OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CHAD WEISGRAM, ET AL., Petitioners v. MARLEY COMPANY, ET AL.

CASE NO: 99-161

PLACE: Washington, D.C.

DATE: Tuesday, January 18, 2000

PAGES: 1-54

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IN THE SUPREME COURT OF THE UNITED STATES

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CHAD WEISGRAM, ET AL., :

Petitioners :

v. : No. 99-161

MARLEY COMPANY, ET AL. :

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Washington, D.C.

Tuesday, January 18, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:56 a.m.

APPEARANCES:

PAUL A. STRANDNESS, ESQ., Wayzata, Minnesota; on behalf of the Petitioners.

CHRISTINE A. HOGAN, ESQ., Bismarck, North Dakota; on behalf of the Respondents.

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PROCEEDINGS

(10:56 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 99-161, Chad Weisgram v. the Marley Company.

Mr. Strandness.

ORAL ARGUMENT OF PAUL A. STRANDNESS

ON BEHALF OF THE PETITIONERS

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

This is a diversity case that was tried under North Dakota law arising out of a fire that resulted in the death of Bonnie Weisgram. After a 2-week trial, the jury found in favor of the plaintiff, but the court of appeals reversed in a split 2 to 1 decision, finding that certain expert testimony, or portions of their testimony, had been improperly admitted by the district court judge.

In addition to reversing the decision, the court decided, on review of the record, that the plaintiff could not produce a case on which it would be entitled to go to the jury and, therefore, directed judgment be entered on behalf of the defendants. That ruling was error.

QUESTION: Mr. Strandness, I noticed that in the -- the Eighth Circuit's opinion, the opinion of the majority, they did not cite the Martin Eby case from this Court which seems to me to have a great deal to do with

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whether they were right or wrong. I presume you will deal with that case in your discussion.

MR. STRANDNESS: I will, Your Honor.

The question becomes what happens next, what happens next to this case once the court of appeals has made this decision.

QUESTION: You -- you phrase the -- the decision a little tendentiously. You said that -- that they determined that the plaintiff could not produce enough evidence to go to the jury. They -- they didn't really do that. They -- they decided that the plaintiff had not produced --

MR. STRANDNESS: This --

QUESTION: -- enough evidence to -- to entitle the case to go to the jury, and that's what the issue is, whether -- whether the plaintiff has to be given another chance.

MR. STRANDNESS: Justice Scalia, what the court of appeals did was to take the record and to delete from that record that was before the jury excerpts of experts' testimony. Then the court of appeals looked at that record and decided that there was insufficient evidence to support the jury's verdict and then issued judgment as a matter of law for the defendant.

QUESTION: Well, but we -- I take it the case is

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being argued on the assumptions, A, that the -- the expert testimony was properly stricken, and B, that without it, there was insufficient evidence to return a verdict in favor of the plaintiff. Those -- those are the predicates on which we're going to proceed in our argument this morning.

MR. STRANDNESS: That's correct, Your Honor, that the -- it's not before the Court the issue as to whether or not the court of appeals properly or improperly --

QUESTION: So -- so -- and your position is that when the court of appeals finds that the evidence submitted to the jury was insufficient to justify a verdict for the plaintiff, it may never order a judgment for the defendant.

MR. STRANDNESS: That's not our position, Your Honor. Our position is that in a situation such as this where there has been testimony that has been deleted from the record, that the fairest and best rule would be to remand the case back to the district court for further determinations according to the evidentiary rulings of the court of appeals.

QUESTION: Well, then -- then you're saying in -- I -- I think what you just said perhaps is inconsistent or at least it seems to me inconsistent with your answer

to Justice Kennedy's question. He -- you say you're not saying that has to be done in every case, but you're saying that the fairest and best rule would be. Are -- do you leave nothing to the discretion of the court of appeals?

MR. STRANDNESS: I would --

QUESTION: I think you -- I think you run right up against our Martin Eby case if you don't leave discretion to the court of appeals.

MR. STRANDNESS: The discretion of the court of appeals involves situations where the record is left intact and they're simply looking at the record to make determinations as sufficiency of the -- the evidence that was heard by the jury. And Justice Kennedy, in his question to me -- I guess I would say that in a situation such as this, that what we're asking for is an automatic remand rule.

QUESTION: I think that that is your position, and I -- and I -- when you say things were deleted from the record, by reason of the expert testimony going --

MR. STRANDNESS: That's correct. It was --

QUESTION: One of --

QUESTION: But -- but that's -- that's always the case when -- when you find the testimony of an expert witness is inadmissible. It's just no longer part of the

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record.

MR. STRANDNESS: Exactly, but what is different --

QUESTION: But -- but do you say that it has to be automatically remanded to the trial court and then the trial court still has discretion to decide whether to grant a new trial?

MR. STRANDNESS: That's correct, Justice O'Connor, that the trial court is in the best position because the trial --

QUESTION: On what basis? What is the criterion that you want the trial court to -- to apply? Whether it guesses that the plaintiff could come up with another expert or what?

MR. STRANDNESS: The same criteria that any trial court, any district court, uses in exercising discretion in making decisions such as admitting expert testimony, on making decisions as to whether or not to grant summary judgment, as to making decisions as to whether or not --

QUESTION: But -- but there's -- there's virtually no discretion as to whether or not to grant summary judgment. It's simply, you know, is there any material fact in dispute. The district court doesn't evaluate witnesses, and it seems to me it's very much in

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the same position here, isn't it?

MR. STRANDNESS: No, it's not, Mr. Chief Justice, because the situation here is we've got an artificial record. This is a truncated record that the court of appeals is looking at. It's not the same record that the jury below saw.

And what the court of appeals, in essence, is doing is confusing two rules, rule 50 which involves motions dealing with sufficiency of the evidence with rule 59 which has to do with errors committed by the trial court and then --

QUESTION: Well then, how -- how you distinguish the Martin Eby case?

MR. STRANDNESS: How do I distinguish that?

QUESTION: Yes. I thought there it said it's up to the court of appeals whether it wants to remand for a new trial or enter judgment for the -- for the party that prevailed in the court of appeals.

MR. STRANDNESS: The -- the chief way I would distinguish that case is simply by the fact that this -- that that case did not involve a truncated record. There was --

QUESTION: It doesn't say anything about truncated record in the rule. I thought the relevant rule is rule (d), 50(d). Am I right?

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MR. STRANDNESS: That's -- that's one of the rules that apply --

QUESTION: What it seems to say, it says, if the motion for summary judgment as a matter of law is denied. They moved for summary judgment. It was denied. Is that right?

MR. STRANDNESS: That's correct.

QUESTION: All right. Then it talks about the prevailing party. That's you.

MR. STRANDNESS: That's correct.

QUESTION: And it says if the appellate court reverses, which is what they did -- right?

MR. STRANDNESS: That's correct.

QUESTION: Then nothing in this rule precludes it from determining that the appellee is entitled to a new trial.

MR. STRANDNESS: That's correct.

QUESTION: Now, that seems to me it might or it might not.

MR. STRANDNESS: That's correct.

QUESTION: And in your case they said no, in part because you never asked for one, and in part because when you did get around to asking one in your motion for a new -- you know, your motion to reconsider after the appellate opinion, you never gave a reason. That is to

say, you never pointed to anything --

MR. STRANDNESS: Well, that --

QUESTION: -- that would say that you have some more evidence to put in.

So, those are all my questions. And what is the answer?

(Laughter.)

MR. STRANDNESS: Justice Breyer -- Justice Breyer, it's -- it's obviously a situation in which in looking at whether or not a petition for rehearing is a suitable place to make an argument for a new trial, it just simply doesn't serve that purpose. It's an inadequate way for a litigant to address this issue.

Now, to -- to really answer your question, I need to back up a little bit and -- and walk through what occurred here in this case. We rested our case on the evidence that had been submitted to the jury with the expectation that the trial court's rulings were sound, that they were sufficient and that the evidence that the jury was going to be hearing would be reliable and would be sufficient to support the verdict.

QUESTION: May I stop you at that point? Wasn't there an objection by the defendant to that expert testimony that could have tipped you off that they would bring that up on appeal?

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MR. STRANDNESS: We were -- we were tipped off that there were objections raised during the trial, but the trial court -- the judge in our trial heard those arguments and rejected them.

QUESTION: Yes, but that's -- that was going to be -- it seemed to me, sitting where you were at the trial, you would know that if there was a jury verdict for the plaintiff and the trial court entered judgment on that verdict, that the defendant would appeal on the ground that that expert testimony was inadmissible.

MR. STRANDNESS: That's correct, but I think what you're referring to, Justice Ginsburg, is perhaps a conditional motion for a -- a new trial, and that typically arises in a situation where the prevailing party also has reasons to take issue with the trial court's rulings. In other words, there were some rulings that took place during the trial that were against the prevailing party's interest. And a conditional reservation of objection to that is -- is the normal practice and that is what is done.

QUESTION: Yes, but I think --

QUESTION: I -- I wasn't suggesting that -- that you are somehow foreclosed because you didn't make that conditional motion. I was just suggesting to you that you knew that this was a ground of appeal and that you could

have asked. You could have said to the district judge, we think that that evidence was all proper, but just in case, could you say in the alternative a new trial.

Or you could have argued -- when you argued your appeal to the court of appeals when you knew what their position would be, when you knew the defendant's position, you could have said, court of appeals, we think that -- that expert testimony was properly admitted, but if we're wrong about that, at least we should get a new trial and not an instruction to enter judgment for the defendant. You could have made that argument to the court of appeals.

MR. STRANDNESS: We could have, but again it's a question of as a litigant that has won at each step of the procedure, if my client was listening to me asking for a new trial when we're winning, they would -- he would have questions about my sanity.

QUESTION: Yes, that's -- that is the awkward thing about rule -- rule 50, that it puts the judge -- also the judge into the position of saying, now, if I'm wrong about that, what would I rule. But it is an option that you had.

MR. STRANDNESS: And -- and that's why the rule provides that if there is a judgment entered as a matter of law, that the -- the non-movant or the person that lost that -- that motion has 10 days to file a motion for a new

trial.

QUESTION: Did the -- did the respondent in this case in his brief to the Eighth Circuit ask that judgment be entered for the -- for the respondent?

MR. STRANDNESS: That's correct, Mr. Chief Justice.

QUESTION: So, you knew at that time at any rate that the respondent's view was if he prevailed or it prevailed on the expert testimony, that they -- they wanted judgment entered there and not remanded for a new trial.

MR. STRANDNESS: That's correct.

QUESTION: And you also had an opportunity after you had lost to come in with a rehearing motion saying, no, don't enter judgment, either give us a new trial because we represent we have other experts to substitute for those who were found incompetent or remand to the district court so that we can convince the district court that we have new experts to substitute. You didn't do that either.

MR. STRANDNESS: Well, we did -- we did ask --

QUESTION: You asked for a new trial.

MR. STRANDNESS: We asked for --

QUESTION: But I don't think you explained why. In other words, you didn't -- correct me if I'm wrong, but

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I thought you did not represent to the court that -- that you had other experts to substitute, experts whom you believed would be competent to testify to substitute for the -- for the ones whose testimony was thrown out.

MR. STRANDNESS: And there's a reason for that, and the reason is that the record that is before the appellate court is much different than the record that exists in the trial court level, and --

QUESTION: Well, what has that got to do with it? I mean, what I'm saying is you could represent to the court at the rehearing stage that it should not enter judgment as a matter of law because you, if allowed, will produce these -- these witnesses. And you don't have to have a record below to say that.

MR. STRANDNESS: But it's not -- it's not a realistic opportunity to make that kind of an argument. You have 14 days to -- to file the papers. You're limited to 15 pages. The rule is very clear. It has to be limited to misapprehensions of fact or of law that the court of appeals overlooked. We already had two of the three panel members on their own, sua sponte, say no new trial should be granted to this petitioner.

QUESTION: But that's true of -- anytime you file a motion for a rehearing, you're asking the judges to reconsider something they did; otherwise, you wouldn't

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file a petition for rehearing.

MR. STRANDNESS: Precisely, Mr. Chief Justice.

But also in looking at realistically how often is a petition for rehearing granted in the Eighth Circuit --

QUESTION: Well, you only have 10 days to do this in the -- you know, in the district courts. Here you have 4 days more, and I guess it doesn't take more than a sentence to say, we didn't think you'd decide the retrial issue yourself. That's sentence one. But you shouldn't because. And then you have only four more sentences to go.

And I have not to this day -- I mean, litigation is time and money for everybody, and courts of appeals don't like to put everybody through unnecessary hoops. So, to this day, I haven't -- I would have thought you were dead in the water, as did they, without your three experts.

So, without those three experts, tell me now what is it you'd do.

MR. STRANDNESS: North Dakota is very unique. North Dakota recognizes circumstantial evidence for proving a product defect, and we did bring this up in our petition for rehearing, that the court of appeals totally overlooked the fact that under North Dakota law --

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QUESTION: But then you're arguing with their summary judgment decision. That's different.

I'm saying, given their decision, to this day I haven't found in your brief any new evidence that you'd introduced, and I think there is none. And I'm just putting this question to be sure there's none.

MR. STRANDNESS: There is new evidence. The new evidence would be we had two other experts that were listed that were not called during the trial that could have been used. If we had gotten these rulings that occurred on the appellate level, if they had occurred during the trial --

QUESTION: And the reason that you didn't say to the court of appeals just what you've told me is?

MR. STRANDNESS: We didn't have a realistic opportunity to do so, to -- to respond in such short notice and to refer to things that were not in the record. The fact that those other experts exist does not appear in the record that went up to the court of appeals. It -- it appears in the record that was before the trial court because this was discovery motions that were not part of the record that went up because that wasn't the issue that was before the court of appeals.

QUESTION: We've gone a long way from Justice Breyer's initial question about the last sentence of rule

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50(d). It seems to me that a logical, proper, and necessary interpretation of that is that in some instances the court of appeals may reverse the judgment without granting you a new trial. That's just implicit in that sentence. And I just don't see how you can get away from the language of the rule.

MR. STRANDNESS: Because what we're asking this Court to decide is a fairness issue, and it's a fairness issue that deals with a very unique situation that occurred here. And it -- the situation that occurred was the truncating of a record.

QUESTION: Well, but the fairness issue -- you're asking us then to say that the court of appeals abused its discretion, but we don't have that issue before us by reason of what we've already established.

MR. STRANDNESS: We're saying that the court of appeals committed error by not sending this case back down to the trial court for a determination as to, under their evidentiary rulings, what should happen to the case.

QUESTION: Well, but ordinarily we don't take cases just to correct errors. The court of appeals will correct errors. We do not take cases to correct errors. And our assumption I think was that some fairly broad principle was involved here, and I guess it is, does the court of appeals have any discretion at all to enter

judgment for the -- for the prevailing party in a situation like this or must it always remand for a new trial?

MR. STRANDNESS: Our position is that it must always remand for further proceedings. It may or may not be a new trial.

QUESTION: So, you must always let the district court decide. Then it seems to me you are in conflict with our Martin Eby case which said that the -- the court of appeals had discretion.

MR. STRANDNESS: Well, but the Martin Eby case again involved a -- a record that had not been deleted. It was not a truncated record.

QUESTION: But there's no language in that case that suggests that it wouldn't cover that. I mean, you have all sorts of reversals on appeal for, you know, erroneous admission of hearsay evidence. It isn't just expert testimony. And I gather you would say that that too would be a truncated record where the court of appeals had no discretion?

MR. STRANDNESS: Where hearsay --

QUESTION: Yes.

MR. STRANDNESS: -- was taken out?

QUESTION: Yes.

MR. STRANDNESS: The testimony. Yes, that would

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be a truncated record.

QUESTION: You're saying it's only when the evidence is insufficient to get to the jury, not when the evidence would be sufficient if you had these experts. But I don't understand that argument, frankly, because what the court of appeals is saying is that testimony should never have been before the jury. So, when we assess whether there should be a new trial or the entry of judgment for defendant, it's just as though that evidence never existed. I don't understand the distinction you're making between an insufficient record in a trial court and a record made insufficient because three witnesses who were credited by the jury shouldn't have testified.

MR. STRANDNESS: Justice Ginsburg, it goes back to the decision of this Court in Montgomery Ward. In Montgomery Ward, this Court, 2 years after the Federal Rules were promulgated, addressed the issue of rule 50 and rule 59, and in the Montgomery Ward case, the -- this Court stated that these are two separate motions. These are two separate rules that can't be interchanged between the two.

What the court of appeals did in this situation -- the Eighth Circuit -- is they -- they basically took a rule 59 motion, which deals with error of law, error committed by the district court, and then excised the

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testimony. A rule 59 motion typically lies as to whether or not a new trial should be determined, but then they took one --

QUESTION: I thought what they were making was the same legal question that you would get at summary judgment. At -- and when make the judgment before the verdict, when you make it after, it's always was there enough produced to warrant a decision in that party's favor. And the -- the legal question doesn't change as you move from summary judgment to judgment as a matter of law before the case is submitted to the jury, the renewed motion after. It's always the same question.

MR. STRANDNESS: But -- but when you're looking at judgment as a matter of law, after the jury has already decided the case, it's different than looking at it before the jury has returned its verdict. What happened in this case, in the Weisgram case, is that after the jury returned its verdict, the court of appeals then excised out testimony, creating a record that was not the same record that was before the jury, and then --

QUESTION: What difference does that make?

MR. STRANDNESS: It makes a difference that the -- the court of appeals was looking at a record that's totally different than what the jury heard for purposes of making a judgment as a matter of law determination --

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QUESTION: No, but it's the jury that was not making the judgment comparable to the court of appeals' judgment. It was the district court that was supposed to make the judgment comparable to the court of appeals' judgment, and the district court was supposed to do it on the basis of what rule 50(a)(1) refers to as legally sufficient evidence. And that, it seems to me, is exactly what the court of appeals is doing here when it reviews on -- on a claim of error.

MR. STRANDNESS: It -- there's a difference, though, Your Honor, and the difference comes in that the appellate court -- if you look at what they have before them to make determinations as judgment as a matter of law as opposed to the district court level, there's a whole world of difference between what they're able to see as far as how the trial was conducted. And that's --

QUESTION: Well, the difference -- the only difference that I understand is they have determined that the testimony of certain experts was not legally sufficient evidence, and therefore they review the record on the basis of what the record should be to determine whether there was evidentiary sufficiency.

MR. STRANDNESS: But then they took the next step and issued judgment as a matter of law, ignoring, for example, North Dakota law, circumstantial evidence, and

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ignoring the --

QUESTION: Okay, but that's -- that has nothing to do, as I understand it, with rule 50. That simply has to do with their failure to take into consideration a -- a rule of -- of North Dakota law, and you were free -- and I presume did bring that up in your motion for rehearing. You say, look, you made a mistake. You -- you know, you -- you missed the North Dakota rule. But that hasn't got anything to do with rule 50.

MR. STRANDNESS: We did bring that up to the --

QUESTION: Sure.

MR. STRANDNESS: -- on our petition for rehearing.

QUESTION: And they either agreed with you or not, but that isn't what this case is about here.

MR. STRANDNESS: The case that's -- that this Court has before it has to do with who's in the best position to make this decision that was made by the court of appeals. The --

QUESTION: But we -- we've held that the court of appeals has some discretion here, and it seems to me, therefore, that your argument boils down to this, that I created an evidentiary or a basis in pleadings or evidence on the basis of which the -- the court really should have

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exercised its discretion to let the district court decide this. And -- and isn't that what the issue boils down to then? Not -- not that they never could -- could decide as a matter of law, but that in this case they shouldn't, and therefore the issue comes down to what should the standard be to -- for determining whether the court of appeals should do it or whether it should remand. Is -- is that what it boils down to at this point?

MR. STRANDNESS: I think it boils down to a better rule would be to have a automatic remand whenever this issue is before the court of appeals.

QUESTION: Well, we're going to have to do some overruling to do that, won't we?

MR. STRANDNESS: I --

QUESTION: We -- I -- I don't know that that's consistent with Neely, and it certainly does not seem to be consistent with the last sentence of 50(d) which Justice Breyer has quoted.

MR. STRANDNESS: It's perfectly consistent with Neely for the simple reason that Neely again dealt with the Court looking at the entire record, the entire case that had been put in to the jury. There was nothing taken out of that record. There was no truncating of -- of testimony --

QUESTION: But your -- your same argument would

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apply in that case. You'd say, oh, if I had only known, we would have had a different theory. I'd have a truncated record and a full record doesn't make a lot -- lot of sense. You can still say, oh, we were trapped. We -- our -- the motion in limine for the defendant was denied, so we proceeded on this theory. If only we had known, we would have had another theory. So, your argument is the same.

MR. STRANDNESS: Well, in Neely, the entire case went in. There was -- there was not anything kept out, and the jury --

QUESTION: How do you know?

MR. STRANDNESS: -- heard the entire evidence.

QUESTION: How do you know? Maybe they would have wanted to introduce another witness or something.

MR. STRANDNESS: Well, at least it wasn't raised on appeal.

QUESTION: All right. Now, I -- I can't decide between two things you're arguing. It seems to me sometimes you're saying the following, which would be a big issue. I don't know -- I don't think it's in front of us, but you're saying that what was wrong with the truncated record is that a court of appeals, when it decides whether a party should have been granted summary judgment, it must consider illegally admitted evidence.

Now, are you arguing that or not?

MR. STRANDNESS: We are not arguing that.

QUESTION: Fine. If you are not arguing that and you believe that the court of appeals should consider only the properly admitted evidence, then I don't really see what you're -- how you can win because their judgment was on the properly admitted evidence, well, there's nothing to have a new trial about. I mean, you haven't made enough of a case.

MR. STRANDNESS: Except that -- I keep getting back to this, and I think it's an important point -- in Montgomery Ward, Montgomery Ward clearly stands for the proposition that there are two separate, distinct -- and they use the term offices for these motions. And you've got rule 50, judgment as a matter of law, which has an office for determining sufficiency of the evidence before the jury, and you've got rule 59 which deals with errors of law. If you truncate a record that's been produced for a jury verdict and -- and then apply judgment as a matter of law determination, you're mixing up those two -- those two motions, which is contrary to what the holding of Montgomery Ward stands for.

QUESTION: I don't see anything in Montgomery Ward that says you're supposed to take into account improperly admitted evidence. I think that your answer to

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Justice Breyer does not reflect your position because you insist that for purposes of determining whether judgment as a matter of law can be rendered rather than a new trial, the court of appeals must assume that this whole case with the unlawfully admitted evidence is properly in the picture. And then we ex it out only for the new trial purpose.

MR. STRANDNESS: I -- I did misstate my position on that, and I think our brief does make that -- that position pretty clear, that for purposes of looking at -- and this -- this is the Midcontinent decision. This is the Eighth Circuit decision where they talk about -- the Eighth Circuit talks about the fact that there's an unfair reliance that goes into taking expert testimony out after a jury has come back and, furthermore, that a judgment as a matter of law motion cannot be made on a truncated record. And that's -- that's what the Eighth Circuit in Midcontinent and that would be our position as well before this Court.

QUESTION: Well, but apparently the panel -- this panel thought that what it did was consistent with Eighth Circuit practice, I take it.

MR. STRANDNESS: Well, the -- the 2-1 split in the Eighth Circuit didn't even talk about Midcontinent in their decision. It was totally ignored, and --

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QUESTION: And by cases that were ignored, as I read your reply brief, you did not respond at all to their reliance on Neely against Eby Construction, did you?

MR. STRANDNESS: We did talk about Neely, Your Honor.

QUESTION: In your reply brief?

MR. STRANDNESS: In our reply brief? We addressed it at some length in our -- in our main petition on the merits.

QUESTION: You addressed it but not at some length. You have two citations to it.

MR. STRANDNESS: I think our position that we -- we took in that brief was that it's distinguishable from the fact that the situation is different in Neely as it is in this case because of the truncated record.

QUESTION: But -- but here it's -- it's a -- it's a case from this Court that is as close to on point as any case you can find. And as my colleagues have suggested, you -- you really give it a brush-off.

MR. STRANDNESS: Well, we certainly did not intend to brush off the case because it is an important decision, but we -- we did feel that we've laid out our distinguishing comments as to why that case does not apply in this situation, that the -- there's a distinct difference between Neely and the facts of this case --

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QUESTION: Where you do that in your brief?

MR. STRANDNESS: Where do we do that?

QUESTION: Where do you say Neely is inapplicable because the court of appeals should have included those experts in the record when it made the judgment just as though it had been -- evidence had been lawfully admitted?

QUESTION: On page 29, you talk about the part of Neely that says there may be grounds for a new trial on your behalf. But I think that's talking about grounds for a new trial because of errors made by the trial judge --

MR. STRANDNESS: That's correct.

QUESTION: -- not just because there was some other evidence you never offered.

QUESTION: And on page 22, it's -- it's not discussed at all. It's -- it's cited there because it's part of another -- of another opinion.

MR. STRANDNESS: 29 is definitely where we talk about it, and -- and I thought we did address the issue as to why it was different in that context of that portion of the brief.

QUESTION: Well, I don't see it if you did. You just have the quotation.

QUESTION: Thank you, Mr. Strandness.

Ms. Hogan, we'll hear from you.

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ORAL ARGUMENT OF CHRISTINE A. HOGAN

ON BEHALF OF THE RESPONDENTS

MS. HOGAN: Thank you, Mr. Chief Justice. May it please the Court:

I would like to address some of the questions that have been raised in the earlier argument now.

It is correct that the plaintiffs did not come to grips with or address Neely or Martin K. Eby as it is -- as the defendant's name is in their brief, either in their reply brief or in their main brief. And I believe that is essentially fatal because Neely, as this Court stated, does address all of the constitutional questions that they have raised.

QUESTION: No, but what he's thinking of, I think, is the following. There are two situations.

Situation one is when an appeal court looks at the whole record and says, look, there just isn't enough evidence. Okay? Defendant, you win. Now, in that situation, they can say no new trial.

Then there's a second situation. It's where they look at the whole record and the whole testimony or half of it is Mr. Smith's, and they say Mr. Smith shouldn't have been admitted. And for that reason, he concedes they can give summary judgment to the defendant. But if it's that situation, for purposes of a new trial

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possibility, they ought to let the trial judge decide it.

Now, I think that's what they're saying, and that leaves room for Neely and for the rule because it's saying not always. If you have the kind of record where it had nothing to do with excising a witness, then of course the trial judge can, though it doesn't have to, just give summary judgment outright. The trial -- the court of appeals. But if it's this other situation, which is theirs, then they should let the district court go first.

Now, that's why they didn't think Neely was relevant, that relevant, et cetera, and that's why they kept saying -- talked about a truncated record, et cetera. That's my understanding of it, anyway.

MS. HOGAN: And -- and that is their argument I do -- I believe.

QUESTION: So, on that argument, it is true what they said about Neely. So, what's your response to that argument?

MS. HOGAN: The response is that Neely does address a sufficiency case, and it says in a sufficiency case, it is up to -- it is appropriate --

QUESTION: But you see, they're saying there are two sufficiency cases.

MS. HOGAN: Yes, and --

QUESTION: There is type A where nobody is talking about a witness not being there. It's just a question of on this record was it sufficient.

MS. HOGAN: And -- and --

QUESTION: And then there's type B where the reason it's insufficient is because without Witness Smith it's insufficient, though with Witness Smith it would be sufficient.

MS. HOGAN: And that is essentially the rule 56 or summary judgment situation, and there is no difference.

QUESTION: Because? They're saying we should elaborate Neely. I mean, I'm not saying we should do it. I'm just trying to make what I understand is their argument so you can address it. So, what's the because? Because?

They're saying it would make a lot of sense in that situation. Appellate courts don't know whether or not there really is the right -- the possibility of introducing a substitute witness or not, and -- and it would make an awful lot of sense and it would save everybody time. That's their kind of argument or --

MS. HOGAN: And the answer --

QUESTION: So, now, what's your response?

MS. HOGAN: The answer to that is actually the question you raised earlier about rule 50(d) and -- and

rule 50(a). Rule 50 --

QUESTION: Well, no. See, it gives meaning to rule 50(d).

MS. HOGAN: Rule -- rule 50(a) says only legally sufficient evidence.

QUESTION: Oh, they're not denying it. They're -- they're not denying that.

MS. HOGAN: And evidence that is not competent, that is not uttered by qualified witnesses and which the appellate court has determined is inadmissible, should never have been admitted in the first place, is not legally sufficient. So, rule 50 answers all of those questions, as does Neely. So, between rule 50 and Neely, all of the constitutional questions and all of the procedural and all of the protocol questions are all answered.

QUESTION: Well, you take the position, I gather, that the court of appeals has discretion to decide whether to send it back for a new trial or even discretion to send it back and let the trial court decide that.

MS. HOGAN: Well, that's really the beauty of rule 50.

QUESTION: Do you agree?

MS. HOGAN: Yes.

QUESTION: Yes.

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MS. HOGAN: It --

QUESTION: And that means, I guess, that under some circumstances, the court of appeals might abuse its discretion when it didn't do that.

MS. HOGAN: You could certainly -- a court could abuse its discretion. But in this case that's not --

QUESTION: How could a court abuse its -- what -- what are the criteria for --

MS. HOGAN: Well, if --

QUESTION: -- for whether you allow a new trial or not?

MS. HOGAN: Well, and -- and Neely did say that the appellate court and the trial court in a sufficiency case are in the same position. The trial court has no special competence in a sufficiency case to address the new trial issue because the whole record is there. And there is -- in fact, they specifically said there was no undue burden on the plaintiff in a sufficiency case to make their new trial argument in the appellate court.

QUESTION: But come to my question. What -- what is the criterion for a new trial --

MS. HOGAN: If --

QUESTION: -- that -- that could cause there to be an abuse of discretion?

MS. HOGAN: Yes, Justice Scalia. If there had

been a case made that there had been evidence improperly excluded from the plaintiffs' case, that could have filled the gap, could have made their case sufficient -- and that's really what Neely contemplated. If the plaintiff in Neely had made such a case.

QUESTION: Improperly excluded in the district court.

MS. HOGAN: Improperly excluded by the district court. A trial court error, a pre-verdict error, that could have been corrected by filling the gap. But -- but rule 50 allows for that.

QUESTION: But there's another alternative. It seems to me there's another alternative, and that is that in the trial proceedings, they may have listed six expert witnesses and they relied on three. And they had the depositions of three more and the judge said, are you going to put in the other three? And the plaintiff says, I don't think I need them, Your Honor. I just -- because I don't want to put in cumulative evidence. And they let it go at that. And then they're reversed on appeal because the first three are found to be incompetent. And there would have been no error in the trial court, but rather a tactical decision by plaintiff's counsel not to put in cumulative evidence.

MS. HOGAN: He's -- he's --

QUESTION: Now, would it be within the discretion of either the court of appeals or the district court to say, well, there was no error, but we think the trial court ought to look at that evidence and see if that might have made up the deficiencies and justify another trial?

MS. HOGAN: I think the better rule is what -- what the -- what this Court said in Neely, that plaintiff has one opportunity to put in their best case. They make those decisions --

QUESTION: So, you say as a matter of law, he couldn't do that.

MS. HOGAN: Not -- not on -- on that record, no.

QUESTION: But would you not agree that Neely at least doesn't pass on that question?

MS. HOGAN: Well, it -- it sort of does because in Neely the plaintiff did hint in their Supreme Court brief that they did have two additional witnesses, and the Court said it was --

QUESTION: Well, but the -- the issue of Court -- it's very clear at the end of the opinion, saying the only issue is whether they had power to do what they did.

MS. HOGAN: Yes. I --

QUESTION: I'm not saying that's the right answer on my hypothetical, but I don't think it's been

decided is all I'm really suggesting.

MS. HOGAN: I -- I do think, in answer to your question, Justice Stevens, a party going into a product liability case in 1997, 3 -- 4 years after Daubert has set down the criteria, that you have to have reliable evidence, you have to have qualified witnesses. They know going in who their three best are, and if they save their three best for last and don't use them because they're cumulative, that's something they're going to have to live with and that's their mistake.

QUESTION: Well, what if --

QUESTION: Well, but --

QUESTION: -- what if the -- they had three expert witnesses lined up ready to go, and the trial court said, that's cumulative? You use one. We're not going to hear the rest. So, they put the one in. Then they go on appeal and the appellate court says, gee, that one wasn't qualified. You shouldn't have heard it.

MS. HOGAN: Well --

QUESTION: Now, is that -- would it be an abuse of discretion there not to send it back and --

MS. HOGAN: Well, very typically trial judges do require parties to limit their witnesses, and so they have to tell the court they're going to have one witness on this point and one witness on this point. To each witness

that they need to call to make the -- an essential element of their case, they have to choose their best witness, make that sufficient evidence for that particular element of their case, and that's their opportunity.

If the trial court said, no, you have to have this all go through one witness, and that witness isn't able to address each element of the case, that might be an abuse of discretion.

QUESTION: And what about the case in which the trial court doesn't even get to the -- the question of the trial court ruling? The -- the individual says, well, I -- I know that Ms. Hogan won her case in the Supreme Court, and therefore I've got to put in all these witnesses, no matter how cumulative, because if I don't and one of them gets knocked out on appeal, I'm out of the game. Isn't -- isn't your rule necessarily going to -- going to force plaintiffs to present cumulative evidence if they've got it in any case in which there may be some question about an expert's qualifications --

MS. HOGAN: No.

QUESTION: -- or for that matter, the admissibility of any evidence.

MS. HOGAN: No, Your Honor. Plaintiff does make that argument in their brief. They -- they do not support it with any citation to anything. I do not find it

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persuasive. Counsel know --

QUESTION: Well, you may -- why isn't it persuasive?

MS. HOGAN: Well --

QUESTION: Because, I mean, on -- on the argument that you've just made, if all the cumulative testimony had gone in and one witness was then thrown out for incompetence on appeal, there would be other evidence in there that would sustain the verdict and, in fact, the -- the plaintiff would win the case.

And the plaintiffs' argument here -- the petitioners' argument here is that that's what we're going to have to do in order to avoid being thrown out of court for insufficiency of evidence if we lose on the qualifications of one expert on appeal. Why isn't that a good argument?

MS. HOGAN: Well, because counsel know what -- if their -- if their witnesses are qualified and if they have reliable backup for their opinions.

QUESTION: Well, it is a good argument. I think your -- your response is, of course, they'll try to cumulate evidence. But the court won't allow -- won't allow them to, and the court will simply say pick your best expert. Don't ask me to make that judgment. You're trying this case. We have an adversary system. Pick your

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best expert.

MS. HOGAN: And --

QUESTION: But I'm not going to allow you to bring in a parade of experts just because you -- you want to --

MS. HOGAN: I --

QUESTION: -- gamble on the system.

MS. HOGAN: I should point out -- well, it's -- it's certainly conceivable that there might be a situation where a trial court would become overzealous perhaps in limiting the number of witnesses a party could have. That's not the situation we have here.

In this case the plaintiff put in all of their evidence that they chose to put in, and then they rested. There were no --

QUESTION: No, but you don't think a trial court ever has to allow cumulation of experts or of any other testimony for the reason that, well, one of them may -- may be found to have been improperly admitted. Does a trial court ever have to take that into account, do you think?

MS. HOGAN: I -- I think if -- that if there is -- it would be better to allow some cumulation of testimony, some duplicative testimony at the trial court level rather than what the plaintiffs are suggesting is -

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- which is allow automatic retrials in every case.

QUESTION: But I thought your answer to Justice Scalia's hypo was going to be, look, the plaintiff has got responsibility to choose the best witness.

MS. HOGAN: I certainly do agree with that.

QUESTION: And if the plaintiff gets it wrong, too bad.

MS. HOGAN: That is -- that is my position.

QUESTION: If that's the answer, then the -- then the trial court doesn't have an obligation to allow cumulative witnesses even if the plaintiff wants it.

MS. HOGAN: And -- and I certainly don't think that a party is going to be encouraged to over-try his case in the first place. What we're suggesting with rule 50 and with what the Eighth Circuit did in this case is that parties are encouraged to put on their best case, and if they -- they have do to it in one shot. They have one opportunity.

QUESTION: Why -- I don't -- then I may be lost in this and it may be my fault. But I thought all they're arguing for is the following, that in a situation where there's the summary judgment, because you kick out a witness, that the plaintiff should have a chance to say to the trial judge, Judge, I know we didn't have enough evidence, but look at this special circumstance. They

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kicked us out on a witness technicality. We have six others we could introduce instead. Please, it's totally unfair not to give us a new trial.

Now, all they want is the opportunity to make that argument. And now, I don't see here why we have to get into the question of whether they're denied that opportunity because maybe they didn't present the court of appeals enough to even get them anywhere. But why shouldn't -- a normal case, they have an opportunity --

MS. HOGAN: They did have the opportunity to --

QUESTION: Well, why not have the opportunity even in the court of appeals to say, Judges, please let the district court make this decision?

MS. HOGAN: Well, they did have that opportunity in their petition for rehearing had they wanted to make that case.

QUESTION: Well, in -- in Neely, I guess, this Court said that the district court is in no better position than the court of appeals --

MS. HOGAN: On --

QUESTION: -- in dealing with --

MS. HOGAN: That is absolutely correct --

QUESTION: -- this sort of a question.

MS. HOGAN: -- Mr. Chief Justice. The Neely

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Court said, in testing the sufficiency of -- of a case, you have the entire record.

And I should point out that there were -- there is not two separate records here. There is no truncated record. The appellate court looked at the entire record. It said that it reviewed it very carefully. They -- they did not review some hypothetical, truncated, artificial record.

QUESTION: That's not what would be at issue. What would be at issue would be the litigation history.

MS. HOGAN: And actually the litigation history in this case, the trial judge that tried this particular case was not familiar with it. The pretrial material was -- was handled all by the magistrate in this case. Everything that was done in front of the district judge in this case is on the record, and that would be the pretrial conferences on the Daubert issue where we made our case that these experts should be excluded in the first place. That is on the record. As far as I know, there is nothing that's not on the record.

QUESTION: Well, his -- his point about the truncated record is that it is the record without the testimony of this witness.

MS. HOGAN: Well --

QUESTION: But that's the same record that the

-- that the district court would have to use on remand. Isn't that right?

MS. HOGAN: And -- and I might add that our initial motion for -- for judgment as a matter of law was made on the entire record, and -- and clearly, the Eighth Circuit reviewed the entire record. It explicitly said that it reviewed the entire record, and it found it insufficient.

So, we're right back to Neely. If you have a -- an insufficiency situation and the entire record is before the appellate court, it really boils down to an efficiency issue.

QUESTION: Well, this is the kind of -- this is the kind of thing that a trial lawyer faces all the time, isn't it?

MS. HOGAN: Yes, it is.

QUESTION: Do I try to get this in with a business record, or do I actually call the witness himself? Do I try to get it in with hearsay, or do I call the original declarant? And those kind of decisions are made all the time.

MS. HOGAN: They -- these are -- these are well known. Before you go in, you know what the Daubert criteria are. You know what your witnesses are. You know that we on the other side have made an argument which, as

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Justice Ginsburg suggested, should have sent a red flag, a forewarning, that there might be an appeal here if -- if the trial court does allow inadmissible testimony to come in. No one was in the dark. Yes, these decisions have to be made and planned before trial and then --

QUESTION: Ms. Hogan?

QUESTION: Talking about being in the dark, I guess the court of appeals was in the dark about Neely because it didn't cite it, and I was concerned about the reply brief. And I noticed your brief in opposition didn't cite it either. You apparently didn't find the case until later.

MS. HOGAN: Our brief?

QUESTION: Yes, your brief in opposition to the cert petition.

MS. HOGAN: Actually the -- the whole Neely issue did not come up until the judgment as a matter of law was granted. That is correct.

QUESTION: No, but the cert petition was filed after the court of appeals entered judgment as a matter of law.

MS. HOGAN: But we --

QUESTION: And you didn't call our attention to the fact that Neely might be a strong case on your side in your brief in opposition to the cert petition. Apparently

you didn't find the case until you got around to briefing the merits is what I'm suggesting.

MS. HOGAN: The -- that may be true, Your Honor. We -- but we certainly were aware of rule 50. And rule 50 is based on Neely and the -- and that's what we had argued in the first place in the trial court. And we -- and certainly Neely does decide all the constitutional issues.

And, in fact, I would like to address the Montgomery Ward issue that counsel has -- has raised. He neglects to point out that the Montgomery Ward issue is also decided by this Court. It -- it does not stand for the proposition that an appellate court cannot grant judgment NOV. In fact it says -- and this is a quote from the Montgomery Ward decision -- the appellate court may reverse the former action and itself enter judgment NOV or it may reverse and remand for a new trial for errors of law.

And in fact, that's what Neely cited as grounds for its decision that the appellate court did have the power and -- and in sufficiency cases is in an -- is in an equally good position as the trial court to make the decision.

QUESTION: Ms. Hogan, the -- the plaintiff argued that suppose this had happened in the district court, that the district court said, oh, my goodness, I

should not have allowed that evidence in. So, I'm instructing entry of judgment as a matter of law for the defendant.

Then the rules give the plaintiff the 10 days to move for a new trial. And the plaintiff could have gone to the district judge and said, notwithstanding that there was insufficient evidence, please give me a new trial. And the -- the plaintiff says, we should have the same opportunity when the court of appeals, rather than the district judge, makes the ruling that our evidence was no good.

MS. HOGAN: In this instance, since there was no such argument made to the trial court, the court of appeals is in equally a good -- as good a position.

QUESTION: I'm not talking you --

MS. HOGAN: But --

QUESTION: I'm not talking about the conditional motion. I'm saying suppose the trial judge had ruled in your favor --

MS. HOGAN: Yes.

QUESTION: -- after the jury verdict came in on the renewed motion for judgment as a matter of law.

MS. HOGAN: And -- and actually that -- even in that type of situation, once the judgment has been made, unless there was some kind of error that the trial court

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prevented that evidence from coming in, I -- that issue was addressed in -- in the Navarro case in the Seventh Circuit where a plaintiff argued, after summary judgment had been entered, that she could have gotten a better affidavit. She needed -- she just needed time to go back, and she thought there would be a deposition. And the -- and the court said, well, if -- if you're just coming in with new evidence now post-judgment that's not new evidence that -- that you didn't have before, that a great many plaintiffs, a great many cases would have to be reopened to bring in new evidence that you didn't think of or didn't put in originally.

QUESTION: But -- but Justice Ginsburg posits a district judge who's willing to reopen it. Would you say that that's an abuse of discretion in the hypothetical that she posed? The district judge says, my God, I -- you know, I made a mistake letting in that -- that expert witness' testimony, and therefore I have to reverse the -- set aside the jury verdict. However, I'm going to grant a new trial because I was at least as guilty as you are.

MS. HOGAN: Well, certainly rule 50 gives the trial court that discretion. I mean, that -- the -- the -- rule 50 gives the -- the courts and the parties a great deal of flexibility. The parties have several opportunities to make their case and the court has --

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QUESTION: And that's not an abuse of discretion.

MS. HOGAN: It might not be.

QUESTION: Then why -- then -- then it wouldn't be -- I assume it would not be an abuse of discretion for the court of appeals to have done that also.

MS. HOGAN: Well, had they been given a -- a very valid, factual basis for a new trial by these plaintiffs --

QUESTION: No -- no more of a factual basis than in the hypothetical I've just given you. No more than, you know, Your Honor, it was a mistake, at least as much the district court's fault as it was ours. We think we can come up with a better expert witness.

MS. HOGAN: Well, that --

QUESTION: That's --

MS. HOGAN: No. A better expert witness I think -- they made their -- they made their plans --

QUESTION: But that was my hypothetical. Why does it differ between the district court and the court of appeals? If the court of appeals can't do it, I don't see why the district court can do it.

MS. HOGAN: Well, if --

QUESTION: And if the district court can do it, I don't understand, you know, why it wouldn't be proper

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for the court of appeals.

MS. HOGAN: Well, rule 50 does give pre-verdict an opportunity for the parties to go back and fill in gaps pre-verdict. Once we're post-judgment, it's -- it is different. The record is -- is closed.

QUESTION: But you said the district judge has that discretion. The district judge says, okay, on this case the defendant is entitled to judgment as a matter of law. Nonetheless, I'm going to give the plaintiff a new trial. You as the defendant at that point could not go up on appeal on that, could you?

MS. HOGAN: Well, it would -- I think it would depend on what those circumstances were in the hypothetical. I think that it would have to be coupled with the fact that there was a witness not called. There would have to be an excusable reason. He would have to --

QUESTION: Well, why? Because whatever reason, the district judge could be altogether wrong, but you would not have a final judgment if, instead of entering judgment as a matter of law, he ordered a new trial. You can't appeal at that stage, can you? The judge enters -- says, we'll have a new trial. Can you go up on appeal at that point? Where is your final judgment?

MS. HOGAN: I would think that that would be

appealable.

QUESTION: I think you're incorrect.

QUESTION: I think there are a couple courts that have given relief by mandamus in extreme situations. I -- I think Justice Ginsburg is right. I -- I don't see that's appealable.

MS. HOGAN: I do -- I do believe, Judge Ginsburg, that in -- in the absence of some extreme error, a party has the duty, just as in rule 56, to come in with their best case and meet the essential elements of their case with -- with sufficient evidence.

QUESTION: Well, let me give you a slight variation on the hypothetical. Supposing that the -- you just have one expert to make it simple. And the error of the trial judge was in allowing all of the expert testimony be put in in the form of leading questions. And on appeal, they said all those -- you strike all the answers to the leading questions. They were improper. Could they then go ahead and enter judgment without -- as a matter of law without allowing a retrial to try and get the same information with proper questions?

MS. HOGAN: Well, you would have the record that would show --

QUESTION: You'd have the record and you just expunge from the record all the answers to the leading

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questions. And the plaintiff could say, well, if I had realized he wasn't going to let me ask leading questions, I would have framed my questions differently.

MS. HOGAN: No, Your Honor. I don't think there would be a new trial in that situation. The appellate court --

QUESTION: You'd say he loses completely because he's expunged from the record the improper -- the answers to the improperly framed questions.

MS. HOGAN: A party has a -- has a duty under our rules. Our rules, all of our Rules of -- of Civil Procedure, particularly rule 50 and rule 56, but also rule 26 and rule 16 -- they are all designed to give a party one opportunity to list their witnesses, to choose their experts, to choose how they're going to put in the essential elements of their case, and do it in one shot.

QUESTION: So -- so, that means that they have no right to a new trial in -- in Justice Stevens' situation. Correct?

MS. HOGAN: That is correct.

QUESTION: Now, is it error if the -- i.e., abuse of discretion, to grant them a new trial anyway?

MS. HOGAN: Rule 50 is discretionary. It is -- it is framed as a discretionary decision.

QUESTION: So, the answer is no? You wouldn't

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be granted any --

MS. HOGAN: The answer is no probably. It might not be.

QUESTION: It's the same in the court of appeals, isn't it? I mean, if they'd have -- isn't it? Is there any reason we shouldn't just say that? It's discretionary. If they have sense very often and it's -- it looks as if there's some real matter of fairness raised, you'd send it back to the district court to decide.

MS. HOGAN: And if there is not and --

QUESTION: If there is not, you just can't imagine how they could give a new trial in this circumstance and you're not presented with anything that would suggest it was unfair, then you'd say, okay, there's no point. Let's not waste time. I mean, is that basically your opinion how it works?

MS. HOGAN: That is my position. In fact, you -- you put your finger right on it because in this particular case it is correct that even today not one scrap of additional evidence has been even alluded to that would change the results here. What we would be looking at is a futile, wasteful exercise in remanding at all.

The -- the Eighth Circuit considered the remand issue and found no basis in this entire record, no

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fairness issue. The plaintiffs were fully protected in this case because they had their full opportunity.

QUESTION: What about Mr. Strandness' argument that there's this theory of circumstantial evidence under North Dakota law on which they could have prevailed?

MS. HOGAN: The Eighth Circuit addressed that issue, Your Honor, in their -- in the -- in the decision on appeal and in denying the -- the request for rehearing.

And I -- I should point out that Marley strenuously disagrees that there is any circumstantial evidence here. First of all, plaintiffs have not pointed to any circumstantial evidence.

QUESTION: Well, excuse me. If that point were correct, wouldn't it -- wouldn't it go to showing that the judgment as a matter of law was incorrect, not that there should be a new trial, but that there should not have been a judgment as a matter of law?

MS. HOGAN: And that -- that's what they argued, that they should not have granted judgment as a matter of law because they didn't consider their circumstantial evidence, and the Eighth --

QUESTION: It doesn't go to the new trial issue.

MS. HOGAN: It does not go to the new trial issue.

QUESTION: That really isn't before the Court -

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MS. HOGAN: That is not before the Court.

QUESTION: -- any question of North -- North Dakota law.

MS. HOGAN: The circumstantial issue has been fully resolved by the Eighth Circuit and is not before this Court. This Court declined to grant cert on that issue, which means that issue was settled in the Eighth Circuit.

And it was decided correctly. The -- the Eighth Circuit did correctly apply North Dakota law. It cited the correct North Dakota law, and it -- and it correctly applied it. It also applied the -- the correct standard of review. Everything about the Eighth Circuit decision was correct, including its application of rule 50, and despite the fact that we did not cite Neely, it -- rule 50 is -- is -- and Neely track each other. And our case does track Neely and it was correctly decided under the North Dakota law.

QUESTION: Thank you, Ms. Hogan.

MS. HOGAN: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:53 a.m., the case in the above-entitled matter was submitted.)

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CASE NO: 99-161

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BY: Ilona M. May
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