CHAPTER 547

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X WHEN VERDICT IS CONTRARY TO LAW

I THE STATUTE GENERALLY

1. New trial defined

When trial is by jury, it is usually necessary to move for a new trial in order to question on appeal the sufficiency of the evidence to support the verdict; the purpose and primary object of a motion for new trial is to secure correction of errors by the trial court without the necessity of incurring the expense, delay, and inconvenience of an appeal to the supreme court. Phelan v Carey, 222 M 1, 23 NW(2d) 11.

As an exception to the general rule that litigants are usually bound upon appeal by the theory or theories, however erroneous or improvident, upon which the case was tried below, the appellate court has the duty to, and upon its own motion may, consider and determine a case upon the ground of illegality, although such ground was neither presented to nor considered by the trial court, if such illegality (a) is apparent upon undisputed facts, (b) is in clear contravention of public policy, and (c) if a decision thereon will be decisive of the entire controversy on its merits. Hart v Bell, 222 M 69, 23 NW(2d) 376.

Where a verdict is a second or succeeding verdict, is in accordance with the prior verdict, and there is no error in the record justifying a reversal, the reviewing

courts are less inclined to set it aside than if it were a first verdict. State v Drescher, 222 M 120, 23 NW(2d) 533.

A motion for a new trial on ground of newly discovered evidence is properly denied for lack of diligence, where the diligence which led to the discovery of the new evidence after trial would have discovered it had such diligence been exercised prior thereto. Carl v DeToffol, 223 M 24, 25 NW(2d) 479.

5. Motion a matter of right

He by whom error is procured may not assert such error as a basis for obtaining a new trial. Clabots v Baddeaux, 221 M 303, 22 NW(2d) 19.

6. After trial by court

Where defendant failed to comply with requirements of statute relative to time of hearing on his motion for new trial on the minutes, the order on the motion was a nullity, and the appeal therefrom must be dismissed. Farmers Association v Kotz, 222 M 153, 23 NW(2d) 576.

Where action on trial is by consent limited to a question of applicability of a single subdivision of a statute, and the court makes findings pursuant to such limitation, it is too late for the defeated party to resort to another and additional subdivision of the statute by motion for amended findings and a new trial. American Surety v Greenwald, 223 M 37, 25 NW(2d) 681.

8. Of less than all the issues

Where only part of the issues are submitted to and determined by a rule, proceedings for a new trial taken before there is a finding upon or decision by the court of the remaining issues, are premature, unless the verdict of the jury upon the issues submitted to them completely disposes of the case adversely to the party applying for a new trial. Pogue v Feagan, 219 M 80, 17 NW(2d) 85.

9. Granted only for material error

Motion for a new trial in a criminal case will not be granted on ground of ignorance or incompetency of attorney in permitting improper evidence to be offered and received without objection, there being no showing of infidelity on the attorney's part and no strong showing of incompetence or prejudice. State v Gorman, 219 M 163, 17 NW(2d) 42.

10. Generally

A new trial should be granted where the substantial rights of the accused have been violated and it is clear that a fair trial was not had. State v Yurkiewicz, 212 M 208, 3 NW(2d) 775.

A new trial will be granted only where it is apparent that the error complained of materially prejudiced the party seeking the new trial. Hlubeck v Beeler, 214 M 484, 9 NW(2d) 252.

A new trial should be granted where there is a likely probability of stronger evidence on a new trial. Parrish v Peoples, 214 M 589, 9 NW(2d) 225.

A trial court's memorandum may not be used to impeach, contradict, or overcome express findings, or an order granting or denying motion for new trial where such memorandum is not made a part of the findings or memorandum or order which formed the basis for new trial or appeal. Kleidon v Glascock, 215 M 417, 10 NW(2d) 394.

Where a motion for a new trial is denied the proper practice in making a second motion requires prompt application of a vacation of the first order, pending consideration of the second motion, leave to submit the second motion being first secured; and if the court in its discretion decides to consider the second motion, the first order should be vacated pending the reconsideration. Crawford v Duluth & Missabe, 219 M 523, 18 NW(2d) 317.

Where it is claimed that the damages were excessive or were inadequate, the matter of a new trial rests in the sound judicial discretion of the trial court. The appellate court in reviewing the action of the trial court is guided by the general rule applicable to all discretionary orders. Litman v Walso, 211 M 398, 1 NW(2d) 391; Maas v Laurson, 219 M 461, 18 NW(2d) 233.

When a judge who tries a case is disabled from hearing a motion for amended findings, or a new trial, a judge of the same judicial district, without the consent of the parties, may hear such motion; and although such alternate judge has no authority to change findings of fact, he may make corrections in the conclusions of law to conform to the findings of fact. Nelson v Anderson, 221 M 25, 21 NW(2d) 881.

Newspaper clippings giving an inaccurate account of trial proceedings and attached to affidavits submitted by the state in opposition to defendants' motion for a new trial on the ground of newly discovered evidence, for the purpose of showing the wide publicity given the trial and thereby to cast doubt upon the credibility of newly produced witnesses, which affidavits were considered by the same court as the one which heard and determined the case originally, was not prejudicial to defendants' rights, and court did not err in denying defendants' motion to strike same from the record. State v Smith, 221 M 359, 22 NW(2d) 318.

After the supreme court has reversed an order and remanded a case a motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court. Rydeen v Collins, 222 M 197, 23 NW(2d) 590.

Where an order has been made denying a motion, the motion should not be reconsidered unless the order has been vacated. Teschendorf v Strangeway, 223 M 409, 27 NW(2d) 430.

IV FOR MISCONDUCT OF COUNSEL

1. Improper remarks on the trial

Where verdicts are amply justified by the evidence and the harm of improper statements by counsel are in part remedied by admonition from the court, such statements are not so prejudicial as to require the granting of a new trial. Murphy v Barlow, 214 M 64, 7 NW(2d) 684.

Notwithstanding liability of defendant is admitted and notwithstanding there is support in the evidence for a verdict allowing substantial damages for personal injuries, a new trial will be granted for improper argument of counsel tending to arouse passion and prejudice in the minds of the jurors, unless the size of the verdict clearly indicates that no prejudice resulted therefrom. James v C. St. P. & O. 218 M 334, 16 NW(2d) 188.

In view of preliminary statement to jurors by plaintiff's counsel that if they believed him to be mistaken in his reference to the evidence they should rely upon their own recollection thereof, and of opposing counsel's statement in the presence of the jury that counsel for plaintiff erroneously referred to some of the evidence, pointing out the error, and the court's cautionary admonitions thereto, it was not error for the trial court in the exercise of its discretion to refuse to grant a new trial because of claimed misconduct of counsel. Smith v Barry, 219 M 183, 17 NW(2d) 324.

The action of plaintiff's counsel in commenting upon the defendant's failure to call as a witness a physician who had examined the plaintiff and who was present in the court room was not misconduct requiring a new trial. Shockman v Union Transfer, 220 M 334, 19 NW(2d) 812.

An accused, whether guilty or innocent, is entitled to a fair trial, and it is the duty of the court, and of the prosecuting counsel as well, to see that he gets one. The conduct of the prosecuting attorney, in the instant case, was such that, although conviction is supported by the evidence, the case must be sent back for a second time for a new trial. State v Haney, 222 M 124, 23 NW(2d) 369.

Where plaintiff failed in her effort to establish any case, the verdict is the only one warranted under the law and by the evidence, and misconduct on the part of counsel, being harmless, is no grounds for a new trial. DeVere v Parten, 222 M 211, 23 NW(2d) 584.

Misconduct on the part of the county attorney did not constitute prejudicial error since the court promptly sustained the objection and experienced counsel for the defendant made no motion to strike the answer, nor request that the jury be instructed to disregard it. State v Murray, 223 M 297, 26 NW(2d) 364.

Because a litigant should not be penalized for the neglect or mistakes of his lawyer, courts will relieve a party from the consequences of the neglect or mistakes of his attorney when it can be done without substantial prejudice to his adversary. Duenow v Lindeman, 223 M 505, 27 NW(2d) 423.

2. Other misconduct

Where plaintiff's counsel was charged with misconduct which was in no way traceable to his adversary, plaintiff's motion for a new trial on that ground was properly denied. Central Motors v Brown, 219 M 467, 18 NW(2d) 236.

VI FOR NEWLY DISCOVERED EVIDENCE

1. To be granted with extreme caution

A motion for a new trial based on newly discovered evidence, or on accident and surprise, is addressed to the sound discretion of the trial court, but an order denying same will not be disturbed by the appellate court unless there is a clear abuse of such discretion. In the instant case where the plaintiff claimed surprise at the testimony of an eye specialist, a new trial will not be granted on the relation of the plaintiff that other eye specialists might testify differently when called. Valencia v Markham, 210 M 221, 297 NW 736.

A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court; and if such evidence is merely cumulative, contradictory, or impeaching of evidence at the trial, denial of a new trial is not an abuse of discretion. Skog v Moose Lake Co. 219 M 322, 17 NW(2d) 641.

A motion for a new trial upon the ground of newly discovered evidence is properly denied for lack of diligence of the moving party where the same diligence which led to the discovery of the new evidence after trial would have discovered it had diligence been exercised prior thereto. Hore's Estate, 220 M 365, 19 NW(2d) 783.

The burden is on the party seeking a new trial on the ground of newly discovered evidence to show affirmatively and unequivocally that the new evidence was not in fact discovered until after trial and that it could not have been discovered before the trial by the exercise of reasonable diligence. In re Hore's Estate, 222 M 197, 23 NW(2d) 590.

A motion for a new trial upon the ground of newly discovered evidence is properly denied for lack of diligence of the moving party where the same diligence which led to the discovery of the new evidence after trial would have discovered it had such diligence been exercised prior thereto. Henderson v Bjork, 222 M 241, 24 NW(2d) 43.

The trial court may in its discretion grant a new trial to a defendant who, having erroneously believed the evidence introduced sufficient, wishes an opportunity to present more convincing evidence. Paine v St. Paul Stock Yards, 35 F(2d) 624.

3. Showing on motion

The appellate court will not hold as a matter of law that the trial court abused its discretion in denying a motion for a new trial on the ground of newly discovered evidence where such evidence is merely cumulative or corroborative of testimony already submitted in the action. State v Smith, 221 M 359, 22 NW(2d) 318.

6. Nature of new evidence

Where the evidence to be offered was new and pertinent but of such doubtful character as to make it improbable it would change the result, the appellate court will not reverse the decision of the lower court in denying a new trial. State v Turner, 210 M 11, 297 NW 108.

Newly discovered evidence is not ground for a new trial if with reasonable diligence it could have been discovered before trial. Henderson v Bjork, 221 M 241, 24 NW(2d) 42; Hore's Estate, 220 M 374, 19 NW(2d) 783.

VII FOR EXCESSIVE OR INADEQUATE DAMAGES

1. Under either clause 5 or clause 7

Though damages were meager, they were not so inadequate as to warrant a new trial. Litman v Walso, 211 M 398, 1 NW(2d) 391.

Verdict of $3,240 for wrongful death of unmarried, 23-year-old workman, leaving grandmother 69 years old, is not excessive. Bimberg v Northern Pacific, 217 M 188, 14 NW(2d) 410.

Verdict of $14,000 for permanent back injuries to 54-year-old switchman with annual earnings of more than $2,000, whose actual loss of wages to time of trial was $3,300, was not excessive. James v C. St. P. & O. 218 M 333, 16 NW(2d) 188.

Verdict of $4,650 for injuries and special damages not excessive. Shockman v Union Transfer, 220 M 334, 19 NW(2d) 814.

2. General principles

Whether a new trial on the ground of excessive or inadequate damages should be granted or refused or whether the verdict be reduced rests in the sound discretion of the trial court, and upon review the appellate court will be guided by the general rule applicable to other discretionary orders. Maas v Midway Chevrolet, 219 M 463, 18 NW(2d) 233; Cole v C. St. P. & O, 59 F. Supp. 443.

In assessing damages, it is permissible to consider the low value of money and high cost of living. Aggravation of an existing condition is compensable. Ranum v Swenson, 220 M 170, 19 NW(2d) 328.

If a personal injury verdict exceeds what can be said to be obtained by sufficient evidence viewed most favorably to the plaintiff it is attributable to passion, prejudice, sympathy, or the like. Excessive damages are a ground for new trial. Jennings v Chicago & Rock Island, 43 F(2d) 397.

3. Necessity of passion or prejudice

Under the circumstances a verdict of $625 clearly did not indicate passion or prejudice. Gillson v Osborne, 220 M 122, 19 NW(2d) 1.

A lower riparian owner, as damages for nuisance due to pollution, obtained a verdict of $5,000, reduced to $3,000. The award did not indicate passion or prejudice. Krueger v City of Faribault, 220 M 89, 18 NW(2d) 777.

Where damages are susceptible of ascertainment by calculation, and the jury returns either an inadequate or excessive amount, it is the duty of the court to grant unconditionally a new trial unless plaintiff consents to a reduction. Fewell v Tappan, 223 M 483, 27 NW(2d) 649.

4. Remitting excess

Where the owner of a dwelling testified to a damage of $3,000 but offered no other evidence and the defendant called a qualified building contractor who, after examination, testified that the damage was $400, a verdict of $1,525 was excessive, and the court properly ordered a new trial unless the owner would consent to a reduction of the verdict to $1,000. Jones v Johnson, 211 M 123, 300 NW 447.

7. For inadequate damages

Whether a new trial upon the ground of excessive or inadequate damages should be granted or refused, or whether the verdict should be reduced, rests in the sound judicial discretion of the trial court, in reviewing which the court will be guided by the general rule applicable to other discretionary orders. In this case, while the

award was meager, there was no abuse of discretion. Litman v Walso, 211 M 402, 1 NW(2d) 391.

Where the jury found that the raising of the water level of a lake substantially damaged abutting land but failed to award damages, the riparian owners are entitled to a new trial. Greenwood v Evergreen Mines, 220 M 296, 19 NW(2d) 726.

VIII FOR ERRORS OF LAW ON THE TRIAL

1. What are errors on the trial

Admission of expert testimony is largely a matter of discretion for the trial judge. He may upon motion for a new trial decide that he abused that discretion and order a new trial on the ground of errors of law occurring at the trial. Symon v Larson, 207 M 605, 292 NW 270.

Plaintiff, an employee of a railway company, was injured while checking merchandise for the defendant wholesale grocery company preparatory to loading the boxes of sugar for transportation. The record is conclusive that plaintiff was a servant of the railway company when injured; and as such appellant owed him the duty of providing him ordinary care and a reasonably safe place wherein to work. The jury could properly find from the record that the tier of boxes which buckled or toppled over on plaintiff was negligently piled. The giving of the res ipsa loquitur to the jury was not an error requiring a new trial. Ryan v Twin City Wholesale Grocery Co. 210 M 21, 297 NW 705.

If the evidence finally warrants conviction a new trial should not be granted in a criminal case because of the refusal of the court to dismiss the case when the state rested. State v Priebe, 221 M 318, 22 NW(2d) 1; State v Hokanson, 211 M 70, 300 NW 193.

Whether error in charge was prejudicial and likely to, or did, mislead the jury, is a question which the trial court is in a better position to determine than is the supreme court. If the trial court deems such error prejudicial and grounds for a new trial, there must be a clear showing of error and abuse of discretion to warrant reversal by the appellate court. Larson v Sventek, 211 M 385, 1 NW(2d) 608.

The court charged that if plaintiff's decedent failed to exercise care an ordinarily prudent person would exercise under similar circumstances he would be guilty of negligence, and "if that negligence contributed directly to the accident as a cause in a material degree" there could be no recovery. This instruction is in substantial accord with the decisions of the Minnesota supreme court. Malmgren v Foldesi, 212 M 354, 3 NW(2d) 669.

The reception of certain evidence with reference to insurance over objections, which was in no way related to the issues involved, constitutes reversible error which requires a new trial. Jeddeloh v Hockenhull, 219 M 541, 18 NW(2d) 582.

Error, if any, in admitting evidence of a fact which is undisputed is not ground for a new trial or reversal on appeal. Krueger v City of Faribault, 220 M 89, 18 NW(2d) 777.

Where plaintiff failed in her effort to establish any case, the verdict is the only one warranted under the law and the evidence, and the errors of law on the trial, being harmless, are no grounds for a new trial. DeVere v Parten, 222 M 211, 23 NW(2d) 584.

Where there was evidence to the effect that there had been an unprecedented rainfall, causing a natural watercourse to overflow its banks, it was erroneous for the trial court to charge that if the county defendant had constructed embankments and culverts in such watercourse so as to interfere with the natural flow of the water therein, on account of which the waters backed up on the land occupied by plaintiff and did damage, defendant would be liable therefor irrespective of negligence. Poynter v County of Otter Tail, 223 M 121, 25 NW(2d) 709.

Refusal of the court to give requested charges which are fully covered by the general charge is not error. Dally v Ward, 223 M 265, 26 NW(2d) 217.

2. How far discretionary

Erroneous rulings respecting admission of evidence creates no right per se to a new trial, in the excepting and defeated party, unless, by a consideration of all the evidence, it appears that prejudice actually resulted to his adversary. Fewell v Tappan, 223 M 483, 27 NW(2d) 649.

3. Necessity of exceptions; notice of trial

Assignments of error involving rulings made on the trial which were not excepted to at the time, or assigned as error in the notice of motion for the new trial, will not be considered by the appellate court. Welsh v Barnes, 221 M 37, 21 NW(2d) 43.

Issues not covered by the pleadings or litigated by consent at the trial will not be considered for the first time in the supreme court on appeal. Safranski v Safranski, 222 M 358, 24 NW(2d) 834.

IX FOR INSUFFICIENCY OF EVIDENCE

1. General rules

A verdict cannot be upheld when based upon mere possibility, speculation, or conjecture. Huntley v Ziegler, 219 M 94, 17 NW(2d) 290.

X WHEN VERDICT IS CONTRARY TO LAW

Where several issues are submitted to the jury and a general verdict returned, and a finding in favor of the prevailing party on one of the issues is not sustained by the evidence, there must be a new trial. Gonyea v Duluth, Missabe & Iron Range, 220 M 225, 19 NW(2d) 385.

Constitutional law, new trial on only one issue. 5 MLR 144.

Errors of law occurring at trial as ground for new trial. 5 MLR 152, 153.

Newly discovered evidence, right to grant new trial unless plaintiff consents to a reduction of the verdict. 5 MLR 236.

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Misconduct of counsel as ground for new trial. 8 MLR 438.

Unexplained communication between counsel and juror as ground for new trial. 8 MLR 613.

Reference by jurors to defendant's former conviction as ground. 10 MLR 173.

Excessiveness or inadequacy of damages for personal injuries, power to grant new trial. 14 MLR 216, 240.

Verdict on special issue in equitable action, effect. 15 MLR 478.

Practice and procedure, power of court to permit renewal of motion after expiration of time for appeal. 16 MLR 116.

Excessive verdict, denial of new trial on plaintiff's consent to remittitur, new trial on issue of damages only. 16 MLR 185.

Right to have motion for new trial heard by judge who tried case. 17 MLR 673.

Damages, inadequacy, denial of new trial on consent to remittitur. 19 MLR 661.

Grounds for new trial as removing reason for equity jurisdiction to set aside judgments for fraud. 20 MLR 140, 160.

547.02 BASIS OF MOTION.

A juror's affidavit is not admissible to impeach the verdict of the jury. Dahlin v Fraser, 206 M 476, 288 NW 851.

A new trial was properly denied when the affidavits were indefinite as to the alleged perjury of a witness at the trial, and there was an apparent lack of diligence on the part of the movant in not obtaining the evidence proposed to be used in the new trial. Manemann v West, 216 M 516, 13 NW(2d) 474.

A new trial was properly denied when it was based upon affidavits of persons who were available prior to the trial of the case and of persons who did not see the accident. Pravo v Reil, 218 M 315, 15 NW(2d) 871.

Where a motion for a new trial is denied and, without vacation of that order, irrespective of whether time to appeal therefrom had expired or not, a second motion for a new trial is denied, the latter order is in real substance nothing more than one refusing to vacate an appealable order and so not appealable. Crawford v Duluth, Missabe & Iron Range, 219 M 523, 18 NW(2d) 317.

A new trial upon the ground of newly discovered evidence is properly denied where it is based upon a claim that the insured is alive and the affidavits used on the motion to show that fact consist partly of hearsay and partly of statements which fail to identify with certainty the person referred to in the affidavits as being the insured. Donea v Massachusetts Mutual, 220 M 204, 19 NW(2d) 377.

Where a motion for a new trial is made upon the minutes and is noticed for hearing within 30 days after the coming in of the verdict or notice of filing of the decision and is heard after the 30-day period without objection by the opposing party, the statutory requirements of a written stipulation extending the time on a court order to the same effect are waived, and the court may hear and determine the motion. Hore's Estate, 220 M 365, 19 NW(2d) 779.

Where the defendant failed to comply with the requirements of the statute relative to time of hearing on his motion for a new trial on the minutes of the court the order on the motion was a nullity, and the appeal therefrom must be dismissed. Farmers Cooperative v Kotz, 222 M 153, 23 NW(2d) 576.

In an action tried by the court, defeated party may move for a new trial on the court's minutes on the ground that conclusions of law are not supported by findings of fact. On such motion the court has no authority to grant a new trial. Its power is limited to modifying the conclusions of law to meet the facts. The court's order denying such motion may be reviewed in the supreme court without a settled case or a bill of exceptions. Johnson v Johnson, 223 M 420, 27 NW(2d) 289.

Comment upon Dodge v Bell, 37 M 383, 34 NW 740. Safeway Stores v Coe, 136 F(2d) 777.

Admissibility of the affidavit of a juror on a motion for a new trial. 1 MLR 189.

547.03 EXCEPTIONS TO RULING, ORDER, DECISION, OR INSTRUCTION OF COURT.

1. **Rulings**
2. **Orders**
3. **Decisions**
4. **Instructions**
5. **Objections and exceptions**
6. **Specifications of error**
7. **Generally**

1. Rulings

Cases relating to motions to strike out evidence: Ross v Duluth, Missabe, 203 M 312, 281 NW 76; Wolfangel v Prudential Ins. Co. 209 M 439, 296 NW 576; Gustafson v Elmgren, 211 M 82, 300 NW 203; Forsberg v Baker, 211 M 59, 300 NW 371; Odegard v Connolly, 211 M 342, 1 NW(2d) 137.

The court properly sustained an objection to a question as the question and answer would have been a repetition of questions previously answered. Hughes v Hughes, 204 M 592, 284 NW 781.

The exclusion of testimony designed to indicate the bias of one of plaintiffs' witnesses is not before the appellate court for review where no exception was taken to the ruling nor error specified in the motion for new trial. Leifson v Henning, 210 M 311, 298 NW 41.

The impropriety of counsel becoming a witness for his client in a case which he was trying is waived where no objection is made to his continuing the examination of witnesses after he had testified, or to his arguing the case to the jury. Pogue v Fegan, 219 M 80, 17 NW(2d) 85.

Where no exception is taken to a ruling excluding evidence and no motion for a new trial is made, the ruling is not reviewable on appeal from the judgment. Stevens v Mpls. Fire Dept. 219 M 277, 17 NW(2d) 642; Keiter v Berge, 219 M 375, 18 NW(2d) 35.

Where against the defendant's objection the court permitted the plaintiff to give certain testimony as to the federal law and the rules and regulations of the federal communications commission, in the absence of a motion to strike or specification of such alleged error in a motion for a new trial, there is no basis on which to predicate error. Johns v McGenty, 222 M 84, 23 NW(2d) 289.

2. Orders

On appeal from an order denying a motion in the alternative for judgment notwithstanding the verdict or for a new trial, an assignment of error to the effect that plaintiff was entitled to judgment upon the evidence is good as raising the question whether the evidence as a matter of law compels a recovery in his favor; but assignments of error involving rulings made on the trial which were not excepted to at the time or assigned as error in the notice of motion for a new trial will not be considered. Welsh v Barnes-Duluth Co. 221 M 37, 21 NW(2d) 43.

3. Decisions

Upon an appeal from a judgment after trial by the court, no motion for a new trial having been made and no errors in rulings or proceedings at the trial being involved, questions for review are limited to a consideration of whether the evidence sustains the findings of fact and whether such findings sustain the conclusions of law and judgment. Meiners v Kennedy, 221 M 6, 20 NW(2d) 539; DeWenter v DeWenter, 222 M 356, 24 NW(2d) 494; Venier v Forbes, 223 M 69, 25 NW(2d) 704.

Where trial is by jury it is usually necessary to move for a new trial in order to question on appeal the sufficiency of the evidence to support the verdict but where, as in the instant case, after a jury trial the court directed a verdict for plaintiffs, on appeal from the judgment the appellate court could consider the question whether the record supported the trial court's rule since motion for directed verdict squarely presented the theory upon which the case should have been decided. Phelan v Carey, 222 M 1, 23 NW(2d) 10.

4. Instructions

Unless the erroneous instructions complained of were on some ruling proposition of law, a verbal error on unintentional misstatement of law or fact which could have been corrected at the trial had the court's attention been called to it by counsel is not such error as requires reversal. Greene v Mathiowetz, 212 M 171, 3 NW(2d) 97.

Contributory negligence was pleaded as a defense, and while it does not appear that a specific request for an instruction thereon was made, defendant's counsel called to the attention of the trial court its failure to charge thereon and elicited from the court the suggestion that such failure was "deliberate." That presents the question whether the testimony was such that defendant was entitled to an instruction on contributory negligence. Hubenette v Ostby, 213 M 351, 6 NW(2d) 637.

Where in an action for wrongful death the court in charging the jury relating to the emergency rule stated the law correctly as far as it went, as no exceptions were taken to those instructions and no requests made to extend it to cover any part of the rule not included in the judge's charge, the error cannot be urged on appeal. Merritt v Stuve, 215 M 44, 9 NW(2d) 329.

It is the duty of counsel on the trial of an action to call attention to obviously unintentional misstatements and verbal errors in the charge of the court to the jury; and, failing to do so, a mere technical error which could have been corrected at the trial if called to the court's attention cannot be of help on appellant's appeal. Slindee v City of St. Paul, 219 M 429, 18 NW(2d) 128.

Where the court instructs the jury to disregard objectionable evidence received during the trial, the presumption is that no prejudice resulted from its reception, and if the instruction was inadequate, the party waives by not calling the court's attention at the time. Krueger v City of Faribault, 220 M 89, 18 NW(2d) 777.

In order to entitle a party to raise objections to errors, inaccuracies, or incomplete statements in a court's charge, the court must specifically be apprised of the same before the jury retires. Jenkins v Jenkins, 220 M 216, 19 NW(2d) 390.

5. Objections and exceptions

Where the question of waiver by the insurer of its defense of attempted fraud was not presented to the lower court and did not appear in the specifications of error in a motion for new trial that question will not be considered on appeal. Supornick v National Retailers Mutual, 209 M 500, 296 NW 904.

Rulings not excepted to at the trial and not assigned as error in the motion for new trial are unavailing on appeal. Smith v Mpls. Securities, 211 M 534, 1 NW(2d) 841.

Where a statement by one of several defendants is an admission as to him and an impeachment of him as to the others and plaintiff fails to call the court's attention at the time to the error in the charge limiting the effect of the statement as impeachment without a qualification that it was an admission against the party making it, the error cannot be relied on for reversal on appeal. Schmitt v Emery, 211 M 547, 2 NW(2d) 413.

Where the propriety of the trial court's allowance of interest was not questioned in the lower court the issue cannot be raised before the appellate court. Bang v International Sisal Co. 212 M 135, 4 NW(2d) 113.

Where misconduct is claimed the exception to such misconduct must either be taken at the time the offense occurs or at the close of the offender's argument. Weber v McCarthy, 214 M 76, 7 NW(2d) 681.

Inaccuracies in the trial court's instructions not specially called to the court's attention will, in the instant case, be disregarded as they in no way affect the result. James v Chgo. St. Paul & Milwaukee, 218 M 333, 16 NW(2d) 188.

In the absence of an exception directed to the alleged error, an error of law on the trial will not be considered upon appeal unless the alleged error is clearly specified in the notice of motion for a new trial. Anderson v Sears, Roebuck Co. 223 M 1, 26 NW(2d) 355.

6. Specifications of error

No reversible error is present where counsel fails to request an instruction that the evidence must be clear and convincing and expresses satisfaction with the charge that the burden of proving forgery may be satisfied by a fair preponderance of the evidence. The scope of review on appeal is limited by the assignments of error in the motion for new trial. Amland v Gross, 208 M 596, 296 NW 170.

Where, as here, there are eight separate findings of fact, some of which are admitted by the pleadings, the finding of fact desired to be challenged as not sustained by the evidence must be specified in the assignment of errors. A decisive finding of fact is not so assailed in this court. Offers of proof to controvert the finding were sustained on plaintiff's objection, but no exception to the ruling was saved at

the trial or assigned in the motion for a new trial, and the ruling cannot be reviewed here. Barnard v County of Kandiyohi, 213 M 100, 5 NW(2d) 317.

7. Generally

In the absence of exceptions, errors of law on the trial will not be considered on a motion for a new trial or on appeal unless they are clearly specified in the notice of motion for a new trial. Ranum v Swenson, 220 M 170, 19 NW(2d) 329.

Unless a statement by the court of its position on the law is objected to on the trial, it cannot be assigned as error in a motion for a new trial. Unless such objection is made and assigned in the motion or exception taken at the time, such statement does not present a basis for an assignment of error in the appellate court. Starks v Starks, 220 M 313, 19 NW(2d) 742.

See, L. 1945, c. 282.

Where a motion in the trial court is made and determined on special grounds stated in the notice of motion, the moving party will not be heard in the appellate court upon new or additional grounds. Pierce v Grand Army, 220 M 552, 20 NW(2d) 489.

Error, if any, in a ruling on the trial may not be reviewed on appeal from a judgment if appellant did not take an exception to the ruling on the trial or assign it as error in a motion for a new trial. Wendelsdorf v County of Martin, 220 M 614, 20 NW(2d) 528.

See, Welsh v Barnes, 221 M 37, 21 NW(2d) 43, cited under section 547.01.

On appeal from a judgment after trial by the court, no motion for a new trial having been made and no errors in rulings or proceedings at the trial being involved, the questions for review are limited to a consideration of whether the evidence sustains the findings of facts and whether such findings sustain the conclusions of law and judgment. Laabs v Hagen, 221 M 89, 21 NW(2d) 93.

547.04 BILL OF EXCEPTIONS AND CASE.

In order to secure review on appeal of a ruling of the trial court in admitting or excluding evidence, it is indispensable in all cases that there should be a bill of exceptions or case containing the evidence erroneously admitted or excluded, the objection of counsel, the ruling of the court upon the objection, and so much of the other evidence in the case as may be necessary to enable the supreme court to review intelligently the action of the trial court. Timm v Schneider, 203 M 1, 279 NW 754.

A transcript of the evidence which the court below had not allowed as a settled case does not furnish basis for a review of the evidence to determine its sufficiency and is not a substitute for a settled case or bill of exceptions. Doyle v Swanson, 206 M 56, 288 NW 152.

A finding of fact in the nature of a conclusion from other facts specifically found may be reviewed on appeal without a settled case or bill of exceptions to determine whether the facts specifically found support the conclusion. Holden v First National Bank, 207 M 211, 291 NW 104.

A motion for a new trial on the ground that the ends of justice require it is not a statutory ground but has in exceptional cases been permitted on the ground of newly discovered evidence where it was of such a nature as to require a different verdict, but the circumstances in the instant case indicate no abuse of the discretion of the trial court, and the trial court's decision is affirmed. Valencia v Markham Cooperative Assn. 210 M 221, 297 NW 736.

To secure a reversal the burden rests upon the appealing party to show prejudicial error; and the court will not review the decision of the trial court upon mere questions of fact unless the record contains all the evidence introduced on the trial pertaining to the question at issue; and in any event the record on appeal should show affirmatively and unequivocally, either in the body of the case or in the certificate of the judge, that the case contains all the evidence introduced on the issue of fact raised in the appellate court. Gubbins v Irwin, 210 M 428, 298 NW 715.

Where the case came to the appellate court without a bill of exceptions or a settled case and the appellant had not challenged the findings, the appellate court must accept as true the findings of fact. Beliveau v Beliveau, 217 M 225, 14 (2d) 360; McGovern v Federal Land Bank, 209 M 403, 296 NW 473.

Where the appeal from the judgment is without case or bill of exceptions the appellate court considers only questions appearing on the judgment roll. Hammond v Flour City Co. 217 M 427, 14 (2d) 452; Krueger v Krueger, 210 M 144, 297 NW 566.

Problem of preserving excluded evidence in the appellate record. 13 MLR 168.

547.05 BILL OF EXCEPTIONS OR CASE, HOW AND WHEN SETTLED.

Where the trial court refused to settle a case long after the judgment had been entered the issue cannot be reviewed by the appellate court. McGovern v Federal Land Bank, 209 M 403, 296 NW 473.

Dodge v Bell, 37 M 383, 34 NW 740, reviewed by federal court. Safeway Stores v Coe, 136 F(2d) 777.

A "petition for rehearing" is, under the federal rules, in all respects the same as a "motion for a new trial." Safeway v Coe, 136 F(2d) 777.