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Motions in Trial- And After

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NOTE 18 December 2015: The trial and post-trial motions have been amended, effective 1 May 2016. See my blog post for 18 December 2015. This paper will be revised to reflect those changes.

While indisputably a dry and perhaps dull topic, a working knowledge of the grounds and distinctions between the various trial and post-trial motions is essential for anyone who tries lawsuits. Properly-asserted motions can and do win trials. Likewise, counsel's failure to make the right motion at the proper time may doom the appeal. This article summarizes what motions should be made, and when.

MOTIONS IN TRIAL

The motions that are most likely encountered in trial are a motion to dismiss in a bench trial and a motion for directed verdict in a jury trial, although not uncommonly the motion *in limine* and the 47(s) motion may be necessary. With the exception of the motion in limine, these motions are often made orally in open court, without filing of motion papers.[2] But if no written memoranda are filed, it's always a good practice to provide the judge and opposing counsel with copies of supporting cases or statutes, highlighting the relevant language.

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[1]Revised and updated from my original article published in VOIR DIRE magazine, Summer 1997.

[2]The rule permits this informality: Utah Rule of Civil Procedure 7(b)(1) *Motions. An application to the court for an order shall be by motion which, unless made during a hearing or trial or in proceedings before a court commissioner, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.* Federal Rule of Civil Procedure 7(b) is similar.

1. Motion for Involuntary Dismissal- Rule 41(b)

This rule applies only to non-jury trials; it is the equivalent of the motion for directed verdict in a jury trial– and more.[3] Utah Rule of Civil Procedure 41(b) provides in relevant part that:

> *After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.*

In federal actions, the counterpart rule is Federal Rule of Civil Procedure 52(c):

> *Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).*

Unlike the motion for directed verdict, this rule contemplates that the court in a bench trial may not only determine the legal sufficiency of the plaintiff's case, but *also* may decide the case on the merits, if it so chooses.[4] That is, the trial judge may determine that the plaintiff has met the burden of *going forward* but has not met the burden of *persuasion*, and dismiss the case

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[3] *See Bair v. Axiom Design, L.L.C.*, 2001 UT 20, 20 P.3d 388, and *Grossen v. DeWitt*, 1999 UT App 167, 982 P.2d 581.

[4] *See Bair v. Axiom Design, L.L.C.*, *supra; Johnson v. Bell*, 666 P.2d 308 (Utah 1983); *Winegar v. Slim Olson, Inc.*, 252 P.2d 205 (Utah 1953).

on the facts before even hearing the defendant's evidence.

Two standards are in play here:

1. *The "law" standard*: the court may involuntarily dismiss the case as a matter of law if the plaintiff has not made out a *prima facie* case; and,

2. *The "fact" standard*: even though the plaintiff has made out a *prima facie* case, the court isn't persuaded by the evidence and dismisses the case as a matter of fact. The court weighs the evidence, draws inferences, considers the credibility of the witnesses, and then decides if it agrees with plaintiff's contentions.[5]

Here's an example of how this works. In a medical malpractice action a plaintiff must normally produce expert testimony establishing both a deviation from the standard of care and that this deviation proximately caused plaintiff's injuries. If plaintiff's expert testifies as to both requirements, neither a directed verdict under Rule 50(a) in a jury trial nor a Rule 41(b) "legal sufficiency" motion in a bench trial should be granted. Nevertheless, the court in a bench trial may grant a 41(b) involuntary dismissal at the close of plaintiff's case if it is not persuaded by plaintiff's evidence. It does *not* need to wait to hear defendant's evidence to decide the case.[6]

The basis on which the 41(b) motion was granted is crucial to the standard of review on appeal. If the trial court dismissed the action *as a matter of law*, the appellate court will review the evidence in the light most favorable to the plaintiff and will affirm the dismissal only if there was no competent evidence to support plaintiff's claim. But if the trial court dismissed *as a matter of fact*, then appellate review is limited to a review of the evidence in the light most

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[5]*See Grossen v. DeWitt, supra*, n.3; *438 Main Street v. Easy Heat, Inc*., 99 P.3d 801, 2004 UT 72.

[6]*See Burton v. Youngblood,* 711 P.2d 245 (Utah 1985).

favorable to the trial court's findings of fact (that is, to the prevailing party), and the findings will be allowed to stand if reasonable minds could agree with them, and overturned only if "clearly erroneous."[7]

Given this crucial difference in the standards of appellate review, astute counsel will afford every opportunity for a trial judge to frame the decision on a 41(b) motion as one made on the *facts*, and not as a matter of *law*.

2. Motion for Directed Verdict- Rule 50(a)

As its name implies, the motion for directed verdict is used only in jury trials and should not be confused with its bench trial equivalent, the Rule 41(b) motion for involuntary dismissal.[8] Federal Rule of Civil Procedure 50(a) has adopted the terminology "motion for judgment as a matter of law" while Utah Rule of Civil Procedure 50(a) still keeps the traditional nomenclature of a "motion for directed verdict."

Under either version of the rule, a directed verdict may only be granted if, after reviewing the evidence in the light most favorable to the non-moving party, the trial court concludes that there is no competent evidence which would support a verdict in its favor.[9] If reasonable minds

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[7]*See Bair v. Axiom*, *supra; Wessel v. Erickson Landscaping Co.*, 711 P.2d 250 (Utah 1985) and Utah Rule of Civil Procedure 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.").

[8]Although lawyers, trial judges, and even appellate jurists sometimes fail to grasp this point. *Compare Hone v. Advanced Shoring and Underpinning, Inc.*, 2012 UT App 327, _____ P.3d _____ (upholding denial of so-called "motion for directed verdict" in bench trial) with *Grossen v. DeWitt*, 1999 UT App 581, 584 ("by its terms, a directed verdict under Rule 50 of the Utah Rules of Civil Procedure contemplates only a jury trial").

[9]*Smith v. Fairfax Realty, Inc.*, 82 P.3d 1064,1067, 2003 UT 41*; DeBry v. Cascade Enter.,* 879 P.2d 1353, 1359 (Utah 1994); *Galloway v. United States*, 319 U.S. 372, 389-96 (1943).

could differ on the issue in controversy, the motion must be denied.[10]

The term "directed verdict" is an anachronism. There is no verdict, directed or otherwise. In earlier times, the court granted the motion and then sought the jury's assent to its decision to enter judgment.[11] That is no longer necessary, and no verdict of any kind is reached: the court simply makes its ruling and, later, issues a written judgment. The jury plays no part in it[12].

The court may deny the motion, grant it, or withhold its ruling until after the jury reaches a verdict. If the verdict is for the moving party, the issue is moot. If the jury verdict is against the moving party, and the trial court *denied* the motion, then the appellate court may simply reinstate the verdict if it reverses the trial judge. But if the trial court *granted* the motion and took the case away from the jury before it reached a verdict, a reversal on appeal will require a new trial that might otherwise have been avoided. For that reason, the preferred practice may be to submit the case to the jury even if the court intends to grant a judgment as a matter of law.[13]

To make a motion for judgment notwithstanding the verdict under Rule 50(b), a directed

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[10] *Id.*; *Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc.*, 652 P.2d 896, 897-98 (Utah 1982).

[11] *See Coray v. Southern Pac. Co.*, 185 P.2d 963, 967 (Utah 1947)("[w]hile it is true in a sense that the motion for a directed verdict is in the nature of a request for instruction, and that in some instances there is a request for a directed verdict included in proposed instructions, the charge to the jury generally is designed to guide the jury in its deliberations. When the court directs a verdict, it takes the case away from the jury so that the court makes the decision instead of the jury. The jury thereby is shorn of its function as their of the facts").

[12] *See* 9 MOORE'S FEDERAL PRACTICE, § 50.03 (3d ed. 2008) and *id.* Vol. 9 § 50App.102. The 1991 amendments to Rule 50 of the Federal Rules of Civil Procedure abandoned the terminology of "directed verdict" and "judgment notwithstanding the verdict" in favor of "judgment as a matter of law." Our local practice is further confused by the traditional defense jury instruction No. 1: "*You are instructed to return a verdict in favor of the defendant and against the plaintiff, no cause of action*."

[13] *See Orfield v. International Harvester Co.*, 415 F. Supp. 406 (E.D. Tenn. 1975), *aff'd* 535 F.2d 959 (6th Cir. 1976).

verdict motion must be made at the close of the opponent's case *and renewed* at the close of all the evidence. (A 2006 amendment to Rule 50(b) eliminated the necessity for this in federal court.) The introduction of evidence after the denial of the motion constitutes a waiver of any future objections to the sufficiency of the evidence if the movant fails to renew the motion at the close of all the evidence.[14] This, in theory, gives the non-moving party the opportunity to correct the deficiency in its case-- if the court is inclined to allow a chance to correct it.

Keep in mind that an appellate court, in the absence of plain error, only reviews the decisions of the trial court; if no decision on a motion for judgment *n.o.v.* or motion for new trial was made concerning the sufficiency of the evidence, then the appellate court has nothing to review.[15] The appellate court does *not* function as the initial reviewer of the sufficiency of the evidence; rather, it only reviews the reviewer; that is, the trial court. And if the trial court wasn't given the opportunity to review the sufficiency of the evidence under a 50(b) or 59(a) motion, then there's nothing for an appellate court to review either.

3. Motions Under Rule 47(s)

Utah Rule of Civil Procedure 47(s)[16] is one of those little-known rules that snares the unwary.[17] It provides simply that "*If the verdict is informal or insufficient, it may be corrected by*

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[14]*See, e.g., Purcell v. Seguin State Bank & Trust Co., 999 F.2d 950, 956-957 (5th Cir. 1993; Jusino v. Zayas, 875 F.2d 986, 991-992 (1st Cir. 1989).* This changed with the 2006 amendments, at least in federal court.

[15]*See, e.g., Collier v. Frerichs*, 626 P.2d 476, 477 (Utah 1981); *Henderson v. Meyer*, 533 P.2d 290, 291-92 (Utah 1975); *Pollesche v. Transamerican Ins. Co.,* 497 P.2d 236, 238 n.1 (1972).

[16]Note for research purposes: for many years, this was Rule 47(r) until the 2003 amendments to Rule 47 moved it down a subsection.

[17]The federal counterpart to Rule 47(s) is Federal Rule of Civil Procedure 49(b), applicable to general verdicts with special interrogatories. *See Johnson v. Ablt Trucking Co.*, 412 F.3d 1138 (10th

the jury under the advice of the court, or the jury may be sent out again." This seemingly innocuous statement has been interpreted to mean that an objection must be made before the court discharges the jury whenever a verdict is incomplete or facially incorrect. Otherwise, an appeal on the issue is waived.[18]

For example, if in a personal injury case a jury returns a verdict awarding special damages but no general damages, one would think that a Rule 59 (b)(5) motion for new trial based upon inadequacy of damages would be well-grounded. Not so. This error is apparent on the face of the verdict, and counsel is required to object and move the court to send the jury out again to clarify its verdict.[19] Another reported example is a jury's inconsistent answers to the special verdict interrogatories.[20]

Cir. 2005); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534 (10th Cir. 1993); *Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd.*, 791 F.2d 1416 (10th Cir. 1986). If a party fails to object before the jury is discharged, it waives any future challenge to the inconsistency because its failure to object in a timely fashion deprives the court of the option of sending the jury back for further deliberations. *See Stancill v. McKenzie Tank Lines, Inc*., 497 F.2d 529 (5th Cir. 1974); *Ludwig v. Marion Labs., Inc*., 465 F.2d 114 (8th Cir. 1972).

[18]In those rare cases in which a general verdict with special interrogatories is used, there may be an inconsistency between rule 47(s) (requiring action before the jury is discharged) and rule 49(b) (stating that when one or more answers to special interrogatories are consistent with each other but one or more are inconsistent with the general verdict, the court *may* return the jury for further consideration of its answers and verdict. If any of the answers are inconsistent with each other, and likewise one or more is inconsistent with the general verdict, then the court *shall* return the jury for further consideration of its answers and verdict.)

[19]*See Langton v. International Transport*, 491 P.2d 1211 (Utah 1971); *Cohn v. J.C. Penney Co., Inc.,* 537 P.2d 306 (Utah 1975). In *Balderas v. Starks*, 138 P.3d 74, 76 2006 UT App. 218, plaintiff's counsel *did* request that the jury be sent back after awarding special, but no general, damages. The jury then returned with a general damage award of $1.00. The appellate court held that any objection to the nominal general damages was waived by failing to ask for the jury to be sent out *again.*

[20]*See Bennion v. LeGrand Johnson Const. Co.*, 701 P.2d 1078 (Utah 1985); *Ute-Cal Land Devel. Corp. v. Sather*, 605 P.2d 1240 (Utah 1980).

The moments after the clerk reads the jury's decision are not conducive to a reasoned analysis of the verdict. The hour is often late, counsel are exhausted, the jury and judge are eager to leave. Nevertheless, you *must* hold the jury in the box for a few minutes while the verdict form is closely reviewed. If there are inconsistencies or apparent mistakes, approach the bench, advise the judge, and ask that the jury be instructed to correct or clarify them.[21] This cannot be done at a later time: the jury, once discharged, is almost never recalled.

4. Motion *in Limine*

A motion *in limine* or "at the threshold" is generally used to request the trial judge to rule on evidentiary matters before trial begins.[22] But there are occasions after trial has started when you may become aware of the potential for the introduction of irrelevant and prejudicial evidence and in these circumstances a motion *in limine* is appropriate. This motion has little value in a bench trial but is valuable to use in a jury trial instead of an objection, which may allow the jury to hear some of the adverse evidence and at the same time call attention to it. Of course, losing the motion gives your opponents advance warning and further time to prepare to deflect the objection. And most trial judges have little patience for hearing motions *in limine* at trial if counsel has had an adequate opportunity to raise the issue before trial. By all means do *not* dump these on the trial judge the morning of trial (or shortly before) unless the grounds were

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[21]See my paper elsewhere in the materials, *Beware the Net Verdict*.

[22]*See, e.g., Sorenson v. Barbuto,* 177 P.3d 614, 2008 UT 8 (excluding treating physician as defense expert); *Hill v. Dickerson*, 839 P.2d 309 (Utah 1992)(precluding use of late-designated witnesses); *Nelson v. Peterson*, 542 P.2d 1075 (Utah 1975) (references to plaintiff's welfare status and illegitimacy of her child). The possibilities are endless: subsequent remedial measures, payment of plaintiff's medical bills, offers of settlement, prior inadmissible convictions, existence of liability insurance, etc. While there is no specific statutory or procedural authority for the motion *in limine*, Evidence Rule 104 has been interpreted to allow it.

unanticipated.

5. Motion for Mistrial

Inherent in a trial court's discretion is the power to grant a mistrial in a variety of circumstances that unduly prejudice a party or affront the integrity of the judicial system. Examples that readily come to mind are inappropriate jury argument by counsel (that cannot be cured by a corrective instruction), juror misconduct (such as conducting site investigations or speaking with parties), and testimony on inflammatory and irrelevant evidence already subject to an exclusion order. As with the motion *in limine*, no procedural rule grants this authority, but no one doubts that a trial judge has the power to end the trial and order a new one. That is a matter within its informed discretion and its decision will be upheld on appeal absent an abuse of that discretion.[23] On the other hand, a mistrial should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted.[24] If a motion for mistrial is refused, the aggrieved party has the burden of proof on appeal to show that the conduct complained of prejudiced the outcome of the trial, a difficult burden indeed.[25]

MOTIONS AFTER TRIAL

The principal motions made after trial are the motion for judgment *n.o.v.*, the motion for new trial, the motion to alter or amend the judgment, and the motion for relief from judgment. These four motions each serve different purposes and have separate standards, although they are

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[23]*See Rasmussen v. Sharapata*, 895 P.2d 391, 394 (Utah Ct. App. 1995).

[24]*See Watkins & Faber v. Whiteley*, 592 P.2d 613, 616 (Utah 1979), *citing Goodwin v. Northwestern Mutual Life Ins. Co.,* 83 P.2d 231 (Wash. 1938); *First General Services v. Perkins*, 918 P.2d 480, 485 (Ut. Ct. App. 1996).

[25]*See State v. Price*, 909 P.2d 256, 262 (Ut. Ct. App. 1995); *State v. Boone*, 820 P.2d 930, 932 (Ut. Ct. App. 1991).

commonly made in conjunction with one another after an adverse result at trial.

"After trial" does not mean immediately after a verdict is returned; it is unnecessary and inappropriate to make post-trial motions at the moment the verdict is reached.[26] Indeed, the post-trial motions technically *cannot* be made until after a judgment is entered by the court on the jury's verdict or its own ruling. All of the post-trial motions must be made within *10 days* after entry of the judgment in state court,[27] except for Rule 60 motions.[28] And this must be a *final* judgment as defined by Rule 54; that is, "any order from which an appeal lies." If counsel does not prepare the order as required by Rule 7(f)(2), finality is not triggered unless the court's order or "judgment" directs that no additional order is necessary.[29]

Rule 6(b) prohibits extensions of the deadlines in both state and federal court. In other words, the 10-day or 28-day period cannot be extended even with a stipulation from opposing counsel and an order of the court.[30] *These deadlines are jurisdictional.*[31]

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[26]Except, of course, for the motion to have the jury correct or clarify its verdict before discharge under Utah Rule of Civil Procedure 47(s).

[27]2009 amendments to the Federal Rules of Civil Procedure 50, 52, and 59 now give you a more reasonable 28 days for these motions in that forum.

[28]Under Utah Rule of Civil Procedure 58A(c), "entry" of a judgment is only complete upon the signature of the judge on the form of judgment and filing by the clerk. One should not confuse return of a *verdict* by the jury with entry of a *judgment* upon that jury verdict by the court.

[29]*See Giusti v. Sterling Wentworth Corp.*, 2009 UT 2 ¶¶ 30-36, 201 P.3d 966 and *Velander v. LOL of Utah, LLC*, 2013 UT App 196, ____ P.3d _____.

[30]U. R. Civ. P. 6(b) Enlargement: *When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect;* ***but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.*** The federal rule is the same. *See Rodick v. City of Schenectady,*

1. Motion for Judgment Notwithstanding the Verdict ("J.N.O.V.")

Utah Rule of Civil Procedure 50(b) provides, in part, that:

> *(b) Motion for judgment notwithstanding the verdict. Whenever a motion for a directed verdict* ***made at the close of all the evidence*** *is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of judgment, a party who has moved for a directed verdict may move 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 ten 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. 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.* (Emphasis added.)

This motion, more commonly known as the motion j.n.o.v. (judgment *non obstante veredicto),* is best understood as merely the *renewal* of a prior motion for directed verdict. The 1991 amendments to Federal Rule of Civil Procedure 50(b) recognized this and re-designated the motion j.n.o.v. as the "Renewed Motion for Judgment as a Matter of Law."

Because a motion j.n.o.v. is a renewal of a motion for directed verdict, it necessarily follows that a directed verdict motion must have been made at trial. It is not enough to have made a motion for directed verdict at the close of the opposing party's case: it must have been renewed

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1 F.3d 1341, 1346 (2d. Cir. 1993).

[31] *See Browder v. Director, Dep't of Corrs.*, 434 U.S. 257, 261-2 n. 5 (1978); *Holbrook v. Hodson*, 466 P.2d 843 (Utah 1970); 9 MOORE'S FEDERAL PRACTICE, §50.42[3] (3d ed. 2008); *but see, Eady v. Foerder*, 381 F.2d 980 (7th Cir. 1967) and *Miller v. Maxwell's International, Inc.,* 991 F.2d 583, 585 (9th Cir. 1993) (setting forth a "unique circumstances" exception to the draconian Rule 6(b) where the court has entered an extension order and a party has reasonably relied upon it); *see also Lund v. Third Judicial Dist. Court*, 90 U.2d 433, 62 P.2d 278 (1936) (pre-Utah Rules of Civil Procedure); 10 MOORE'S FEDERAL PRACTICE §59.12[b].

at the close of *all* the evidence or the motion j.n.o.v. is waived.[32] As I've mentioned, a 2006 amendment to the federal rule eliminated this requirement for federal cases, but note that it *still is present* in Utah Rule of Civil Procedure 50(b).[33]

The reason for this requirement is (or *was*, in federal court) is to avoid making a trap of the motion for judgment notwithstanding the verdict, either at the trial stage or on appeal. When a claimed deficiency in the evidence is called to the attention of the trial judge and of counsel before the jury has commenced deliberations, counsel still may do whatever can be done to mend his case. But if the court and counsel learn of such a claim for the first time after verdict, both are ambushed and nothing can be done except by way of a complete new trial.[34] "It is contrary to the spirit of our procedures to permit counsel to be sandbagged by such tactics or the trial court to be so put in error."[35]

The grounds for the motion j.n.o.v. are the same as for a directed verdict. That is, a j.n.o.v. can be granted only when the losing party is entitled to judgment as a matter of law. The trial court may grant a motion for a j.n.o.v. only when the evidence is, as a matter of law, insufficient to support the jury verdict. Put differently, the trial court is justified in granting a

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[32]*See e.g.*, *Davoli v. Webb*, 194 F.3d 1116, 1136 (10th Cir. 1991); *Continental Trend Res. v. Oxy USA*, 810 F. Supp. 1520, 1523-4 (W.D. Okla, 1992); 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2536 (2d ed.1994) ("It is thoroughly established that the sufficiency of the evidence is not reviewable on appeal unless a motion for judgment as a matter of law was made in the trial court. Indeed a motion at the close of plaintiff's case will not do unless it is renewed at the close of all the evidence"). I know of no Utah case on point.

[33]The Utah Supreme Court's Advisory Committee on Rules of Civil Procedure is reviewing this and other differences in the state and federal rules.

[34]*Quinn v. Southwest Wood Prods., Inc*., 597 F.2d 1018, 1025 (5th Cir.1979).

[35]*Id.*

j.n.o.v. only if, after looking at the evidence in the most favorable light to the non-moving party, it concludes that there is no competent evidence to support a verdict for that party.[36] On appeal, the court will review the record and determine whether there is any basis in the evidence to support the jury's verdict. If there is, the j.n.o.v. will be reversed.[37]

2. Motion for New Trial: Rule 59(a)

Utah Rule of Civil Procedure Rule 59(a) allows seven grounds for the trial court to grant a new trial:

1) Irregularity of the proceedings;

2) Jury misconduct;

3) Accident or surprise;

4) Newly discovered material evidence;

5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

6) Insufficiency of the evidence to justify the verdict or that the verdict is "against law;" and,

7) Error in law.

Its federal equivalent more simply provides that a new trial may be ordered "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." The most commonly-encountered grounds for Rule 59(a) motions are excessive or inadequate damages and insufficiency of the evidence, and these require some discussion.

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[36]*See Braithwaite v. West Valley City,* 921 P.2d 997, 999 (Utah 1996); *Gold Standard v. Getty Oil*, 915 P.2d 1060, 1066 (Utah 1996); ASC Utah v Wolf Mtn., 2013 UT 24, ¶18, ____ P.3d _____.

[37]*See id.*

To justify a new trial for excessive damages under Rule 59(a)(5), the damage award must be more than generous; it must be clearly excessive under any rational view of the evidence.[38] Short of ordering a new trial, the court also may offer the victor the opportunity of accepting a remittitur or additur. Although those words are not found in the civil rules, remittitur and additur are within the inherent powers of a state judge to correct excessive or inadequate damage awards short of the time and expense of a new trial.[39]

In a remittitur, the court offers the victorious plaintiff a reduction in damages as an alternative to granting the defendant's motion for new trial for excessive damages. The flip side of the coin is additur, used where the verdict is too meager, where the trial court conditions its grant of plaintiff's motion for a new trial for insufficiency of damages on defendant's consent to the entry of judgment in larger amount.[40]

Additur, unlike remittitur, is *not* an option in federal court– the trial judge cannot constitutionally offer the option of an additur but can only order a new trial for insufficient damages.[41] Both remittitur and additur require the consent of the affected party, without it, a new

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[38]*Bennion v. LeGrand Johnson Constr. Co.*, 701 P.2d 1078, 1084 (Utah 1984).

[39]*See generally, Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 803-4 (Utah 1991); 11 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, Civil 3d §2815-6 (2008); 12 MOORE'S FEDERAL PRACTICE, §59.13[2][g] (3d ed. 2008).

[40]*See, e.g.*, *Dupuis v. Nelson*, 624 P.2d 685 (Utah 1981) and *Onyeabor v. Pro Roofing, Inc.,* 787 P.2d 525 (Ut. Ct. App. 1990).

[41]*Dimick v. Schiedt*, 293 U.S. 474 (1935) found additur to violate the plaintiff's Seventh Amendment right to jury trial (per Sutherland, J.). On the other hand, a remittitur is permissible because it has the effect of "merely lopping off an excrescence." *Id.* at 486-7. And there are devices used by some courts despite the *Dimick* holding, discussed in 12 MOORE'S FEDERAL PRACTICE, §59.13[2][g][C] (3d ed. 2008).

trial follows.[42] No appeal is permissible from an additur or remittitur which a party has accepted; it is analogous to a settlement agreement or a consent decree.[43] If a plaintiff refuses a remittitur or a defendant refuses an additur, a new trial, not an appeal, follows. The order granting the new trial is not appealable because it is not a final judgment.[44]

As to the "insufficiency of the evidence" ground under 59(a)(6), there is a persistent tendency to confuse the standard for granting a new trial based on this ground with the standard for granting a directed verdict or j.n.o.v.[45] Unlike in directing a verdict, which may be done "only when there is no substantial evidence, [a] verdict may be set aside and new trial granted when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice."[46]

In other words, a judge may set aside a verdict on a motion for new trial even though there is substantial evidence to support it. On the other, appellate cases state that a jury's verdict should be upheld as long as *some* evidence and reasonable inferences support its finding.[47] Nor is the trial judge required to view the evidence in the light most favorable to the prevailing party.[48]

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[42]*See Dalton v. Herold,* 934 P.2d 649 (Utah 1997).

[43]*See id.*

[44]*See Haslam v. Paulsen*, 389 P.2d 736 (Utah 1964).

[45]*See* 11 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, Civil 3d § 2806 (2008).

[46]*Aetna Casualty & Surety Co. v. Yeatts,* 122 F.2d 350 (4th Cir. 1941), quoted in *Crookston v. Fire Ins. Exchange*, 817 P.2d 789, 803 n. 15 (Utah 1991).

[47]*See, e.g., Lawrence v MountainStar Healthcare*, 2014 UT App 40, _____ P.3d _____.

[48]*See id.; Deats v. Commercial Security Bank*, 746 P.2d 1191 (Ut. Ct. App. 1987), *cert. denied*, 765 P.2d 1277 (Utah 1988).

The judge's discretion to weigh the evidence is not unlimited, and a new trial should not be ordered simply because of disagreement with the verdict. The trial judge may only properly grant a new trial when he or she can reasonably conclude that the verdict is clearly against the weight of the evidence or that there is insufficient evidence to justify the verdict.[49] Interestingly, while a trial court should only grant a new trial when the verdict is against the manifest weight of the evidence, once the motion is granted, the trial court's decision will be reversed only for an abuse of discretion.[50]

Otherwise put, an order granting a new trial will be affirmed if there was substantial competent evidence which would support a verdict for the moving party.[51] This is far more lenient than the standard of review for a granted motion for j.n.o.v. The trial court has no discretion in granting a motion for j.n.o.v., the decision must be correct. If there is any basis in the evidence to support the verdict, the trial court's decision will be reversed.[52]

An example of the differing appellate standards for review of j.n.o.v. and new trial motions is *Braithwaite v. West Valley City Corp.*[53] In that case, the Supreme Court reversed a

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[49]*See Crookston, supra n. 18*, 817 P.2d 789, 799 at n.9; *Goddard v. Hickman*, 685 P.2d 530, 532 (Utah 1984)("The power of a trial judge to order a new trial is to be used in those rare cases when a jury verdict is manifestly against the weight of the evidence"); *Nelson v. Trujillo*, 657 P.2d 730, 732 (Utah 1982).

[50]*See Crookston,* 817 P.2d at 799. Later in the same case, the Court somewhat confusingly defines the standard of appellate review as being "in reviewing the judge's ultimate decision to grant or deny a new trial, we will reverse only if there is no reasonable basis for the decision." 817 P.2d at 805. *See also Amoss v. Bennion*, 517 P.2d 1008, 1010 (Utah 1973); *Braithwaite v. West Valley City Corp., supra* n.12, 921 P.2d at 1001.

[51]*See Braithwaite v. West Valley City Corp., supra.*

[52] *See id.*

[53]921 P.2d 997 (Utah 1996).

trial court's entry of j.n.o.v. for a defendant in a personal injury case, finding there was competent evidence to support the jury verdict. Nevertheless, the Court affirmed the trial court's grant of the new trial motion because there was also evidence which would have supported a verdict for the defendant: "Our determination that there was sufficient evidence supporting the jury's verdict in favor of the Braithwaites does not preclude a finding that the City presented substantial competent evidence supporting its position."[54] Therefore, a new trial was ordered.

Keep in mind that the waiver of the right to request j.n.o.v. by not making a motion for directed verdict does *not* prevent a party from moving for a new trial on the ground that the verdict is against the weight of the evidence.[55] In other words, there's no reason for the *pro forma* motion for directed verdict so often made by defense counsel when the plaintiff has obviously made out a legally-sufficient case. If the verdict goes against the defense, a new trial motion is still appropriate. All that is waived by not making a directed verdict motion is the chance to make a motion for j.n.o.v. on the ground the plaintiff's case was insufficient as a matter of law.

3. Motion to Alter or Amend Judgment: Rule 59(e)

The rules do not set forth the grounds for this motion but the cases recognize four grounds: to incorporate a new change in the law, to correct clear legal error, to reflect new evidence not available at the time of trial, or to prevent manifest injustice.[56] There is considerable overlap between the motion to alter or amend judgment and the motion for relief from judgment under Rule 60, although the motion to amend must be made within ten days of entry of judgment.

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[54]921 P.2d at 1002.

[55]*See Velasquez v. Figueroa-Gomez,* 996 F.2d 425 (1st Cir. 1993).

[56]*See* S. Baicker-McZee, FEDERAL CIVIL PRACTICE RULES HANDBOOK, pp. 627-628 (1997).

The motion to alter or amend is typically used to correct technical deficiencies in the judgment, such as a failure to calculate prejudgment interest correctly.[57]

4. Motion for Relief from Judgment

Rule 60(b) allows relief from a final judgment on seven distinct grounds:

1. Mistake, surprise, or excusable neglect;
2. New evidence discovered too late to move for a new trial under 59(b);
3. Fraud;
4. Lack of service of process;
5. The judgment is void;
6. The judgment has been satisfied; or
7. "Any other reason justifying relief from the operation of the judgment."

Motions based on the first four grounds must be made within three months of entry of the judgment. Other motions must be made within a "reasonable" time.

Unlike the motion for j.n.o.v. and the motion for new trial, the 60(b) motions usually don't go to the merits of the underlying action.[58] Generally they are used to correct clerical errors, for relief from default judgments, for challenging the jurisdiction of the court entering the judgment but not for post-trial attacks upon the size of the verdict , the fairness of the trial, or the sufficiency of the evidence to justify the verdict. They are not to be used as a substitute for an appeal.[59]

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[57]*See, e.g., Brunetti v. Mascaro*, 854 P.2d 555 (Utah Ct. App. 1993).

[58]*See Board of Educ. v. Cox*, 384 P.2d 806 (Utah 1963).

[59]*See Kell v. State,* 2012 UT 25, ¶18, 285 P.3d 1113; *Dennett v. Ferber,* 2013 UT App. 209, ¶9.

5. "Motion for Reconsideration"

No such motion is recognized under either the Utah or the Federal rules.[60] In the past, courts held that it was the substance of the motion that matters, not the form, and such a non-motion as the "motion" for reconsideration could sometimes be entertained. This is no longer the case, at least in state court. Our Supreme Court has strongly condemned the use of this motion and in 2006 directed attorneys to "immediately discontinue the practice of filing post judgment motions to reconsider."[61] If one is filed, if they consider it at all, courts treat it as a mislabeled motion and look to its substance under Rules 52(b), 59(e), or Rule 60.[62]

Nevertheless, a "motion for reconsideration" still may be made under a different guise. If it involves a ruling other than entry of judgment (when you must use a proper post-trial motion), then Rule 54 (b) allows the judge to re-examine any of his or her rulings before final judgment is entered. Although a motion to reconsider is not expressly available under this rule, Utah Rule of Civil Procedure 54(b) implies that a judge is allowed to change her mind, at least in actions involving multiple parties or claims:

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[60] *See Hatfield v. Board of County Commissioners*, 52 F.3d 858, 861 (10th Cir. 1995); S. BAICKER-MCZEE, FEDERAL CIVIL PRACTICE RULES HANDBOOK, p. 629 (West Publishing Co. 1997); *Tracy v. University of Utah Hospital*, 619 P.2d 340, 342 (Utah 1980).

[61] *Gillett v. Price*, 135 P.3d 861, 864 2006 UT 24. See also, *Ron Shepherd Insurance v. Shields*, 882 P.2d 650, 653 n.4 (Utah 1994) and *Watkiss & Campbell v. Foa*, 808 P.2d 1061, 1064-65 (Utah 1991); *Davis v. Grand County Service Area*, 905 P.2d 888, 891 (Utah Ct. App.1995); *Bonneville Billing v. Torres*, 15 P.3d 112, 113-14, 2000 UT App 338; *IHC Health Servs., Inc. v. D & K Mgmt., Inc.,* 2008 UT 73, ¶ 27, 196 P.3d 588 ("While a case remains pending before the district court prior to any appeal, the parties are bound by the court's prior decision, but the court remains free to reconsider that decision. It may do so *sua sponte* or at the suggestion of one of the parties.... As long as the case has not been appealed and remanded, reconsideration of an issue before a final judgment is within the sound discretion of the district court.") *Accord*, *McLaughlin v. Schenk*, _____ P.3d _____, 2013 UT 20 (replacement judge did not abuse discretion when he decided to re-visit the retired judge's decision).

[62] *See Cope v. Utah Valley State College*, _____ P.3d _____, 2012 Ut App 319, ¶ 9

> Judgment upon multiple claims and/or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision **is subject to revision at any time before the entry of judgment** adjudicating all the claims and the rights and liabilities of all the parties. (Emphasis added.)

Appellate courts have recognized this concept, noting that courts can consider several factors in whether to review a prior ruling: if the matter is presented in a "different light" or under "different circumstances;" if there has been a change in the governing law; if a party offers new evidence; if "manifest injustice" will result if the court does not reconsider the prior ruling; if the court needs to correct its own error; or if an issue was inadequately briefed when first contemplated by the court.[63]

Do not use the term "motion for reconsideration," and request the trial judge to reconsider a prior ruling sparingly, however you label the motion. As the Supreme Court has noted, motions for reconsideration "have proliferated in civil actions to the extent that they have become the cheatgrass of the litigation landscape. We acknowledge that the extraordinary circumstance may arise when it is appropriate to request a trial court to reconsider a ruling. These occasions are rare, however, and we encourage attorneys to reverse the trend to make motions to reconsider

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[63] *Colony Insurance v. Human Ensemble*, 2013 UT App 68, ¶¶ 5-7 *(*reconsideration of denied motion for summary judgment within trial court's discretion); *Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306, 1311 (Utah Ct. App. 1994) (motion for summary judgment can be reconsidered); *Cope v. Utah Valley State College*, *Id.* (same). *See also State v. O'Neil*, 848 P.2d 694, 697 n.2 (Utah Ct. App. 1993); *Salt Lake City Corp. v. James Constructors*, 761 P.2d 42, 44 (Utah Ct. App. 1988).

routine."[64]

Take-Home Key Pointers

The distinctions and interplay among the trial and post-trial motions can be confusing. While nothing substitutes for a careful re-read of the procedural rules, remember these key principles:

- The grounds for a motion to dismiss in a bench trial are broader than those for a motion for directed verdict. The judge can consider not only whether the plaintiff has made out a legally sufficient case but also whether he is convinced by that evidence. And because a decision based on the facts is much easier to uphold on appeal than a decision as a matter of law, always press for a "fact" ruling.

- A *pro forma* motion for directed verdict in a jury trial is not necessary if your opponent has made out a legally sufficient case. A motion for new trial under Rule 59(a)(6) is always an option to challenge a verdict which is against the weight of the evidence, whether you have moved for a directed verdict or not.

- Whether you represent the plaintiff or the defendant, if you have grounds for a directed verdict, be certain to make the motion both at the close of your opponent's case and at the close of all the evidence, the latter at least in state court. If you fail to renew your motion at the close of the evidence, you will be foreclosed not only from making a motion for j.n.o.v. but also from challenging the legal sufficiency of the evidence on appeal.

- A motion for j.n.o.v. is merely a renewal of a directed verdict motion and is judged by the same standards. The "insufficiency of evidence" standard on a motion for new trial

[64] *Shipman v. Evans*, 100 P.3d 1151, 1155, 2004 UT 44.

is *not* the equivalent to the much-stricter directed verdict/j.n.o.v. standard and allows the trial judge considerable latitude in overturning verdicts even when the case is legally sufficient.

- Utah Rule of Civil Procedure 47(s) requires the correction of errors or inconsistencies in jury verdicts before the jury is discharged, and failure to do so will waive the error. Take the time to review the special verdict before the judge discharges the jury.

- Never rely on a stipulation (or even an order) to extend the time to file post-trial motions. Except for Rule 60(b) motions, the deadline for post-trial motions is ten days after the entry of judgment in state court and it cannot be extended.

- You should never file a "motion for reconsideration." But in *proper* circumstances, you may accomplish the same thing using rule 54(b).

FJC
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