PROPOSED

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2021

Order Amending Rule 50(b) of the Vermont Rules of Civil Procedure

Pursuant to the Vermont Constitution, Chapter II, § 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 50(b) of the Vermont Rules of Civil Procedure be amended to read as follows (new matter underlined):

RULE 50. JUDGMENT AS A MATTER OF LAW IN ACTIONS TRIED BY A JURY; ALTERNATIVE MOTIONS FOR NEW TRIAL; CONDITIONAL RULINGS

(b) **Renewal of Motion for Judgment after Trial; Alternative Motion for New Trial.** Whenever a motion for judgment as a matter of law made under subdivision (a) is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by filing not later than 28 days after entry of judgment or, if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged. Renewal of the motion is necessary to appeal from a denial of or a failure to grant a motion for judgment as a matter of law <u>that raises a question of the sufficiency of the evidence</u>. A motion for a new trial under Rule 59 may be joined with renewal of the motion, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

Reporter's Notes—2022 Amendment

V.R.C.P. 50(b) is amended in response to the Vermont Supreme Court's request in <u>Blondin v. Milton Town School District</u>, 2021 VT 2, ¶ 26 n. 10, that the Civil Rules Committee consider whether that rule "should be amended to be consistent with the federal rule and potentially to allow consideration of pure questions of law on appeal absent renewal following judgment."

V.R.C.P. 50(b) as originally adopted in 1971 was identical to F.R.C.P. 50(b) as it then stood. Reporter's Notes (1971). In 1988 the Vermont Rule was amended by the addition of the language, "Renewal of the motion is necessary to appeal from a denial of or failure to grant a motion for judgment as a matter of law." The 1988 Reporter's Notes state that the sentence was added to make explicit a requirement found implicit in F.R.C.P. 50(b) to which the Vermont Rule was otherwise identical. Subsequent amendments to V.R.C.P. 50(b) tracked most changes in the Federal

Rule through 2009. See Reporter's Notes to 2009 and 2018 amendments of V.R.C.P. 50(b). The requirement of renewal of the motion before an appeal from the denial, however, remains unique to the Vermont Rule.

The U.S. Supreme Court in Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 407 (2006), held that failure to renew a pre-verdict motion for judgment as a matter of law under Rule 50(b) prevented appellate review of a sufficiency of evidence challenge. In Blondin, the Vermont Supreme Court, ¶¶ 10-11, noted several Federal Court of Appeals decisions holding that Unitherm applied only to Rule 50(b) motions addressing sufficiency of the evidence and that a motion raising "a pure question of law" could be reviewed even though the motion had not been renewed after verdict. Even assuming, though not deciding, that "a pure question of law" had been raised by respondent, the Vermont Supreme Court, in light of the explicit renewal requirement unique to the Vermont Rule, declined "of our own motion" to adopt this exception.

The U.S. Court of Appeals decisions examined by the Vermont Supreme Court, and many other such decisions that recognize the pure question of law exception, read Unitherm as limited to questions of sufficiency of the evidence and not extending to issues that do not involve any evidentiary questions and would normally only be decided by the judge in a jury trial. See, e.g., Doherty v. City of Maryville, 431 F. App'x 381, 385 (6th Cir. 2011); Belk, Inc. v. Meyer Corp., 679 F.3d 146, 160 (4th Cir. 2012); Linden v. CNH Am., LLC, 673 F.3d 829, 832-33 (8th Cir. 2012); Frank C. Pollara Grp., LLC v. Ocean View Inv. Holding, LLC, 784 F.3d 177, 188 (3d Cir. 2015). See also cases cited in 9B Wright and Miller, Federal Practice and Procedure §§ 2537, 2540 (3d ed.).

The present amendment of V.R.C.P. 50(b) adopts this interpretation of Unitherm by limiting the requirement to renew the motion to sufficiency-of-the-evidence questions. The effect of the amendment is to allow case-by-case development of the line between sufficiency-of-the-evidence questions and pure questions of law. The amendment reflects a change in the circumstances that led to the 1988 amendment of V.R.C.P. 50(b). The Reporter's Notes to that amendment state that the purpose of the added sentence was to make clear that Federal case law was "unambiguous" in requiring a new motion after verdict for judgment notwithstanding the verdict to support an appeal from a denial of a directed verdict. Unitherm, decided in 2006, and the many Courts of Appeal's decisions applying it, make clear that Federal case law has undergone the sea change reflected in the

present amendment: Only motions for judgment based on sufficiency-of-the-evidence claims require a new post-verdict motion.

2. That these amendments be prescribed and promulgated, effective on _____. The Reporter's Notes are advisory.

3. That the Chief Justice is authorized to report this amendment to the GeneralAssembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this_____ day of_____, 2021.

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice

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William D. Cohen, Associate Justice