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CIVIL PROCEDURE AND CONSTITUTIONAL LAW: Changing New Mexico Remittitur Procedure to Protect the Appropriate Balance of Power Between Judge and Jury—*Allsup's Convenience Stores, Inc. v. North River Insurance Co.*

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I. INTRODUCTION

In *Allsup's Convenience Stores, Inc. v. North River Insurance Co.*,¹ the New Mexico Supreme Court radically changed the law of remittitur. The court's decision makes it much more difficult for a trial court to successfully reduce the size of a jury verdict. Consequently, most defendants will now file motions for a new trial, rather than motions for a remittitur, when they find a jury's award of damages to be excessive.

Remittitur is a post-trial order issued by a court when it finds a jury's award of damages excessive and the result of "passion, prejudice, partiality, sympathy, undue influence,...corrupt motive...or where the jury has mistaken the measure of damages."² Traditionally, remittitur orders gave plaintiffs a choice between accepting a smaller award or undergoing a new trial.³ If the plaintiff accepted the smaller amount, he or she waived the right to appeal.⁴ If the plaintiff refused the remittitur, he or she could not appeal until after the conclusion of a second trial.⁵

Allsup's held that traditional remittitur procedure violated the constitutional right to trial by jury⁶ as granted in the Constitution of the State of New Mexico.⁷ Because remittitur substantially limited a plaintiff's opportunity to appeal, it enabled trial courts to override a jury's verdict and substitute the court's own assessment of damages. The court's change to the jury verdict would also escape appellate review. In response, the *Allsup's* court held that trial judges issuing remittitur orders must give plaintiffs the option of conditionally accepting the remittitur "under protest," which would in turn allow for the filing of an immediate appeal.⁸ Furthermore, the court held that trial judges must provide express reasons for ordering a remittitur based on evidence of passion or prejudice, and that the appellee assumes the burden on appeal to show that the jury awarded excessive damages.⁹

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1. 127 N.M. 1, 976 P.2d 1 (1998).

2. *Id.* at 9, 976 P.2d at 9.

3. *Id.* at 6, 976 P.2d at 6.

4. *Id.*

5. *Id.* at 6, 976 P.2d at 6.

6. *Id.* at 8, 976 P.2d at 8.

7. N.M. CONST. art. II, § 12 ("The right to trial by jury as it has heretofore existed shall be secured to all and remain inviolate.").

8. *Id.* at 9, 976 P.2d at 9. A plaintiff who accepts a proposed remittitur "under protest" essentially rejects the judge's assessment of damages. The "acceptance" is merely a procedural technique used for the purpose of rendering the judgment final so that the plaintiff can file an appeal and contest the propriety of the judge's remittitur order. *Id.* at 7, 976 P.2d at 7.

9. *Id.* at 9-10, 976 P.2d at 9-10.

Allsup's makes it much more difficult for a trial court to decrease the amount of damages awarded by a jury. As a result, defendants who find verdicts to be excessive will now probably favor motions for a new trial over remittitur motions because new trial orders are not subject to immediate appeal and are reversible only for abuse of discretion.

This Note will address how *Allsup's* radically changed remittitur in New Mexico. Section II will summarize the history of remittitur procedure. Section III will set forth the facts and procedural history of the case. Section IV will explain the rationale for the court's decision. Section V will analyze whether the court made a wise decision and discuss the implications of *Allsup's* for future cases.

II. BACKGROUND

The historic justification for remittitur is that it saves time and money by facilitating settlements.¹⁰ Remittitur theoretically allows both parties to walk away satisfied.¹¹ The plaintiff obtains the compensation the trial judge considers reasonable, while avoiding the expense and time commitment of a second trial.¹² Meanwhile, the defendant pays a sum less than that awarded by the jury.¹³

The use of remittitur dates back to English common law.¹⁴ From the earliest days of the English jury system, judges have granted new trials in cases where they found that the jury awarded excessive damages.¹⁵ Remittitur emerged as an effective alternative to new trial orders as litigation became more complex, costly, and time consuming.¹⁶ It is unclear how often English judges utilized remittitur,¹⁷ but the practice dates back at least as far as 1764. At that time, the judge in *Breadmore v. Carrington* asked the plaintiff in a trespass and false imprisonment case to accept reduced damages rather than a new trial.¹⁸

Remittitur became a part of American law in 1812 when future United States Supreme Court Justice Joseph Story decided *Blunt v. Little*, a malicious prosecution case.¹⁹ A jury awarded \$2000 in damages and Story agreed to deny the defendant's motion for a new trial if the plaintiff would agree to remit a portion of the award. The judge clearly recognized the magnitude of his decision:

I have the greatest hesitation in interfering with the verdict, and in so doing, I believe that I go to the very limits of the law. After full reflection, I am of [the] opinion, that it is reasonable that the cause should be submitted to another jury, unless the plaintiff is willing to remit \$500 of his damages.²⁰

10. *Id.* at 6, 976 P.2d at 6.

11. *Id.*

12. *Id.*

13. *Id.*

14. See *Breadmore v. Carrington*, 95 Eng. Rep. 790 (K.B. 1764).

15. See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 300 (Lippincott 1874).

16. See Brad Snyder, *Protecting the Media from Excessive Damages: The Nineteenth-Century Origins of Remittitur and Its Modern Application in Food Lion*, 24 VT. L. REV. 299 (2000).

17. See *id.*

18. See *Breadmore*, 95 Eng. Rep. at 790.

19. 3 F. Cas. 760 (C.C.D. Mass. 1822).

20. *Id.* at 762.

During the Industrial Revolution, remittitur became a common judicial practice.²¹ Prior to that era, most cases on judicial dockets involved contracts, debt, land disputes, or property destruction.²² Judges seldom used remittitur because juries found damages relatively easy to calculate.²³ Industrialization led to more personal injury cases where assessing damages proved more difficult.²⁴ Thus, judges found themselves compelled to intervene more frequently. Commentators disagree over what motivated judges to order more remittiturs.²⁵ Many do note, however, that judges often acted to protect businesses from populist juries who were well aware of the deep pockets of commercial entities.²⁶

The Supreme Court of the United States found remittitur constitutional in *Dimick v. Schiedt*.²⁷ The decision settled the issue of whether, in federal court cases, remittitur conflicted with the Seventh Amendment right to trial by jury.²⁸ The Court justified its decision by invoking the doctrine of stare decisis. "[F]or more than a century the federal courts have followed the approved practice of conditioning the allowance of a new trial on the consent of plaintiff to remit excessive damages..."²⁹ However, the court hinted that "if the question of remittitur were now before us for the first time, it would be decided otherwise."³⁰ Thus, a century of case law made it impractical for the Court to find remittitur unconstitutional.

From the early days of New Mexico's statehood, it has been the law that trial judges may require a remittitur as an alternative to granting a new trial in cases where the court finds the jury's verdict excessive.³¹ In *Henderson v. Dreyfus*, the jury awarded the plaintiff \$35,000 after the defendant newspaper publisher printed a story alleging that the plaintiff desecrated an American flag.³² The trial court found the verdict excessive and allowed the plaintiff to choose between a new trial or \$10,000.³³

The New Mexico Supreme Court further refined the standard of review for remittitur orders in two cases from the 1950s. In *Hall v. Stiles*,³⁴ the court affirmed a jury verdict of \$50,000 for the plaintiff in a wrongful death action.³⁵ The court held that the jury's findings should be disturbed only for passion or prejudice, not merely because the trial judge believed that the amount of money awarded by the jury was greater than he or she would have awarded.³⁶ The court followed the *Hall* precedent in *Montgomery v. Vigil*,³⁷ which focused on personal injuries sustained in an

21. Snyder, *supra* note 16, at 307.

22. *Id.*

23. *Id.* at 308.

24. *Id.* at 317.

25. *Id.* at 313-14.

26. *Id.*

27. 293 U.S. 474 (1935).

28. *Id.*

29. *Id.* at 474.

30. *Id.*

31. See *Henderson v. Dreyfus*, 26 N.M. 541, 556-57, 191 P. 442, 448 (1919).

32. *Id.*

33. *Id.*

34. 57 N.M. 281, 258 P.2d 386 (1953).

35. *Id.*

36. *Id.* at 285, 258 P.2d at 390.

37. 65 N.M. 107, 332 P.2d 1023 (1958).

automobile accident. The jury awarded the plaintiff \$5000.³⁸ The court concluded that the jury based its decision on passion or prejudice.³⁹ It ordered the plaintiff to accept \$3000 or undergo a new trial.⁴⁰ Thus, the New Mexico Supreme Court reaffirmed in *Montgomery* what it held in *Hall*, that remittitur is only warranted when a jury verdict is excessive and influenced by passion, prejudice, or a similar motive.⁴¹

III. STATEMENT OF THE CASE

Allsup's Enterprises, Inc. (Allsup's), a convenience store chain, entered into a series of agreements to purchase workers' compensation and general liability insurance coverage from North River Insurance Company and United States Fire Insurance (North River).⁴² Alexis, Inc. entered the agreements as a third party administrator directly responsible for claims handling.⁴³ The premiums paid by the convenience store chain were based in part upon the losses it incurred.⁴⁴ As such, Allsup's made payments based on an estimated premium. Once the policy period expired, North River then adjusted the cost of Allsup's coverage upward or downward, depending on Allsup's actual losses.⁴⁵

This lawsuit arose from alleged breaches of the contracts made by Allsup's, North River, and Alexis.⁴⁶ Allsup's made three claims against North River. First, Allsup's alleged that North River breached an obligation to supervise and ensure the quality of the claims handling facilitated by Alexis.⁴⁷ Second, Allsup's alleged a wrongful drawdown⁴⁸ on a letter of credit by North River.⁴⁹ Third, Allsup's alleged that North River failed to perform loss control services, such as instituting programs to diminish injuries on the job.⁵⁰ North River filed a counterclaim against Allsup's and alleged that the corporation failed to make required premium payments.⁵¹

District Court Judge Susan Conway entered judgment following a twelve-week trial.⁵² The jury awarded Allsup's \$540,000 in compensatory damages for North River's inadequate claims handling and \$4792 in compensatory damages for North River's wrongful drawdown.⁵³ It also awarded Allsup's \$4,000,000 in punitive damages for North River's bad faith supervision of claims handling and \$500,000

38. *Id.* at 108, 332 P.2d at 1024.

39. *Id.* at 113, 332 P.2d at 1027.

40. *Id.*

41. *Id.*

42. *Allsup's Convenience Stores, Inc. v. North River Ins. Co.*, 127 N.M. 1, 5, 976 P.2d 1, 5 (1998).

43. Alexis had no part in the appeal because it reached a settlement with Allsup's after trial. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. North River required Allsup's to provide security for potential unpaid premiums in the form of a letter of credit. North River later "drew down" the letter when Allsup's failed to pay premiums due under their contract. *Id.* at 16, 976 P.2d at 16.

49. *Id.*

50. *Id.* at 5, 976 P.2d at 5.

51. *Id.* at 6, 976 P.2d at 6.

52. *Id.* at 7, 976 P.2d at 7.

53. *Id.* at 5-6, 976 P.2d at 5-6.

in punitive damages for North River's wrongful drawdown.⁵⁴ By directed verdict, the court awarded \$1,645,708 to North River for unpaid premiums by Allsup's.⁵⁵ Thus, the verdict amounted to a net award of \$3,399,084 for Allsup's.

In response to the award of damages, North River filed a "Motion to Amend the Judgment, for Judgment Notwithstanding the Verdict [NOV], or in the Alternative, for New Trial, or for Remittitur."⁵⁶ The court denied the motion for judgment NOV, but granted a remittitur in the amount of \$3,000,000 on the award for inadequate supervision of claims handling and a remittitur in the amount of \$400,000 on the award for wrongful drawdown.⁵⁷ The ruling did not clearly state whether the plaintiff had the option of rejecting the remittitur and undergoing a new trial.⁵⁸ In the end, the remittitur resulted in an entry of judgment for \$916 for North River.⁵⁹

North River then filed a motion asking the court to stipulate a time period during which Allsup's had to either accept the remittitur or accept a new trial.⁶⁰ Instead of responding to the motion, Allsup's filed a notice of appeal.⁶¹ Under existing case law, remittitur orders were ordinarily not considered final judgments, and thus, were not appealable.⁶² Despite this, Allsup's alleged that the remittitur order constituted a final judgment because it failed to give the corporation a choice between accepting the remittitur or a new trial, rather than a smaller award of damages.⁶³

The *Allsup's* appeal raised an important question about appellate review of remittitur orders. In *Nally v. Texas-Arizona Motor Freight, Inc.*,⁶⁴ the New Mexico Supreme Court held that an order granting a remittitur, or in the alternative a new trial, was not immediately appealable. Under *Nally*, plaintiffs had the limited choice of taking the lesser sum determined by the judge and waiving appeal, or undergoing the new trial and appealing thereafter.⁶⁵ Under *Nally*, a plaintiff could not accept a remittitur order "under protest" and then immediately appeal the propriety of the remittitur order.⁶⁶

In deciding the *Allsup's* appeal, the New Mexico Supreme Court held that it believed the remittitur procedure used in *Nally* potentially violated both the constitutional right to trial by jury and the constitutional right to one appeal from a final judgment.⁶⁷ If the plaintiff accepted the remittitur, he or she waived the right to appeal.⁶⁸ If the plaintiff refused the remittitur, he or she could only appeal after undergoing a second trial.⁶⁹ This limited right to appeal created a potential conflict with the right to trial by jury because it enabled trial judges to override verdicts

54. *Id.* at 6, 976 P.2d at 6.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. 67 N.M. 153, 156, 353 P.2d 678, 680 (1960).

65. *Id.*

66. *Allsup's*, 127 N.M. at 6, 976 P.2d at 6.

67. *Id.*

68. *Nally*, 67 N.M. at 156, 353 P.2d at 680.

69. *Id.*

without subjecting themselves to appellate review.⁷⁰ Given the choice between accepting a smaller award of damages or risking everything in a new trial, most plaintiffs chose to accept the remittitur and end the litigation.⁷¹ Thus, in *Allsup's*, the New Mexico Supreme Court chose to consider the issue of whether a claimed error in granting a motion for a remittitur should be reviewed as any other claimed error on appeal.⁷²

IV. RATIONALE

The New Mexico Supreme Court based its decision in *Allsup's* on constitutional grounds⁷³ and ultimately found that the remittitur procedure used prior to *Allsup's* violated the constitutional right to trial by jury.⁷⁴ Because remittitur provided plaintiffs with such a limited opportunity to appeal, the procedure essentially enabled trial judges to substitute their assessment of damages in place of the jury's verdict.⁷⁵ Consequently, *Allsup's* held that a plaintiff could now accept a remittitur order "under protest" and file an immediate appeal.⁷⁶ Moreover, the court held that the appellee, and not the appellant, shall assume the burden on appeal and thus must show that the trial judge's decision is well supported by evidence of passion or prejudice.⁷⁷

The court asserted that its decision ensured a plaintiff's constitutional right to trial by jury by offering the opportunity to appeal a remittitur order immediately.⁷⁸ The *Allsup's* opinion promised that "the voices of the jury" would be heard regardless of whether the appellate court affirmed or denied the trial judge's order.⁷⁹ If the higher court affirmed, the plaintiff could still refuse the judge's remittitur proposal on remand and present his case to a new jury during retrial. If the higher court reversed, the original jury verdict would be reinstated. Thus, *Allsup's* guaranteed plaintiffs the right to have a jury determine damages by allowing them to appeal remittitur orders immediately.

The court also asserted that *Allsup's* protected the constitutional right to one appeal from a final judgment.⁸⁰ Existing remittitur procedure waived the right to appeal when a plaintiff accepted a remittitur.⁸¹ It delayed appeal when the plaintiff refused a remittitur and decided to undergo a new trial.⁸² *Allsup's* changed remittitur procedure to allow for immediate appeal.⁸³ Thus, the court protected the

70. *Allsup's*, 127 N.M. at 6, 976 P.2d at 6.

71. *Id.*

72. *Id.*

73. *Id.* at 8, 976 P.2d at 8.

74. *Id.*; N.M. CONST. art. II, § 12 ("The right to trial by jury as it has heretofore existed shall be secured to all and remain inviolate.").

75. *Allsup's*, 127 N.M. at 8, 976 P.2d at 8.

76. *Id.*

77. *Id.* at 9, 976 P.2d at 9.

78. *Id.* at 8, 976 P.2d at 8.

79. *Id.*

80. *Id.*; N.M. CONST. art. VI, § 2 ("an aggrieved party shall have an absolute right to one appeal").

81. *Nally*, 67 N.M. at 156, 353 P.2d at 680.

82. *Id.*

83. *Allsup's*, 127 N.M. at 8, 976 P.2d at 8.

constitutional right to appeal by holding that plaintiffs could obtain a final judgment by accepting a remittitur under protest.

The court also offered several more reasons to support its holding. First, the court attacked the historic rationale for remittitur by demonstrating how the circumstances of this case conflicted with the procedure's underlying theory.⁸⁴ Traditionally, courts considered remittitur to be an effective tool because it generally facilitated settlements and allowed both parties to walk away satisfied.⁸⁵ The court noted, however, that "[s]uch a theory can hardly be said to apply...where the plaintiff is outraged, not mollified, by the remittitur choice, and where there is disagreement...as to what a 'reasonable' jury should have awarded."⁸⁶ The circumstances of *Allsup's* were also employed to illustrate how remittitur does not always foster efficient dispute resolution. The court noted that the judicial interest in efficiency is only served when the plaintiff accepts the remittitur, rather than undergoing a new trial.⁸⁷ The trial in *Allsup's* lasted twelve weeks. Thus, the court surmised, if the plaintiff refused the remittitur, a retrial would consume substantial judicial resources.⁸⁸

The court projected that this change in the law would improve the consistency of trial results and prevent arbitrary conduct by trial judges.⁸⁹ It proposed that the immediate opportunity to appeal a remittitur order to a panel of appellate judges decreases the likelihood that an arbitrary or ill-conceived action by a single judge would go uncorrected.⁹⁰ In this way, the *Allsup's* court considered consistency as another benefit of its change in the law of remittitur.

The judicial goal of resolving disputes on the merits was also addressed in the *Allsup's* opinion. The court portrayed the issue of remittitur as a struggle between competing goals, where the interest in resolving disputes on the merits must prevail over the interest in judicial economy.⁹¹ The court focused on the well-recognized proposition that the chief objective of civil litigation is to provide plaintiffs with a fair opportunity to prove their contentions and obtain adequate compensation, while also providing the defendant with a fair chance to rebut those contentions.⁹² "The main rationale for remittitur is the promotion of efficiency. Yet those who support the practice on this basis clearly do not wish to compromise justice in the interest of efficiency."⁹³ As such, the court based its decision in part on the need to resolve disputes on the merits, even when efficiency is compromised.⁹⁴

84. *Id.* at 7, 976 P.2d at 7.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 8, 976 P.2d at 8.

90. Barbara Lerner, *Remittitur Review: Constitutionality and Efficiency in Liquidated Damages Cases*, 43 U. CHI. L. REV. 376, 391 (1976).

91. *Allsup's*, 127 N.M. at 7-8, 976 P.2d at 7-8.

92. *Id.*

93. *See id.* at 8, 976 P.2d at 8 (quoting Lerner, *supra* note 90, at 391).

94. The interest in resolving disputes on the merits also helps to explain the court's decision to shift the burden of proof to the appellee on appeal. Such a shift is unusual in New Mexico civil procedure. It occurs in other instances, however, where a trial court's decision interferes with a trial on the merits. An order granting summary judgment or a directed verdict is an example of this phenomenon.

The *Allsup*'s opinion distinguished the New Mexico Supreme Court's position from the federal system's approach to remittitur. It reviewed the United States Supreme Court's opinion in *Donovan v. Penn Shipping Co.*,⁹⁵ which set out the remittitur procedure for federal courts. *Donovan* held that plaintiffs are barred from obtaining review of remittitur orders, even when they accept the orders "under protest." In the end, the New Mexico Supreme Court concluded that *Donovan* lacked sufficient analysis to support its holding.⁹⁶ *Allsup*'s stated that "[t]he [United States Supreme] Court offered no analysis for its ruling, but merely cited to a long and unbroken line of decisions [that] had frequently been applied."⁹⁷ *Allsup*'s opted to not follow the federal court rule governing remittitur because the court found it unsupported by sound rationale.⁹⁸

Allsup's also changed the appeal process for remittitur orders. As stated earlier, it held that trial judges must clearly articulate their reasons for granting a remittitur,⁹⁹ and that defendants face the burden on appeal to justify a trial judge's remittitur order.¹⁰⁰ The court based this holding on the principle that it is the "fundamental function of a jury to determine damages."¹⁰¹ It also acknowledged that judges are potent figures capable of exerting substantial power and influence over juries.¹⁰² Therefore, the court extended the "specific finding" requirement of *Montgomery v. Vigil* by requiring trial judges to clearly articulate how and why damages are excessive.¹⁰³ It held that verdicts should be reduced only when the trial judge can offer specific findings that his or her opinion is more reliable than the jury's.¹⁰⁴

V. ANALYSIS AND IMPLICATIONS

Allsup's made an important change in New Mexico law that protects the appropriate balance of power between judges and juries in the state's legal system. Before *Allsup*'s, remittitur gave trial judges tremendous power to override jury verdicts and no mechanism existed to check this power. Plaintiffs could obtain neither immediate appellate review if the plaintiff rejected the remittitur order, nor any appellate review if the plaintiff accepted the remittitur. Judges could present plaintiffs with a choice between walking away with some compensation and avoiding the expenses of a new trial, or declining the proposed award and relitigating the case with no guarantee of the outcome. Given this choice, it seems reasonable to conclude that most plaintiffs would opt for the remittitur, thus

95. 536 F.2d 536, *aff'd*, 429 U.S. 648 (1977).

96. *Allsup*'s, 127 N.M. at 7, 976 P.2d at 7.

97. *Id.* (quoting *Wiggs v. Courshon*, 485 F.2d 1281 (5th Cir. 1973)).

98. The court also cited to cases in which other jurisdictions adopted similar remittitur rules with apparent success. However, the court offered no analysis of these cases or their impact on subsequent litigation. *Id.* at 8, 976 P.2d at 8.

99. *Id.* at 9, 976 P.2d at 9.

100. *Id.* at 9-10, 976 P.2d at 9-10.

101. *Id.* at 8, 976 P.2d at 8.

102. *Id.* at 9, 976 P.2d at 9.

103. *Id.*

104. The court also asserted that this standard of review promotes efficiency because it ensures that reviewing courts have a clear explanation of the trial judge's decision. *Id.*

allowing the trial judge to override the jury's calculation and end the litigation without appellate review.

The decision in *Allsup's* makes it much more difficult for a judge to override a jury's verdict. Plaintiffs may now seek immediate appellate review of remittitur orders that they feel are inappropriate. They do not need to endure a costly and lengthy new trial beforehand. A trial judge cannot use the risk of losing the total award of damages while incurring additional trial expenses as a tool to persuade the plaintiff to accept a remittitur. Now, an appellate court must also agree that the award was improper before a new trial will take place. As a result, *Allsup's* protects the principle that juries should ordinarily determine damages by making it more difficult for a trial judge to override a verdict.

Moreover, *Allsup's* created a distinction between the appeal process for orders proposing a remittitur and the appeal process for orders granting a new trial without providing the remittitur alternative. This contrast will encourage defendants to move for a new trial, rather than a remittitur, when the defendants perceive a jury verdict to be excessive.

When an appellate court reviews a remittitur order, the burden rests with the appellee.¹⁰⁵ The defendant must present specific findings that passion or prejudice tainted the jury's award of damages.¹⁰⁶ In *Allsup's*, the New Mexico Supreme Court reinstated the jury verdict because North River could not meet this difficult test.¹⁰⁷ A remittitur order accepted under protest is also immediately appealable.¹⁰⁸

Unlike remittitur orders, appellate courts review orders granting a new trial based on the standard of abuse of discretion.¹⁰⁹ In *Rhein v. ADT Automotive, Inc.*,¹¹⁰ the court explained that it applies this standard because trial judges observe the demeanor of witnesses and hear all the evidence firsthand.¹¹¹ New trial orders also differ from remittitur orders because they are not subject to immediate appeal.¹¹² Except in extraordinary cases, an appellant may only appeal after the conclusion of the second trial because a new trial order is not a final judgment.¹¹³

The distinction between the appeal process for remittitur orders and new trial orders will likely encourage defendants to move for a new trial, instead of moving for a remittitur, in the event that they find a jury's verdict excessive. A remittitur order accepted under protest is immediately appealable and a heavy burden rests with the defendant. If a defendant moves for remittitur and the trial judge grants the motion, the defendant must then show on appeal specific findings that the jury's verdict was the product of passion or prejudice.

On the otherhand, if the defendant moves only for a new trial, his or her likelihood of success is much higher. If the judge grants the motion, it is the plaintiff who carries the burden on appeal of showing that the trial judge abused his

105. *Id.*

106. *Id.*

107. *Id.* at 10, 976 P.2d at 10.

108. *Id.* at 9, 976 P.2d at 9.

109. *State v. Chavez*, 98 N.M. 682, 684, 652 P.2d 232, 234 (1982).

110. 122 N.M. 646, 651, 930 P.2d 783, 788 (1996).

111. *Id.* at 650, 930 P.2d at 787.

112. *Id.*

113. *Id.*

discretion. The plaintiff can appeal only after the conclusion of the second trial. As a result, filing a motion for a new trial is now a much more attractive option for a defendant than filing a motion for a remittitur.

A trial judge who is determined to impose a remittitur order may still be able to defeat a plaintiff's strategy of filing only a motion for a new trial. In rare cases, judges have entered remittiturs *sua sponte*.¹¹⁴ Thus, a trial judge could potentially order a remittitur even when the defendant filed only a motion for a new trial. In doing so, however, the judge would subject himself or herself to a much greater chance of reversal on appeal than if he or she granted the new trial motion requested by the plaintiff without offering the remittitur alternative.

The justification for the different standards for appeals of remittitur orders and appeals of new trial orders seems to be the court's concern about protecting the right to trial by jury. An order for a new trial does not jeopardize that right because the defendant has the opportunity to present his or her case again. A remittitur order is different. Under the old standard where an appeal was prohibited until the conclusion of the second trial, a plaintiff could be persuaded into accepting the remittitur and so end the litigation. This option allowed the trial judge to substitute his decision on damages for the jury's decision. As such, judicial concern about protecting the right to trial by jury best explains the different standards of review for remittitur orders and new trial orders.

The court failed to explain, however, why a trial judge's firsthand observations of the proceedings matter more when reviewing a new trial order than when reviewing a remittitur order. *Rhein* explained that an abuse of discretion standard was appropriate because a trial judge is better positioned to observe the demeanor of witnesses and hear evidence firsthand.¹¹⁵ Indeed, the trial judge is better positioned than an appellate court to observe demeanor and hear evidence in a remittitur case as well. Despite this, the court adopted a different standard without offering an explanation for why firsthand knowledge was less important.

The decision in *Allsup's* also raises the question of how New Mexico courts will treat future cases that involve motions for additur. Additur is the opposite of remittitur. It is an order by which a court offers the defendant the option of either consenting to a higher award of damages or undergoing a new trial.¹¹⁶ Although additur has been declared unconstitutional in the federal court system,¹¹⁷ the procedure remains permissible under New Mexico law.¹¹⁸

In the past, appellate courts have reviewed the propriety of additur orders by examining the evidence on damages in the light most favorable to upholding the judgment.¹¹⁹ Such deference to the decision of the trial judge directly conflicts with the rationale underlying *Allsup's*, where the New Mexico Supreme Court sought to protect the constitutional right to trial by jury by making it more difficult for judges

114. See *Bender v. City of New York*, 78 F.3d 787 (2d Cir. 1996); *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982).

115. *Rhein*, 122 N.M. at 651, 930 P.2d at 788.

116. *Jehl v. Southern Pacific Company*, 427 P.2d 988 (Cal. 1967).

117. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

118. See *Baxter v. Gannaway*, 113 N.M. 45, 822 P.2d 1128 (Ct. App. 1991).

119. *Id.*

to substitute their judgment for that of a jury. There is no principled reason why courts should review jury verdicts deemed excessive differently from jury verdicts deemed inadequate. Both remittitur orders and additur orders can interfere with the right to trial by jury by giving a court the opportunity to substitute its judgment for that of the jury. Therefore, *Allsup's* provides defendants who contest additur orders in future cases with a strong argument that additur and remittitur should be treated the same and the burden should rest in both types of cases with the party seeking to override the jury's verdict.

Trial judge Susan Conway could have achieved the result she intended by granting North River's motion for a new trial, rather than its motion for a remittitur. *Allsup's* is unusual in that the trial judge's order was clearly intended to leave the plaintiff with no choice but to accept a new trial. Remittitur orders generally reduce a jury's verdict by an amount that will present the plaintiff with a meaningful choice between accepting the remittitur or opting for the new trial. For example, in *Montgomery*, the jury awarded the plaintiff \$5000 and the court remitted \$2000.¹²⁰ Here, the trial judge's order left the plaintiff with no award at all. Thus, the convenience store chain had no reasonable choice but to undergo a new trial.

The New Mexico Supreme Court's decision in *Allsup's* conflicts with a recent trend of cases in which federal and state courts have increased judicial control over punitive damage awards. That trend developed amidst much publicity about extraordinarily high awards of damages.¹²¹ In *BMW of North America, Inc. v. Gore*,¹²² the United States Supreme Court held that although juries deserve considerable flexibility when assessing punitive damages, some awards are so excessive that they violate the Due Process Clause of the Fourteenth Amendment.¹²³ *BMW* held that a person not only deserves fair notice regarding what conduct will subject him or her to punishment, but also deserves notice regarding the severity of the penalty for such conduct.¹²⁴ Thus, the Court set forth a test that lower courts should use to ensure more careful review of jury verdicts awarding punitive damages.¹²⁵

The New Mexico Supreme Court recently imposed a stricter standard for awarding punitive damages in contract cases. In *Paiz v. State Farm Fire and Casualty Co.*, the court stated that punitive damages cannot be predicated on gross negligence, but may only arise from conduct that is malicious, fraudulent, oppressive, or committed recklessly or with wanton disregard for the plaintiff's rights.¹²⁶ In tort law, there is no equivalent case rejecting gross negligence as grounds for punitive damages; however, the New Mexico Supreme Court rewrote

120. 65 N.M. at 107, 332 P.2d at 1027.

121. Daniel M. Weddle, *Insurance Law Annual: A Practitioner's Guide to Litigating Punitive Damages after BMW of North America, Inc. v. Gore*, 47 DRAKE L. REV. 661, 676-77 (1999); See *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Ct. Aug. 18, 1994) (jury awarded plaintiff \$2.9 million after she was severely burned when she spilled coffee purchased at a drive-thru window).

122. 517 U.S. 559 (1996).

123. *BMW*, 517 U.S. at 568.

124. *Id.* at 574.

125. *Id.*

126. 118 N.M. 203, 211, 880 P.2d 300, 308 (1994). The court explained that punitive damages serve the limited purpose of punishing and deterring certain conduct, and, therefore, may only be awarded based on evidence of a culpable mental state.

the Uniform Jury Instructions to exclude gross negligence as a ground for punitive damages in tort cases.¹²⁷

Allsup's conflicts with the general trend favoring greater judicial control over awards of punitive damages. In *BMW*, the Court reversed a jury's award of damages because it was so excessive that the award violated the United States Constitution. In *Paiz*, the court reversed a jury's award of punitive damages because it held that such damages were inappropriate in cases of grossly negligent conduct. Unlike those cases, *Allsup's* decreases the power of courts to interfere with jury verdicts by placing the burden on defendants to justify remittitur orders. The *Allsup's* opinion reinstated the jury's verdict because North River could not meet this heavy burden. Thus, *Allsup's* runs counter to the trend of increased judicial control over awards of punitive damages.

Although *Allsup's* made a positive change in New Mexico law, the decision also raises questions about whether the court acted properly when it decided to hear the case. The New Mexico Supreme Court heard this case because *Allsup's* appealed an order by the trial judge that granted North River's motion for a remittitur.¹²⁸ *Allsup's* argued that the ambiguously worded order violated the constitution because it did not offer the party a choice between accepting the remittitur or accepting a new trial.¹²⁹ At the time that the Supreme Court accepted the case, it was well established in New Mexico case law that remittitur orders were not final judgments, and as a result were unappealable.¹³⁰ Indeed, the Court stated, "*Allsup's* appeal initially appeared not to be accommodated by our case law and appellate rules."¹³¹ Nevertheless, the Court heard *Allsup's* appeal and radically changed remittitur procedure in New Mexico.

North River raised a good argument that the Court should have denied *Allsup's* appeal. The trial court obviously intended the remittitur order to provide *Allsup's* with a choice, at least theoretically, between accepting or rejecting the new trial even though it did not make its intention very clear. The court indeed determined that "[t]he [trial] court exercising its discretionary power, albeit ambiguously, offered *Allsup's* the option of remitting part of the award or accepting a new trial."¹³² Consequently, if the court only considered the issue raised on appeal, *i.e.*, whether Judge Conway issued a unilateral remittitur, *Allsup's* appeal could have been denied. As North River suggested in its answer brief, the court could have remanded the case to the trial court with clear instructions to offer *Allsup's* a choice between accepting the remittitur or receiving a new trial.¹³³ Doing so would have satisfied the choice requirement while avoiding the complex issue of whether remittitur procedure in New Mexico violated the state constitution.

127. N.M. U.J.I. Civ. 13-1718.

128. *Allsup's*, 127 N.M. at 6, 976 P.2d at 6.

129. Appellant's Brief-In-Chief at 9, *Allsup's Convenience Stores, Inc. v. North River Ins. Co.*, 976 P.2d 1 (N.M. 1998) (No. 22621).

130. *Nally v. Texas Arizona Motor Freight, Inc.*, 67 N.M. 153, 353 P.2d 678 (1960).

131. *Allsup's*, 127 N.M. at 6, 976 P.2d at 6.

132. *Id.*

133. Appellee's Answer Brief at 5, *Allsup's Convenience Stores, Inc. v. North River Ins. Co.* 976 P.2d 1 (N.M. 1998) (No. 22621).

V. CONCLUSION

Allsup's made a significant change in New Mexico remittitur procedure that protects the appropriate balance of power between judges and juries. The court's decision ensures that trial courts can only use a remittitur order to override a jury verdict when the judge can articulate good reasons. As a result, the court's decision will probably lead most defendants to file motions for a new trial, rather than motions for a remittitur, when they believe that a jury awarded excessive damages.