

1957

## Errors in Framing Special Verdict and Instructions: Necessity of Motion for New Trial Grounded Thereon as Pre-Requisite to Availability on Appeal

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### Repository Citation

Paul F. Wojtkiewicz, *Errors in Framing Special Verdict and Instructions: Necessity of Motion for New Trial Grounded Thereon as Pre-Requisite to Availability on Appeal*, 41 Marq. L. Rev. 217 (1957).

Available at: <https://scholarship.law.marquette.edu/mulr/vol41/iss2/13>

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In *Beverly v. Thorpe*<sup>18</sup> the Court held that a no-action clause in a state recognizing such clauses as valid retained its vitality in a suit in Wisconsin. Joinder of the insurer as a party defendant was not allowed because Sec. 260.11(1), although merely procedural,<sup>19</sup> also takes away a valuable right and to apply it to a contract good in the state where written would be unconstitutional as an impairment of a valid contract.

*Ritterbusch v. Sexsmith* made passing reference to the constitutional ground applied in *Byerly*. The decision was in fact, though, made to rest upon the conflict of laws doctrine that the law of the state where a policy is issued determines the efficacy of the no-action clause.

"No case has been cited to us from the decisions of this court or any other court which holds that the obligation of an automobile liability policy is to be interpreted by any law other than that of the state where the contract was made. Considering the great volume of litigation growing out of automobile accidents this dearth of authority is significant and not to be explained except by acknowledging the principle that the law of the state where the contract is made determines the obligation of the contract, not the law of the place of performance."<sup>20</sup>

The Wisconsin Supreme Court has steadfastly refused to give extra-territorial effect to Sec. 260.11(1) in every case where the issue was raised. Whether these decisions have in fact construed Sec. 260.11(1) as being inapplicable to the policies under consideration or whether instead the conflict of laws rule of *Ritterbusch* controls; the result would appear to be the same, viz., Sec. 260.11(1) does not apply to policies of insurance containing a no-action clause recognized as valid in the state where the policy was issued.

DONALD GANCER

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**Errors in Framing Special Verdict and Instructions: Necessity of Motion for New Trial Grounded Thereon as Prerequisite to Availability on Appeal**—On trial of an auto negligence action, counsel for the defendant objected to the form of a special verdict proposed for submission to the jury, pointing out to the court that the special verdict was duplicitous in that it permitted finding defendant's deceased driver negligent not only as to lookout, but also as to management and control. The jury returned a special verdict under which the driver was found causally negligent as to speed, lookout, and management and control. After verdict, the defendant moved for a new trial. The motion for new trial specified five grounds in support thereof, none of which specifically

<sup>18</sup> *Byerly v. Thorpe*, 221 Wis. 28, 265 N.W. 76 (1936); Followed in *Kilcoyne v. Trausch*, 222 Wis. 528, 269 N.W. 276 (1936).

<sup>19</sup> See notes 16 & 17 *supra*.

<sup>20</sup> See note 4 *supra*, 256 Wis. at 515, 41 N.W. 2d at 615. Two justices dissenting to this statement of the conflict of laws rule.

referred to the duplicitous verdict. The trial court denied the motion and the defendant appealed from the judgment. *Held*: Affirmed. Although the defendant would be entitled to a new trial because of the duplicitous verdict, the right to raise the issue on appeal was lost by not affirmatively establishing by the record that the error was called to the trial court's attention in considering the motion for new trial. The court stated the correct rule to be that:

“. . . no error of the court should be reviewable *as a matter of right* on appeal without first moving in the trial court for a new trial bottomed on such error, if the error is of a category that a trial court could correct by granting a new trial.”

*Wells v. Dairyland Mutual Insurance Co.*, 274 Wis. 505, 80 N.W. 2d 380 (1957).

The Court mentioned that another rule often had been cited as correct, *i.e.*, a motion for a new trial is necessary only to preserve for review errors committed by the jury, and errors committed by the court are reviewable without such motion.<sup>1</sup> The Court said a review of the cases presented a “chaotic inconsistency” and a rectification was necessary.

A cursory examination of the Wisconsin cases dealing with the necessity of a motion for a new trial discloses that inconsistency has been present in the area. However, on closer examination, a certain measure of consistency is found in the earlier decisions, and, to this extent, the present decision is an innovation in Wisconsin law.

Prior to the instant case, it was clear that to have a review of certain errors there had to be a motion for new trial presented to the trial court.<sup>2</sup> Generally, if a review of the sufficiency of the evidence was sought, a party was required to move in the trial court for a new trial on the ground that the verdict was contrary

<sup>1</sup> This rule was cited in the following cases: *McNamer v. American Insurance Co.*, 267 Wis. 494, 66 N.W.2d 342 (1954); *Sullivan v. Minneapolis, St. Paul Railway Co.*, 167 Wis. 518, 167 N.W. 311 (1918); *Plankington v. Gorman*, 93 Wis. 560, 67 N.W. 1128 (1896). See also *Strnad v. Co-operative Insurance Mutual*, 256 Wis. 261, 40 N.W.2d 552 (1949), in which then Chief Justice Rosenberry said it was “. . . the settled law of this state that errors committed by the court may be reviewed by the supreme court upon an appeal from the judgment in the absence of a motion for a new trial.” This case is not clearly in point as it dealt with an appeal from an order granting a new trial.

<sup>2</sup> The only case which seemed to say a motion for a new trial directed to the trial court was necessary in order to move the Supreme Court to order a new trial in all cases was *Krudwig v. Koepke*, 223 Wis. 244, 270 N.W. 179 (1936). The case was criticised—see 38 WIS. L. REV. 122.

WIS. STATS. §270.49 (1955), now reads “(1) The trial judge may entertain a motion to be made on his minutes, to set aside a verdict and grant a new trial because of errors in the trial or because the verdict is contrary to law or to the evidence, or for excessive or inadequate damages or in the interest of justice; . . .”

to the evidence.<sup>3</sup> Likewise, a motion for new trial was definitely necessary if there was a contention that damages were excessive.<sup>4</sup> However, it seems the motion was not necessary where the trial court directed a verdict against a party or improperly denied a motion for a directed verdict.<sup>5</sup> There was also some authority to the effect that errors in regard to the admission or rejection of evidence could be raised on appeal without a motion for new trial.<sup>6</sup>

Whether errors in instructions were available on appeal if there was no motion for new trial cannot be definitely determined. It would appear they were at one time.<sup>7</sup> In the present case the court cites a number of decisions which, it claims, created precedent for its rule. However, an examination of the decisions cited (and of those cited in the appellate briefs) indicates that the question in such cases was whether the error was ever pointed out properly to the lower court at all.<sup>8</sup> One case cited, *Mossak v. Pfost*,<sup>9</sup> on its face supports the court's contention. In the *Mossak* case the court said:

"The instruction was erroneous. But we may not consider the error; it was not specifically pointed out by the plaintiff in her motion for a new trial as a ground therefor."<sup>10</sup>

<sup>3</sup> *Strnad v. Co-operative Insurance Mutual*, 256 Wis. 261, 40 N.W.2d 522 (1949); *Shores Lumber Co. v. Starke*, 100 Wis. 498, 76 N.W. 366 (1898); *Reed v. City of Madison*, 85 Wis. 667, 56 N.W. 182 (1893).

<sup>4</sup> *Howard v. Beldenville Lumber Co.*, 134 Wis. 644, 114 N.W. 1114 (1908). The Court said the motion for a new trial must specify the grounds at least as specifically as they are mentioned in the statute or the particular question could not be raised on appeal.

<sup>5</sup> *McNamer v. American Insurance Co.*, 267 Wis. 494, 66 N.W.2d 342 (1954); *Kopplin v. Quade*, 145 Wis. 454, 130 N.W. 511 (1911); *Zahn v. Milwaukee and Superior Railway Co.*, 114 Wis. 38, 89 N.W. 889 (1902); *Wheeler v. Seamans*, 123 Wis. 573, 102 N.W. 28 (1905). There seems to be no reason under the main case to require a motion in the lower court when there is a contention on appeal that a directed verdict should have been given. After all the party is not asking for a new trial but for judgment in his favor.

<sup>6</sup> *Sullivan v. Minneapolis, St. Paul Railway Co.*, 167 Wis. 518, 167 N.W. 311 (1918). The Court said that under the settled law of this state, a question of the improper admission of testimony could be reviewed on appeal even though no motion for a new trial was made in the lower court. The Court questioned the language in several earlier cases which seemed to indicate the motion was necessary.

<sup>7</sup> *Prichard v. Deering Harvester Co.*, 117 Wis. 97, 93 N.W. 827 (1903).

<sup>8</sup> In *Graves v. State*, 12 Wis. \*591 (1860), *State v. Biller*, 262 Wis. 472, 55 N.W.2d 414 (1952), and *Zombkowski v. Wisconsin River Power Co.*, 267 Wis. 77, 64 N.W.2d 236 (1954), all cases cited by the Court in the main case, the issue was whether a party could raise an error in instructions for the first time on appeal. *Ferry v. State*, 266 Wis. 508, 63 N.W.2d 741 (1954), is another case cited by the Court. In the *Ferry* case it is obvious the lower court was never informed of the claimed error in instructions. See the Brief for the State, p. 33, which says, "The record discloses that no objection to the court's instruction was ever made in the trial court."

One could suppose from a reading of these cases that although exceptions did not have to be taken to instructions in the more recent cases, see note 13 *infra*, the error had to be pointed out to the trial court sometime, and the only available time would normally be when the motion for new trial was made.

<sup>9</sup> 258 Wis. 73, 44N.W.2d 922 (1950).

<sup>10</sup> *Id.* at 76, 44 N.W.2d at 923.

*Norton v. State*<sup>11</sup> is the only authority given for the quoted statement in the *Pfost* case. Upon a check of the *Norton* case, and the authorities listed therein,<sup>12</sup> we find that the cases merely say that if no proper exception had been taken to a particular instruction, the mentioning of the specific error on the motion for new trial would preserve the question for appeal. Of course, in Wisconsin it is no longer necessary either to take exception or to interpose any type of objection to instructions.<sup>13</sup>

Whether there was confusion or not in the past is no longer too important, for the Wisconsin Court has now made its position clear. The following statement is certainly unequivocal:

"A procedural device which affords an opportunity to a trial court to correct its own errors by directing a new trial, without the necessity of an appeal to this court to reach the same result, would seem to be in the public interest. During the course of a trial the trial judge often is required to 'shoot from the hip' in making his rulings without the benefit of briefs or time to make an independent research of the authorities. A very different situation prevails when the trial judge has before him after verdict a motion for new trial grounded upon alleged error. Time will then permit the preparation and filing of briefs by counsel, and for the judge to do independent research of his own."<sup>14</sup>

PAUL F. WOJTKIEWICZ

**Administrative Law—Notice of Special Assessment—Action in equity to set aside special assessments.** The City of Milwaukee levied special assessments for street improvements against property owned by the plaintiff. Abutting landowners were given notice of the assessments by publication, in compliance with the City Charter which provided that notice of an assessment for street improvement benefits was

<sup>11</sup> 129 Wis. 659, 109 N.W. 531 (1906).

<sup>12</sup> See *Grabowski v. State*, 126 Wis. 447, at 458, 105 N.W. 805, at 806 (1905).

<sup>13</sup> WIS. STATS. §270.39 (1955); *Reuling v. Chicago, St. P. M. & O. R. Co.*, 257 Wis. 485, 44 N.W.2d 253 (1950).

<sup>14</sup> 274 Wis. at 516. It might be argued that the trial court is not exactly forced to "shoot from the hip" when there are objections to a proposed special verdict, as happened in this case, for there is probably no more opportune time to excuse the jury for a few hours and hear argument.

Lest one get the idea this note is a criticism of the rule laid down, it should be noted that some other states have the same rule. See 3 AM. JUR., *Appeal & Error* §267. Further, it should be obvious that if there is any possibility of preventing the expense of an appeal, the possibility should be exhausted.

The main case has already been cited with approval in two cases. In *Frion v. Craig*, 274 Wis. 550, 80 N.W.2d 808 (1957), the Court decided that the trial judge's questioning of witnesses and comments during the trial could not be raised on appeal because not raised in the motions after verdict. In *Bronk v. Mijal*, 275 Wis. 194, 81 N.W.2d 481 (1957), the Court held that although the court was requested to submit a certain question in the special verdict, failure to move for a new trial after verdict bottomed upon such error precluded the raising of the issue on appeal.