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THE APPEAL OF THE GRANT OF A NEW TRIAL IN FEDERAL COURT

ROGER M. BARON*

I. INTRODUCTION

As a general proposition, appellate review of the grant of a new trial by a federal district court is possible only upon the rendition of a final judgment in the newly granted trial. This rule is encapsulated in the phrase "reviewable but not appealable." In a limited number of situations, however, immediate appeal may be obtained. This Article reviews the law that has developed in the federal court system concerning the circumstances under which such review is attainable.¹

II. THE GENERAL RULE: REVIEWABLE BUT NOT APPEALABLE

The general appeals statute, section 1291 of title 28 of the United States Code, limits authorization of review by the federal courts of appeals to "all final decisions of the district courts."² The

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¹ Initially, it should be noted that the grant or denial of a motion for a new trial is a procedural matter governed exclusively by federal law, regardless of whether the underlying claim is a federal or state law cause of action. *See* *Wiedemann v. Galiano*, 722 F.2d 335, 337 (7th Cir. 1983); *Silverii v. Kramer*, 314 F.2d 407, 413 (3d Cir. 1963).

² 28 U.S.C. § 1291 (1982). The statute reads in full:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Id.; *see* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2818, at 114 (1973).

The grant of a new trial limited solely to the issue of damages is generally treated identically to the grant of a new trial on all issues. In each case, the grant is reviewable only on appeal from a final judgment following the second trial. *See* *Dassinger v. South Cent. Bell Tel. Co.*, 537 F.2d 1345, 1346 (5th Cir. 1976).

Supreme Court has defined a final decision as one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."³ When a new trial is granted after a jury verdict, the action remains pending in the trial court with the parties relegated to the positions they occupied prior to the first trial. Consequently, such a grant is not a final order and hence is not appealable under section 1291. Instead, the grant of a new trial is considered an unappealable "interlocutory order."⁴

Although not appealable, the grant of a new trial may ultimately be reviewable by the appellate court following the entry of a final judgment in the second trial,⁵ or in whatever subsequent retrial culminates in a final judgment.⁶ The prohibition against an immediate appeal is predicated upon a policy against appellate intrusion on a piecemeal basis. Ideally, it is believed, the federal appellate courts should be able to review in one sitting all stages of a proceeding.⁷ The general rule that the grant of a new trial is not

³ *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133, 1136 (1988) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

⁴ *Roy v. Volkswagenwerk Aktiengesellschaft*, 781 F.2d 670, 671 (9th Cir. 1985) (per curiam).

⁵ See *Evers v. Equifax, Inc.*, 650 F.2d 793, 796 (5th Cir. Unit B July 1981); see also 11 C. WRIGHT & A. MILLER, *supra* note 2, § 2818, at 115. An initial verdict winner, after losing a second trial, may appeal from a final judgment based thereon—without challenging any aspect of the second trial—for the sole purpose of contesting the propriety of the action of the district court in granting the new trial. See, e.g., *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1555 n.2 (11th Cir. 1984) (appellant only challenged order granting new trial after verdict in new trial); *Evers*, 650 F.2d at 796 (appellant awaited entry of final judgment in second trial before appealing order granting second trial).

⁶ See *Dassinger*, 537 F.2d at 1346.

⁷ See *Cobbledick v. United States*, 309 U.S. 323, 325 (1940). In *Cobbledick*, Justice Frankfurter outlined the rationale for the federal appeals policy:

Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.

Id.; see also J. FRIENDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* § 13.1, at 581 (1985) (rationale behind final judgment rule is based on "a desire to achieve judicial economy and efficiency").

With respect to the prospect of securing appellate review, the treatment afforded the grant of a new trial is consistent with the treatment afforded the denial of a new trial. The denial of a motion for a new trial under Federal Rule of Civil Procedure 59(a) is not, in and of itself, appealable because it merely restates an attack on the merits of the challenged judgment. *Youmans v. Simon*, 791 F.2d 341, 349 (5th Cir. 1986). It is the accompanying

immediately appealable places the initial verdict winner in an anomalous position. Such a party may certainly be aggrieved by the grant of a new trial, yet he or she is required to lose that trial,⁸ or at least suffer a less favorable result,⁹ in order to seek appellate review of the decision which forced him or her to undergo the second trial. In denying review in the event the initial verdict winner again prevails in the new trial, it is said that he has suffered only the mere inconvenience of undergoing a second trial.¹⁰

III. STANDARD OF REVIEW

Parties aggrieved by the grant of a new trial, in many instances, ultimately do receive appellate review. Frequently, however, their plea for relief is overshadowed by the subsequent retrial and the oft-quoted principle that the grant of a new trial is within the broad discretion of the trial court.¹¹ There is great reluctance on the part of the appellate courts to interfere with a trial court's decision to grant a new trial. While the decision has been described as subject to an abuse of discretion standard,¹² this language probably understates the broad discretion actually afforded the trial

judgment that would constitute the basis for an appeal, at which time the denial of a motion for a new trial may be reviewed. *See* *Peters Township School Dist. v. Hartford Accident & Indem. Co.*, 833 F.2d 32, 35 (3d Cir. 1987).

⁸ *See, e.g., Hewitt*, 732 F.2d at 1555 (appellant appealed granting of new trial after receiving adverse judgment in second trial).

⁹ *See, e.g., Narcisse v. Illinois Cent. Gulf R.R.*, 620 F.2d 544, 545-46 (5th Cir. 1980) (injured appellant appealed granting of new trial after damages awarded were reduced at conclusion of new trial).

¹⁰ *Cf. Gallimore v. Missouri Pac. R.R.*, 635 F.2d 1165, 1171 n.9 (5th Cir. Unit A Feb. 1981) (lamenting waste of private and judicial resources in new trial). In reference to "the waste of private and judicial resources" necessary to a second trial, the appellate court in *Gallimore* observed: "This is simply part of the penalty exacted of our system of justice by the rule that in the ordinary course of events, an order granting a new trial is interlocutory and not subject to immediate appeal." *Id.*

¹¹ *See, e.g., Sellers v. Baisier*, 792 F.2d 690, 693 (7th Cir. 1986) ("trial court has broad discretion in ruling on motions for a new trial"); *Eximco, Inc. v. Trane Co.*, 748 F.2d 287, 290 (5th Cir. 1984) (per curiam) (trial court has "wide" discretion in granting new trial).

If the second trial is totally free from prejudicial error, then the appealing party is in the awkward position of seeking to overturn what appears as a fair verdict simply because the second trial was not necessary since the first trial also was free from prejudicial error. Thus, in most cases even if it were error to grant a new trial, that error will be deemed harmless or moot by the time appellate review occurs.

J. FRIENDENTHAL, M. KANE & A. MILLER, *supra* note 7, § 12.4, at 558-59.

¹² *See Evers v. Equifax, Inc.*, 650 F.2d 793, 796 (5th Cir. Unit B July 1981); *Massey v. Gulf Oil Corp.*, 508 F.2d 92, 94 (5th Cir.), *cert. denied*, 423 U.S. 838 (1975).

judge.¹³

Against this background, it may come as a surprise to learn that there have actually been instances in which the initial verdict winner has obtained relief subsequent to an adverse result in the new trial. Indeed, there have been cases where the appellate court has reinstated the first jury's verdict despite the fact that a second jury has decided the case differently.¹⁴ Although earlier cases which reinstated initial verdicts did not rest on constitutional grounds,¹⁵ recent cases¹⁶ have sounded of the pertinent command of the seventh amendment that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States."¹⁷ By these words, the seventh amendment "'expresses in clear terms the principle that facts once found by a jury in . . . a civil trial are not to be reweighed and a new trial granted lightly.'"¹⁸ The constitutional argument is most appealing in those cases where the district court has granted a new trial because the verdict is against the weight of the evidence.¹⁹

IV. EXCEPTIONS TO THE GENERAL RULE

There are a number of exceptions to the general rule that the grant of a new trial is not subject to immediate appellate review.

A. *Certified Interlocutory Appeals*

Although the grant of a new trial is not appealable as a final

¹³ See *Champeau v. Fruehauf Corp.*, 814 F.2d 1271, 1274 (8th Cir. 1987).

¹⁴ See, e.g., *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1559 (11th Cir. 1984); *Narcisse v. Illinois Cent. Gulf R.R.*, 620 F.2d 544, 548 (5th Cir. 1980); *Duncan v. Duncan*, 377 F.2d 49, 55 (6th Cir.), cert. denied, 389 U.S. 913 (1967).

¹⁵ See, e.g., *Duncan*, 377 F.2d at 55 (court reversed on ground that trial judge abused discretion).

¹⁶ See, e.g., *Evers*, 650 F.2d at 796 (noting that seventh amendment protects against improper intrusion on jury's function).

¹⁷ U.S. CONST. amend. VII.

¹⁸ *Narcisse*, 620 F.2d at 546 (quoting *Spurlin v. General Motors Corp.*, 528 F.2d 612, 620 (5th Cir. 1976)).

¹⁹ See *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984) ("When a new trial is granted on the basis that the verdict is against the weight of the evidence our review is particularly stringent to protect the litigant's right to a jury trial."); *Evers v. Equifax, Inc.*, 650 F.2d 793, 796-97 (5th Cir. Unit B July 1981) ("the greatest degree of scrutiny is exercised when a new trial is granted on the ground that the verdict is against the weight of the evidence").

Clearly, when the grant of a new trial is for reasons unrelated to the evidence, the constitutional concern of the seventh amendment is not nearly as significant. See *Anderson v. City of Atlanta*, 778 F.2d 678, 689 n.15 (11th Cir. 1985).

judgment pursuant to 28 U.S.C. § 1291, it may be appealable as a certified interlocutory appeal pursuant to section 1292(b). An appeal of this nature requires the cooperation of both the trial and appellate courts. The trial court must certify in writing that its order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."²⁰ Then, within ten days after the entry of the certification order, an application for appeal may be made to the court of appeals, which has full discretionary power to accept or reject it.²¹ The Supreme Court has held that noncompliance with the precise requirements and time limit of the statute cannot be cured by agreement of the parties or by the indulgence of the court of appeals,²² even though the matter otherwise may warrant certification.²³ However, where the statute has been followed, and both the trial and appellate courts have cooperated, immediate review by a certified interlocutory appeal has been used successfully to reverse the grant of a new trial and reinstate the original verdict.²⁴ This result is in accordance with the underlying rationale of section 1292(b), which was passed as a consequence "of dissatisfaction with the prolongation of litigation and with harm to litigants uncorrectable on appeal from a final judgment which sometimes resulted from strict application of the federal final judgment rule."²⁵

B. *Mandamus*

The remedy of mandamus may provide an alternative method of seeking immediate appellate review of the grant of a new trial. However, the Supreme Court's decision in *Allied Chemical Corp. v. Daiflon, Inc.*²⁶ illustrates that its usage is limited at best. In

²⁰ 28 U.S.C. § 1292(b) (Supp. IV 1986).

²¹ *Id.* Even where the trial court agrees to certify the question, there is no requirement that the court of appeals allow the interlocutory appeal. See *Gallimore v. Missouri Pac. R.R.*, 635 F.2d 1165, 1168 & n.4 (5th Cir. Unit A Feb. 1981).

²² See *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744-45 (1976).

²³ See *id.* at 745.

²⁴ See *Tikalsky v. City of Chicago*, 687 F.2d 175, 178 (7th Cir. 1982).

²⁵ *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 753 (3d Cir.) (en banc), cert. denied, 419 U.S. 885 (1974).

²⁶ 449 U.S. 33 (1980) (per curiam). In *Daiflon*, the court of appeals had utilized mandamus to correct what it perceived as the district court's interference with the plaintiff's seventh amendment right to a jury trial. See *Daiflon, Inc. v. Bohanon*, 612 F.2d 1249, 1260

Daiflon, the Supreme Court held that the "trial court's ordering of a new trial rarely, if ever, will justify the issuance of a writ of mandamus," since such a usage of mandamus would "undermine[] the policy against piecemeal appellate review."²⁷ According to the *Daiflon* court, a writ of mandamus should issue only in "exceptional circumstances, amounting to a judicial usurpation of power."²⁸

As a result of *Daiflon*, the federal circuit courts have been less inclined to utilize mandamus to provide for immediate review of grants of new trials by district courts.²⁹ Nevertheless, in an appropriate case, where the trial court's action is "blatantly wrong," mandamus may issue.³⁰

C. Jurisdictional Defects

If a district court should attempt to grant a new trial at a time when it has no jurisdiction to do so, it has been held that a direct appeal to the court of appeals will lie.³¹ There is also some authority that mandamus is appropriate to secure immediate review of the trial court's attempt to act at times when it lacks power to do so.³² This exception to the general rule has been described as a "narrow" one³³ and the appellate courts do not appear willing to expand the exception beyond jurisdictional defects which are based on untimeliness.³⁴

(10th Cir. 1979). The Supreme Court reversed and held that the remedy of mandamus was not available. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 37 (1980).

²⁷ *Daiflon*, 449 U.S. at 36.

²⁸ *Id.* at 35.

²⁹ See, e.g., *Delano v. Kitch*, 663 F.2d 990, 1002 (10th Cir. 1981) (writ not issued because plaintiffs failed to show they lacked other adequate means to relief and that they had clear and indisputable right to issuance), *cert. denied*, 456 U.S. 946 (1982).

³⁰ See *Central Microfilm Serv. Corp. v. Basic/Four Corp.*, 688 F.2d 1206, 1212-13 (8th Cir. 1982) (after two trials, mandamus review of new trial order proper when grounds for review "[did] not turn on a [new] trial court's proximity to the proceedings"), *cert. denied*, 459 U.S. 1204 (1983).

³¹ See *Stradley v. Cortez*, 518 F.2d 488, 491-92 (3d Cir. 1975).

³² See *Peterman v. Chicago, Rock Island & Pac. R.R.*, 493 F.2d 88, 89 (8th Cir.), *cert. denied*, 417 U.S. 947 (1974). However, it should be noted that *Peterman* was decided prior to the Supreme Court's decision in *Daiflon*.

³³ See *Herold v. Burlington N., Inc.*, 761 F.2d 1241, 1249 (8th Cir.), *cert. denied*, 474 U.S. 888 (1985).

³⁴ See *id.*; see also *Eaton v. National Steel Prods. Co.*, 624 F.2d 863, 864 (9th Cir. 1980) (*per curiam*) (court unwilling to consider lack of jurisdiction exception where motion for new trial timely filed).

D. Remittitur

In a remittitur situation, the plaintiff³⁵ is given the choice of either accepting a lesser amount of damages than that awarded by the jury or being subject to the grant of a new trial.³⁶ A plaintiff who accepts the remittitur consents to a reduced judgment and thereby effectuates a settlement which eliminates any right of appeal.³⁷ On the other hand, if the plaintiff rejects the remittitur, he is subjected to a new trial and the accompanying general rule that a grant of a new trial is not appealable.³⁸

During the 1960's and 1970's a line of cases developed, primarily in the Fifth Circuit,³⁹ which served to ameliorate the harshness of this rule. It was recognized that plaintiffs may reluctantly accept a remittitur because of fear that a second trial could result in a smaller award.⁴⁰ The remoteness of appellate review did not seem to afford the plaintiff a true choice.⁴¹ Under the view adopted by the Fifth Circuit, a plaintiff could accept a remittitur "under protest" and then challenge the correctness of the remittitur order on a direct appeal.⁴²

The propriety of accepting remittiturs "under protest" for the purpose of taking a direct appeal was addressed and rejected by the Supreme Court in the 1977 decision, *Donovan v. Penn Shipping Co.*⁴³ In *Donovan*, the court of appeals had dismissed the plaintiff's appeal of a remittitur accepted under protest.⁴⁴ The Supreme Court affirmed in a per curiam opinion, reestablishing a line of precedent stretching back to 1889 holding that a plaintiff cannot "protest" and appeal a remittitur order to which he has agreed.⁴⁵

Cases decided subsequent to *Donovan* continue to recognize

³⁵ Or the defendant in the case of a counterclaim.

³⁶ See 11 C. WRIGHT & A. MILLER, *supra* note 2, § 2815, at 100.

³⁷ See *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 650 (1977); *Evans v. Calmar S.S. Co.*, 534 F.2d 519, 522 (2d Cir. 1976); *Reinertsen v. George W. Rogers Constr. Corp.*, 519 F.2d 531, 533 (2d Cir. 1975).

³⁸ See *Seltzner v. RDK Corp.*, 756 F.2d 51, 52 (7th Cir. 1985) (per curiam).

³⁹ For a listing of this line of cases, see *Donovan*, 429 U.S. at 649.

⁴⁰ See Recent Developments, *Civil Procedure—Second Circuit Examines Appealability of Remittitur*, 44 FORDHAM L. REV. 845, 851 (1976).

⁴¹ See *id.* at 851-52.

⁴² See *United States v. 1160.96 Acres of Land*, 432 F.2d 910, 912 (5th Cir. 1970).

⁴³ 429 U.S. 648 (1977) (per curiam).

⁴⁴ See *Donovan v. Penn Shipping Co.*, 536 F.2d 536, 538 (2d Cir. 1976), *aff'd*, 429 U.S. 648 (1977).

⁴⁵ See *Donovan*, 429 U.S. at 649-50.

that acceptance of a remittitur bars an appeal;⁴⁶ however, relief from an improper remittitur was granted on a direct appeal on one occasion when "the trial court lacked the power to order a remittitur based on post-trial occurrences."⁴⁷ On another occasion, mandamus relief was granted so as to thwart the trial court's attempt to require yet a third trial contingent upon the denial of a remittitur as to damages assessed in the second trial.⁴⁸

E. Collateral Order Doctrine

Another means by which immediate review of the grant of a new trial may be obtained is through the "collateral order" doctrine. Under this doctrine, if a decision can be characterized as one falling within "that small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated," then the decision is appealable as a final decision under section 1291 of title 28.⁴⁹

In *Stevens v. Corbell*,⁵⁰ the Fifth Circuit reviewed an order of a district court granting plaintiff a new trial in a section 1983 suit against a number of police officers after the jury had returned a verdict in favor of the officers.⁵¹ The Fifth Circuit, relying on the collateral order doctrine, granted immediate review, noting that the "freedom from the burdens of standing trial" might have been part of the qualified immunity claimed by the defendant police officers.⁵² In allowing immediate review, the Fifth Circuit cited the 1985 Supreme Court decision, *Mitchell v. Forsyth*,⁵³ which allowed a direct appeal from the denial of a summary judgment motion

⁴⁶ See, e.g., *Baltezore v. Concordia Parish Sheriff's Dep't*, 767 F.2d 202, 208 (5th Cir. 1985) (remittitur, though accepted under protest, not subject to appeal), *cert. denied*, 474 U.S. 1065 (1986); *Higgins v. Smith Int'l, Inc.*, 716 F.2d 278, 281 (5th Cir. 1983) (acceptance of remittitur is final and unappealable).

⁴⁷ *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1448 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2014 (1988).

⁴⁸ See *Central Microfilm Serv. Corp. v. Basic/Four Corp.*, 688 F.2d 1206, 1211-12 (8th Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983).

⁴⁹ *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

⁵⁰ 832 F.2d 884 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 2018 (1988).

⁵¹ *Id.* at 885.

⁵² *Id.* at 887.

⁵³ 472 U.S. 511 (1985).

brought on the basis of a similar qualified immunity defense. Such application of the collateral order doctrine is rare, however, in cases when, as in *Stevens*, the party already has been required to participate in one trial. It would seem that the doctrine would be more applicable in connection with pretrial dispositions such as actually existed in *Mitchell*. In other words, if a party has the right not to stand trial, it would appear that such right should in all likelihood be asserted, subject to immediate appellate review under the collateral order doctrine, *prior to* the first trial.

F. *The Conditional Grant of a New Trial*

Federal Rule of Civil Procedure 50(c)(1) imposes upon a district court an obligation to rule on an alternative motion for a new trial when the district court decides to grant a motion for judgment notwithstanding the verdict ("judgment n.o.v.").⁵⁴ The ruling is a conditional one because a new trial will be granted only if the judgment n.o.v. is subsequently vacated or reversed by the appellate court.⁵⁵ In the event the initial verdict winner elects to challenge the granting of the judgment n.o.v., the conditional grant of a new trial is also immediately reviewable. Hence, if the court of appeals finds the judgment n.o.v. to have been improvidently granted, it will also consider the propriety of the grant of a new trial. If a new trial should not have been granted—and this is more likely when the grant is founded on insufficiency of evidence—the court of appeals may reverse the district court's grant and reinstate the initial verdict.⁵⁶

V. CONCLUSION

The grant of a new trial by a federal district court, as a general rule, is not immediately reviewable by an appellate court. There are a number of limited exceptions to this rule over which the Supreme Court has kept a relatively tight reign. When review is postponed, the grant of the new trial is likely to be deemed to have been within the discretion of the trial judge and is frequently

⁵⁴ FED. R. CIV. P. 50(c)(1).

⁵⁵ *See id.*

⁵⁶ *See, e.g., Anderson v. City of Atlanta*, 778 F.2d 678, 689 (11th Cir. 1985) (grant of motion for new trial reversed when court of appeals found sufficient evidence); *Spurlin v. General Motors Corp.*, 528 F.2d 612, 621 (5th Cir. 1976) (grant of a new trial reversed when jury verdict not against great weight of evidence); *Lind v. Schenley Indus.*, 278 F.2d 79, 91 (3d Cir.) (en banc) (same), *cert. denied*, 364 U.S. 835 (1960).

overshadowed by the second trial. Thus, parties may be better served by attempting to characterize their situation as falling within one of the exceptions warranting immediate review. Additionally, in the event the grant of a new trial is based on insufficiency or weight of the evidence, the original verdict winner may be able to successfully invoke his seventh amendment right not to have those facts, once tried by a jury, reexamined.

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