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Appellate Review Of Judgment Notwithstanding The Verdict

against the insurance company becomes undesirable in such a case.

A comparison of the "third solution," as expounded in the *Juzefski* case, with the "fourth solution," as recommended by the dissent in *Sperling,* will reveal that the "fourth solution" is the more logical of the two. The court in the *Juzefski* case did not look beyond the apparent ambiguity. If it had it would have found that there was only one reasonable construction of the contract. If one looks not only at the words but also at the normal implications that flow therefrom, it is easily seen that "his household" means the familial or residential group with which one lives. A wife or son who lives under the parental roof has a household.[30] To adopt the construction of the court would, in effect, construe out of existence the exclusion clause in the policy, for Keys was not the head of any household. In the words of the dissenting judge in the *Juzefski* case: "I think it incorrect to find ambiguity by the process of suggesting a strained and quite unnatural interpretation as a basis of possible conflict."[31]

Therefore, solutions one and three appear to reject the rule of reasonable construction and refuse to ascertain the intention of the parties if any interpretation of the words results in a finding of liability against the insurance company. Reasonableness is no longer a criterion in determining the intention of the parties because this intent is no longer a primary consideration, except as expressed in the words which are construed most strongly against the insurer. The undesirability of this change in insurance law becomes apparent from the fact that insurance companies are found liable in situations when the parties to the contract had not even remotely intended such liability. The court in such a case gives the insured greater protection than he paid for.

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APPELLATE REVIEW OF JUDGMENT NOTWITHSTANDING THE VERDICT

As a result of a statutory and judicial relaxation of procedural rules, courts in most states now have power to make post-verdict dis-

[30]Farm Bureau Mut Auto. Ins. Co. v. Violano, 123 F.2d 692 (2d Cir. 1941).

[31]342 P.2d at 933. "Words should be taken in that sense to which the apparent object and intention of the parties limit them, and the courts will always look behind the terminology to ascertain what the parties intended in making the contract." 1 Couch, Insurance § 15:22 (2d ed. 1959). In the light of this statement and the Lott and Habaz cases, the fallacy of the court's decision in the Sperling case becomes apparent.

positions of cases by entering judgment notwithstanding the verdict.[1] In some of these states, lawmakers have provided for the possibility of a disagreement of the jurors by authorizing the entry of judgment in that event also.[2] But when a trial court first denies motions for a directed verdict, and later enters judgment notwithstanding the verdict—the same evidence forming the basis for both determinations, a reviewing court may become somewhat dubious of the propriety of the trial court's entry of judgment.

The recent Ohio case of *Perko v. Local 207 of Int'l Ass'n of Bridge Workers*[3] presented this situation under a statute which provides for the entry of judgment notwithstanding the verdict or upon disagreement of the jury. The statute authorizes judgment when a party is entitled thereto as a matter of law upon the pleadings or the evidence received on trial, but not on the ground that the verdict is against the weight of the evidence.[4] The case involved an alleged interference by the defendant with the plaintiff's right to work. During the trial, the defendant's motions for a directed verdict at the close of the plaintiff's evidence and again at the close of all the evidence were denied, and the case was submitted to the jury. Its members were unable to reach an agreement on a verdict, and the jury was discharged. Thereupon, the defendant filed a "motion for judgment on disagreement of jury" under the Ohio statute[5] upon the ground that it was entitled by law to judgment upon the evidence received during the trial. The trial court granted this motion but rendered no opinion as to the basis for its action. The Ohio Court of Appeals affirmed the trial court's

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[1]E.g., Pa. Stat. Ann. tit. 12, § 684 (1953); Va. Code Ann. § 8-352 (1950). For a collection of cases arising under Rule 50(b) of the Federal Rules of Civil Procedure, and like state statutes, see Annot., 69 A.L.R.2d 449 (1960).

[2]The authorities are not in agreement as to the trial court's power to enter judgment after a disagreement of the jury when the statute only authorizes the entry of judgment notwithstanding the verdict. Compare, Domarek v. Bates Motor Transp. Lines, Inc., 93 F.2d 522 (7th Cir. 1937) (holding that the court had such power), with Brandsrud v. Beattie Steinborn Co., 74 S.D. 224, 50 N.W.2d 639 (1951) (holding that the statute authorizing judgment notwithstanding the verdict inapplicable when no verdict is returned). For a collection of cases involving the entry of judgment after a disagreement of the jury, see Annot., 31 A.L.R.2d 885 (1953).

[3]171 Ohio St. 68, 167 N.E.2d 903 (1960).

[4]Ohio Rev. Code Ann. § 2323.18 (Baldwin, Supp. 1960): "When upon the statements in the pleadings or upon the evidence received upon the trial, or both, one party is entitled by law to judgment in his favor, upon motion of such party ... judgment shall be so rendered by the court although the jury may have failed to reach a verdict or a verdict has been rendered against such party and a judgment entered thereon, and whether or not a motion to direct a verdict has been made or overruled, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence."

[5]Ibid.

judgment, stating that "the court, after careful consideration of the entire record finds that plaintiff, appellant has not sustained the burden of proof...."[6]

In a four to three decision, the Supreme Court of Ohio reversed the judgment of the lower courts and remanded the case for a new trial. From the opinion it appears that the Supreme Court did not consider whether there was evidence in the record to support the plaintiff's cause, but instead relied on two inferences drawn from the action of the lower courts. The first inference was that the trial court did not intend its entry of judgment for the defendant to mean that there was no evidence to support plaintiff's case, for if it had, it would have granted the defendant's motion for a directed verdict. The second inference was that the intermediate appellate court in affirming the trial court's judgment realized that the evidence had been weighed; this inference arose from the opinion of the intermediate appellate court which stated that the plaintiff had failed to sustain the burden of proof. On the strength of these two inferences, the Supreme Court concluded that the trial court had weighed the evidence in reaching its decision to enter judgment for the defendant. Since the statute expressly denies the trial court power to weigh the evidence in considering a motion for judgment notwithstanding a jury verdict, by analogy the Supreme Court concluded that the trial court should not have this power where the jury reached no verdict because of a disagreement.

The statute which authorizes the entry of "judgment notwithstanding" represents a departure from the common law rules in that it authorizes the court to make a post-verdict final determination of a case upon the basis of evidence received at the trial,[7] while at common law a post-verdict final determination could be made only on the basis of the pleadings.[8] Also, the common law only permits the

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[6]167 N.E.2d at 904.

[7]See note 4 supra.

Referring to the federal rule, it has been said: "The rule does not have the effect of narrowing or restricting the exclusive providence of the jury to determine questions of fact. A motion under the rule can be granted only where the moving party was entitled to a directed verdict. If there were contested issues of fact appropriate for submission to the jury, it is error to grant a motion for judgment under the rule." Brodrick v. Derby, 236 F.2d 35, 37 (10th Cir. 1956), citing Berry v. United States, 312 U.S. 450 (1941).

[8]Slocum v. New York Life Ins. Co., 228 U.S. 364, 380-82 (1913). But see Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654 (1935), wherein it was held that the court could reserve its ruling on a motion for a directed verdict until after the verdict, at which time it could make its ruling and enter judgment thereon notwithstanding the verdict.

court to direct a verdict against a party who on trial fails to produce sufficient evidence to go to the jury,[9] but the statute extends this rule by authorizing such a determination after a verdict or disagreement of the jury.[10] In effect, the statute allows the test for a directed verdict to be applied at the time of the post-verdict motion.[11] Thus a peculiar situation occurs when a trial court, after denying motions for a directed verdict, subsequently enters "judgment notwithstanding" when the same evidence forms the basis for determination on both motions.[12] It was this situation in the *Perko* case that gave rise to the inference that the trial court's action was improper.

Approaching the problem from the standpoint of the Ohio Supreme Court, a possible inference would be that the trial court, in denying the motion for a directed verdict, believed that a prima facie case[13] had been established by the plaintiff. Thus the trial court would not have been authorized to enter a judgment for the defendant.[14] But the situation may have been such that the trial court was undecided as to whether a prima facie case had been established, and desiring additional time to re-examine the record,[15] submitted the case to the jury subject to its prerogative of later entering "judgment notwithstanding." In the absence of evidence to the contrary it would seem that the second inference is the more proper of the two, in that if the first inference were correct, it would follow that the trial judge knowingly violated the statute.

Courts with rules similar to the Ohio statute take the view that in such a case the better practice is for the trial court to submit the case

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[9]A final determination in this sense does not include the granting of a motion for a new trial. See, 9 Wigmore, Evidence § 2495 (3d ed. 1940).

[10]See note 4 supra.

[11]Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940); Ayers v. Woodard, 166 Ohio St. 138, 140 N.E.2d 401 (1957).

[12]As to whether the court is required to consider the record as of the time of the motion for judgment under the rule or at the time of the prior motion for a directed verdict, compare In re Bingaman's Estate, 155 Neb. 24, 50 N.W.2d 523 (1951), with Weber v. United Hardware & Implement Mutuals Co., 75 N.D. 581, 31 N.W.2d 456 (1948).

[13]The term prima facie case is employed herein as "representing the stage... where the proponent, having the first duty of producing some evidence in order to pass the judge to the jury, has fullfilled that duty, satisfied the judge, and may properly claim that the jury be allowed to consider his case." 9 Wigmore, Evidence § 2494 (3d ed. 1940).

[14]See note 7 supra.

[15]"This procedure permits the trial judge to give further consideration to a difficult question after the verdict and after having been obliged to give a quick decision, under the pressure of the waiting jury...." Herrmann, The New Rules of Procedure in Delaware, 18 F.R.D. 327, 340-41 (1956).

to the jury for its voluntary finding.[16] If a motion for judgment notwithstanding the verdict is granted after the jury returns its verdict, a new trial may be avoided inasmuch as the appellate court, if it disagrees with the trial court, can direct the trial court to reinstate the verdict and enter judgment thereon.[17] It does not appear that the propriety of this practice should be affected by the subsequent failure of the jury to reach a verdict.

The second inference relied upon by the Supreme Court arose from the intermediate court's opinion which stated that the plaintiff had failed to sustain the burden of proof. The intermediate court's opinion is itself ambiguous due to the dual meaning of the term "burden of proof."[18] Burden of proof in one sense deals with the risk of non-persuasion of the jury,[19] while in the other sense it deals with the burden of satisfying the judge that there is a triable issue for the jury.[20] The opinion, under the first meaning of burden of proof, could mean that the intermediate court felt that there was sufficient evidence upon the record to establish a prima facie case in favor of the plaintiff. In such a case the trial court would not be authorized to enter "judgment notwithstanding" since this would necessitate weighing the evidence.[21] The opinion, under the other meaning of burden of proof, could mean that the evidence upon the record failed to show that the plaintiff had established a prima facie case. In this case the trial court would be authorized to enter "judgment notwithstanding."[22]

The ambiguity of the intermediate court's opinion accentuates the question of whether the opinion should constitute a part of the basis for determination by the Supreme Court, since it is generally

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[16]Shaw v. Edward Hines Lumber Co., 249 F.2d 434 (7th Cir. 1957); Craighead v. Missouri Pac. Transp. Co., 195 F.2d 652 (8th Cir. 1952); Fratta v. Grace Line, Inc., 139 F.2d 743 (2d Cir. 1943.)

[17]Ibid. See Phelps, Reinstatement of a Verdict in Ohio, 10 U. Cinc. L. Rev. 481 (1936).

[18]Wigmore sets out two clearly distinguishable meaning of "burden of proof":

(1) Risk of Non-Persuasion of the Jury. This concept suggests that a triable issue has been established, and involves the duty upon the respective parties of adducing evidence to persuade the jury in its finding. 9 Wigmore, Evidence § 2485 (3d ed. 1940).

(2) Duty of Producing Evidence to the Judge. This concept involves the duty of both parties to "satisfy the judge that they have a quantity of evidence fit to be considered by the jury, and to form a reasonable basis for the verdict." 9 Wigmore, Evidence § 2487 (3d ed. 1940).

[19]Id. § 2485.

[20]Id. § 2487.

[21]See note 4 supra.

[22]Ibid.

held that a reviewing court is restricted to the record in making its determination.[23] The usual rule, which can be traced back to the 1827 United States Supreme Court case of *Williams v. Norris*,[24] is that the opinion of a lower court is not a part of the record.[25] The Court in the *Williams* case refused to decide the case on legal questions arising from the opinion of the lower court which did not appear in the record. Mr. Chief Justice Marshall stated:

> "[I]t [the opinion of the lower court] can be introduced for no other purpose than to suggest to the superior court those arguments which might otherwise escape its notice, which operated in producing the judgment, and which ... ought to be weighed by the superior court before the judgment should be reversed or affirmed."[26]

If the sole function of the lower court's opinion upon review is to suggest arguments to the higher court, it would be wholly inconsistent to allow this opinion to form a part of the basis for the determination by the appellate court.

In substantiating the holding of the *Williams* case, the Chief Justice set forth the proposition to which the courts generally adhere, that "if it [the judgment of the lower court] should be correct, although the reasoning by which the mind of the judge was conducted to it should be deemed unsound, that judgment would certainly be affirmed in the superior court."[27] In other words, if the statement of the opinion or some other action of the lower court shows an improper application of the law, it is incumbent upon the reviewing court to ascertain whether the judgment could be affirmed under a proper application of the law. Thus in the *Perko* case, the Supreme Court should not have reached a decision opposing that of the lower courts merely from a determination that the reason for the lower courts' decisions was erroneous; its duty was to ascertain whether the judgment of the lower courts could legally be based on the facts of the case and the law applicable thereto.

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[23]Klager v. Murphy Alfalfa, Inc., 165 Kan. 130, 193 P.2d 216 (1948); Loth v. Loth, 227 Minn. 387, 35 N.W.2d 542 (1949); Schubert v. St. Louis Pub. Serv. Co., 358 Mo. 303, 214 S.W.2d 420 (1948); Kennedy & Parsons Co. v. Schmidt, 152 Neb. 637, 42 N.W.2d 191 (1950); Kontwer v. Unemployment Compensation Bd. of Review, 148 Ohio St. 614, 76 N.E.2d 611 (1947); New Bay Shore Corp. v. Lewis, 193 Va. 400, 69 S.E.2d 320 (1952).

[24]25 U.S. (12 Wheat.) 117 (1827).

[25]Accord, Wilson v. Wilson, 64 Cal. 92, 27 Pac. 861 (1883); Pennsylvania Co. v. Versten, 140 Ill. 637, 30 N.E. 540 (1892); State v. Central Pac. R.R., 17 Nev. 259, 30 Pac. 887 (1883); Buckley v. Duff, 111 Pa. 223, 3 Atl. 823 (1886).

[26]25 U.S. (12 Wheat.) at 119-20.

[27]Id. at 120.

"It is of the first importance to assure so far as possible an objective and impartial determination of the facts involved in a controversy, and of the law to be applied to those facts."[28] This determination serves not only as a check on the judiciary but also as a basis of decisions by the courts in other cases according to the "common law technique of decisions and doctrine of precedents."[29] To this extent the parties and the court alike have an interest in the treatment of a case on review. Even if the record is inadequate to affirm or reverse the lower court's holding, due consideration should be given to the fact that much of what is important in arriving at a determination of the facts by the trial court is lost to a reviewing court in transcribing oral testimony.[30]

It is felt that the rule authorizing the entry of "judgment notwithstanding" has been successful because the judge making the initial determination is present during the trial and is able to get the "feel" of the case, and so he is better qualified to make a ruling.[31] The purpose of the rule is to speed up litigation by preventing unnecessary retrials.[32]

However, if any doubt is permitted to surround the appellate review of the use of this rule, then trial judges will be faced with a dilemma. They may choose to direct a verdict and risk having the decision reversed on appeal after which a new trial is necessary; or they may find that the failure to direct a verdict has cast doubt upon the propriety of a subsequent "judgment notwithstanding." Therefore, appellate courts should provide clear and logical rules for the review of the "judgment notwithstanding"; otherwise the benefit intended by the rule may never be realized.

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[28]Pound, Appellate Procedure in Civil Cases 3 (1941).

[29]Id. at 4.

[30]Id. at 6.

[31]Cone v. West Va. Pulp & Paper Co., 330 U.S. 212, 216 (1947).

[32]Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 250 (1940). "The limitation of this common-law procedure was thought to be unjust because it sometimes coerced the losing party to compromise or abandon legal rights involved in the case or suffer the delay, expense, and effort of another trial upon what frequently proved to be substantially the same evidence." Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N.W.2d 533, 535 (1949).