Blackstone talks about this in terms of supervising possible errors that may have occurred before. It would have not been a supervisorial function if the only supervision that could have taken place would have been with the permission of the judge being supervised.

QUESTION: Why did Joseph Story think that the appellate judges didn't have this power, and why did we think for about a century and a half that the remittitur could only be granted --

MR. OLSON: Well, in the first place the Judiciary Act of 1789 made no distinction whatsoever in terms of which judge or in which function the new trial motion could be considered or granted.

In fact, in section 17 and -- in section 17 and section 18 of the Judiciary Act of 1789 it says either judge might approve the going forward of the motion for a new trial.

QUESTION: And when it says, either judge, which -- what judges are they referring to?

MR. OLSON: They're referring to the circuit judges in -- that's in section 18, Chief Justice Rehnquist.

QUESTION: Where two judges, a circuit judge and a district judge sat together to try a case?

MR. OLSON: Yes. Yes.

QUESTION: Well, of course, but then that's not an appellate court. I mean, all the judges in 1789, all of the judges had nisi prius functions. They all had trial court functions.

MR. OLSON: I understand that. We did not --

QUESTION: You didn't need to give them all that power.

MR. OLSON: We -- well, the fact is, though, that the Judiciary Act of 1789 did not say that this had to be done by a trial judge sitting in a trial capacity. It authorized any court of the United States to grant a motion for a new trial, and --

QUESTION: Well, surely not a court in which the case hadn't been tried.

MR. OLSON: The --

QUESTION: Or appealed. I mean, a district court in South Carolina couldn't grant a new trial in a case tried in Pennsylvania.

MR. OLSON: What the -- that's correct, Chief Justice Rehnquist. What the --

QUESTION: In other words, it meant where appropriate.

MR. OLSON: It -- no.

QUESTION: So it gets you nowhere.

MR. OLSON: What it meant --

QUESTION: It just says every judge can do it where appropriate, and the issue is whether it's appropriate when he's not the trial judge, so --

MR. OLSON: No, the decision --

QUESTION: -- the words of the 1789 act get you nowhere.

MR. OLSON: What I'm saying is, it does not in any way refute the process that was going on concurrently at common law where a decision was made by a separate group of en banc judges that an excess of judgment had been rendered, and then that decision that a new trial should be granted was sent back to the place where the case was tried originally, or to where the record was returned, in the exact words of Blackstone.

So that when this process -- because we created a different system of courts than existed in England at the time, there is going to be some differential in the process, but the substance of the fact is that a reexamination and a grant of a new trial was not -- in that context was not considered to be a reexamination, which the Framers were concerned about.

It's fairly clear --

QUESTION: Mr. Olson, if we were back in the era of Swift v. Tyson, when there was common law to apply, and Federal courts could divine it, you would never be making this kind of argument, because the Reexamination Clause would control. So my question to you is, why are you emphasizing the possibility of appellate review, instead of saying that this is New York substantive law, and fitting it into the Federal system is the job of the trial judge, and that's what went awry here.

And the Second Circuit, instead of taking it on itself to do this review, should have instructed the trial judge that that's what the trial judge should have done.

MR. OLSON: Well, I agree with everything that you said, and I was going to discuss the Erie question.

What the appellate court clearly did in this case is decide that no reasonable jury could have come to the conclusion -- in fact, that is the exact words of the Second Circuit in this case -- could have come to the conclusion that the jury did in this case, and it's clear, in giving all deference to the decision of the jury and all inferences in favor of the petitioner, that the district judge should have done exactly what you said.

And the court in this case granted a new trial, which is exactly the procedure that did exist at common law to correct these kinds of errors, and then went on to

suggest, as permitted under the Federal practice, that there could be a remittitur, which would avoid the new trial in the -- at the option of the plaintiff.

QUESTION: Mr. Olson, that's contrary to what we've at least said in the past the court's empowered to do. We said in the Fralock case, a case a lot closer to the framing of the Seventh Amendment than we are today, we said, if -- no error of law appearing upon the record, this Court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have rendered a verdict for a lesser amount.

If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefore rested with the court below under its general power to set aside the verdict.

That's very categorical, and it says just the opposite of what you're telling us.

MR. OLSON: Well, what this Court said in the Browning-Ferris case is that the court of appeals was to review the decision of the district court to see whether the court of appeals came to the conclusion -- this is a unanimous decision of this Court 6 years ago. Our only inquiry is whether the court of appeals erred in finding that the district court did not abuse its discretion in

refusing to grant petitioner's motion for a new trial, and --

QUESTION: Did that involve compensatory damages?

MR. OLSON: This case involved punitive -- the Browning-Ferris case involved punitive damages.

QUESTION: Am I permitted to think that punitive damages do not involve a question of fact, whereas compensatory damages do?

MR. OLSON: I think both types of damages under the decisions of this Court, and the decisions of the courts that have considered them and sanctioned them, say that punitive damages and compensatory damages do involve some element of fact-finding and some element of the application of the law to the facts.

It's a mixed question of law and facts, especially when the question is being reviewed, and what this Court said three times --

QUESTION: You think both are equivalently factual. The question how much -- you know, what value of suffering or injury has this person undergone, you think that is no more factual than the question, how much should this person be punished.

MR. OLSON: I think it is more factual, but we're on a spectrum here. Blackstone talks in terms of,

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when it talks about the private rights and private wrongs versus public rights and public wrongs, is talking about punitive damages to the extent that he was examining that subject in a context of a public wrong and a public remedy, so Blackstone at least was considering there was a public societal interest in the amount of punitive damages.

Now, of course, this case does not involve that subject, but I do think that there are different -- you have State -- you're having a State impose a penalty for what's perceived as antisocial conduct in the context of punitive damages, and there may be more strict judicial review.

QUESTION: It doesn't seem to me at all a question of fact.

MR. OLSON: Pardon me?

QUESTION: It doesn't seem to me at all a question of fact, how much somebody should be punished.

MR. OLSON: In this Court's decision in Pacific Mutual v. Haslip, the Court said that appropriate considerations may be given both by the jury and the judge and the trial court and the appellate courts of how much other punishment existed, what was the degree of the egregiousness of the wrong, and things of that nature.

I'm tempted very much to agree that it's purely

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a legal question, but I think I have to concede, to be honest, that there are factual elements wrapped up in it under this Court's jurisprudence.

QUESTION: What if you have a negligence action, a diversity, tried in Federal court, and a jury returns a verdict for the plaintiff. The district judge refused to set it aside, grant a motion for a new trial. Appeal to the court of appeals, the court of appeals is of the view that no reasonable juror could have found that the defendant was negligent in this case. Can it reverse the judgment?

MR. OLSON: I believe it can. I believe --

QUESTION: Without violating the Seventh Amendment?

MR. OLSON: Yes, I believe it can.

This Court has said over and over that the Seventh Amendment was not intended to enact the forms of practice or the procedures that existed at common law. This Court has said that it is the substance of what was taking place at common law.

QUESTION: And I suppose you would say that the substance of the common law or the law today is that there is a large element of law in a damage award. That is to say, you can consider reputation in the community, or you can't, you can consider pain and suffering, or you can't.

MR. OLSON: I totally agree with that. In fact, that's exactly what New York substantively decided. New York could have said, no case shall be -- in -- certainly for photography shall recover more than $100,000, but the legislature obviously felt that that was not an appropriate thing to do for every different types of -- type of action, so --

QUESTION: So where does the standard abuse of discretion come from? I think everybody -- if it's procedural, material deviation from reasonableness. If it's procedural, it drops out, you lose. If it's substantive, then Erie takes over, and I guess like any other legal matter the district court applies it.

Then we review the district court's decision. What's the standard there? I take it you're saying the standard is, where did this abuse-of-discretion idea come from?

MR. OLSON: Well, I'm not sure exactly where it came from, but I --

QUESTION: What's the standard -- if it is a legal matter, a legal cap, district judge applies it like any other legal matter, appellate court reviews it, by what standard? It's not -- it's just a straight legal question, isn't it?

MR. OLSON: Well, of course it is, if that's the

characterization that you accept of what is going on here. I think --

QUESTION: But if that isn't the characterization, then it's procedural.

MR. OLSON: No. I believe that it's a mixed question of fact and law that's taking place here.

QUESTION: On mixed questions, like any other mixed question on the legal part, probably, but not always the --

MR. OLSON: Well, what was very clearly going on here in New York was that New York wanted to change its substantive law.

It changed its substantive law in these procedural amendments to change rules like joint and several liability and other things, and imposed this kind of comparable limitation on the amount of damages, and did exactly as you were suggesting in your question, asked the court -- and Justice Kennedy's question, asked the court to look at other verdicts to make sure that judgments are not going to be out of whack, that they're not going to be excessive, that they're reasonably consistent with judgments in other cases.

QUESTION: In this particular case, Judge Brieant might not have thought he was supposed to apply the standard of New York, and the appellate court did it

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for him. I guess that would be wrong. They should send it back, is that right?

MR. OLSON: No, I think what the appellate -- I think it is possible to assume, it's possible to assume anything with respect to what the district judge did here, because he didn't say anything about what he was doing, although it's clear that he did say on the record that he felt that $1,500 per slide was not something that was possible.

He said no sane person, or words to that effect, would accept that kind of characterization, so he was concerned about it, but then when it came to granting the motion for a new trial, he did nothing. He just denied the motion for a new trial.

It's clear that in a review of that, the court of appeals felt that that was an abuse of discretion.

QUESTION: But Mr. Olson, you describe the history as though it's all or nothing at all. The factual question of whether $1,500 is an excessive jury judgment is either reviewable by the appellate court or not, whereas the historical record suggests that it may be reviewable in some contexts, namely, in the context of whether the judgment can stand, whether there was liability, but not reviewable in another context. That is, in the context of whether the damages are excessive.

It isn't an all or nothing at all that a particular factual question is either reviewable by the appellate court or not. What the common law seems to show is that it was reviewable for some purposes but not reviewable for purposes of determining whether damages were excessive.

MR. OLSON: The common law is very clear that the supervisorial function by the court above was to be considered in the matter of the sound discretion, though it's the words of Blackstone, of the court above. He did acknowledge, and it's understandable that the trial judge would have been consulted with respect to whether the new trial would be granted because we did not have records in those days like we do today --

QUESTION: You're considering the en banc court the court above, and I just --

MR. OLSON: That's what he -

QUESTION: I don't walk with you that far.

MR. OLSON: Those are the words he said. Now, what could be more similar to what happened here than to that process, a separate, en banc court reviewing the procedures that had occurred out in the countryside to determine whether there was an excessive verdict, and the exercise of the sound discretion of that court to determine whether there's an aberration, but --

QUESTION: Mr. Olson, I could understand your argument better if we were a unitary system, as was England, with one law, but that has to be -- that system has to be put together with the Federal system. That was wholly out of the picture in the common law model that you're following, and you seem to be saying what you're arguing today would hold as much in an FELA case as it would in a diversity case.

MR. OLSON: Well, certainly, I don't -- I'm not personally familiar, I think, with the Court's jurisprudence on FELA cases and whether -- the extent to which the Seventh Amendment would impact that decision.

QUESTION: There has been extraordinary deference to jury verdicts in FELA cases.

MR. OLSON: Well, I'm -- what I'm saying is that the answer to your question depends upon whether we're talking about Erie or the Seventh Amendment. The Seventh Amendment, to the extent that it adopted the rules at common law, did not constitutionalize a standard of review. The standard of review was in the discretion of the court above.

Now, it may well be that this Court and the courts of the United States chose to implement that in many respects as an abuse-of-discretion standard, and there is some support for that in Blackstone, because

naturally --

QUESTION: May I ask a question about whether -- do you concede that the words, common law, in the Seventh Amendment, refer to the common law of England at a particular time, or is it possible -- say there was a different rule in the State of New York in 1790, so they even let legislatures sometimes reexamine verdicts at that time in our history. Which would be the source of law --

MR. OLSON: I think the better view is as cited in both of the briefs and cited by petitioner, that Justice Story articulated, that it was the Federal common law to which the Framers of the Constitution were referring --

QUESTION: The Federal common law?

MR. OLSON: I mean, excuse me, the English common law, rather than the law -- the common -- as this Court has pointed out, and particularly in Galloway, the common law was -- and Hamilton writes about this in Federalist 81 and 82 and 83, that the common law in each particular State differed. In four States, there was an automatic right to a second trial. In fact, you would have trials until you got two out of three.

QUESTION: It didn't differ, Mr. Olson. Some States were wrong. That's the way the 18th Century --

(Laughter.)

QUESTION: -- mind would have regarded it. There was a common law, and some States had it wrong. Isn't that --

MR. OLSON: Well, part of the common law, Justice Scalia -- in fact, I'm glad that you made that point.

Part of the common law was, and part of the reverence that we have for the common law and the Framers had for the common law was the fact that it was a continuing evolutionary process by which justice would be done, and in fact it would be very anomalous, and this Court has said it, for the Framers of the Constitution to have locked in a particular mode of procedure or forms of practice.

QUESTION: Well, wasn't it assumed, and haven't we consistently assumed that if there was no clear exemplification in American practice of what the common law rule was, that the default rule was English common law in 1791. Isn't that the default position?

MR. OLSON: Yes.

QUESTION: And to that extent, there is a locking in.

MR. OLSON: Well, a locking in, but a locking into the -- what this Court has said is the elemental principles of the jury trial, the fundamental basics of

the jury trial, not the forms of procedure. This Court has said that over and over again, when it's upheld a six-jury trial, when it's upheld JNOV's, when it's upheld --

QUESTION: Well, we--

MR. OLSON: -- corrective verdicts, when it's upheld partial summary judgments.

QUESTION: In the first part of the Seventh Amendment, yes. In the first part of the Seventh Amendment, which simply says you'll have trial by jury, and what constitutes that you can make additions and subtractions, but the second part of it is so unusual. It says, shall not be examined other than according to the rules of the common law.

MR. OLSON: This --

QUESTION: That means you can't add or take away.

MR. OLSON: That is --

QUESTION: And the first half of it doesn't suggest that you can't add and take away.

MR. OLSON: When this Court has considered things like JNOV, partial new trials, the Court has been referring to the Reexamination Clause, and not the first part of the -- and this Court has never said that its jurisprudence with respect to taking the spirit of the trial by jury and not the forms of practice and procedure

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that existed in 1791 applied only to the first half of the Seventh Amendment but not somehow to the second half of the Seventh Amendment. It would have made no sense.

In fact, the forms of procedure by which jury trial results were examined wasn't dependent upon any particular practice or procedure. As Blackstone makes it clear, the idea of the new trial was for the purpose of the preservation of the jury trial itself, and for the purpose of preserving the confidence that the people would have in this most elegant -- as he puts it, the new trial, the motion for a new trial eliminates these inconveniences which could occur as a result of errors or excesses, and at the same time the motion for a new trial preserves entire and renders perfect that most excellent method of decision which is the glory of the English law.

QUESTION: Mr. Olson --

QUESTION: How does that bear on the language that according to the rules of common law?

MR. OLSON: This was the rules -- the rules --

QUESTION: Well, that doesn't sound like the rule of common law. It sounds like perhaps a reason for why they had some rules of common law.

MR. OLSON: It suggests exactly why there were new trials.

The concern that the Framers had with respect to

the Examination Clause was the civil law procedure, where another court would review a decision of a court, a decision tried by a jury, and then that court would either constitute another jury, or create another jury --

QUESTION: Well --

MR. OLSON: -- and there would be a series of --

QUESTION: -- that maybe a concern that led them to adopt the second part of the Seventh Amendment, but we go by what they said, and what they said was, and according to the rules of common law.

MR. OLSON: And I'm suggesting there's no better chronicle of the rules of common law that existed at that time than Blackstone's Commentaries, written in 1768, and he describes the rules of common law --

QUESTION: Well, I'm sure that may be very valuable, and perhaps that's governing, but we don't need all this hype about how great it all is.

(Laughter.)

MR. OLSON: Well, the reason that I mention that is that Blackstone had a reason for putting that hype, as you put it, in Chapter 24. He believed not that the new trial was something that was terrible, or something to be avoided, or something that was an inroad on the trial by jury, but in fact it was an important component of the jury trial that there would be these retrials.

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QUESTION: The issue is whether he believed it was action by an appellate court or not, and I believe he said that once, and elsewhere he suggests the opposite. That's really the issue.

MR. OLSON: Under --

QUESTION: We have no doubt that he approved it and thought it was excellent.

MR. OLSON: And he thought --

QUESTION: But the question is whether he thought --

(Laughter.)

QUESTION: The issue is whether he thought that was action by an appellate, and whether he was correct in thinking that that was action by an appellate court as opposed to action by the trial court itself.

MR. OLSON: He felt -- he felt first, and this is the most important point of all, is that he felt that a rehearing before another jury, to use his words, was as little prejudice to either party as if it had never been heard before. He felt that the instrument, or the instrumentality of the new trial was a valuable means of protecting the system. As to whether or not he thought -- he never said that he thought it was important that it was the trial court. The --

What the petitioner is arguing for in this case

is that the trial judge have the power, standing alone, to determine whether there would be a new trial or not. That system never existed at the common law, and what existed at the common law was a review en banc by separate judges that would exercise -- there's reasons why he uses the word, supervisorial --

QUESTION: Mr. Olson, may I just detract you from that for a moment and ask the kind of question that Justice Scalia asked of Mr. Abady. I think you're biting off more than you need to here, and do you at least have, as a second, as an alternate position that even if what you're -- what Mr. Abady has argued is right for a Federally created claim, this is an Erie matter, and therefore the Federal court simply can't give awards that you couldn't get in the State court across the street.

MR. OLSON: I agree with that, and this Court said it best, it seems to me, in the Guaranty trust case, where it said the intent of the Erie decision was to ensure that all cases of Federal court in diversity jurisdiction, the outcome of the litigation in the Federal court should be substantially the same as far as --

QUESTION: I see. Well, what if it's demonstrable statistically that juries always give higher verdicts than judges would. Does that mean that the Seventh Amendment becomes a dead letter if a State decides

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that it is going to allow its judges always to come up with a damage --

MR. OLSON: It would under no circumstances change, or make the Seventh Amendment a dead letter unless the judges were given the power to substitute their judgment for that of the jury with respect to the amount of damages.

QUESTION: But they are. But they are. As -- I mean, the very existence of the Seventh Amendment, if the States don't have it, will lead you to a difference between the amount of money you're going to get in a Federal court that has a jury trial by right and a State court.

MR. OLSON: I don't believe that that's correct, Justice Scalia, based upon what happened in this case. This is an example of a supervisorial function that will send the case back to a new jury unless the petitioner accepts the amount that the judge said was the maximum amount that the jury could award --

QUESTION: Suppose the State abolishes the jury.

MR. OLSON: Pardon me?

QUESTION: Suppose the State abolishes the jury and says, we're going to have no more juries.

MR. OLSON: The Seventh Amendment would not tolerate that, and this Court has said --

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QUESTION: But we've never held the Seventh Amendment applies to the States.

QUESTION: States can abolish the jury.

MR. OLSON: I'm talking in terms of --

QUESTION: Okay.

MR. OLSON: I'm assuming that Justice Scalia was asking about diversity --

QUESTION: Now, would the Federal court have to abolish the jury?

MR. OLSON: No.

QUESTION: It couldn't abolish the jury, could it?

MR. OLSON: No.

QUESTION: And you get vastly different results -- don't you believe you get vastly different results if you have the Federal courts in the State sitting with juries, and the State court sitting without juries? Where would you bring your lawsuit as a plaintiff?

MR. OLSON: It's entirely possible --

(Laughter.)

QUESTION: And do you think that Erie permits that?

MR. OLSON: What the Court has said is that to the extent the legal rules can determine the outcome, the

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differential in the Federal court should not be different than the State court. Here we have a substantive decision by New York exercising its legislative function that in actions for recovery of damages there ought to be some limitation, some equality --

QUESTION: Are you arguing that you're not reexamining a question of fact that's tried by a jury --

MR. OLSON: We are --

QUESTION: -- but you are reexamining a mixed question of law and fact?

MR. OLSON: Exactly, and that the grant of a new trial in the first instance is not a reexamination, and Blackstone did not consider that, and he said that in so many words.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Olson.

The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)

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WILLIAM GASPERINI, Petitioner v. CENTER FOR HUMANITIES, INC. CASE NO. 95-719

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BY Ann Marie Federico

(REPORTER)