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Federal Civil Procedure - Newly Discovered Evidence - Diligence Required in Order to Obtain New Trial

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the arrest of X, the evidence will be admitted. Our homes may now be invaded upon the fabrication or imaginations of law enforcement officers. The Supreme Court did not, or may not, have weighed the values of police expediency versus privacy and sanctity of the home. In some circumstances, obviously, the decision may save lives or property. But in others, it may destroy valuable personal rights. There *must* be a middle ground. "Under our system, suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest."[15]

ALLEN W. BRIGHT

FEDERAL CIVIL PROCEDURE — NEWLY DISCOVERED EVIDENCE — DILIGENCE REQUIRED IN ORDER TO OBTAIN NEW TRIAL—The plaintiff, an employee of the defendant railroad company, and his road crew were to assist another crew rerail a locomotive. The engine was surrounded by snow which had become solidly packed, creating a hazardous condition. In the course of the work, plaintiff slipped and fell, sustaining personal injuries. In an action against the railroad, the trial court entered a verdict for the defendant. Several months after the judgment, on the grounds of newly discovered evidence, plaintiff moved for a new trial under Rule 60 (b) (2) of the Federal Rules of Civil Procedure. The alleged newly discovered evidence was the testimony of a railroad employee stating that his crew was the first to arrive at the derailment. The newly discovered evidence revealed that before the plaintiff arrived blow torches had been used around the derailed engine, causing a considerable amount of the snow to melt. Due to the extremely cold temperature, the melted snow immediately refroze and created the icy surface on which the plaintiff had slipped and sustained his injuries.

The alleged newly discovered evidence was offered after a local railroad employee's bulletin reported that the plaintiff had lost his suit against the railroad. After reading of the result, a railroad employee offered testimony as to his knowledge of the circumstances surrounding plaintiff's injuries. The United States Court of Appeals for the Third Circuit, with one judge dissenting, *held* that the plaintiff knew or should have known that another railroad employee witnessed his fall and that failure to question this witness

15. Henry v. United States, 361 U.S. 98 (1959).

concerning the accident was a lack of reasonable diligence and did not warrant the reopening of the final judgment.

The dissent emphasized that although the new evidence was not procured for the trial because of the unknown fact that the ground hazard had been artificially created, this evidence could have changed the result of the trial. In the original action, plaintiff failed to call this witness because he did not wish to duplicate the testimony describing the ground surface where he sustained his injuries. *Plisco v. Union R.R.*, 379 F.2d 15 (3d Cir. 1967).

The motion for a new trial was brought under Rule 60(b) (2) of the Federal Rules of Civil Procedure. This rule, in part, states that relief from a final judgment or order will be given upon just terms where there is "newly discovered evidence which by due diligence could not have been discovered in time to move for a nw trial under Rule 59(b)."[1] Rule 59(b) sets the time for a motion for a new trial at "not later than 10 days after the entry of judgment."

Newly discovered evidence is "evidence of a new and material fact, or new evidence in relation to a fact in issue, discovered by a party to a cause after the rendition of a verdict or judgment therein."[2] Newly discovered evidence is usually uncovered by the non-prevailing party who moved for a new trial. The Federal Rules of Civil Procedure provide that a motion for a new trial based on newly discovered evidence must be made within a reasonable time and not more than one year after the judgment. In the instant case, the motion was made several months after the judgment was rendered. The granting of a new trial is discretionary with the trial judge and if there has been an abuse of that discretion, a court of appeals may overrule the trial court and grant a new trial.

The substance of the law is stated in the Rules. However, each case must be decided on its own merits, and on its particular set of facts. In order that a motion for a new trial be granted, it must be shown that although the movant exercised due diligence, he failed to uncover the evidence he now alleges to be newly discovered.[3] Once the trial court rules on the motion for a new trial, it will not be overturned unless the ruling is clearly erroneous.[4]

Courts have not favored the granting of a new trial to an unsuccessful litigant after a judgment has been entered. There is a substantial burden on the movant to show that diligence was

1. Fed. R. Civ. P. 60(b).
2. Black's Law Dictionary (4th ed.).
3. Moylan v. Siciliano, 292 F.2d 704, 705 (9th Cir. 1961).
4. Barrington v. Swanson, 249 F.2d 640, 644 (10th Cir. 1957).

exercised before the trial and to explain why the newly discovered evidence was not uncovered before the trial.[5]

While the showing of due diligence is a requirement to obtain a new trial, it is not the sole requirement. The newly discovered evidence must be material to the case, not merely cumulative.[6] Newly discovered evidence which affects only the weight and credibility of other evidence is not sufficient grounds for a new trial.[7] In addition, the newly discovered evidence must be of a nature that it will probably produce a different result upon retrial.[8]

Although courts have been extremely hesitant to grant a new trial for these reasons, there have been a number of exceptions.[9] Since the cases that have granted a new trial have turned on the specific facts in each individual case, it is necessary to examine the facts in each instance.

An action for personal injuries sustained in an automobile accident, brought an order for a new trial because "substantial justice was not done and the triers of fact should have an opportunity to resolve the issues presented with *all* the admissible evidence before them."[10] Here, the defendant questioned the plaintiff, trying to discover the names of eye witnesses. The plaintiff refused to divulge the name of an individual who had arrived at the scene shortly after the accident had occurred. At the trial, the defendant learned of an insurance adjuster who had the names of three witnesses who were travelling in front of the defendant at the time of the accident. These witnesses disclosed new evidence which showed that the collision occurred when the plaintiff's automobile crossed the center line of the highway where it collided with the defendant's automobile. In granting the new trial the court said that this newly discovered evidence "is highly relevant to the central issue and is of such a nature that added to the evidence previously submitted to the jury, it could reasonably serve to change the verdict."[11] The court held that the trial court abused its discretion and further revealed that "where a review

5. Martin v. Klein, 172 F. Supp. 778, 780 (D. Mass. 1959). Kleinschmidt v. United States, 146 F. Supp. 253, 257 (D. Mass. 1956).

6. Black's Law Dictionary (4th Ed.) defines cumulative evidence as "that which goes to prove what has already been established by other evidence."

Great American Indem. Co. v. Brown, 307 F.2d 306, 309 (6th Cir. 1962); United States v. 72.71 Acres of Land, 23 F.R.D. 635, 638 (Md. 1959); Chemical Delinting Co. v. Jackson, 193 F.2d 123, 127 (5th Cir. 1951).

7. Grant County Deposit Bank v. Greene, 200 F.2d 835, 841 (8th Cir. 1952); Chemical Delinting Co. v. Jackson, *supra* note 6 at 127; Brown v. Schwartz, 164 F.2d 151, 152 (5th Cir. 1947).

8. Knight v. Hersh, 313 F.2d 879, 880 (D.C. Cir. 1963); Chemical Delinting Co. v. Jackson, *supra* note 6 at 127.

9. Edgar v. Finley, 312 F.2d 538 (8th Cir. 1963); DiGiovanni v. DiGiovannantonio, 233 F.2d 26 (D.C. Cir. 1956); Ferrell v. Trailmobile, Inc. 233 F.2d 697 (5th Cir. 1955).

10. Edgar v. Finley, *supra* note 9 at 538.

11. *Id.* at 538.

of material evidence newly discovered after trial clearly indicates that substantial justice was not done, and where the non-prevailing party was not dilatory in failing to discover such evidence before trial, a proper motion for a new trial should be granted."[12]

A new trial was granted in an action to recover payments made under an installment contract even though due diligence was not used in securing the evidence.[13] The defendant claimed that he had made the installment payments, but was forced to pay again to prevent foreclosure. Three money orders were in question. After judgment was rendered against the defendant, he secured photostatic copies of the three money orders which bore the plaintiff's endorsement. The defendant also produced an affidavit from the bank auditor stating that the money orders were deposited to the plaintiff's account. The court, in granting a new trial stated,

> "If, in fact, practially conclusive evidence shows that the appellant had actually paid all eighteen installments for the purchase of the trailer, it is obvious that the judgment should be set aside to prevent a manifest miscarriage of justice. In such a case the ends of justice may require granting a new trial even though proper diligence *was not used* to secure such evidence for use at the trial."[14] (emphasis supplied).

A third case involved an estate proceeding. A foreign marriage certificate, which was required proof in the case, was requested at a time sufficiently prior to the trial date. However, it failed to arrive until after judgment had been rendered. The court said that the marriage certificate was "a key piece of evidence in the litigation . . . and that bona fide efforts were made to secure it."[15] On this basis, the court granted a new trial.

A New Jersey District Court, in denying a motion for a new trial, summed up the reasons behind its decision by quoting from a state court decision:

> These rules of law must be strictly enforced. If not strictly enforced, it would open the door for litigants to withhold available testimony, and then, if the result of the trial was adverse, resort could be had under the guise of newly discovered testimony to obtain another trial in which the litigant could correct the mistakes made in the former trial and perhaps secure a different result. The aim of the law should

12. *Id.*
13. Ferrell v. Trailmobile, *supra* note 9 at 6
14. *Id.*
15. DiGiovanni v. DiGiovannantonio, *supra* note 9 at 28.

> be to force litigants to the fullest preparation of their cases before trial. This can best be accomplished by strictly enforcing the principles of law governing new trials.[16]

The State of North Dakota adopted the Federal Rules of Civil Procedure as part of the NORTH DAKOTA CENTURY CODE in 1957. Since that time the North Dakota courts have not been called upon to construe Rule 60(b) (2). It seems reasonable, however, that the North Dakota courts would require a high degree of diligence in procuring evidence before trial in order that newly discovered evidence would be a means of obtaining a new trial. In requiring this high degree of diligence, North Dakota should follow the federal courts in strictly enforcing the rules governing the granting of new trials for newly discovered evidence.

RONALD D. MARKOVITS

HUSBAND AND WIFE—WOMAN'S ACTION FOR LOSS OF CONSORTIUM—DISCRIMINATION ON BASIS OF SEX. — Plaintiff's husband had been injured as a result of the negligent tort of the defendant aluminum casting company. These injuries resulted in the plaintiff's loss of consortium of her husband. The circuit court sustained a demurrer on the grounds that loss of consortium does not constitute a cause of action. On appeal, the Supreme Court of Wisconsin *held* that the loss of consortium action was available to women. *Moran v. Quality Aluminum Casting Co.*, 34 Wis. 2d 542, 150 N.W.2d 137 (1967).

This case is in direct opposition to a recent Tennessee case which *held* that a woman had no cause of action for the loss of consortium due to her husband's injury although the husband would have had an action if the wife had been so injured. The Tennessee court said this was not discrimination on the basis of sex, but was no more than a practical and logical classification.[1]

The Tennessee decision is clearly within the majority in cases involving negligent tort causing loss of consortium. It arises from the early development of the concept as a cause of action for the husband only and has continued thus for reasons both substantive and procedural.

Emerging from the medieval concept of the marital union with the wife being inferior,[2] consortium was originally considered a

16. Moore v. Rosecliff Realty Corp., 88 F. Supp. 956, 961 (D.N.J. 1950).

1. Krohn v. Richardson, Merrill, Inc., 406 S.W.2d 166 (Tenn. 1966).
2. 10 ST. LOUIS U. L. J. 276, 277 (1965).