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The Damage Is Done: Ordering a New Trial Based Only on Damages

Katherine Kubale* & Richard Bales**

I. INTRODUCTION

During every trial, the court's goal should be to ensure that no party is unfairly prejudiced by an inaccurate damage award. Courts seek to ensure that verdicts accurately and justly reflect the evidence presented to the jury, and do not result in a miscarriage of justice by awarding a nominal amount to a party who has suffered greatly.[1] Disproportionate damage awards can arise for various reasons, including inadequate jury instructions[2] or

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1. *See* Holmes v. City of Massillon, Ohio, 78 F.3d 1041, 1047 (6th Cir. 1996) ("Generally, when a district court determines that a verdict is against the weight of the evidence, that court has a duty to grant a new trial in order to prevent a miscarriage of justice."); *see also* Sanders v. Green, 208 F. Supp. 873, 878–79 (E.D. S.C. 1962) (granting new trial on damages where jury's award was "grossly inadequate").

2. *See, e.g.*, Pryor v. C.O. 3 Slavic, 251 F.3d 448, 454 (3d Cir. 2001) (affirming district court's

ambiguity on the verdict forms.[3] In these instances, the court is empowered to order a new trial based solely on damages if such an order would rectify the injustice of the original damage award.

Federal Rule 59(a) allows trial courts to grant new trials to any or all of the parties, on any or all of the issues.[4] However, it "does not specify the grounds on which a motion for a new trial may be granted,"[5] or how courts should address situations where it is impossible to have a new trial on damages alone without also including evidence and testimony relating to other issues from the first trial.[6] The vague language of the Rule fails to articulate whether, in a new trial based only on damages, evidence relating to other issues should be allowed if it relates to the issue of damages, or if a new trial on all issues must be ordered when the issue of damages is too intertwined with other aspects of the first trial.[7] Because Rule 59(a) gives courts the broad power to grant partial new trials, on one or all of the issues, the circuits have had to determine how best to apply this broad rule where the issue of damages is closely related to other issues, such as liability.

Circuits are split as to whether to adopt the Stand Alone approach or the Semi-Inclusive approach.[8] Where the issue of damages is so interwoven with other issues, some courts have applied the Stand Alone approach, allowing a new trial when the issue of damages is completely independent from that of liability and where it is clear that the error as to the damage award did not in any way affect the determination of liability.[9] The rationale behind this approach is that it prevents partial new trials "where a tangled or complex fact situation would make it unfair to one party to determine damages apart from liability."[10] Further, it is appropriate for a court to grant a partial new trial only when it is plain that the error as to one element of the verdict did not in any way affect the determination of the other issues.[11] Courts adopting this approach have done so with the goal of avoiding limited new trials where a confusing set of facts would make it unfair to one

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order for a new trial where the jury instructions were "confusing and misleading"); Allred v. Maersk Line, Ltd., 35 F.3d 139, 140 (4th Cir. 1994) (remanding for new trial on damages due to an error in the jury instructions); McElroy v. Cessna Aircraft Co., 506 F. Supp. 1211, 1220 (W.D. Pa. 1981) (awarding a new trial limited to damages where defendant was entitled to an adverse inference instruction).

3. *See, e.g.*, Watts v. Laurent, 774 F.2d 168, 176 (7th Cir. 1985) (finding that the jury verdict forms were clearly ambiguous as to the amount of the total damages award).

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

5. Molski v. M.J. Cable, Inc., 481 F.3d 724, 729 (9th Cir. 2007).

6. *See* FED. R. CIV. P. 59(a).

7. *See id.*

8. *See infra* Part III.

9. *See, e.g.*, Pryer v. C.O. 3 Slavic, 251 F.3d 448, 454–55 (3d Cir. 2001).

10. *Id.* at 455.

11. *Id.* (citing Elcock v. Kmart Corp., 233 F.3d 734, 758 (3d Cir. 2000)).

party to determine damages apart from liability.[12] Further, this approach aims to eliminate situations where there might be reason to think that a verdict represents a compromise among disagreeing jurors as to liability.[13]

Conversely, other courts have applied the Semi-Inclusive approach, allowing a new trial on damages only, even where the issue of damages is closely intertwined with that of liability, but permitting both parties to present evidence from the liability phase of the first trial, as long as that evidence is relevant to the issue of damages.[14] Additionally, under this approach, the judge will "apply a broad standard with respect to the relevance of this sort of evidence[,] and there shall be a strong presumption that evidence from the liability phase might be relevant" to the issue of damages.[15] The rationale behind this approach is that it prevents the inherent problems and injustices that can arise when "a new jury addresses damage questions without knowledge of the evidence introduced in the liability phase of the trial."[16]

Federal Rule 59(a) is written broadly, and authorizes courts to grant a new trial to any party, on any issue.[17] In 59(a) cases, even where the question of error is not confined to damages, courts should not deprive a party from receiving a partial new trial. In these situations, an appropriate solution is to confine the trial to damages, while allowing each party to present evidence from the first trial that is relevant to the original jury's determination of damages. This will allow the second jury to fairly evaluate the factors necessary to either uphold, or rectify, the original damage award. Therefore, the Semi-Inclusive approach is most consistent with the general standards of the Federal Rules and most adequately safeguards the parties from prejudice.

This Article argues that courts should adopt the Semi-Inclusive approach to ensure that, in trials based solely on damages, both parties are able to present evidence that is relevant to and supportive of their arguments. Part II of this Article describes the background, purpose, and past interpretations of Rule 59.[18] Part III of this Article illustrates the application

12. *See id*.
13. *Id*.
14. *See, e.g.*, Watts v. Laurent, 774 F.2d 168, 181 (7th Cir. 1985).
15. *Id*.
16. *Id*.
17. FED. R. CIV. P. 59(a).
18. *See* discussion *infra* Part II.

of the two approaches.[19] Part IV analyzes and demonstrates the positive and negative aspects of each.[20] It finds that the Semi-Inclusive approach is preferred because it safeguards against any injustice that might occur when one party is precluded from presenting evidence that might be crucial to its case and is most consistent with the language and purpose of Rule 59(a).[21]

II. BACKGROUND

A. Text and Overview

Federal Rule of Civil Procedure 59(a) provides:

> (1) *Grounds for New Trial*. The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:
>
> > (A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court . . . .[22]

Rule 59 gives district courts broad discretion in granting new trials.[23] Further, when an appellate court remands a cause for a new trial because of error, the court may limit the scope of the trial to the assessment of damages.[24] Courts should base a decision on whether to grant a new trial on their assessment of the fairness of the first trial and the reliability of the jury's verdict.[25] Therefore, courts considering the question of whether to allow a new trial based only on damages must base their decision on whether a limited new trial would be fair to the parties.[26]

B. Standard of Review

Rule 59 does not enumerate specific grounds upon which a new trial may be granted.[27] Historically recognized grounds include, but are not

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19. *See* discussion *infra* Part III.
20. *See* discussion *infra* Part IV.
21. *See* discussion *infra* Part IV.
22. FED. R. CIV. P. 59(a).
23. Schramm v. Long Island R.R., 857 F. Supp. 255, 257 (E.D. N.Y. 1994) ("Rule 59(a) of the Federal Rules of Civil Procedure vests with the district courts considerable discretion in ordering a new trial.").
24. *See* Anderson v. Siemens Corp., 335 F.3d 466, 475 (5th Cir. 2003).
25. Seidman v. Am. Airlines, Inc., 923 F.2d 1134, 1140 (5th Cir. 1991); Wellogix, Inc. v. Accenture, LLP, 823 F. Supp. 2d 555, 571 (S.D. Tex. 2011).
26. *See Wellogix*, 823 F. Supp. 2d at 571.
27. *See* FED. R. CIV. P. 59.

limited to: claims that "the verdict is against the weight of the evidence, the damages awarded are excessive, [or that] the trial was unfair."[28] The district court must weigh the evidence as the court saw it and set aside the jury's verdict where "the verdict is contrary to the clear weight of the evidence."[29] Further, the court must view the evidence in the light most favorable to the jury's verdict.[30] The verdict must be upheld unless the evidence points so strongly and overwhelmingly in favor of the other party that the court believes that reasonable persons could not arrive at a contrary conclusion.[31] The absolute lack of evidence to support a jury's verdict makes refusal to grant a new trial an error of law.[32]

Apart from an inadequate damages award, a party might move for a new trial under Rule 59(a) because the jury either relied too heavily on faulty witness testimony,[33] or failed to properly consider reliable witness testimony.[34] As described by the Second Circuit in *Raedle v. Credit Agricole Indosuez*:

> On new trial motions, the trial judge may weigh the evidence and the credibility of witnesses and need not view the evidence in the light most favorable to the verdict winner. However . . . trial judges must exercise their ability to weigh credibility with caution and great restraint, as a judge should rarely disturb a jury's evaluation of a witness's credibility, and may not freely substitute his or her assessment of the credibility of witnesses for that of the jury simply because the judge disagrees with the jury. [Moreover] . . . [w]here

28. *Seidman*, 923 F.2d at 1140 (quoting Smith v. Transworld Drilling Co., 773 F.2d 610, 613 (5th Cir. 1985)); *see also* Molski v. M.J. Cable, Inc., 481 F.3d 724, 729 (9th Cir. 2007); 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2805 (2d ed. 1995).

29. *Molski*, 481 F.3d at 729.

30. Song v. Ives Labs, Inc., 957 F.2d 1041, 1047 (2d Cir. 1992) ("[A] trial judge hearing a motion for a new trial 'is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner.'") (quoting Bevevino v. Saydjari, 574 F.2d 676, 684 (2d Cir. 1983)); Smith v. Transworld Drilling Co., 773 F.2d 610, 613 (5th Cir. 1985) ("[T]he district court weighs all the evidence, but need not view it in the light most favorable to the nonmoving party.").

31. *Wellogix*, 823 F. Supp. 2d at 571; Pac. Emp'rs Ins. Co. v. P.B. Hoidale Co., 804 F. Supp. 137, 141 (D. Kan. 1992); *see also* DLC Mgmt. Corp. v. Town of Hyde Park, 163 F.3d 124, 134 (2d Cir. 1988) ("A court considering a Rule 59 motion for a new trial . . . should only grant such a motion when the jury's verdict is egregious.").

32. *Molski*, 481 F.3d at 729; Urti v. Transp. Commercial Corp. 479 F.2d 766 (5th Cir. 1973).

33. Antevski v. Volkswagenwerk Aktiengesellschaft, 4 F.3d 537, 540 (7th Cir. 1993) ("If a verdict is based on false testimony, the district judge has the discretion under Rule 59 to grant the injured party a new trial.").

34. *See* Raedle v. Credit Agricole Indosuez, 670 F.3d 411, 418 (2d Cir. 2012).

> the resolution of the issues depended on assessment of the credibility of the witnesses, it is proper for the court to refrain from setting aside the verdict and granting a new trial.[35]

Trial courts' broad power to grant a Rule 59(a) motion can serve to remedy an unjust result in one trial; however, it can also produce tension between the parties' Seventh Amendment right to trial by jury and the district court's power to set aside an erroneous verdict based on the weight of the evidence.[36] This tension seems to be at its peak in cases where "the result turns [mostly] on the credibility of a single witness."[37] Although the trial judge may substitute his or her view of the evidence for that of the jury, the judge must be convinced that the verdict is seriously erroneous and will result in a miscarriage of justice.[38]

The bottom line in Rule 59(a) cases is that a jury verdict should rarely be disturbed.[39] Rule 59 "affords trial courts latitude in reviewing jury verdicts and in considering [witness] credibility."[40] However, where "a verdict is predicated almost entirely on the jury's assessments of credibility, such a verdict generally should not be disturbed except in an egregious case."[41]

C. Gasoline Products v. Champlin Refining Co.

In *Gasoline Products Co. v. Champlin Refining Co.*, the United States Supreme Court acknowledged the different approaches and interpretations that the circuits could apply in deciding whether to allow a new trial based solely on damages.[42] In that case, the petitioner sued in district court for royalties alleged to be due under a contract with the respondent.[43] The contract licensed the respondent to use two "Cross cracking units," which were structures used in increasing the production of gasoline from crude oil.[44] The respondent pleaded, in a counterclaim consisting of two counts, a contract by the petitioner to construct a "Cross vapor treating tower," which would treat gasoline produced by the cracking units and was necessary to

35. *Id.* (second alteration in original) (citations omitted) (internal quotation marks omitted).
36. *Id.*
37. *Id.*
38. *Id.* at 418–19.
39. *Id.* at 418.
40. *Id.*
41. *Id.*
42. 283 U.S. 494, 496–97 (1931).
43. *Id.* at 495.
44. *Id.*

make it marketable.[45] The consideration of this contract was alleged to be the execution of the license contract at issue, as well as two related contracts.[46] Parties admitted performance under these contracts.[47]

The first count of the respondent's counterclaim "alleged a contract arising from an oral proposal by the petitioner's vice president . . . to construct for respondent a Cross vapor system treating tower.[48] Additionally, the respondent was to repay the petitioner for the cost of the tower if the tower functioned in a satisfactory manner.[49] The second count of the respondent's counterclaim alleged a written proposal similar to the oral proposal that the respondent accepted and confirmed by the execution of the other contracts.[50]

The counterclaim charged that, because the petitioner failed to construct the treating system, and because the respondent had not yet been able to construct a substitute system, the respondent was forced to store large quantities of the cracked gasoline awaiting treatment.[51] This resulted in four principal items of damage to the respondent: (1) "the expenses of the storage;" (2) "depreciation of the gasoline by evaporation and other causes;" (3) "the loss incident to shutting down respondent's plant because of the lack of treating apparatus;" and (4) "the loss of anticipated profits from the sale of gasoline."[52]

The jury returned a verdict on both the petitioner's action and on the respondent's counterclaim, "leaving a balance in the petitioner's favor for which the District Court gave judgment."[53] The First Circuit reversed because of errors with respect to the amount of damages on the counterclaim and restricted the issues in the new trial solely to the determination of damages.[54] The Supreme Court then granted certiorari to review whether the First Circuit erred in limiting the new trial to damages only.[55]

The petitioner argued that if the new jury were not allowed to consider the issue of liability on the contract set up in the counterclaim, the court

45. *Id*.
46. *Id*.
47. *Id*. at 495–96.
48. *Id*. at 496.
49. *Id*.
50. *Id*.
51. *Id*.
52. *Id*.
53. *Id*.
54. *Id*.
55. *Id*. at 497.

would be denying him his Seventh Amendment constitutional right to a trial by jury.[56] Although there was no practice at common law of setting aside a verdict in part, many states modified that rule to permit a new trial on less than all of the issues of fact, as long as the issues were clearly separable.[57] Further, the Court stated that the significance of the right to a trial by jury is that the issues of fact be submitted for determination with appropriate instruction and guidance to the jury.[58] Additionally, the Court noted that "the Seventh Amendment does not exact the retention of the old forms of procedure," "prohibit the [use] of new methods for ascertaining what facts are in issue," or require that, when one issue has been determined in accordance with the Constitution, it be tried a second time just because another issue was decided erroneously.[59]

Consequently, the Court held that, where the requirement of a jury trial has been satisfied by a verdict as to one issue of fact, that requirement does not compel a new trial of that issue just because another, separate issue is to be tried again.[60] Based on that reasoning, the Court stated that, because the issues arising from the petitioner's cause of action on the royalty contract were separable from the other issues, and the verdict as to those issues was free from error, it need not be disturbed.[61]

The issue remaining for the Court's consideration was whether the issue of damages was so separate from the others, arising from the counterclaim, that it could be tried separately.[62] The Court acknowledged that the verdict on the counterclaim could have been taken to establish the existence of the contract and its breach; however, in the new trial, the jury was unable to remedy the amount of damages unless also advised of the terms of the contract.[63] Additionally, the dates of the formation and breach were possibly material because it would be open to the petitioner to insist upon the duty of the respondent to minimize damages.[64] However, the contract and counterclaim differed as to the dates of formation and breach, and as to the number of towers that were to be constructed.[65]

Therefore, the Court held that the issue of damages was "so interwoven with that of liability" that the question of damages could not be submitted to the jury independently without causing confusion and uncertainty and

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56. *Id.*
57. *Id.* at 497–98.
58. *Id.* at 498.
59. *Id.*
60. *Id.* at 499.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 499–500.

resulting in an unfair trial.[66] The Court stated that "[t]here should be a new trial of all the issues raised by the counterclaim."[67]

Although *Gasoline Products* deals more with the constitutional questions that arise from a new trial based on Rule 59(a), it provides some insight into the rationale behind the Stand Alone approach. This case effectively counters the argument that allowing a new trial on only one issue unconstitutionally deprives one party of its right to a jury trial. It does so by illustrating the purpose of the Seventh Amendment, which is to allow issues to be considered by a jury that has been provided instructions from the court that will facilitate effective deliberation and analysis under the principles of law.

Most importantly for purposes of this article, *Gasoline Products* effectively illustrates the Stand Alone approach and problems that can arise when a new jury is asked to decide one issue in a case involving many complicated aspects. It demonstrates the close proximity that damages and liability will likely have in most cases. Although this article argues that the Semi-Inclusive approach is most effective,[68] *Gasoline Products* presents helpful insight into the Stand Alone approach by showing how difficult it would be for a new jury to fairly evaluate an erroneous damage award without information leading up to that decision.[69] The verdict as to the respondent's counterclaim seemed to validate the assertion that a contract existed, and that the petitioner breached it.[70] The Court recognized that the issues of liability and damages were inextricably intertwined.[71]

Gasoline Products effectively communicates the difficulties in evaluating damages alone in a new trial, which lead some circuits to apply the Stand Alone approach. However, the Semi-Inclusive approach effectively remedies those difficulties.

III. THE STAND ALONE APPROACH VS. THE SEMI-INCLUSIVE APPROACH

Circuits are split as to whether it is better to apply a broad or narrow standard in Rule 59(a) cases.[72] Under the narrow Stand Alone approach, a

66. *Id*. at 500.
67. *Id*. at 501.
68. *See* discussion *infra* Parts III, IV.
69. *See Gasoline Products*, 283 U.S. at 500.
70. *See id*. at 499–500.
71. *Id*. at 500.
72. *See infra* Part III.A–B.

new trial on damages alone will be allowed only if the issue of damages is completely separate from any other issue.[73] This means that the new jury must be able to effectively remedy an erroneous damage amount without the aid of evidence from any other aspect of the first trial.[74]

Under the broad Semi-Inclusive approach, a new trial based only on damages will be allowed, even if the damage award is closely intertwined with another issue—such as liability—that is not being re-tried.[75] There, the new jury is allowed to hear evidence from other aspects of the first trial, as long as it has something to do with the issue of damages.[76]

A. The Stand Alone Approach

The United States Court of Appeals for the Third Circuit decided in *Pryer v. C.O. 3 Slavic*, that it would apply the Stand Alone approach in Rule 59(a) cases.[77] Under this approach, new trials based solely on damages are allowed in situations where the issue of damages stands completely alone and separate from any other issue, and, therefore, no evidence relating to any other aspect of the first trial is necessary or admissible.[78]

The plaintiff, Raymond T. Pryer, was an inmate at a state prison and claimed that the defendant guards subjected him to excessive force.[79] Pryer, proceeding pro se, introduced medical records documenting his injuries and testified without dispute as to the injuries he sustained.[80] In the initial trial, the court failed to inform the jury that it could award damages for intangible harms, including emotional pain and humiliation.[81] Additionally, the court instructed the jury that, if Pryer failed to prove by a preponderance of the evidence that he suffered any actual damages, the jury must return an award of nominal damages.[82] Although the jury found that some of the guards acted reasonably, it also determined that four of the guards were liable, and awarded Pryer nominal damages.[83]

The district court ordered a new trial on its own motion on the issue of damages only.[84] The court ruled that "the jury's verdict on damages was

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73. *Gasoline Products*, 283 U.S. at 500.
74. *Id.*
75. *See* Watts v. Laurent, 774 F.2d 168, 181 (7th Cir. 1985).
76. *Id.*
77. 251 F.3d 448 (3d Cir. 2001).
78. *Id.* at 454–55.
79. *Id.* at 450–51.
80. *Id.*
81. *Id.* at 451.
82. *Id.* at 452.
83. *Id.* at 449, 452.
84. *Id.* at 449–50, 452. Additionally, it is reasonable to assert that the language in Rule 59 allowing for a new trial on any motion applies to motions made by parties. Allowing a court to grant

against the weight of the evidence," and ordered a new trial to "avoid a miscarriage of justice."[85] The court ruled that its instructions to the jury as to compensatory and nominal damages were inadequate and erroneous.[86]

During the second trial, the focus was solely on the damages caused to Pryer, and he testified at length.[87] At the conclusion of the second trial, the jury awarded Pryer $300,000 in compensatory damages.[88]

In response, the guards moved for a new trial, or, in the alternative, to reduce the amount of the verdict.[89] After the district court denied their motion, the guards appealed the trial court's order for a new trial limited solely to damages,[90] arguing that the issues of liability and damages were so interrelated that a new trial should not have been ordered unless it was to be extended to all issues.[91]

In deciding whether to grant a partial new trial on damages, the Third Circuit stated that its ruling would be guided by the Supreme Court's reasoning in *Gasoline Products Co. v. Champlin Refining Co.* and provided three reasons for its holding.[92] First, the Third Circuit recognized that the incident at issue involved an entangled fact situation where both sides vehemently denied liability.[93] Both sides introduced witnesses who testified that the other side was at fault, and Pryer produced detailed medical records.[94] Second, the Third Circuit stated that the injuries detailed in Pryer's medical records could be a result of the guards' use of reasonable force, their excessive use of force, or even Pryer's own actions.[95] Consequently, the Third Circuit concluded that it would be impossible to determine from the record whether Pryer's injuries were caused by excessive force, reasonable force, Pryer's own actions, or some combination of these possibilities.[96] Third, the Third Circuit acknowledged that a jury, when assessing damages, must know the exact factual background as to how a

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a new trial on its own motion seems to undermine the very purpose of Rule 59.

85. *Id.* at 452.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 452–53.
91. *Id.* at 454.
92. *Id.* at 454–56.
93. *Id.* at 455.
94. *Id.*
95. *Id.*
96. *Id.* at 456.

party's injuries occurred and who caused those injuries.[97]

Here, the court held that it was not clearly apparent that the issues of damages and liability were so distinct and separate that a trial based solely on damages could be had without injustice.[98] Further, the Third Circuit expressly declined to adopt the Semi-Inclusive approach, allowing new trials on only damages with cautionary instructions to the second jury.[99] Upon concluding that it would be impossible for a second jury to fairly determine the extent of Pryer's injuries without also fully understanding the manner in which the guards' actions caused the injuries, the Third Circuit followed the *Gasoline Products* standard and held that a new trial was necessary on all issues.[100]

B. The Semi-Inclusive Approach

Although the Stand Alone approach effectively eliminates many frivolous new trials, some circuits have adopted the Semi-Inclusive approach in hopes of providing a less rigid standard of applying Rule 59(a).[101] The Semi-Inclusive approach allows some evidence from other aspects of the first trial to be admitted if they are related to the issue of damages; however, it does not open the floodgates to allow in any and every issue from the first trial just because a party might want to present it to the new jury.[102]

In *Watts v. Laurent*, the United States Court of Appeals for the Seventh Circuit applied a more relaxed approach in determining what evidence is admissible during a new trial on the issue of damages alone.[103] Applying the Semi-Inclusive approach, the Seventh Circuit allows both parties to present evidence relating to issues other than damages in the second trial, as long as the evidence is somehow related to the damages issue.[104]

The plaintiff, Jeffrey Watts, was an inmate at a youth correctional facility.[105] He sued several employees at the facility under 42 U.S.C. § 1983, alleging violation of his constitutional rights.[106] Watts's claim stemmed from an incident wherein another inmate allegedly attacked Watts while he and other residents were running toward their housing unit.[107] Watts testified

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97. *Id.*
98. *Id.* at 457.
99. *Id.* at 458.
100. *See id.*
101. *See, e.g.*, Watts v. Laurent, 774 F.2d 168, 181 (7th Cir. 1985).
102. *See id.* at 181.
103. *See id.*
104. *Id.*
105. *Id.* at 170.
106. *Id.*
107. *Id.* at 171.

that many of the inmates at the facility were involved in gangs, and that the inmate who attacked him was the "chief" of one of the gangs.[108] Watts theorized that the inmate attacked him because his continued refusal to join a gang undermined the inmate's authority as a gang "chief."[109] Watts also presented evidence that the four employees overheard the inmate threatening him.[110]

During the trial, the employees were concerned that the jury would find a defendant liable merely because he or she was joined to another defendant against whom the evidence was stronger.[111] In response to this concern, the trial court instructed the jury:

> [A]lthough there is more than one defendant in this action, it does not follow from that fact that if one is liable that they are all liable. Each one is entitled to a fair consideration of his own defense and is not to be prejudiced by the fact . . . that you may find against one or more of the others. The instructions govern the case as to each defendant insofar as they're applicable to him or to her, to the same effect as if he or she were the only defendant in the case and . . . you will decide each defendant's case separately as if it were a separate lawsuit.[112]

The trial court also agreed to use separate verdict forms for each employee.[113] The jury awarded Watts compensatory damages, and filled in $40,000 on the verdict form for each individual defendant.[114] A district judge then entered judgment for Watts against each of the defendants for $40,000 individually.[115]

After the verdict, the employees filed a joint motion to clarify the judgment, maintaining that the jury had intended to award Watts $40,000 in damages against all of the defendants together, as opposed to the judge's interpretation that the jury awarded the plaintiff $40,000 from each individual employee for a total judgment of $200,000.[116] The district court

108. *Id*.
109. *Id*.
110. *Id*.
111. *Id*. at 175.
112. *Id*. (alterations in original) (emphasis omitted) (quoting jury instructions).
113. *Id*.
114. *Id*.
115. *Id*.
116. *Id*.

judge who heard this case agreed with the employees.[117] The court then vacated the earlier judgment and stated that the employees were together liable to Watts for a total of $40,000.[118]

On appeal, Watts argued that the face of the verdict forms clearly showed the jury's intent that he be awarded $40,000 from each employee individually.[119] The employees argued, however, that the verdict forms clearly showed that the jury thought Watts's damages amounted to $40,000, and awarded only that amount in total.[120] The Seventh Circuit held that Watts could obtain a new trial on damages if he chose because the issue of damages was ambiguously presented to the jury.[121]

In granting Watts a new trial, the Seventh Circuit recognized the injustice that can arise in new trials based only on damages.[122] To avoid those problems, the court stated that the parties should be able to present whatever evidence from the liability phase is also relevant to the issue of damages, and that the trial judge should apply a broad standard in assessing the relevancy of evidence from the liability phase to the issue of damages.[123] Further, during the new trial, there must be a strong presumption that evidence from the liability phase is relevant to the issue of damages, and the new jury is to be instructed that the relevant issues of liability have already been decided.[124] However, the Seventh Circuit stated that these instructions are not to preclude the presentation of evidence from the liability phase to the extent that such evidence is relevant to damages.[125]

The Seventh Circuit based its reasoning on the *Gasoline Products* Stand Alone approach on the prior Seventh Circuit decision of *MCI Communications Corp. v. American Telephone & Telegraph Co*.[126] In *MCI Communications Corp*., the court stated that new trials on damages, rather than liability, "must be grounded upon a clear understanding between the court and the parties of the issues and proof involved in each phase of the trial."[127] Further, the court acknowledged that "the most difficult part of the decision to remand for a partial new trial on damages is the formulation of rules to guide such a proceeding."[128] In a partial new trial on damages, it is

117. *Id*.
118. *Id*. at 176.
119. *Id*.
120. *Id*.
121. *Id*. at 181.
122. *Id*.
123. *Id*.
124. *Id*.
125. *Id*.
126. 708 F.2d 1081 (7th Cir. 1982).
127. *Id*. at 1168.
128. *Id*.

critical to realize that the issues of liability, jurisdiction, and immunity have not been remanded and are not subject to further review.[129]

However, the Seventh Circuit acknowledged that it is sometimes necessary to educate the second trial's fact finder on issues such as liability, even though the second trial is only on damages.[130] In these instances, evidence that might be associated with the determination of liability may be introduced or reintroduced.[131]

IV. ANALYSIS

A. Analysis of the Stand Alone Approach

There are two arguments favoring the Stand Alone approach. First, the Stand Alone approach discourages courts from granting partial new trials in cases where all of the issues are inextricably intertwined.[132] This narrow approach seeks to prevent prejudice that can arise when a new jury is not allowed to consider the substantial impact that liability can have on the amount of a damage award.[133] However, the counterargument is that such a narrow standard could prevent the moving party from getting a fair evaluation of an erroneous damage award.[134] If the amount of damages awarded is truly unfair, a party might be precluded from obtaining a new trial simply because the issue of liability was significantly related to the damages award.[135]

The second argument for the Stand Alone approach is that it allows for a new trial on only one issue without including numerous pieces of extraneous evidence from the first trial.[136] This is especially helpful in cases where the first verdict might have been the result of poor jury instructions, or cases like *Pryer* where the plaintiff is a convicted felon who suffered severe physical injury.[137] In those instances, the second jury is able to narrowly evaluate the

129. *Id*.
130. *Id*.
131. *Id*.
132. *See* Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 499–500 (1931); Pryer v. C.O. 3 Slavic, 251 F.3d 448, 454–55 (3d Cir. 2001).
133. *See Gasoline Products*, 283 U.S. at 499–500; *Pryer*, 251 F.3d at 455.
134. *See Pryer*, 251 F.3d at 460 (Mansmann J., dissenting) (citing Wheatley v. Beetar, 637 F.2d 863, 867–68 (2d Cir. 1980)).
135. *See id*. at 460–61 (Mansmann J., dissenting).
136. *See id*. at 455.
137. *Pryer*, 251 F.3d 448.

sole issue of damages without being influenced by testimony from experts or by one party's background.[138] It presumably is the most efficient approach because fewer issues must be retried to the new jury.

Some courts use a two- or three-prong test to aid in determining whether to grant a new trial limited solely to the issue of damages.[139] For instance, a court might hold that a new trial on damages is allowed only where: "(1) the question of liability was not intertwined with the question of damages and (2) the issue of liability was either (a) not contested or (b) had been fairly determined so that no substantial complaint could be made with respect [to the ultimate finding of liability]."[140]

However, while preventing a rush of frivolous partial new trials, the Stand Alone approach risks imposing requirements so rigid that partial new trials could become impossible to obtain altogether.[141] Consider a case in which a plaintiff is injured in a car accident and is awarded only nominal damages. In a jurisdiction that applies the Stand Alone approach, one or both of the parties might be prejudiced if denied the opportunity to have a partial new trial because of a connection between the damage award and another issue.[142] For instance, if the first jury decided to award the plaintiff nominal damages because he was intoxicated and driving recklessly, the judge might decline to grant a partial new trial because the damage award was intertwined with the issue of the plaintiff's contributory negligence.[143]

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138. *But cf*. Butler v. Dowd, 979 F.2d 661, 669 (8th Cir. 1990) (discussing plaintiffs' argument that new trial based on damages was necessary because jury's award of nominal damages reflected its bias against plaintiffs' status as prisoners, but ultimately deciding that a new trial was not warranted because "plaintiffs' prisoner status [was] not the only explanation for the jury's award").

139. Randy R. Koenders, Annotation, *Propriety of Limiting to Issue of Damages Alone New Trial Granted on Ground of Inadequacy of Damages*, 5 A.L.R. 5TH 875, 899–900 (1992).

140. *Id*. at 900.

141. *Cf*. *Pryer*, 251 F.3d at 460–61, 461 n.8 (Mansmann, J., dissenting) (citing Olsen v. Correiro, No. 92–10961–PBS, 1995 WL 62101, at *3 (D. Mass. Feb. 3, 1995) (explaining the interconnectedness of the issues of liability and damages, and noting that, as a practical matter, "[t]he universal requirement of a causal link between liability and damages means that the issues can never be completely unlinked").

142. *Cf*. Wheatley v. Beetar, 637 F.2d 863, 867–68 (2d Cir. 1980).

> Defendant, here has had a fair trial on the issue of liability and it would be . . . grossly unfair to plaintiff, as well as contrary to the spirit of F.R. 59, to require a retrial of the question of defendant's culpability which has already been decided by the jury in plaintiff's favor. Moreover . . . a grave injustice would occur to a plaintiff if, having submitted the question of liability to a jury, and having obtained a favorable verdict, a plaintiff should be compelled to risk another trial, with a possibility of an adverse verdict, solely because a jury failed to take into consideration all of the elements of damage as clearly instructed by the Court.

Id. (quoting Yates v. Dann, 11 F.R.D. 386, 394 (D.Del. 1951)) (internal quotation marks omitted).

143. *Cf., e.g*., Hatfield v. Seaboard Air Line R.R., 396 F.2d 721, 723–24 (5th Cir. 1968) (explaining that the nominal damage award indicated "confusion on the part of the jury with regard to the contributory negligence issue," that there had been a "contaminat[ion of] the entire verdict," and that the interconnectedness of the issues of liability and damages "require[d] a new trial of all

If this results in remand for a new trial on all issues, the defendant might be unfairly affected because the second jury will get to hear about all of the issues from the first trial and might completely reverse the original verdict. Therefore, what began as a dispute over the sole issue of damages could result in a complete reversal of liability.

The Stand Alone approach could result in a windfall for undeserving parties. This possibility calls into question whether there is really a fair or accurate assessment of the issue of damages in circuits that apply the Stand Alone approach in granting new trials.

B. Analysis of the Semi-Inclusive Approach

Two arguments favor the Semi-Inclusive approach. The first is that it allows both parties to present the necessary evidence from the liability phase of the trial to aid the second jury in determining the correct appropriation of damages.[144] However, the Semi-Inclusive approach also might allow the second jury to hear extraneous evidence in trials that are intended to be confined to one issue alone.[145] This could result in the moving party getting a second trial on all issues, which could unfairly punish the opposing party.

Second, the Semi-Inclusive approach strikes a "happy medium," allowing both parties an equal chance at submitting relevant evidence without repeating the first trial unnecessarily.[146] While the Stand Alone approach permits a partial new trial only when the issue of damages is completely separate from all other issues, the Semi-Inclusive approach permits both parties to submit evidence and testimony from the first trial, as long as it is relevant to the issue of damages.[147] The application of this relaxed standard seems to remedy some of the flaws that result from the Stand Alone approach,[148] but not without creating some of its own. By allowing both sides to present evidence from the first trial, it might become impossible to ever truly have a new trial based solely on one issue. The

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the issues").

144. *See* Watts v. Laurent, 774 F.2d 168, 181 (7th Cir. 1985).

145. *Cf. id.* (describing an ostensibly liberal process whereby "[t]he trial judge shall apply a broad standard with respect to the relevance of . . . evidence and there shall be a strong presumption that evidence from the liability phase may be relevant in some way to damages").

146. *See* Pryer v. C.O. 3 Slavic, 251 F.3d 448, 454 (3d Cir. 2001) (plaintiff proffering this same idea in furtherance of his argument that the Third Circuit adopt the semi-inclusive approach). *Cf. id.* at 460 (Mansmann, J. dissenting) (discussing the importance of limited retrials to judicial economy).

147. *See Watts*, 774 F.2d at 181.

148. *See* discussion *supra* Part IV.A.

circuits applying the Semi-Inclusive approach risk opening the door to any evidence in any way related to the issue of the second trial, no matter how tenuously connected.[149]

For instance, in a medical malpractice case where the plaintiff is awarded nominal damages after claiming that he was injured during surgery, the plaintiff can argue under the Semi-Inclusive approach that the injury made him miss work and he is entitled to lost wages. The plaintiff could argue that lost wages are a form of damages, so this evidence must be admissible. He could further argue that evidence relating to his psychological and emotional state should be admitted because it would relate to damages for emotional distress.

Similarly, the physician could argue that evidence relating to the plaintiff's medical history, as well as any evidence and testimony relating to the actual surgery, should be admitted because it relates to the amount that the surgeon may owe the plaintiff. While this might not seem to be prejudicial to either party, this outcome defeats the purpose of Rule 59(a) because it results in what resembles a completely new trial on all of the issues—not just the one that the court ordered.

C. Analysis of Both Approaches and Proposal

Although both approaches aim to ensure that partial new trials do not center around facts where liability and damages are confusingly intertwined, the Stand Alone approach described in *Gasoline Products*[150] does not remedy the issue most effectively for two reasons. First, by denying partial new trials whenever the issue of damages is in any way related to the determination of liability, or of other issues, one or both parties to an action might be unfairly prejudiced.[151] Second, the new jury might not be able to accurately assess whether a damage award is erroneous without information relating to liability or other aspects of the first trial.[152]

Neither the Stand Alone approach nor the Semi-Inclusive approach is flawless. Both have the potential to produce results that seem to be outside the purpose of Rule 59(a).[153] However, the Semi-Inclusive approach is the best choice for two reasons. First, it is consistent with the general standard courts use to apply 59(a). In those general cases, courts look at the evidence presented at the trial to assess whether error occurred in the verdict. That

149. *Cf. Watts*, 774 F.2d at 181 (calling for "the free presentation of evidence and information from the liability phase to the extent such evidence is relevant . . . *in any way*" (emphasis added)).

150. *See supra* Part II.C.

151. *See, e.g.*, *supra* note 142 and accompanying text.

152. *See supra* Part IV.A.

153. *See supra* notes 142, 149 and accompanying text.

should also be the approach when the only issue is damages. Second, the Semi-Inclusive approach allows both parties to present evidence relevant to the original damage award, which will likely give the second jury a clearer picture of the reasoning that led to the allegedly erroneous amount. This will benefit both parties by increasing the chance that the second jury will have all the information necessary to make an informed, accurate judgment.

V. CONCLUSION

Rule 59(a) gives courts the authority to order a new trial on any or all of the issues.[154] When the only issue is damages, courts have taken two approaches. Some courts have adopted the narrow Stand Alone approach that allows a new trial on damages alone only when the issue of damages is completely separate from liability.[155] Other courts have adopted the broad Semi-Inclusive approach that allows evidence relating to other aspects of the first trial to be admitted, as long as it is relevant to the damage issue.[156]

The Semi-Inclusive approach is the more favorable of the two approaches. In allowing parties to present evidence from other aspects of the trial that might be crucial to their cases, the Semi-Inclusive approach safeguards against one party being prejudiced due to the new jury's lack of information and is most consistent with the language and purpose of Rule 59(a).

154. FED. R. CIV. P. 59(a).
155. *See supra* Part III.A.
156. *See supra* Part III.B.

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