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MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR NEW TRIAL

Subsections (b) and (c) of Rule 50 of the Wyoming Rules of Civil Procedure[1] were formulated and adopted primarily for the purpose of speeding litigation and preventing unnecessary retrials and appeals. These subsections are applicable where the trial has been to a jury; 50 (b) has no application where trial was to the court alone.[2] Where there has been an adverse verdict, or where a verdict has not been returned, as in the instance of a hung jury, or of a mistrial after submission of the case to the jury, a party who has previously made a motion for a directed verdict at the close of all the evidence may move for judgment notwithstanding the verdict. It must be remembered that a previous motion for a directed verdict at the close of all the evidence is an essential prerequisite to the granting of judgment on a motion made after an adverse verdict.[3] A motion for a new trial may be joined with the motion for judgment, or a new trial may be prayed for in the alternative. The motion for judgment notwithstanding the verdict cannot be granted, unless, as a matter of law, the opponent of the movant has failed to make a case and should therefore have had a verdict directed against him,[4] or the moving party has established an absolute defense, such as contributory

1. (b) Motion for Judgment Nothwithstanding the Verdict. When a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the moving party may move not later than 10 days after the entry of judgment to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative; and a motion to set aside or otherwise nullify a verdict or for a new trial shall be deemed to include a motion for judgment notwithstanding the verdict as an alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

   (c) Same; Conditional Rulings on Grant of Motion.

   (1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed. If the motion for new trial is thus conditionally granted, the court shall specify the grounds therefor, and such an order does not affect the finality of the judgment. In case the motion for new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court shall have otherwise ordered. In case the motion for new trial has been conditionally denied and the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

   (2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may, not later than 10 days after entry of judgment, serve a motion for a new trial, which shall be granted or denied, conditionally or otherwise, and if conditionally, with the consequences stated in paragraph (1) of this subdivision.

   (3) Any party who fails to make a motion for new trial as provided in this rule shall be deemed to have waived the right to move for a new trial.

2. See Hunter-Wilson Distilling Co. v. Foust Distilling Co., 181 F.2d 543 (3d Cir. 1950).
3. Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350 (4th Cir. 1941).
4. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251, 61 S.Ct. 189, 85 L.Ed. 147 (1940).

negligence as a matter of law.[5] The motion for a new trial may be directed to the discretion of the trial judge as when it is bottomed on the claim that for some reason the trial was unfair to the moving party. The motion may also raise questions of law arising out of asserted error in admission or rejection of evidence or instructions to the jury.[6]

Various situations where only the motion for judgment has been made will first be considered. then consideration will be given to situations which might exist when both a motion for judgment and a motion for a new trial have been duly presented.

Under the new rule a trial judge would be well advised to deny a motion for a directed verdict at the close of the evidence even though he feels it may be well grounded.[7] After the jury has then returned a verdict, the trial judge may set it aside if he feels it improper and grant judgment on a motion for judgment notwithstanding the verdict. If, on appeal, the granting of the motion for judgment is held to be error, the appellate court may simply reverse and remand with directions to reinstate the verdict and enter judgment thereon.[8] Though this recommended practice may result in letting the case go to the jury unnecessarily in the first instance, the time and expense of another trial is saved if it is later determined on appeal that there were issues presented upon which a jury should have passed. Where the motion for a directed verdict is erroneously sustained, the appellate court is compelled to remand for a second trial to a jury.

A party who has been favored by a verdict and has had it set aside on motion for judgment notwithstanding the verdict may, after the entry of the adverse judgment, move for a new trial by virtue of 50 (c) (2).[9] If this motion for a new trial is not made, the right to make the motion will be deemed waived by operation of 50 (c) (3).[10] By virtue of this same provision, the right to move for a new trial would also be waived by a party who has made only a motion for judgment notwithstanding an adverse verdict and has neglected to make an alternative motion for a new trial . 50 (c) (3), then, would seem to determine a previous conflict of authority in state courts as to whether an appellate court would recognize the right to move for a new trial when such has not been asked for below.[11] Thus, where neither party has asked for a new trial, the proper course for the appellate court would be either to affirm the judgment

5. See, e.g., Bailey v. Slentz, 189 F.2d 406 (10th Cir. 1951).
6. Supra note 4.
7. See Craighead v. Missouri Pac. Transp. Co., 195 F.2d 652, 657 (8th Cir. 1952).
8. Fratta v. Grace Line, 139 F.2d 743, 744 (2d Cir. 1943).
9. Supra note 1.
10. Supra note 1.
11. Denial of the right to move for a new trial where none has been asked for below: Bragg v. Chicago, M. & St. P. Ry. Co., 81 Minn. 130, 83 N.W. 511 (1900). Contra, Dudley v. Harrison, McCready & Co., 173 So. 820 (Fla. 1937); Cockrum v. Keller, 258 Ill. 276, 101 N.E. 594 (1913).

notwithstanding the verdict or reverse with directions to enter a judgment on the verdict.[12]

In many cases a party may wish to make both a motion for judgment and a joint or alternative motion for a new trial. Such a situation is presented in the case of *Montgomery Ward & Co. v. Duncan*.[13] In that case the defendant, Montgomery Ward, made a motion for judgment notwithstanding an adverse verdict for the plaintiff. This motion was grounded primarily on there being insufficient evidence to go to the jury on the question of negligence, which was asserted to be the basis of liability. A new trial was prayed for in the alternative on the grounds that the damages were excessive, that the court erred in ruling on evidence and that there was error in refusing to give requested instructions. In such a case, the proper utilization of Rule 50 (b) and (c) will allow a movant an opportunity to be heard as to the grounds for both motions with a minimum of time and expense. Both motions should be ruled upon by the trial court when they are presented in the alternative.[14] Even where judgment is granted, 50 (c) requires the trial court to rule on the motion for a new trial.[15] The ruling on the latter motion is then to be effective only if the granted judgment is vacated or reversed on appeal. By the express terms of the rule, the conditional granting of the motion for a new trial does not affect the finality of the granted judgment. This last provision of the rule should effectively guard against the situation where a grant of a new trial on an alternative motion, unconditional by its terms, will be held to vacate a judgment notwithstanding the verdict, granted on that motion.[16]

Rule 50 (c) codifies the practice suggested by the Supreme Court in the *Montgomery Ward* case in the situation where a motion for judgment together with a motion for a new trial, joint or alternative, has been made in the trial court. The requirement that the trial court rule on both motions has a twofold effect. The ruling on the motion for a new trial will be made while the evidence is still fresh in the trial judge's mind. Under the old practice, the propriety of granting a motion for judgment notwithstanding the verdict would have had to be determined on appeal

12. The rule makes no provision as to the course of action to be taken by an appellee who is seeking to sustain a judgment on the verdict after the denial of judgment notwithstanding the verdict. The field of error for this party has been favored by the verdict is quite narrow, since the verdict will have nullified error except on rulings as to admissibility of evidence. Where there have been rulings in the lower court excluding evidence which would have strengthened appellee's position, it has been suggested that he cross-assign error for the purpose of obtaining a new trial if his judgment is not upheld. See 5 Moore's Federal Practice 50.01 (7) and 50.15 (2d ed. 1951).
13. 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (1940).
14. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 253, 61 S.Ct. 189, 85 L.Ed. 147 (1940).
15. Supra note 1 .
16. See Allegheny County v. Maryland Casualty Co., 132 F.2d 894 (3d Cir. 1942), where the unconditional granting of a motion for judgment notwithstanding the verdict was held to vacate that judgment, with the result that an appeal was dismissed since an order granting a new trial is not an appealable order. Contra, McIlvaine Patent Corp. v. Walgren Co., 138 F.2d 177 (7th Cir. 1943).

before a ruling on the motion for a new trial would be called for. If a granted judgment had been reversed on appeal, the practice would have been for the appellate court to remand with directions to rule on the motion for a new trial.[17] A denial of the motion might then have resulted in a second appeal.[18] Under the new practice the appellate court has an opportunity to rule on both the asserted grounds for the judgment notwithstanding the verdict and the asserted error upon which the motion for a new trial is grounded. This opportunity is, however, limited by the carryover of pre-existing rules which impose limitations on the scope of an appellate court's review.[19]

The courses of action open to the trial and the appellate court in a situation such as is presented in the *Montgomery Ward* case will now be considered (i.e., where both a motion for judgment notwithstanding the verdict and a motion for a new trial have been made).

The trial court in this situation might deny both of the motions and thus the judgment on the verdict would stand. The defendant could appeal from that judgment, assigning as error both the refusal to grant the judgment notwithstanding the verdict and errors of law in the trial. There then would be three courses of action open to the appellate court. It might affirm, it might reverse and itself grant judgment notwithstanding the verdict or it might reverse and remand for a new trial for errors of law.[20]

The trial court might grant the motion for judgment and deny the motion for a new trial. An appeal would lie from the granted judgment. The appellate court might simply affirm or it might reverse the action of the trial court as to the granted judgment and remand with directions to enter judgment on the verdict of the jury.[21] Where the motion for judgment has been granted and the motion for a new trial has been denied, it is the suggestion of the Supreme Court that the appellee cross-assign error, in the appellant's appeal, to rulings of law at the trial. If the granted judgment is then reversed on appeal, the appellate court may pass on the errors of law which are asserted by the appellee to nullify the

17. See, e.g., Bryan v. Inspiration Consol. Copper Co., 24 Ariz. 47, 206 Pac. 402 (1922); In re Caldwell's Estate, 216 Cal. 694, 16 P.2d 139 (1932); Linker v. Union Pac. R.R., 87 Kan. 186, 123 Pac. 745 (1912); Fisk v. Henarie, 15 Ore. 89, 13 Pac. 760 (1887); McLain v. Easley, 146 Wash. 377, 264 Pac. 714 (1928).

18. The appeal would lie from judgment on the verdict and not from the order denying the new trial, since the latter order is generally not appealable. See Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 253, 61 S.Ct. 189, 85 L.Ed. 147 (1940); Fairmount Glass Works v. Coal Co., 287 U.S. 474, 481-485, 53 S.Ct. 252, 77 L.Ed. 439 (1933).

19. Where a judgment notwithstanding the verdict has been reversed on appeal, the appellate court must generally remand for a new trial if the motion for such had been granted in the alternative. This result follows because of the rule that the grant of a new trial (whether on an alternative motion) is not ordinarily subject to review by an appellate court. Binder v. Commercial Travelers Mutual Accident Assn., 165 F.2d 896 (2d Cir. 1948).

20. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 254, 61 S.Ct. 189, 85 L.Ed. 147 (1940).

21. Boulter v. Commercial Standard Ins. Co., 175 F.2d 763 (9th Cir. 1949); supra note 20.

judgment on the verdict.[22] There is some authority in the federal courts for the proposition that when an appellate court reverses a granted judgment notwithstanding the verdict, it must also consider whether the motion for a new trial should have been denied, even though there has been no cross-appeal.[23] Many unnecessary retrials should be saved by this rule, since under the old practice, after a granted judgment notwithstanding the verdict had been reversed, the appellate court would have remanded for further proceedings as to the asserted grounds for a new trial.[24]

The trial court might grant both the motion for judgment and the conditional motion for a new trial.[25] Where both motions have been granted and the granted judgment is reversed on appeal, the conditional order granting the new trial is not ordinarily subject to review.[26] Thus the appellate court could not reverse and grant judgment on the verdict; it must remand for further proceedings since it is ordinarily governed by the trial judge's award of a new trial.[27] It is apparent that the purpose of the new rule, i.e., to speed litigation and prevent unnecessary retrials, might be frustrated by the indiscriminate conditional granting of a new trial by a trial judge whenever a motion for judgment is granted. Some degree of imagination will be required of a trial judge, in order that a truly independent ruling will be made on each motion when both are presented.

The trial judge might deny the motion for judgment and grant the motion for a new trial. In this instance no appeal would lie, since the order granting the new trial is not reviewable.[28] Neither is the order denying a motion for judgment appealable.[29]

It will be noted that by the terms of 50 (b) "a motion to set aside or otherwise nullify a verdict or for a new trial shall be deemed to include a motion for judgment notwithstanding the verdict as an alternative."

22. Supra note 20.
23. Zimmerman v. Mathews Trucking Corp., 205 F.2d 837 (8th Cir. 1953). In this case defendant had been granted a judgment notwithstanding the verdict in the district court and his alternative motion for a new trial had been denied. Judgment notwithstanding the verdict was reversed and the original verdict for the plaintiff reinstated. On rehearing the case was remanded for a new trial since it was determined that defendant had properly preserved its points by making cross-assignments of error in the plaintiff's appeal.
24. Supra note 17.
25. This would seem to be a rather common situation in the federal courts, where the trial judge has the discretionary power to set aside a verdict as against the weight of the evidence. Thus where a judgment notwithstanding the verdict has been granted on the ground that there was insufficient evidence to go to the jury, a new trial would ordinarily be granted because the verdict was against the weight of the evidence. See, e.g., Bopst v. Columbia Casualty Co., 37 F.Supp, 32 (D.Md. 1940). Since the federal courts distinguish between directing a verdict (or granting judgment notwithstanding the verdict) on a ground of insufficient evidence and setting aside a verdict as against the weight of the evidence, a reviewing court might feel that granting judgment notwithstanding the verdict was error, while setting aside the verdict and granting a new trial was proper.
26. Binder v. Commercial Travelers Mutual Accident Assn., 165 F.2d 896 (2d Cir. 1948).
27. Supra note 20.
28. Bales v. Brome, 53 Wyo. 370, 84 P.2d 714 (1939); Flint v. Voiles, 50 Wyo. 43, 58 P.2d 443 (1936).
29. Ford Motor Co. v. Busam Motor Sales, 185 F.2d 531 (6th Cir. 1950).

This provision avoids a Supreme Court decision[30] which held that in the absence of a motion made for judgment within 10 days after the reception of a verdict, an appellate court is prohibited from entering such a judgment. Thus, where the trial court has denied a motion for a new trial and entered judgment on the verdict, a party might appeal and be successful in obtaining judgment in the appellate court, even though a motion for the same was not made in the trial court. That the rule explicitly provides for such a procedure should be ample warning to prevent a claim of surprise by the appellee.

The new rule should effectively accomplish its purpose if used imaginatively. It must be remembered that a motion for a directed verdict at the close of all the evidence is a prerequisite to a motion for judgment after the reception of a verdict. If there are grounds for making a motion for a new trial, as well as grounds for the motion for judgment, the motion should be made or it will be deemed waived. A trial judge should be hesitant in granting a directed verdict at the close of all the evidence; by letting the case go to the jury, unnecessary retrials can be avoided. When both motions have been presented in the trial court, care should be taken by the trial judge to make a truly independent ruling on each one. Indiscriminate making of conditional orders granting a new trial on an alternative motion will result in unnecessary retrials. Where these few pitfalls are kept in mind, it seems evident that each party will be given an opportunity to be heard as to any substantial error with a minimum of time and expense.

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PROPER AND IMPROPER SUMMARY JUDGMENT CASES

The summary judgment procedure was originated in England in 1855 and was applicable only to actions upon bills of exchange and promissory notes. The procedure was later broadened by the Judicature Act of 1873. By 1925 New Jersey and New York had adopted the procedure as had the federal courts hearing cases in these states under the Conformity Act. The federal courts adopted the procedure in 1938 and Wyoming in 1957.

The summary judgment procedure grew out of a distaste for the practice of stalling judgments by false pleas having no basis in fact,[1] or by attempting legal blackmail in bringing unfounded suits in order to force settlements.[2] Wyoming Rule of Civil Procedure 56 (c) is identical with the Federal Rule and fixes the standard by which to determine whether

30. Johnson v. New York, N.H. & H. Ry., 344 U.S. 48, 73 S.Ct. 125, 97 L.Ed. 77 (1952)

1. Sexton v. The American News Co., 133 F.Supp. 591 (N.D.Fla. 1955); Prudential Insurance Co. v. Goldstein, 43 F.Supp. 767 (E.D.N.Y. 1942).
2. Miller v. Miller, 122 F.2d 209 (D.C. Cir. 1941); Rabe v. Metropolitan Life Insurance Co., 1 F.R.D. 391 (D.Mass. 1940).