

RULE 6~~5~~<sup>4</sup>

NEW TRIALS

A. New trial defined. A new trial is a re-examination of an issue of fact in the same court after judgment.

B. Jury trial; grounds for new trial. A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

B.(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

B.(2) Misconduct of the jury or prevailing party.

B.(3) Accident or surprise which ordinary prudence could not have guarded against.

B.(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.

B.(5) Excessive damages, appearing to have been given under the influence of passion or prejudice.

B.(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

B.(7) Error in law occurring at the trial and objected to by the party making the application.

C. New trial in case tried without a jury. In an action tried without a jury, a former judgment may be set aside and a new trial granted on motion of the party aggrieved on any grounds set forth in subsections (1), (2), (3), (4) or (7) of section B. of this Rule where applicable. On a motion for a new trial in an action tried without a jury, the court may

open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

D. Specification of grounds of motion; when motion must be on affidavits.

In all cases of motion for a new trial, the grounds thereof shall be plainly specified, and no cause of new trial not so stated shall be considered or regarded by the court. When the motion is made for a cause mentioned in subsections (1) to (4) of section F. of this Rule, it shall be upon affidavit, setting forth the facts upon which the motion is based.

E. When counteraffidavits are allowed; affidavits as to newly discovered evidence; former proceedings considered. If the motion is supported by affidavits, counteraffidavits may be offered by the adverse party. If the cause is newly discovered evidence, the affidavits of any witness or witnesses showing what their testimony will be, shall be produced, or good reasons shown for their nonproduction. In the consideration of any motion for a new trial, reference may be had to any proceedings in the case, prior to the verdict or other decision sought to be set aside.

F. Time of motion; counteraffidavits; hearing and determination.

A motion to set aside a judgment and for a new trial, with the affidavits, if any, in support thereof, shall be filed within 10 days after <sup>F</sup>the filing of the judgment sought to be set aside, or such further time as the court may allow. When the adverse party is entitled to oppose the motion by counteraffidavits, he shall file the same within 10 days after the filing of the motion, or such further time as the court may allow. The motion shall

be heard and determined by the court within 55 days from the time of the entry of judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

G. New trial on court's own motion; review. If a new trial is granted by the court on its own motion, the order shall so state and shall be made within 30 days after the filing of the judgment. Such order shall contain a statement setting forth fully the grounds upon which the order was made, which statement shall be a part of the record in the case.

H. Remittitur and additur. When a finding is made that the only error in the trial is the inadequacy or excessiveness of the verdict, the court may deny a motion for new trial on condition that within 10 days the non-moving party consents in writing to the entry of judgment of an amount found by the judge to be the lowest or highest amount respectively which the evidence will support.

COMMENT:

A. This is ORS 17.605.

B. This is ORS 17.610 with the language changed as submitted in the prior law - equity revisions. The grounds for new trial are unchanged but "and excepted to" is changed to "objected to" in ground (7).

C. This is the modified version of 17.435 previously submitted to the Council as part of the law - equity revisions. The last sentence comes from Federal Rule 59 (a).

D. This is ORS 17.620.

E. This is ORS 17.625.

F. This is ORS 17.615.

G. This is ORS 17.630. The last sentence of that statute, however, will have to remain as a statute as it relates to appellate procedure.

## Rule 64.

### Background Note.

#### ORS sections superseded

ORS. 17.435, 17.605, 17.610, 17.615,  
17.620, 17.625, 17.630.

#### Comment:

This Rule is based upon existing ORS sections. Section C is based on 17.435 but the language is modified to refer to a case tried without a jury rather than a suit in equity and the last sentence is new. The last sentence of ORS 17.630 is ~~not~~ included and will remain as a statute as it ~~is~~ ~~a~~ relates to appellate procedure.

RULE 64  
NEW TRIALS

A. New trial defined. A new trial is a re-examination of an issue of fact in the same court after judgment.

B. Jury trial; grounds for new trial. A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

B.(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having fair trial.

B.(2) Misconduct of the jury or prevailing party.

B.(3) Accident or surprise which ordinary prudence could not have guarded against.

B.(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.

B.(5) Excessive damages, appearing to have been given under the influence of passion or prejudice.

B.(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

B.(7) Error in law occurring at the trial and objected to by the party making the application.

C. New trial in case tried without a jury. In an action tried

without a jury, a former judgment may be set aside and a new trial granted on motion of the party aggrieved on any grounds set forth in ~~subsections (1), (2), (3), (4) or (7) of~~ section B. of this rule where applicable. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

D. Specification of grounds of motion; when motion must be on affidavits. In all cases of motion for a new trial, the grounds thereof shall be plainly specified, and no cause of new trial not so stated shall be considered or regarded by the court. When the motion is made for a cause mentioned in subsections (1) to (4) of section F. of this rule, it shall be upon affidavit, setting forth the facts upon which the motion is based.

E. When counteraffidavits are allowed; affidavits as to newly discovered evidence; former proceedings considered. If the motion is supported by affidavits, counteraffidavits may be offered by the adverse party. If the cause is newly discovered evidence, the affidavits of any witness or witnesses showing what their testimony will be, shall be produced, or good reasons shown for their nonproduction. In the consideration of any motion for a new trial, reference may be had to any proceedings in the case, prior to the verdict or other decision sought to be set aside.

F. Time of motion; counteraffidavits; hearing and determination. A motion to set aside a judgment and for a new trial, with the affidavits, if any, in support thereof, shall be filed within 10 days after

the filing of the judgment sought to be set aside, or such further time as the court may allow. When the adverse party is entitled to oppose the motion by counteraffidavits, he shall file the same within 10 days after the filing of the motion, or such further time as the court may allow. The motion shall be heard and determined by the court within 55 days from the time of the entry of the judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

G. New trial on court's own motion; review. If a new trial is granted by the court on its own motion, the order shall so state and shall be made within 30 days after the filing of the judgment. Such order shall contain a statement setting forth fully the grounds upon which the order was made, which statement shall be a part of the record in the case.

#### BACKGROUND NOTE

ORS sections superseded: ORS 17.435, 17.605, 17.610, 17.615, 17.620, 17.625, 17.630.

#### COMMENT

This rule is based upon existing ORS sections. Section C. is based on 17.435, but the language is modified to refer to a case tried without a jury rather than a suit in equity, and the last sentence is new. The last sentence of ORS 17.630 is not included and will remain as a statute as it relates to appellate procedure.

rule, whichever is earlier, mail a copy of the order and notice of the date of entry of the order or denial of the motion to each party who is not in default for failure to appear. The clerk also shall make a note in the docket of the mailing.

F. Motion for new trial after judgment notwithstanding the verdict. The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 64 not later than 10 days after entry of the judgment notwithstanding the verdict.

BACKGROUND NOTE

ORS section superseded: 18.140 and 46.155

COMMENT

Rule 63 is based upon ORS 18.140. The reference to failure to state a cause of action in a pleading as a ground for judgment NOV was eliminated as unnecessary and inconsistent with the pleading rules. Section 63 F. is based upon Federal Rule 50 (c)(2).

RULE 64

NEW TRIALS

A. New trial defined. A new trial is a re-examination of an issue of fact in the same court after judgment.

B. Jury trial; grounds for new trial. A former judgment may be set aside and a new trial granted in an action or proceeding where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

B.(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion,



by which such party was prevented from having fair trial.

B.(2) Misconduct of the jury or prevailing party.

B.(3) Accident or surprise which ordinary prudence could not have guarded against.

B.(4) Newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial.

B.(5) Excessive damages, appearing to have been given under the influence of passion or prejudice.

B.<sup>5</sup>(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

B.<sup>6</sup>(7) Error in law occurring at the trial and <sup>excepted</sup>~~objected~~ to by the party making the application.

C. New trial in case tried without a jury. In an action or proceeding tried without a jury, a former judgment may be set aside and a new trial granted on motion of the party aggrieved on any grounds set forth in section B. of this rule where applicable. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

D. Specification of grounds of motion; when motion must be on affidavits. In all cases of motion for a new trial, the grounds thereof shall be plainly specified, and no cause of new trial not so stated shall be considered or regarded by the court.

When the motion is made for a cause mentioned in subsections (1) to (4) of section B. of this rule, it shall be upon affidavit, setting forth the facts upon which the motion is based. If the cause is newly discovered evidence, the affidavits of any witness or witnesses showing what their testimony will be, shall be produced, or good reasons shown for their nonproduction.

E. When counteraffidavits are allowed; former proceedings considered. If the motion is supported by affidavits, counteraffidavits may be offered by the adverse party. In the consideration of any motion for a new trial, reference may be had to any proceedings in the case, prior to the verdict or other decision sought to be set aside.

F. Time of motion; counteraffidavits; hearing and determination. A motion to set aside a judgment and for a new trial, with the affidavits, if any, in support thereof, shall be filed ~~within~~ <sup>not later than</sup> 10 days after the filing of the judgment sought to be set aside, or such further time as the court may allow. When the adverse party is entitled to oppose the motion by counteraffidavits, such party shall file the same within 10 days after the filing of the motion, or such further time as the court may allow. The motion shall be heard and determined by the court within 55 days from the time of the <sup>Filing.</sup> ~~entry~~ of the judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

G. New trial on court's own motion; review. If a new trial is granted by the court on its own <sup>initiative</sup> ~~motion~~, the order shall

so state and shall be made within 30 days after the filing of the judgment. Such order shall contain a statement setting forth fully the grounds upon which the order was made, which statement shall be a part of the record in the case.

BACKGROUND NOTE

ORS sections superseded: ORS 17.435, 17.605, 17.610, 17.615, 17.620, 17.625, 17.630 , 46.155.

COMMENT

This rule is based upon existing ORS sections. Section 64 C. is based on 17.435, but the language is modified to refer to a case tried without a jury rather than a suit in equity, and the last sentence is new. The last sentence of ORS 17.630 is not included and will remain as a statute as it relates to appellate procedure.

RULE 64

NEW TRIALS

A. New trial defined. A new trial is a re-examination of an issue of fact in the same court after judgment.

B. Jury trial; grounds for new trial. A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

B.(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having fair trial.

B.(2) Misconduct of the jury or prevailing party.

B.(3) Accident or surprise which ordinary prudence could not have guarded against.

B.(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.

B.(5) Excessive damages, appearing to have been given under the influence of passion or prejudice.

B.(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

B.(7) Error in law occurring at the trial and objected to by the party making the application.

C. New trial in case tried without a jury. In an action tried

without a jury, a former judgment may be set aside and a new trial granted on motion of the party aggrieved on any grounds set forth in section B. of this rule where applicable. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

D. Specification of grounds of motion; when motion must be on affidavits. In all cases of motion for a new trial, the grounds thereof shall be plainly specified, and no cause of new trial not so stated shall be considered or regarded by the court. When the motion is made for a cause mentioned in subsections (1) to (4) of section B. of this rule, it shall be upon affidavit, setting forth the facts upon which the motion is based.

E. When counteraffidavits are allowed; affidavits as to newly discovered evidence; former proceedings considered. If the motion is supported by affidavits, counteraffidavits may be offered by the adverse party. If the cause is newly discovered evidence, the affidavits of any witness or witnesses showing what their testimony will be, shall be produced, or good reasons shown for their nonproduction. In the consideration of any motion for a new trial, reference may be had to any proceedings in the case, prior to the verdict or other decision sought to be set aside.

F. Time of motion; counteraffidavits; hearing and determination. A motion to set aside a judgment and for a new trial, with the affidavits, if any, in support thereof, shall be filed within 10 days after

5  
the filing of the judgment sought to be set aside, or such further time as the court may allow. When the adverse party is entitled to oppose the motion by counteraffidavits, he shall file the same within 10 days after the filing of the motion, or such further time as the court may allow. The motion shall be heard and determined by the court within 55 days from the time of the entry of the judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

G. New trial on court's own motion; review. If a new trial is granted by the court on its own motion, the order shall so state and shall be made within 30 days after the filing of the judgment. Such order shall contain a statement setting forth fully the grounds upon which the order was made, which statement shall be a part of the record in the case.

#### BACKGROUND NOTE

ORS sections superseded: ORS 17.435, 17.605, 17.610, 17.615, 17.620, 17.625, 17.630.

#### COMMENT

This rule is based upon existing ORS sections. Section C. is based on 17.435, but the language is modified to refer to a case tried without a jury rather than a suit in equity, and the last sentence is new. The last sentence of ORS 17.630 is not included and will remain as a statute as it relates to appellate procedure.

rule, whichever is earlier, mail a copy of the order and notice of the date of entry of the order or denial of the motion to each party who is not in default for failure to appear. The clerk also shall make a note in the docket of the mailing.

F. Motion for new trial after judgment notwithstanding the verdict. The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 64 not later than 10 days after entry of the judgment notwithstanding the verdict.

#### BACKGROUND NOTE

ORS section superseded: 18.140 and 46.155

#### COMMENT

Rule 63 is based upon ORS 18.140. The reference to failure to state a cause of action in a pleading as a ground for judgment NOV was eliminated as unnecessary and inconsistent with the pleading rules. Section 63 F. is based upon Federal Rule 50 (c)(2).

#### RULE 64

#### NEW TRIALS

A. New trial defined. A new trial is a re-examination of an issue of fact in the same court after judgment.

B. Jury trial; grounds for new trial. A former judgment may be set aside and a new trial granted in an action or proceeding where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

B.(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion,

so state and shall be made within 30 days after the filing of the judgment. Such order shall contain a statement setting forth fully the grounds upon which the order was made, which statement shall be a part of the record in the case.

BACKGROUND NOTE

ORS sections superseded: ORS 17.435, 17.605, 17.610, 17.615, 17.620, 17.625, 17.630 , 46.155.

COMMENT

This rule is based upon existing ORS sections. Section 64 C. is based on 17.435, but the language is modified to refer to a case tried without a jury rather than a suit in equity, and the last sentence is new. The last sentence of ORS 17.630 is not included and will remain as a statute as it relates to appellate procedure.



RULE 64

NEW TRIALS

A. New trial defined. A new trial is a re-examination of an issue of fact in the same court after judgment.

B. Jury trial; grounds for new trial. A former judgment may be set aside and a new trial granted in an action or ~~process~~ ~~ing~~ where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

B.(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having fair trial.

B.(2) Misconduct of the jury or prevailing party.

B.(3) Accident or surprise which ordinary prudence could not have guarded against.

B.(4) Newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial.

B.(5) Excessive damages, appearing to have been given under the influence of passion or prejudice.

B.(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

B.(7) Error in law occurring at the trial and objected or excepted to by the party making the application.

F. Time of motion; counteraffidavits; hearing and determination. A motion to set aside a judgment and for a new trial, with the affidavits, if any, in support thereof, shall be filed ~~within~~ <sup>not later than</sup> 10 days after the filing of the judgment sought to be set aside, or such further time as the court may allow. When the adverse party is entitled to oppose the motion by counteraffidavits, such party shall file the same within 10 days after the filing of the motion, or such further time as the court may allow. The motion shall be heard and determined by the court ~~within~~ <sup>within</sup> 55 days from the time of the ~~entry~~ <sup>filing</sup> of the judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

G. New trial on court's own ~~motion~~ <sup>initiative</sup>; review. If a new trial is granted by the court on its own ~~motion~~ <sup>initiative</sup>, the order shall so state and shall be made within 30 days ~~after~~ <sup>AFTER</sup> the filing of the judgment. Such order shall contain a statement setting forth fully the grounds upon which the order was made, which statement shall be a part of the record in the case.

#### COMMENT

This rule is based upon existing ORS sections. Section 64 C. is based on 17.435, but the language is modified to refer to a case tried without a jury rather than a suit in equity, and the last sentence is new. The last sentence of ORS 17.630 is not included and will remain as a statute as it relates to appellate procedure. Subsections 64 B.(5) and (6) were retained in the

language of ORS 17.610, although they have been severely limited by Article VII, Section 3 of the Oregon Constitution. Van Lom v. Schneiderman, 187 Or 89 (1949); Bean v. Hostetler, 182 Or 518 (1948).

RULE 64  
NEW TRIALS

A. New trial defined. A new trial is a re-examination of an issue of fact in the same court after judgment.

B. Jury trial; grounds for new trial. A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

B.(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having fair trial.

B.(2) Misconduct of the jury or prevailing party.

B.(3) Accident or surprise which ordinary prudence could not have guarded against.

B.(4) Newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial.

B.(5) Excessive damages, appearing to have been given under the influence of passion or prejudice.

B.(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

B.(7) Error in law occurring at the trial and objected to or excepted to by the party making the application.

C. New trial in case tried without a jury. In an action tried without a jury, a former judgment may be set aside and a new trial granted on motion of the party aggrieved on any grounds set forth in section B. of this rule where applicable. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

D. Specification of grounds of motion; when motion must be on affidavits. In all cases of motion for a new trial, the grounds thereof shall be plainly specified, and no cause of new trial not so stated shall be considered or regarded by the court. When the motion is made for a cause mentioned in subsections (1) through (4) of section B. of this rule, it shall be upon affidavit, setting forth the facts upon which the motion is based. If the cause is newly discovered evidence, the affidavits of any witness or witnesses showing what their testimony will be, shall be produced, or good reasons shown for their nonproduction.

E. When counteraffidavits are allowed; former proceedings considered. If the motion is supported by affidavits, counteraffidavits may be offered by the adverse party. In the consideration of any motion for a new trial, reference may be had to any proceedings in the case prior to the verdict or other decision sought to be set aside.

F. Time of motion; counteraffidavits; hearing and determination. A motion to set aside a judgment and for a new trial, with the affidavits, if any, in support thereof, shall be filed not later than 10 days after the filing of the judgment sought to be set aside, or such further time as the court may allow. When the adverse party is entitled to oppose the motion by counteraffidavits, such party shall file the same within 10 days after the filing of the motion, or such further time as the court may allow. The motion shall be heard and determined by the court within 55 days from the time of the filing of the judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

G. New trial on court's own initiative. If a new trial is granted by the court on its own initiative, the order shall so state and shall be made within 30 days after the filing of the judgment. Such order shall contain a statement setting forth fully the grounds upon which the order was made, which statement shall be a part of the record in the case.

#### COMMENT

This rule is based upon existing ORS sections. Section 64 A. is based on ORS 17.605. Section 64 B. is based on ORS 17.610. Section 64 C. is based on 17.435, but the language is modified to refer to a case tried without a jury rather than a suit in equity, and the last sentence is new. Sections 64 D. and E. are based on ORS 17.620 and 17.625. Section 64 F. is based on ORS 17.615. Section 64 G. is based on ORS 17.630. The last sentence of

ORS 17.630 is not included and will remain as a statute as it relates to appellate procedure.

Subsections 64 B.(5) and (6) were retained in the language of ORS 17.610, although they have been severely limited by Article VII, Section 3, of the Oregon Constitution. Van Lom v. Schneiderman, 187 Or 89 (1949); Bean v. Hostettler, 182 Or 510 (1948).