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Post-Trial Motions Can Be Key To California Appeals

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Law360, New York (December 7, 2016, 12:15 PM EST) -- After an adverse judgment in California state court, litigants often want to know if they have to bring post-trial motions in the trial court before pursuing an appeal. While post-trial motions may be a prerequisite to appeal in some cases, in most cases post-trial motions are not required and sometimes may not even be a good idea.



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The general rule in California is that post-trial motions are not required in order to raise errors of law on appeal. “[T]he appellant’s right to appeal [is] not lost by the failure to file a motion for a new trial ... [¶] “Although it is common practice for a dissatisfied litigant to urge errors of law as grounds for a new trial it is not compulsory that he do so but he may, instead, present them on appeal as grounds for reversal of the judgment. ...” (Estate of Barber (1957) 49 Cal.2d 112, 118-119.)

The best known exception to this general rule is a claim of excessive or inadequate damages. “[A] failure to move for a new trial ordinarily precludes a party from complaining on appeal that the damages awarded were either excessive or inadequate, whether the case was tried by a jury or a court without a jury ... The trial court is in a better position than a reviewing court to determine whether a jury verdict was influenced by passion or prejudice. Moreover, the power to weigh the evidence and resolve issues of credibility is vested in the trial court, not the reviewing court. [Citation.] Consequently, where the ascertainment of the amount of damage requires resolution of conflicts in the evidence or depends on the credibility of witnesses, the award may not be challenged for inadequacy or excessiveness for the first time on appeal.” (Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co. (1977) 66 Cal.App.3d 101, 122 (Glendale).)

Note, that, consistent with the general rule, claims involving purely legal errors in a damage award can be raised on appeal without first making a new trial motion. “The failure to move for a new trial, however, does not preclude a party from urging legal errors in the trial of the damage issue such as erroneous rulings on admissibility of evidence, errors in jury instructions, or failure to apply the proper legal measure of damages.” (Ibid..)

In addition to excessive or inadequate damages, as a practical matter, a new trial motion is also required in order to seek appellate review of a claim of jury misconduct or newly discovered evidence. Why?

First, these claims require the introduction of admissible evidence. (See Code Civ. Proc., §§ 657, subds. (2) & (4); 658; People v. Bryant (2011) 191 Cal.App.4th 1457, 1467-1468; Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2016) ¶ 18:152, pp. 18-41 to 18-42.)

Second, jury misconduct and newly discovered evidence usually come to light after trial, and the appellate court will not ordinarily admit or evaluate the credibility of evidence. (See Eisenberg, Horvitz & Wiener, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2015) ¶ 1:12.1, p. 1-3 [“The courts of appeal do not supplant the trial courts as the original forum for consideration of the facts and evidence ...”].)

As a result, in most cases the only way to preserve issues of jury misconduct and newly discovered evidence for an appeal is to first raise these issues in the trial court on a motion for new trial.

Meticulous compliance with the procedures governing a new trial motion is just as important as the issues raised. There is very little wiggle room when it comes to new trial procedure because a trial court has no inherent power to order a new trial, and may not grant such relief unless its authority to do so has been invoked in the manner prescribed by statute.

"The procedural steps prescribed by statute [see Code Civ. Proc., §§ 656-662.5] for making and determining a motion for new trial are mandatory and must be strictly followed. A departure from them is usually held to be a jurisdictional defect, depriving the court of power to act." (8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court § 20, p. 602; see id. § 19, pp. 601-602; § 46, p. 632; In re Marriage of Herr (2009) 174 Cal.App.4th 1463, 1471 ["courts have no inherent power to grant a new trial: '[t]he right to a new trial is purely statutory ... [and therefore] 'the procedural steps prescribed by law ... are mandatory and must be strictly followed'"].)

Procedural errors in making a new trial motion can have serious consequences. I recall one case where a defendant aggrieved by a large verdict omitted "excessive damages" from the grounds stated in its notice of intention to move for new trial, thereby depriving the trial court of power to consider that ground in ruling in the motion. (See Wagner v. Singleton (1982) 133 Cal.App.3d 69, 72 ["the motion for new trial can only be granted on a ground specified in the notice of intention to move for a new trial"]; Sitkei v. Frimel (1948) 85 Cal.App.2d 335, 337 ["A defective notice of intention cannot be amended after the expiration of the statutory time for filing the notice ..."].)

In another case, the aggrieved defendant persuaded the trial court to grant a conditional new trial on the ground of excessive damages (see Code Civ. Proc., § 662.5), only to discover that the notice of intent to move for new trial had been filed one day late, with the result that the new trial order was void (see Pelletier v. Eisenberg (1986) 177 Cal.App.3d 558, 563 [the "untimely filing [of the notice of intention to move for a new trial] deprived the trial court of its jurisdiction to entertain the motion"]).

To make matters worse, since both of these incidents involved the issue of excessive damages, which must be raised on a motion for new trial in order to be raised on appeal, the procedural errors made by these defendants barred them from seeking appellate review of excessive damage awards. (Glendale, supra, 66 Cal.App.3d at p. 122.)

Even if not required in order to appeal, post-trial motions might still be worthwhile, for a few reasons.

First, a motion for new trial may be made following a trial to the court without a jury. (Code Civ. Proc., § 662.) Section 662 empowers the trial court "on such terms as may be just, [to] change or add to the statement of decision, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, ... vacate and set aside the statement of decision and judgment and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof and before a decision had been filed on judgment rendered."

Given the breadth of this authority, a motion for new trial following a bench trial provides an opportunity to seek reconsideration or reopening of a case, even after the statement of decision has been filed and the judgment entered.

Second, where there is no issue concerning sufficiency of the evidence, and the claim is that the court in a bench trial or the jury in a special verdict made a legal error, a motion to vacate under Code of Civil Procedure section 663 allows an aggrieved party to seek correction of the error from the trial court without incurring the time and expense of an appeal. (See 8 Witkin, Cal. Procedure, supra, Attack on Judgment in Trial Court § 140, pp. 732-733.)

The procedure for bringing such a motion is similar to the new trial procedure. (See Code Civ. Proc., § 663a, subd. (a).)

Third, whenever a motion for directed verdict should have been granted in a jury trial, the trial court, on motion of a party, or on its own motion may grant a judgment notwithstanding the verdict (JNOV). (Code Civ. Proc., § 629, subd. (a).)

This motion allows an aggrieved party to test the sufficiency of the evidence at trial as a matter of law, again without incurring the expense of an appeal, by arguing that, even when the evidence is construed in the light most favorable to the party who secured the verdict, the aggrieved party is entitled to judgment. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110.)

Bringing a JNOV motion together with a new trial motion can be a benefit to an aggrieved party who later appeals because “[i]f the [JNOV] motion ... is denied and if a new trial is denied, the appellate court shall, if it appears that the motion for [JNOV] should have been granted, order judgment to be entered on appeal from the judgment or order denying the motion for [JNOV]. ...” (Code Civ. Proc., § 629, subd. (c).)

This does not mean, however, that a JNOV motion is required. Case law indicates an appellate court should grant similar relief, (i.e., reverse with directions to enter judgment for the defendant), with or without a JNOV motion, whenever “the plaintiff has had a full and fair opportunity to present the case, and the evidence is insufficient as a matter of law to support plaintiff’s cause of action.” (*McCoy v. Hearst Corp.* (1991) 227 Cal.App.3d 1657, 1661; accord, *Cassista v. Community Foods Inc.* (1993) 5 Cal.4th 1050, 1066; *Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 833-834; *Kelly v. Haag* (2006) 145 Cal.App.4th 910, 919.)

Nonetheless, bringing a JNOV motion in the trial court and then, if unsuccessful, pursuing an appeal can enhance the position of the aggrieved party by (1) giving the aggrieved party two bites at the apple, and (2) allowing the aggrieved party to invoke the statutory mandate on appeal.

There may be situations where post-trial motions are not a good idea. If there is no issue that requires post-trial motions, whether to make such motions becomes a matter of trial tactics.

If you have reason to believe the trial judge wants to grant relief, by all means file one or more of the available posttrial motions. But if there is no reason to believe the trial court will grant post-trial relief, and especially if the trial judge appears sympathetic to your opponent, post-trial motions may only provide the trial court with an opportunity to make unfavorable comments on the evidence and reinforce adverse rulings.

So, where post-trial motions are not required to preserve issues for appeal, think strategically before investing the time and money in post-trial motion proceedings.

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