THE COST OF PERFECTION: AN ANALYSIS OF *DIETZ V. BOULDIN*

DANE M. LEPOLA†

I. INTRODUCTION

One rotten apple may spoil the whole bushel. However, does one mistake, in regard to a jury guaranteed by the Seventh Amendment of the United States Constitution,[1] spoil the entire trial? The United States Supreme Court answered this question in *Dietz v. Bouldin*.[2] The Supreme Court held that a United States District Court has the limited power to re-

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1. The Seventh Amendment guarantees, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII.

2. Dietz v. Bouldin, 136 S. Ct. 1885 (2016).

empanel a jury if a number of factors are met.[3] In coming to this decision, the Court relied on modern trial practice and the Federal Rules of Civil Procedure.[4]

In the past, re-empanelment would not have been an option.[5] Any simple error in the trial, at common law, would require a completely new trial.[6] But things have changed and this Note will argue that modern trial practice has moved away from this non-error standard, and replaced it with the harmless error standard codified in Federal Rule of Civil Procedure 61.[7] The harmless error standard states that an error is not grounds for a new trial unless that error substantially impacted one of the party's rights or the outcome of the case.[8] The purpose of the Federal Rules of Civil Procedure is to secure a "just, speedy, and inexpensive" resolution to each dispute.[9] The expense reduction aspect of Rule 1 of the Federal Rules of Civil Procedure, which provides that the Rules should be employed to secure an inexpensive determination of all federal actions and proceedings, has become even more relevant in recent years, considering the increased costs of civil litigation.[10]

After reviewing both the majority[11] and dissenting[12] opinions in *Dietz*, this Note will discuss how the increased costs of civil litigation, coupled with Rule 1 of the Federal Rules of Civil Procedure, has changed a number of aspects of the American civil litigation system,[13] the latest of which is the United States Supreme Court's approval of jury re-empanelment in civil trials.[14]

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3. *Id.* at 1890.
4. *Id.* at 1892, 1895–96.
5. *Id.* at 1895.
6. *Id.*
7. *See infra* Section II(B)(2).
8. FED. R. CIV. P. 61. Rule 61 states in part that "[a]t every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." *Id.*
9. FED. R. CIV. P. 1.
10. *See infra* Part III (B). *See generally* Emery G. Lee, III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 770 (2010).
11. *See infra* Part II (B)(1).
12. *See infra* Part II (B)(2).
13. *See infra* Part III (B).
14. *See infra* Part III (A).

II. BACKGROUND

A. Development of Civil Litigation and the Right to a Trial by Jury

Parties have enjoyed the right to a civil trial by jury since the founding of the United States.[15] The Seventh Amendment to the United States Constitution states, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[16] In *Parklane Hosiery Co. v. Shore*, the Supreme Court held "[t]he thrust of the Seventh Amendment is to preserve the right to jury trial as it existed in 1791."[17] Although keeping the right to a trial by jury the same as it was in 1791 may have been the Supreme Court's intention when it decided *Parklane*, the Court's intention has since changed, as exemplified by its decision in *Dietz v. Bouldin*.[18]

As litigation became more expensive, the Federal Rules of Civil Procedure helped simplify procedure for judges and attorneys and to protect diligent litigants right to their day in court.[19] Rule 1 provides that the rules should be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."[20] Courts generally agree that this Rule entitles litigants to a fair trial, but not a perfect one.[21] Additionally, the Advisory Committee has amended the Federal Rules a number of times in recent years, especially the rules relating to discovery,[22] in an attempt to reduce costs.[23] Therefore, the Seventh Amendment calls for a trial by jury, but Rule 1 allows for a lack of perfection.[24]

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15. U.S. CONST. amend. VII.

16. *Id.*

17. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 333 (1979) (quoting Curtis v. Loether, 415 U.S. 189, 193 (1974)).

18. Dietz v. Bouldin, 136 S. Ct. 1885 (2016).

19. New Amsterdam Cas. Co. v. Waller, 323 F.2d 20, 25 (4th Cir. 1963).

20. FED R. CIV. P. 1.

21. Boe v. Lane & Co., Inc., 428 F. Supp. 1179, 1183 (E.D. La. 1977). In *Boe* the court held that a new trial was not required when defendant's counsel asked the plaintiff an improper question regarding compensation and the plaintiff answered the question before his counsel could object. *Id.* at 1180. The court held that the answer did not "so taint[] the assessment of damages that the court should order a new trial." *Id.*

22. *See infra* Part III(B). *See generally* FED. R. CIV. P. 26.

23. The increase in litigation costs have also led to a number of other changes in federal litigation that attempt "to keep litigation costs under control." *See* Jay Tidmarsh, *The Litigation Budget*, 68 VAND. L. REV. 855, 858 (2015). The Federal Rules of Civil Procedure have been amended a number of times over the past 35 years in an attempt to "limit[] discovery and enhanc[e] judicial power to manage litigation." *Id.* at 858 n.8. These amendments have focused on limiting discovery and encouraging judicial

In addition to Rule 1, Rule 61 also guides jury re-empanelment.[25] Rule 61, which governs harmless errors, states that "[u]nless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is grounds for granting a new trial, setting aside a verdict . . . ."[26] In other words, under the Federal Rules of Civil Procedure, if an error is not significant enough to affect or distort the outcome of the case, the court must ignore that error.[27] The idea of a harmless error is a relatively new concept.[28] In the past, any mistake or error, no matter how small or meaningless, would "taint" the jury and cause its dismissal.[29] The Rule 61 harmless error doctrine replaced the no error doctrine[30] and the Supreme Court further modified the current practice in *Dietz v. Bouldin*.[31]

B. Dietz v. Bouldin *and the Resulting Changes to a Trial by Jury*

In *Dietz v. Bouldin*, the Supreme Court held that there was no blanket ban on recalling a civil jury after discharge.[32] In *Dietz*, the trial court judge mistakenly released a jury after it had returned an impermissible verdict.[33] Within moments, the judge realized the mistake and ordered the jurors brought back to the courtroom.[34] The judge determined that the jury was not tainted, and as a result, he ordered them

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supervision of the discovery process. *Id.* (quoting Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1850 (2014)).

24. In addition, the United States Supreme Court has also attempted to reform the Federal Litigation System to reduce costs. *See* Ashcraft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). *Twombly* "imposed a 'requirement of plausibility' [standards] on complaints filed in federal court." Tidmarsh, *supra* note 23, at 857 (internal citations omitted). This standard was clarified in *Iqbal* when the Court created an analysis to be used to determine if the complaint was plausible. *Id.* at 857 n.7.

25. FED R. CIV. P. 61 (Rule 61 requires that a harmless error during the course of the proceeding be ignored).

26. *Id.*

27. *E.g.*, Virginia-Carolina Tie & Wood Co. v. Dunbar, 106 F.2d 383, 387 (4th Cir. 1939). In this case, the Fourth Circuit held that a new trial was not necessary when the trial judge struck testimony from the record. *Id.* The Fourth Circuit held that the judge was properly using his discretion, and that even if he was not "the testimony was [not] of sufficient importance to have affected the result." *Id.*

28. Rule 61, along with the rest of the Federal Rules of Civil Procedure were adopted 80 years ago, in 1937. FED. R. CIV. P. 61, advisory committee's notes.

29. Dietz v. Bouldin, 136 S. Ct. 1885, 1894 (2016).

30. *Id.*

31. *Id.* at 1896. The Court notes that jury practice today is not as strict as it was during the common law period.

32. *Id.* at 1897.

33. *Id.* at 1890.

34. *Id.*

to continue deliberation in an attempt to save the money expended on the trial.[35] Rocky Dietz appealed this decision, arguing that a federal district court did not have the power to re-empanel a previously dismissed jury.[36]

Dietz v. Bouldin stemmed from an automobile accident where Hillary Bouldin ran a red light and hit petitioner Rocky Dietz's car.[37] Dietz brought suit and Bouldin removed the case to federal court.[38] At trial the parties stipulated that Dietz's medical expenses of $10,136 were reasonable as a result of the injury.[39] As a result, the issue at trial became whether Dietz could receive damages over the $10,136 stipulated by the parties.[40]

During deliberation, the jurors sent a note to the judge asking if Dietz's medical expenses were already paid and, if so, who paid them.[41] After discussion with the attorneys, the judge stated that he was unsure if the jurors understood that their verdict could not be less than the stipulated amount of $10,136,[42] and after a discussion with both parties, the judge told the jury that the information was not relevant.[43] After continued deliberation, the jury returned a verdict for Dietz, but they awarded him zero dollars in damages.[44] The judge received the verdict, thanked the jurors for their service, and dismissed them.[45] Moments later the judge realized the mistake and ordered the clerk to bring the jury back.[46] The clerk stopped the jurors and brought them back into the courtroom.[47] Only one member of the jury left the building.[48]

The judge then explained to counsel what had occurred and discussed the possible solutions. The options were to either re-empanel the jurors or order a new trial.[49] Dietz's counsel objected to re-empaneling the jurors, arguing that they were not "capable of returning a fair and impartial verdict" but the judge disagreed, stating that "he would 'hate to just throw away the money and time that's been expended in this

35. *Id.*
36. *Id.* at 1891.
37. *Id.* at 1890.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*

trial.'"[50] After questioning the jurors to confirm that they had not talked with anyone about the case, the judge explained the mistake and ordered them to continue deliberation.[51] A day later, the jury returned a verdict in Dietz's favor, awarding him $15,000.[52] Dietz appealed based on the re-empanelment, but the Ninth Circuit affirmed the district court's holding.[53] Dietz then appealed the district court's ruling to the Supreme Court, and the Court granted certiorari.[54]

1. The Majority Opinion

After hearing the case, the Supreme Court affirmed the district court's decision to re-empanel the jury in a majority opinion written by Justice Sotomayor.[55] The Court recognized that the Federal Rules of Civil Procedure are not the only place where a federal court derives its power.[56] The Court stated that district courts possess "inherent powers that are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'"[57] Therefore, even though there is no rule regarding the re-empaneling of a jury, it is still acceptable under the broad stroke of authority encompassed in Rule 1.[58]

Although the Court reaffirmed a district court's inherent powers, it put forward a number of factors that a district court must consider when deciding whether to recall a jury.[59] These factors include: (1) "the length of delay between discharge and recall," (2) "whether the jurors have spoken to anyone about the case after discharge," and (3) "the reaction to the verdict."[60] Further, a court must consider the extent to which the "jurors accessed their smartphones or the internet, which provide other avenues for potential prejudice."[61]

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50. *Id.* at 1891 (quotation in original).
51. *Id.*
52. *Id.*
53. Dietz v. Bouldin, 794 F.3d 1093 (9th Cir. 2015).
54. *Dietz*, 136 S. Ct. at 1896.
55. This opinion was joined by Roberts, C.J., and Ginsburg, Breyer, Alito, and Kagan, J.J. *Id.* at 1888.
56. *Id.* at 1891.
57. *Id.* (quoting Link v. Wabash R. Co., 370 U.S. 626, 630–31 (1962)).
58. *Id.*
59. *Id.* at 1894.
60. *Id.*
61. *Id.* at 1895. For a detailed discussion of the effect that technology such as the internet and smartphones has on the jury system, see Michael R. Kon, *iJury: The Emerging Role of Electronic Communication Devices in the Courtroom*, 57 WAYNE L. REV. 291 (2011).

The Court focused on the length of time between discharge and recall because the greater the time between these two events, the greater the chance a juror's impartiality becomes tainted.[62] As time goes on the jurors may forget facts or other aspects of the case.[63] Additionally, a greater time between discharge and recall will allow for an increased chance of prejudice and outside influence tainting the jury.[64] The Court did not give a specific cut-off time for when it would be improper to recall a jury. Instead, it stated that it is up "to the discretion of the district court" with the caveat that the time could, in certain instances, only be a few moments.[65] Although there is no bright line cut off time, a district court must consider the length of time between discharge and recall when determining if a jury can be re-empaneled.

The Court next focused on whether the dismissed jurors communicated with anyone about the case.[66] The concern is that an outside conversation could sway the jurors' opinion and taint the purity of the decision-making process.[67] According to the majority, even a comment such as "good job" or "nice work" from the court clerk or one of the attorneys could taint a juror, and make him unable to make a fair and impartial decision if recalled in the future.[68]

According to *Dietz*, the third factor a reviewing court must consider is the reaction to the verdict.[69] Specifically, the Court was concerned with reactions that occur within the courtroom, such as gasps, crying, or cheering.[70] These types of reactions are common both in the courtroom as a verdict is read and outside the courtroom after the jury is released.[71] The Court expressed concern that reactions could cause individual jurors to begin to question their decision.[72] Although not specifically noted by the Court, yelling by a plaintiff who had lost the use of her legs, or even worse a young child as the result of a car accident, could tug at the heart strings of a juror and cause him to feel as if he made the wrong decision.[73] If the trial court recalled that juror, he may remember the

62. *Dietz*, 136 S. Ct. at 1894.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. This is an author-made hypothetical that follows the Court's concern about the effect of an emotional reaction by a member of the courtroom gallery or even a party to the case who is in the courtroom.

reaction by the injured victim, which could have an effect on his decision-making process.[74] This emotion could play a role in the juror's decision making, which would take away its purity.[75]

Finally, the Supreme Court suggested that a court should also question jurors about the extent to which they had access to smartphones, the internet, or any other form of technology that could possibly provide prejudice.[76] In other words, when determining whether re-empaneling is appropriate, the court must consider the influence something online could have had on the juror.[77] According to the majority opinion, examples of something that could cause influence include checking Twitter or receiving a text message about the verdict from a friend.[78] If a juror were to see a "re-tweet" of a news article discussing how upset the plaintiff was with the verdict, or the harm that the verdict caused to the defendant, this could pose a threat to the juror's "purity" if he were re-empaneled.[79]

While the Supreme Court discussed these factors specifically, Justice Sotomayor was very clear that this was not an all-inclusive list.[80] The Court stated that when deciding whether to re-empanel a jury, a trial court must consider all relevant factors, but does not even imply what the other factors could or should include.[81] It is unknown what the Court had in mind when it described these other relevant factors, but it can be assumed that as the process of re-empaneling juries develops, the Court will discuss and debate these additional unnamed factors in detail.[82]

In *Dietz*, the Court analyzed the aforementioned factors and concluded that the district court did not abuse its discretion when it rescinded the discharge order and re-empaneled the jury.[83] The Court found that the jurors were only dismissed for a few minutes, no juror

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74. Continuation of the aforementioned hypothetical.

75. *Dietz*, 136 S. Ct. at 1894–95. "[A] judge should be reluctant to reempanel a jury that has witnessed emotional reactions to its verdict." *Id.*

76. *Id.* at 1895.

77. *Id.*

78. *Id.*

79. *See generally id.* The Court states that "prejudice can come through a whisper or a byte." *Id.* In other words, talking to members of the gallery or other people is one form of produce and reading information or possibly even getting emails or text messages from third-parties about the case is another form of prejudice that could have an effect on the jury's impartiality.

80. The Court specifically states that the ability to re-empanel is only available in civil cases and should never be used with a jury in a criminal proceeding. *Id.*

81. *Id.*

82. Factors such as the time the jury took to reach the verdict or if there was any difficulty reaching the verdict are possible things that courts in the future will need to consider before re-empaneling a jury.

83. *Dietz*, 136 S. Ct. at 1895.

spoke with anyone about the case, there were no emotional reactions or outcries in the courtroom when during the announcement of the verdict, and there was no use of technology that could have tainted the jury.[84]

2. Justice Thomas' Dissent

Although a majority of the Court agreed that these factors are an acceptable way to determine if a jury can be re-empaneled, two Justices disagreed and dissented.[85] Justice Thomas came to the conclusion that once a jury is dismissed it cannot be re-empaneled, and as a result he would have reversed the Ninth Circuit and remanded the case for a new trial.[86] Justice Thomas looked to the common law and the rule that once a jury is dismissed and broken apart, recalling it to amend or change the verdict is impermissible.[87] Justice Thomas stated that "[t]he theory underpinning this rule was simple: Jurors, as the judges of fact, must avoid the possibility of prejudice."[88]

Justice Thomas noted that even though jurors are no longer sequestered during the trial as they were at common law, partaking in improper communication with the parties or judge to find outside information regarding the case is forbidden.[89] His biggest concern was that after a jury is dismissed, and the rules governing the individual jurors are no longer in place, impartiality could be lost and a juror could become biased.[90] For example, a juror could talk to one of the parties about the case, overhear someone discussing the verdict, or simply search a legal term or concept on the internet. Justice Thomas expressed that this contact, however minimal, would affect a juror's ability to make an impartial decision based only on the evidence and facts of the case.[91]

Further, Justice Thomas argued that although the Court has created the four-factor test for determining whether it is appropriate to re-empanel a jury, it lacks clarity and guidance for district courts.[92] According to Justice Thomas, the problem is the lack of certainty.[93] For example, the dissent discussed time, noting that the majority opinion

84. *Id.*
85. *Id.* at 1897 (Thomas, J., dissenting, joined by Kennedy, J.).
86. *Id.* at 1899. The majority describes the idea that once a jury has been broken it cannot be re-empaneled—the "'Humpty Dumpty' theory of the jury." *Id.* at 1896.
87. *Id.* at 1897.
88. *Id.*
89. *Id.* at 1898.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*

requires a district court to look at time, but there is no specific time guidance; it is unknown what "too long" means.[94] Justice Thomas admitted that a bright line rule would have its drawbacks, and that there may be some inconveniences with granting a new trial, but the new trial will ensure confidence in the verdict and the jury system as a whole.[95] Justice Thomas acknowledged that there are downfalls of ordering a complete new trial,[96] admitting that the new trial may be inconvenient.[97] However in the long run he believes that having a trial and verdict completely free from outside influence or "contamination" is more important that convenience or efficiency.[98] In other words, the purity of the process is the most important aspect of trial.

The majority responded to this argument by pointing to modern trial practice.[99] At common law, any mistake during a jury trial would require a completely new trial with a completely new jury, but the harmless error standard set forth in Rule 61 replaced this concept.[100] Further, the majority noted that modern trial practice has also affected the lives of jurors during trial.[101] For example, jurors are no longer sequestered during the entirety of the trial, and can go home to their families at night.[102] As a result of these changes, the majority of the Court concluded that modern trial practice has limited the relevance of common law practices and procedures when determining if a trial judge has the power to recall a recently discharged civil jury.[103]

C. The Cost of a New Trial

Another issue that the district court judge considered when deciding whether to re-empanel the jury was the cost of trial.[104] The judge stated "that he would 'hate to just throw away the money and time that's been expended in [the] trial.'"[105] If the judge were to grant a new trial, the amount of money wasted would be no small sum. The average civil trial, including discovery and other litigation expenses, costs around $15,000

94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 1895.
100. *Id.* (citing *Kolteakos v. United States*, 328 U.S. 750, 758, 760 (1946)).
101. *Id.* at 1895–96.
102. *Id.*
103. *Id.*
104. *Id.* at 1891.
105. *Id.* (quoting the trial judge).

for plaintiffs and $20,000 for defendants.[106] Thus, using this average, a new trial would have cost Mr. Dietz $30,000 and Mr. Bouldin $40,000[107] to litigate a case that ended in an award of damages totaling $15,000.[108] In other words, the estimated cost of re-doing the *Dietz* trial would cost each party at least double what the jury ended up awarding the plaintiff. The *Dietz* decision tipped the balance away from common law trial practices and towards modern trial practices and the general guidelines of the Federal Rules of Civil Procedure. At common law a jury trial had to be perfect no matter the cost, but that is no longer the case.[109] Today a trial need not be perfect, just fair.[110]

III. ANALYSIS

The increase in litigation costs has resulted in a number of changes to the federal litigation system.[111] These changes have tended to focus on the pretrial aspect of litigation,[112] but *Dietz* has expanded this cost saving focus to trial.[113] Although these cost saving initiatives may erode the "purity" of a trial, they are necessary changes that are a result of the ever-increasing cost of litigation in the American judicial system. Although somewhat difficult to measure,[114] the median cost of litigation is $15,000 for plaintiffs and $20,000 for defendants.[115] Litigation costs have continued to rise as the years go on. In 2000, Fortune 200 Companies spent $66 million on outside litigation.[116] By 2008 this figure

106. Lee & Willging, *supra* note 10, at 770. This cost estimate includes attorney's fees and is for cases with discovery.

107. It is better to focus on Mr. Boldin's cost, considering Mr. Dietz may have been willing to pay for the second trial if he thought that the jury would award him a larger verdict.

108. *Dietz*, 136 S. Ct. at 1891.

109. Boe v. Lane & Co., Inc., 428 F. Supp. 1179, 1183 (E.D. La. 1977).

110. *Id.*

111. Tidmarsh, *supra* note 23, at 858.

112. *See supra* notes 23–24 and accompanying text.

113. *See Dietz*, 136 S. Ct at 1893. In consideration of costs, the Court notes that "recall can save the parties, the court, and society the costly time and litigation expense of conducting a new trial with a new set of jurors." *Id.*

114. "The empirical evidence for out-of-control costs is limited." Lee & Willging, *supra* note 10, at 770. In other words, it is difficult say with exact certainty how much litigation costs have risen in recent years. The figures used throughout this Note are general estimates that serve the purpose of adding numeric value to analysis.

115. *Id.* Although these are just averages, the authors note that "half of plaintiffs' attorneys reported costs under $15,000, and half of defendants' attorneys reported costs under $20,000." *Id.*

116. *Id.* (internal citations omitted).

increased to roughly $115 million.[117] This represents a $49 million increase in just eight years.[118]

Assuming the costs of litigation continue to rise, the struggle between keeping costs manageable under Rule 1 of the Federal Rules of Civil Procedure and allowing a litigant to exercise his Seventh Amendment right to trial will increase.[119] As noted above, a new trial would have been required to remedy the situation in *Dietz* at common law.[120] Using averages, the cost to retry this case would have been $35,000.[121] Spending this much money to retry a case that resulted in a verdict of $15,000,[122] would be nothing more than a waste, especially when considering only one juror even left the courthouse.[123]

A. The Four-Factor Test Created by the Court Protects a Litigant's Right to a Fair Trial

The goal of the federal judiciary, as set forth in Rule 1 is "to secure the just, speedy, and inexpensive determination of every action and proceeding."[124] This case presented a conflict between the "just" aspect of Rule 1 and the "inexpensive" aspect. The Supreme Court followed Rule 1, along with Rule 61,[125] by establishing the multi-factor test for re-empaneling a jury in attempt to balance these interests.[126] This case does not represent a blanket affirmation of all jury re-empaneling; rather, it allows a judge to re-empanel only when she has considered the time between discharge and recall, if the jurors have discussed the case with anyone, whether there was any form of reaction to the verdict in the courtroom, and finally the amount of access the recently discharged

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117. *Id.*

118. $115 million - $66 million = $49 million. Even if some of these costs were due to inflation or other reasons, a $49 million increase in six years is still a major increase.

119. *See supra* notes 112–15.

120. Dietz v. Bouldin, 136 S. Ct. 1885, 1895 (2016).

121. *See supra* notes 111, 113–15. The $35,000 sum comes from combining the average $15,000 spent by plaintiffs and $20,000 spent by defendants. The real cost in this case could be very different. Further, this is a high estimate. The discovery and pretrial preparations have been completed, but still the cost would be much greater than if the jury was simply re-empaneled.

122. *Dietz*, 136 S. Ct. at 1890.

123. *Id.* at 1891. Some may argue that allowing both parties to agree to the re-empanelment could be beneficial, but one can imagine that the losing party will almost always oppose re-empanelment, considering that jury has already found in the other party's favor.

124. FED. R. CIV. P. 1.

125. Rule 61 requires a court to "disregard all errors and defects that do not affect any party's substantial rights." FED. R. CIV. P. 61.

126. *See supra* note 58 and accompanying text.

jurors had to the internet or other forms of modern technology.[127] The benefits behind these factors are two-fold. They protect against wasteful and unnecessary litigation spending[128] while also protecting and preserving a litigant's right to a just and fair trial by jury guaranteed by the Seventh Amendment and Rule 1 of the Federal Rules of Civil Procedure.[129]

1. The Time Between the Jury's Discharge and Recall[130]

Considering the time between the jury's discharge and recall speaks directly to the harmless error doctrine put forth in Rule 61.[131] Under Rule 61, a party's "substantial rights" must be affected before a trial court can grant a new trial.[132] A substantial right is "[a]n essential right that potentially affects the outcome of a lawsuit and is capable of legal enforcement and protection, as distinguished from a mere technical or procedural right."[133] As time goes on the jurors may begin to forget facts or even become prejudiced.[134] Once a juror becomes prejudiced or begins to forget the facts of the case, the party's substantial rights will be affected and as a result the error would no longer be harmless.[135] Because each case must be analyzed individually, the Court does not give a specific time cut off for when a jury can no longer be recalled, rather this discretion is left to the district court.[136] Although it is not expressly stated in the *Dietz* opinion, the Court appears to imply that the district judge is only permitted to recall a jury if the time between discharge and recall only results in a Rule 61 harmless error and not an error that would affect one of the party's substantial rights.[137]

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127. *See supra* note 58 and accompanying text.

128. More specifically, the cost of completely retrying the case.

129. *See supra* notes 9, 15 and accompanying text.

130. Dietz v. Bouldin, 136 S. Ct. 1885, 1894 (2016).

131. *See supra* note 114.

132. Miller v. Greenleaf Orthopedic Assoc.'s, S.C., 827 F.3d 569, 575 (7th Cir. 2016); *see also* Keepers, Inc. v. City of Milford, 807 F.3d 24, 37 (2nd Cir. 2015).

133. *Right*, BLACK'S LAW DICTIONARY (10th ed. 2014).

134. *Dietz*, 136 S. Ct. at 1894.

135. *Id.* at 1893. The Court is very careful to thoroughly note that "[t]he inherent power to rescind a discharge order and recall a dismissed jury . . . must be *carefully* circumscribed, especially in light of the *guarantee of an impartial jury* that is vital to the fair administration of justice." *Id.* (emphasis added).

136. *See supra* notes 60, 62–65 and accompanying text.

137. *Dietz*, 136 S. Ct. at 1894.

2. Have the Jurors Discussed the Case with Anyone?[138]

The next factor a district court must consider is whether the jurors have discussed the case with anyone after discharge.[139] If a juror were to discuss the case with someone he may reconsider his decision[140] or become partial, which would cause the parties to lose an impartial jury, a right guaranteed by the Seventh Amendment.[141] If a juror were not impartial, the entire purpose of a trial would become "illusory."[142] If a single juror lacks impartiality, the idea of a fair trial would be eviscerated.[143]

There are a number of reasons for preventing jurors from discussing the case with outsiders before the end of trial.[144] These reasons include: keeping deliberations confidential, preventing notions of an unfair fair trial with without due process, and preventing third party influence on the jurors' decision making.[145] Any juror communication with third parties after the verdict would allow these factors to come into play, and the result would be similar to a juror discussing the case with a third party before reaching the verdict.[146] By requiring the district judge to determine if the juror discussed the case with anyone after the verdict was announced, the Supreme Court has increased the protection against a biased jury, and also furthered the protection of the litigant's Seventh Amendment right.[147]

3. The Reaction as the Verdict was Read in Court[148]

Trials can be highly stressful and emotional situations, and this emotion can arise when the jury announces its verdict.[149] These reactions

138. *See supra* notes 68–70 and accompanying text.

139. *Dietz*, 136 S. Ct. at 1894.

140. *Id.*

141. Skaggs v. Otis Elevator Co., 164 F.3d 511, 514–515 (10th Cir. 1998). The court in *Skaggs* held that "[a]lthough the Seventh Amendment does not contain language . . . which specifically guarantees a criminal defendant the right to an 'impartial jury,' the right to a jury in a civil case would be illusory unless it encompassed the right to an impartial jury." *Id.* An impartial jury has as much worth as a car without an engine.

142. *Id.*

143. *See generally id.*

144. Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. COLO. L. REV. 409, 428–33 (2012).

145. *Id.*

146. *See generally id.* (again considering the reasons that courts do not want jurors communicating with anyone before the verdict is reached).

147. *See supra* notes 141–42; *see also Dietz v. Bouldin*, 136 S. Ct. 1885, 1894 (2016).

148. *See supra* notes 69–74 and accompanying text.

149. *Dietz*, 136 S. Ct. at 1894.

can take many forms, such as cheering, yelling, crying, or other vocal expressions released by members of the courtroom gallery or even by members of the public in the halls outside the courtroom.[150] There are numerous news reports and videos that show many different types of reactions by litigants, victims, people in the courtroom, or family members of the parties.[151] As the Supreme Court notes, witnessing an outburst such as this could taint the jurors impartiality, and cause him to question his decision and possibly ask himself if he made the right call.[152] An impartial jury is a key to the Seventh Amendment.[153] The Court again protects the right to an impartial jury by considering the reaction in the courtroom.[154] The Seventh Amendment grants the right to an impartial jury to all civil litigants,[155] and the Supreme Court has protected this right by requiring the judge to consider any courtroom reaction when deciding whether to re-empanel a dismissed jury that has been dismissed.[156]

4. Did the Juror Access the Internet?

The final factor that a court must consider when deciding whether it should re-empanel a jury is the amount of cellphone and internet access that the jurors may have had.[157] At the beginning of trial, jurors are instructed not to do any research or try to learn anything about the case.[158] Jurors are further instructed not to use any electronic devices to

150. *Id.*; *see also* WTVC News Channel 9, *Courtroom Chaos After Guilty Verdict in Murder Trial*, YouTube (Jan. 21, 2014), https://www.youtube.com/watch?v=xBVkjwM3hXU. The emotional outpouring and reaction is seen very clearly in this video, and the effect that this would have on a jurors' impartiality and ability to decide based only on the facts of the case can be considered. *Id.*

151. *See supra* note 150.

152. *Dietz*, 136 S. Ct. at 1894.

153. *See* Skaggs v. Otis Elevator Co., 164 F.3d 511, 514–515 (10th Cir. 1998); *see also* McCoy v. Goldston, 652 F.2d 654, 657 (6th Cir. 1981) ("The right to an impartial jury in civil cases is inherent in the Seventh Amendment's preservation of a right to trial by jury."); Scott W. Howe, *Juror Neutrality or an Impartiality Array? A Structural Theory of the Impartial Jury Mandate.* 70 NOTRE DAME L. REV. 1173, 1219 (1995) (arguing that the constitutional due process requirement mandates an impartial jury always, not just in the Sixth Amendment context of a criminal trial).

154. *Dietz*, 136 S. Ct. at 1894.

155. *See supra* note 153 and accompanying text.

156. *Dietz*, 136 S. Ct. at 1894–95 ("a judge should be reluctant to re-empanel a jury that has witnessed emotional reactions to its verdict").

157. *See supra* notes 74–76.

158. KEVIN F. O'MALLEY, ET AL., FED. JURY PRACTICE & INSTRUCTIONS §101:13 (6th ed. 2016) (citing *As Jurors Go Online, U.S. Trials Go Off Track*, REUTERS (Dec. 8, 2010), http://www.reuters.com/article/2010/12/08/us-internet-jurorsidUSTRE6B74Z820101208).

communicate with anyone about the case or through social media sites such as Facebook, Twitter, or LinkedIn.[159] Keeping jurors from researching the case during the trial is a challenge.[160] As technology has improved and become readily available, the number of challenged verdicts has increased as well.[161] According to a survey by Reuters, there have been at least ninety verdicts challenged because of juror misconduct relating to internet usage since 1999, and of these ninety challenged verdicts, over half have taken place between 2008 and 2010.[162]

After a trial ends the jurors are discharged and are no longer under the court's control.[163] Further they are no longer forbidden from discussing the case with others or coming into contact with information that may prejudice them.[164] After dismissal, a juror can do his own investigation by driving past the site of the accident, researching the case or laws regarding it, or even checking on social media or news websites to see if there is any reaction to the trial or verdict.[165] Any one of these actions could lead to prejudice.

The Court in *Dietz* was concerned with prejudice that comes from a juror using the internet to research the case or using a cellphone to talk to someone about the case.[166] This prejudice can lead to a lack of impartiality, which in turn would lead to a Seventh Amendment violation.[167] By requiring a judge to consider the internet usage and contact with others that a juror may have come across, the Supreme Court has again insured protection of a litigant's Seventh Amendment rights to a trial by jury.[168]

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159. *Id.*

160. *See generally* J. Brad Reich, *Inexorable Intertwinement: The Internet and the American Jury System*, 51 IDAHO L. REV. 389, 398–400 (2015).

161. Apple, Inc. released its first-generation iPhone in 2007. Kim Hart, *Hype Meets Reality at iPhone's Debut*, WASH. POST, June 30, 2007, at D1. The number of verdicts that had to be thrown out because of juror internet usage sharply increased the following year. *Supra* note 160, at 398–400.

162. *Supra* note 160, at 393

163. Dietz v. Bouldin, 136 S. Ct. 1885, 1895 (2016).

164. *Id.*

165. *See generally id.* The Court notes that after the trial has concluded a juror could send a text message to a spouse regarding the outcome, or use Google to research the case, or even look at reactions to the case on social media. *Id.*

166. *Id.* Discussing the case is not the only thing a cellphone could be used for in today's technologically advanced world. As has already been noted, a juror could use her cellphone to access Google and research the case, or even write, blog, or post about her experience.

167. *See supra* notes 141, 150 and accompanying text (discussing how a reaction in the courtroom could take away a juror's impartiality).

168. *See supra* notes 141, 150 and accompanying text (discussing how a reaction in the courtroom could take away a juror's impartiality).

As noted above, Justice Thomas does not believe that the Court has done enough to protect a litigant's Seventh Amendment rights.[169] He believes that this multi-factor test will lead to an increase in litigation,[170] which will lead to an increase in cost.[171] Thus, for Justice Thomas, the best way to protect the Seventh Amendment is to leave it as it is. Per the majority, this is not the desired approach.[172] If the trial court can both fix the error and guarantee both parties a fair jury by following the four aforementioned factors, the cost savings gained by avoiding a new trial outweighs the harm that could possibly come to either party.

B. These Factors Allow for the Protection of a Litigant's Rights in a Cost-Effective Way

Litigation is a costly endeavor.[173] With average litigation costs exceeding $10,000 per party,[174] the United States Supreme Court has worked to keep costs at a manageable level by requiring that a claim be plausible to survive a motion to dismiss.[175] The historical pleading standard put forth in *Twombly* and *Iqbal* led to an increase in the amount of cases dismissed as a result of Rule 12(b)(6) motions.[176]

Aside from dismissals, the number of cases that have settled before going to trial in the post *Twombly* and *Iqbal* litigation system has decreased (albeit a slight decrease).[177] Parties may decide to settle for any number of reasons including cost savings, reduced time in litigation, court efficiency, party satisfaction, and party needs.[178] Although there has not been a drastic change, the Supreme Court's decisions in *Twombly* and *Iqbal* have reduced the number of cases that proceed to trial, which in turn reduces the amount of money spent on litigation.[179] Although not

169. *See supra* Part II(B)(2).

170. Dietz v. Bouldin, 136 S. Ct. 1885, 1898 (2016).

171. *See supra* Part II(C).

172. *Dietz*, 136 S. Ct. at 1896.

173. *See supra* notes 114–18 and accompanying text.

174. *See supra* notes 114–18 and accompanying text.

175. Ashcroft v. Iqbal, 556 U.S. 662, 677–78 (2009); *see also* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

176. Benjamin Sunshine & Victor Abel Pereyra, *Access-to-Justice v. Efficiency: An Empirical Study of Settlement Rates After* Twombly *&* Iqbal, 2015 U. ILL. L. REV. 357, 366–67 (2015).

177. *Id.* at 387. The authors of this article note that there was an increase in the number of settlements, although it was only 1.27% according to this study. *Id.*

178. Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1350 (1994).

179. *See supra* notes 165–66 and accompanying text (showing the increase of Rule 12(b)(6) dismissals and settlements after *Twombly* and *Iqbal*); *see also* Tidmarsh, *supra* note 23, at 858 (describing litigation costs).

in the discovery and pretrial phase, the Court's holding in *Dietz* furthers the goal of cost efficiency by allowing a judge to re-empanel a jury rather than requiring a new trial to take place.[180]

The Federal Rules of Civil Procedure have also furthered the cost saving goal.[181] A well-known cost saving change occurred in 2015 to Rule 26(b), which requires a trial court to limit discovery if it is unreasonable or can be found through a less expensive or less burdensome source.[182] The overuse of discovery is by no means a new problem.[183] During the 1983 changes to Rule 26, section 26(b) was amended to discourage disproportionate or overused discovery.[184] The 2015 changes to the rule are just the most recent step along the path of limiting discovery costs.

Another change was the 2010 amendment to Rule 56(g), which allows a court to order any non-disputed material fact be treated as a fact "established in the case" if it "does not grant all the relief requested by the motion."[185] The 2010 advisory committee notes state that the purpose behind this change is to a allow a court to decide that the expense of determining a factual dispute at the summary judgment (disposition) stage is greater than the cost would be to determine the issue in other ways, such as trial.[186] In other words, Rule 56 allows the trial court to partake in a cost-benefit analysis when determining a factual dispute and/or when the trier of fact should consider the dispute.[187]

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180. Dietz v. Bouldin, 136 S. Ct. 1885, 1897 (2016); *see also* Tidmarsh, *supra* note 23, at 858. Although the Court does not specifically discuss cost reduction, a new trial would cost litigants a substantial sum, especially when considering the verdict in this case was the relatively low amount of $20,000.

181. *See e.g.*, FED R. CIV. P. 12; FED R. CIV. P. 26(b).

182. The specific section of Rule 26 that relevant for this discussion states that the court, either on its own initiative or by motion of one of the parties, "*must* limit the frequency or extent of discovery otherwise allowed by these rules or by local rules if it determines that the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." FED. R. CIV. P. 26 (b)(2)(c)(i) (emphasis added).

183. FED. R. CIV. P. 26(b) advisory committee's note to 1983 amendment.

184. *Id.* The objective of the changes was to "guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry." *Id.*

185. FED. R. CIV. P. 56(g).

186. The advisory committee's notes state:

> If it is readily apparent that the court cannot grant all the relief requested by the motion, it may properly decide that the cost of determining whether some potential fact disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial.

FED. R. CIV. P. 56(g) advisory committee's note to 2010 amendment.

187. *See generally id.*

The cost saving purpose is also apparent in Rule 4(d), which allows a party to avoid unnecessary summons serving costs.[188] Per the 1993 committee, this change aimed to reduce or eliminate the cost that a party may incur while attempting to serve another party.[189] In passing, the Supreme Court has also discussed the costs of notice.[190] In *Mullane*, the petitioner argued notice in a newspaper was not enough to satisfy the Due Process clause.[191] The Court, in holding that the respondents due process rights were not violated, noted that the costs of searching for the location of all beneficiaries of a certain trust would be impracticable and is not a requirement of due process.[192]

IV. CONCLUSION

Litigation has heavy costs associated with it,[193] and both the Supreme Court and Federal Rules of Civil Procedure have attempted to keep the costs as low as possible.[194] The Supreme Court's decision in *Dietz v. Bouldin* is just the latest step along the path of litigation cost reduction—a path which the Federal Rules of Civil Procedure[195] and the United States Supreme Court[196] have charted. By allowing a trial judge to re-empanel an already discharged jury, the Court has given district courts a cost-effective way to solve jury mistakes.[197] Although there is some concern about the impact jury re-empanelment will have on litigants Seventh Amendment rights,[198] the overall outcome of this case is positive. Not only are the litigant's rights continually protected, but the efficiency and cost effectiveness of the American legal system is protected as well.

188. FED. R. CIV. P. 4(d).
189. FED. R. CIV. P. 4(d) advisory committee's notes to 1993 amendment.
190. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306 (1950) (holding that notice in newspaper is not enough when the parties whereabouts and addresses are known).
191. *Id.* at 311.
192. *Id.* at 317–18.
193. *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009).
194. *See supra* notes 175–80.
195. *See supra* notes 180–92.
196. *See supra* notes 175–92.
197. *See supra* Part III(B).
198. *See supra* Part II (A)(2).