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NEW TRIALS FOR FAILURE OF SUBSTANTIAL JUSTICE

PHILIP A. TRAUTMAN*

Of the several grounds for a new trial in Washington, one in particular has created considerable difficulty for the supreme court, the superior court judges, and counsel. The ground in question is set forth in Rules of Pleading and Procedure 59.04W(9), "That substantial justice has not been done." This is followed by the provision that, "In all cases wherein the trial court grants a motion for a new trial, it shall, in the order granting the motion, give definite reasons of law and facts for so doing."

The problem has been one of determining the degree of discretion resting with the superior courts under the above provisions, the scope of review by the supreme court, and for counsel, the criteria for the drafting of new trial orders to avoid reversal on appeal. A study of this problem was undertaken on behalf of the State of Washington Judicial Council. In the belief that the results would be of interest to attorneys generally, the report to the Council has been modified for presentation in this article.

An understanding of the rule and its purpose first necessitates an analysis of its historical background. This will be followed by a detailed consideration of the cases interpreting and applying the rule and a comparison of the practice in other jurisdictions. Finally, certain recommendations will be made in the way of a possible amendment to the rule, or a reinterpretation of the rule as it now exists.

INHERENT POWER OF TRIAL COURTS

The power of the English common law trial courts to grant new trials for a variety of reasons with a view to the attainment of justice was well established prior to the establishment of the federal and state governments in this country. As early as 1757, Justice Denison stated, "... the granting a new trial, or refusing it, must depend upon the Legal Discretion of the Court; guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice."

An adequate summary of the common law base for the trial court's

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power to grant a new trial was set forth by Judge Parker in the oft-

The exercise of this power is not in derogation of the right of trial
by jury but is one of the historic safeguards of that right. *Smith v. Times Pub. Co.,* 178 Pa. 481, 36 A. 296, 35 LRA 819; *Bright v. Eynon,* 1 Burr. 390; *Mellin v. Taylor,* 3 BNC 109, 132 Eng. Reports 351. The
matter was well put by Mr. Justice Mitchell, speaking for the Supreme
Court of Pennsylvania in *Smith v. Times Publishing Co., supra* [178
Pa. 481, 36 A. 298], as follows: "The authority of the common pleas
in the control and revision of excessive verdicts through the means of
new trials was firmly settled in England before the foundation of this
colony, and has always existed here without challenge under any of our
constitutions. It is a power to examine the whole case on the law and
the evidence with a view to securing a result, not merely legal, but also
not manifestly against justice, —a power exercised in pursuance of a
sound judicial discretion, without which the jury system would be a
capricious and intolerable tyranny, which no people could long endure.
This court has had occasion more than once recently to say that it was
a power the courts ought to exercise unflinchingly.

Under the English common law a motion for a new trial was ad-
dressed to the sound judicial discretion of the trial court. No rigid
nor fixed formula prescribed how this principle was to be universally
applied. Rather, the trial court was to apply the principle so that
substantial justice was done on the facts of the individual case, subject
to the power of the appellate courts to reverse the trial court for an
abuse of discretion.

It has been recognized that this power to grant a new trial is inherent
in the court. Indeed, the first case reported on the subject stated that
the power to grant a new trial is inherent in nature where it appears
than an injustice has been done. The observation has also been made
that the basis for all of the stated grounds for new trials in rules and
statutes is the inherent power of the court to correct any errors in its
proceedings that have had any material effect on the outcome of
the trial.

The inherent power of the trial court to grant new trials on the
ground that substantial justice has not been done was recognized in
Washington long before a rule in point was adopted. In the early case
of *Clark v. Great No. Ry. Co.,* the trial judge expressed the opinion

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3 122 F.2d 350 (4th Cir. 1941).
4 Id. at 353.
5 Wood v. Gunston, Style 466 (1655).
6 2 DUGGAN & ORLAND, WASHINGTON PRACTICE 276 (1957).
7 37 Wash. 537, 79 Pac. 1108 (1905).
that though he did not think that the weight of the evidence supported
the jury's findings, he was compelled to deny a motion for a new trial.
Since "under our judicial system, the trial judge in a civil jury case
has little more power or authority than a 'mentor at a town meeting,'
I am not at liberty to disturb the jury's finding on that issue."

The appellate court reversed and stated:

It appears from the foregoing statement that the trial court labored
under an entire misapprehension as to its powers and its duties. Our
statute provides that a new trial may be granted, among other grounds,
for insufficiency of the evidence to justify the verdict; and this power
must be exercised by the trial courts, if at all. These courts should give
due care not to invade the legitimate province of the jury, but if, after
giving full consideration to the testimony in the light of the verdict, the
trial judge is still satisfied that the verdict is against the weight of the
evidence, and that substantial justice has not been done between the
parties, it is his duty to set the verdict aside.\(^8\)

The court quoted with approval from an Iowa case\(^9\) as follows:

Those courts [trial courts] ought to independently exercise their power,
to grant new trials, and with entire freedom from the rule which con-
trols appellate tribunals, they ought to grant new trials whenever their
superior and more comprehensive judgment teaches them that the
verdict of the jury fails to administer substantial justice to the parties
in the case.\(^10\)

In subsequent cases direct and indirect reference was periodically
made to failure of substantial justice as a ground for a new trial,\(^11\)
culminating in the well-known opinion by Judge Steinert in \textit{Brammer
v. Lappenbusch}.\(^12\) The trial judge expressed the view that because of
certain changes in the then-existing statutes prescribing grounds for
a new trial, the legislature intended to restrict the power of the court
in setting aside the verdicts of juries and on that basis denied a motion
for a new trial. The supreme court reversed and stated:

It is apparent, we think, that the trial court was of the opinion that
the statute made the verdict of the jury impregnable against any exer-
cise of discretion on the part of the court with reference to setting
the verdict aside, even though the court were satisfied that substantial
justice had not been done, and that, wholly because of that view, the

\(^8\) Id. at 540, 79 Pac. at 1109.
\(^11\) Norland v. Peterson, 169 Wash. 380, 13 P.2d 483 (1932); Trunk v. Wilkes, 162
Wash. 114, 297 Pac. 1091 (1931); Sylvester v. Olson, 63 Wash. 285, 115 Pac. 175
(1911).
\(^12\) 176 Wash. 625, 30 P.2d 947 (1934).
court denied the motion for new trial. We believe that the court was in error in its conclusion.

The statute does not attempt to limit the inherent power of the court. The form of its language, it will be noted, is permissive, not restrictive. It says that, for certain causes, the court may grant a new trial. It does not say that it shall not do so for any other cause. In so far as the amended portion of the statute is concerned, it neither conferred any power upon the court which it did not already inherently possess, nor did it attempt to restrict the court in the exercise of its inherent power. Had the legislature never enacted subdivisions 5 and 7 of Sec. 399 as amended [relating to excessive and inadequate damages and verdicts against the evidence and law], the court would nevertheless have had inherent power to grant a new trial upon either of those grounds. . . .

All of our decisions have proceeded upon the principle that, if the trial court, in the exercise of its sound discretion, is satisfied that substantial justice had not been done in a given case, it is its right and its duty to set the verdict aside.13

Here then was a clear enunciation of the inherent power of trial courts in this state to grant new trials for failure of substantial justice and further, a recognition that such a consideration affects all grounds prescribed by statute or rule. It is the underlying authority for the exercise of discretion by the trial courts on any motion for a new trial.

The authority of the trial court to exercise its discretion if satisfied that substantial justice was not done continued to be regarded as an inherent power until its explicit statement by rule in 1951. For example, though statutes spoke of remittitur only in the event of passion and prejudice of the jury, it was held that the trial court might reduce a verdict with the consent of the plaintiff in lieu of a new trial even though there was no finding of passion or prejudice, if the trial court concluded the damages were so excessive that substantial justice had not been done.14

As recently as 1955 the supreme court spoke of the inherent power of the trial court in recognizing the power to grant a new trial on the court's own motion for failure of substantial justice. In Snyder v. General Elec. Co.,15 the court observed,

Rule 16 [Pleading, Practice and Procedure 59.04W] does not attempt to limit the inherent power of the superior courts to grant new trials because substantial justice has not been done; it does not say that

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13 Id. at 629, 30 P.2d at 948.
14 See Nagle v. Powell, 5 Wn.2d 215, 105 P.2d 1 (1940), where the verdict was reduced from $2,250 to $935, and Olson v. Weitz, 37 Wn.2d 70, 221 P.2d 537 (1950), where it was reduced from $15,000 to $9,000.
the courts may not exercise their inherent power sua sponte. It neither
confers any power upon the superior courts that they did not already
possess nor attempts to restrict them in the exercise of their inherent
power, except to make the exercise of that power subject to review by
this court under certain conditions, just as any other discretionary
power would be. The rule does list certain causes for which a new
trial may be granted "on the motion of the party aggrieved." Our
holding, therefore, is that Superior Court Rule 16 does not restrict
the inherent power of the superior courts to grant new trials on the
ground that substantial justice has not been done, even though that
ground be not enumerated in the motion for a new trial.16

It is important to recognize that the power of trial courts to grant
new trials in jury cases on the ground of failure of substantial justice
is inherent and for that reason the above discussion has been directed
towards the power's source and nature. The principle problem posed
by the power, however, has not been with respect to its existence but
rather to the method and manner of its exercise.

REASONS—PRIOR TO 1951

The leading case representative of the situation prior to 1951 is
Coppo v. Van Wieringen.17 In a personal injury action the plaintiffs
moved for a new trial claiming the damages awarded by the jury were
inadequate. The trial court granted new trials "on the grounds that
substantial justice has not been done and that the verdict is inade-
quate." The supreme court affirmed and in so doing summarized the
then-existing situation concerning the grant of new trials.

The supreme court re-affirmed the inherent power of the trial court
to grant a new trial for failure of substantial justice and concluded
that a statement to that effect by the trial court was sufficient to pre-
clude any review by the supreme court except to determine if there
was a case for the jury and conflicting evidence on a controlling issue.
If so, review was precluded for the reason that, "there are many com-
paratively trifling appearances and incidents, lights and shadows,
which may well have affected the mind of the judge as well as the jury
in forming opinions of the weight of the evidence, the character and
credibility of the witnesses, and of the very right and justice of the
case."18 Relying upon numerous prior holdings, the court held that it

10 Id. at 64, 287 P.2d at 110.
17 36 Wn.2d 120, 217 P.2d 294 (1950).
18 Id. at 130, 217 P.2d at 297.
would be presumed that the reasons for the new trial rested upon matters that could not be made part of the record.

In an extensive opinion, the court went on to discuss grounds for new trials and concluded that

we must, in line with our decisions, affirm orders granting new trials when such orders state: (A) That substantial justice has not been done; (B) That the evidence is not sufficient to sustain the verdict, or that the verdict is against the weight of the evidence; (C) That the damages awarded are either inadequate or excessive; (D) No ground or reason therefore; except where there is no case for the jury or no evidence to support a verdict other than the one rendered.\(^\text{19}\)

The court expressed disapproval of the situation since it served to create "an iron curtain, cutting off any adequate review of whether or not there was any reason for the trial judge to set aside the verdict of the jury and grant a new trial." It went on to point out that revisions of the rules of court were under consideration and that a change might be made.

In anticipating this change it is important to note that the court was not disapproving the granting of new trials on the ground of failure of substantial justice. Nor was it disapproving of the limitation on review when the basis for the trial court's conclusion of such failure rested upon reasons outside the record and which could not be made a part thereof.

"The reason may be outside the record—'the lights and shadows' of the trial, the very atmosphere of the courtroom, those things which are manifest to the trial judge but which cannot be captured for the record—and in that event we agree that our review should be limited to the questions of whether there is a case for the jury and whether the verdict is the only one possible as a matter of law."\(^\text{20}\)

It was only when the basis for the trial judge's action was entirely within the record or could realistically be made a part thereof that the court disapproved the prior practice. This thought is evidenced by the concluding words of the majority:

There is no desire to interfere with the inherent right of a trial judge to grant a new trial, subject only to the limited review now possible, where the reasons for granting the new trial cannot be made a part of the record. On the other hand, there should be some way of securing a review of such an order when the trial judge's action is based upon

\(^{19}\) Id. at 141, 217 P.2d at 306.
\(^{20}\) Id. at 140, 217 P.2d at 306.
the record. Any rule adopted, to be effective, would require that the trial judge state his reason or reasons for granting a new trial and, also, whether the order is based upon the record or upon facts and circumstances outside the record which could not be made a part thereof.\textsuperscript{21}

The supreme court found itself in the position wherein the granting of new trials by a trial court was unreviewable in many instances. It disapproved of this extreme when a basis for review was readily available; it did not disapprove of lack of review in all instances. This must be kept in mind in analyzing the subsequently adopted rule and the interpretations thereof.

Further examples of the situation existing prior to the adoption of the rule in 1951 were the following cases decided subsequent to the \textit{Coppo} decision and prior to the rule:

\textit{Battee v. Seattle}\textsuperscript{22}—per curiam opinion affirming an order granting a new trial, which simply stated, "It is further ordered that the plaintiffs be, and they hereby are, granted a new trial in this cause on the ground that the verdict was contrary to the weight of the evidence and on no other ground."\textsuperscript{23}

\textit{McGinn v. Kimmel}\textsuperscript{24}—opinion affirming the grant of a new trial on a general order not based upon any specific ground.

\textit{Johnson v. Ilwaco}\textsuperscript{25}—opinion affirming the grant of a new trial on a general order not based upon any specific ground, the trial court order having been entered before January 1, 1951.

\textit{Evans v. Yakima Valley Transp. Co.}\textsuperscript{26}—the supreme court reversed a trial court order of September 7, 1950, granting a new trial, which did not state any grounds or reasons, where there was a failure to produce any evidence on a controlling issue. As has been seen, this was the only review available prior to 1951 in the event of the grant of a new trial in the four instances previously discussed.

**Rule of Court Requiring Reasons**

Effective January 1, 1951, \textit{Superior Court Rule 16} [\textit{Pleading Practice and Procedure 59.04W}] was enacted, which copied ver-

\textsuperscript{21}Id. at 142, 217 P.2d at 306.
\textsuperscript{22}36 Wn.2d 578, 219 P.2d 117 (1950).
\textsuperscript{23}Ibid.
\textsuperscript{24}36 Wn.2d 786, 221 P.2d 467 (1950).
\textsuperscript{25}38 Wn.2d 408, 229 P.2d 878 (1951).
\textsuperscript{26}39 Wn.2d 841, 239 P.2d 336 (1952).
batim a statute setting forth eight grounds for a new trial and adding one additional ground: “9. That substantial justice has not been done.” As has been seen, in reality this ground already existed though not previously explicitly stated by statute or rule. Ground number nine is merely an expression of the inherent power of the courts to correct their own proceedings and records.

In addition, the following clause was included: “In all cases wherein the trial court grants or denies a motion for a new trial, it shall, in the order granting or denying the motion, give definite reasons of law and facts for so doing.” It is this clause and its subsequent interpretation that has created the criticism surrounding the review of new trial orders. The evident purpose of the provision was to effectuate the end expressed in the Coppo case. By requiring a trial judge to give definite reasons of law and fact for his action, the appellate court would be in a better position to review his ruling and determine whether or not it constituted an abuse of discretion.

The purpose in requiring reasons in the event of the denial of a new trial is not readily apparent. This had created no problem for the supreme court in the past so far as review was concerned. As was recognized in the Coppo case, the difficulties had arisen only in conjunction with the granting of new trials wherein the trial court might have relied upon non-record factors. It is likely that the inclusion of the phrase relating to denials was inadvertent. In any event, three years later, July 1, 1954, the clause was amended to delete the phraseology applying to denials and to read: “In all cases wherein the trial court grants a motion for a new trial, it shall, in the order granting the motion, give definite reasons of law and facts for so doing.” It is to the granting of new trials that our attention shall be directed in this article.

Before considering the cases interpreting the trial court’s power to grant new trials, one other matter should be noted. In State v. Arnold,27 decided before the deletion of the requirement of reasons on denial of a new trial, it was held that in cases involving the denial of a motion, it is necessary for counsel to call the trial court’s attention to the rule and request that the order assign reasons in order to take advantage of the rule on appeal. It is to be noted that while the court in the Arnold case spoke broadly of orders granting or denying, this was dictum as to the former, and no such requirement has been held

27 43 Wn.2d 63, 259 P.2d 1104 (1953).
necessary in the case of the grant of a new trial. Apparently the rule operates to require that reasons in support of the grant be sufficient without the necessity of counsel directing the trial court's attention to the matter. The operation of the rule in the case of a grant of a new trial was not meant to be adversary in nature; rather, it was for the supreme court's benefit in order that it might rule intelligently. By implication it should not have to be pressed on the trial court by counsel. No such purpose was indicated as to denial, however. To the contrary, good reasons existed for requiring the rule to be interpreted as adversary in nature in the case of denial.\textsuperscript{28}

**Supreme Court's Application of Rule**

The ground of failure of substantial justice has not fared well since the adoption of the rule requiring definite reasons of law and facts. Instead of a situation where the supreme court rarely reversed the grant of a new trial, as existed prior to the rule, there is now a situation where the grant of a new trial on substantial justice grounds is rarely affirmed. This is best evidenced by an analysis of the cases decided since the adoption of the rule.

*Anderson v. Dalton.*\textsuperscript{29} In a malicious prosecution action a verdict was rendered for $7,500. The trial court granted a new trial for the reason that the damages were so excessive as unmistakably to indicate that the amount was the result of passion or prejudice and allowing the verdict to stand "would not be substantial justice to defendant." The grant was conditioned that if the plaintiff would consent to a reduction of $2,500, a new trial would be denied. The plaintiff consented and the defendant appealed. In a 5-4 decision, the supreme court reversed and granted a complete new trial on the ground that the passion or prejudice may have influenced the finding of liability. The majority did not cite the rule then in effect requiring a statement of reasons. If the rule was considered by the supreme court, the statement of reasons in this early case, decided shortly after the adoption of the rule, was apparently deemed adequate. It was just that the supreme court did not believe the trial court had gone far enough in the granting of relief.

*Mulka v. Keyes.*\textsuperscript{30} The trial judge granted a new trial to the de-

\textsuperscript{28} See 29 Wash. L. Rev. 145 (1954) for a discussion of these reasons.
\textsuperscript{29} 40 Wn.2d 894, 246 P.2d 853 (1952).
\textsuperscript{30} 41 Wn.2d 427, 249 P.2d 972 (1952).
fendant "upon the ground that substantial justice has not been done." He then set forth the reasons for this conclusion: (1) the slight evidence of negligence; (2) a juror failed to disclose her prejudice against the defendant on her voir dire examination; (3) plaintiff's counsel made prejudicial statements in the presence of the jury; (4) the speed of the verdict; (5) consideration of the entire record and proceedings; (6) the appearance and demeanor of the witnesses. The supreme court considered each of the stated reasons and concluded they were insufficient "viewed either severally or collectively" to warrant a new trial.

Two of the reasons related to non-record matters. The manner of plaintiff's counsel in stating his objections and its effect upon the jury were matters which could not directly appear in the record. Likewise, the appearance and demeanor of the witnesses were clearly outside the record. Under the Coppo rationale these were the types of things intended to be left for the trial court's determination. The supreme court had stated, "There is no desire to interfere with the inherent right of a trial judge to grant a new trial, subject only to the limited review now possible, where the reasons for granting a new trial cannot be made a part of the record."31 The supreme court in the Mulka case recognized that the manner of counsel and the appearance and demeanor of the witnesses could not be made a part of the record. Why then did the supreme court not defer to the trial court's discretion? The decision can be explained on the basis that the trial court had attached no particular significance to the counsel's statements or the demeanor of the witnesses at the time of their occurrence. Rather, these were apparently raised as an afterthought. The difficulty is that the supreme court went on to say, "In any event, the court has failed to state in its order definite reasons why the appearance and demeanor of any witness was prejudicial to respondent or in what manner his appearance and demeanor had that effect upon the jury. In the absence of such definite reasons we cannot hold that Rule 16 was complied with."

The obvious conclusion to be drawn is that the trial court's assertion that its order is based upon matters outside the record is not a sufficient reason. Even a reference to the demeanor of the witnesses, admittedly not a consideration based on the record, is too general. It is evidently necessary for the trial judge to specify with particularity the manner in which non-record matters are prejudicial. In this respect, the interpretation of the rule goes beyond its intent as expressed in the Coppo

It is true that the purpose of the rule was to enable the supreme court to review the trial court's action in granting a new trial. It is also true that to allow a trial court to rely upon non-record factors interferes with the supreme court's power to review. Likewise, however, to refuse to allow the trial court to rely upon non-record factors interferes with the discretionary powers of the trial court. While it does not appear that the Coppo case intended the latter result, the Mulka case tends toward that conclusion.

One final point about the Mulka case relates to language used by the court which seems to raise the question as to whether a trial court may ever grant a new trial on the sole ground of failure of substantial justice. "Respondent argues that Rule 16, supra, does not require that the reasons which cause the trial court to conclude that substantial justice has not been done must be legally sufficient to warrant the granting of a new trial on one of the other eight specific grounds set forth in the rule. Assuming that this argument has merit, we consider the reasons stated in the court's order in this case to be insufficient, viewed either severally or collectively, to warrant granting respondent a new trial." [Emphasis added].

It seems obvious that the respondent's contention was correct and that the specific inclusion of ground nine in the rule was intended as a separate and independent ground. Why then does the court qualify this with the assumption? Does this mean that there is a doubt on the part of the supreme court as to whether a trial court can any longer rely solely upon the factor of substantial justice as a ground, even with an adequate statement of reasons? Certainly a trial court could have done so prior to the adoption of the rule and nothing appears in the rule suggesting a change in this regard. As a matter of fact, the specific statement in the rule of substantial justice as a ground argues for a continuation of the prior practice. Nevertheless, the qualification or statement of doubt is indicative of the philosophy which has generally prevailed in interpreting the rule, i.e., a restriction upon the powers of the trial court which is not apparent upon the face of the rule nor from its background.

Mieske v. P.U.D. No. 1.32 After a verdict for $10,531.66, the trial court ordered a new trial on the ground that the verdict "is excessive and by reason thereof suggests to the court that substantial justice has not been done," unless the plaintiff consented to a reduced sum of $8,031.66. On appeal by the plaintiff the supreme court affirmed,

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32 42 Wn.2d 871, 259 P.2d 647 (1953).
relying upon *Anderson v. Dalton* and the inherent power of the trial court. Nothing was said about the rule requiring reasons, though the supreme court indicated that if the defendant had cross-appealed, the record would have supported an even greater reduction than that ordered by the trial court.

*Rung v. Radke.* The trial court granted a new trial upon the ground that substantial justice had not been done and set forth two reasons for that conclusion: (1) Counsel for the defendant in explaining a prior conviction of the defendant exploited the circumstances in such a way as to convey to the jury that the defendant had been unjustly prosecuted, with the result that the jury was prejudiced against the plaintiff; and (2) counsel for the defendant held the plaintiff up to ridicule and scorn by emphasizing the immaterial fact that plaintiff was the recipient of a state pension. The supreme court evaluated counsel’s statements as they appeared in the record and concluded they did not justify a new trial.

As in the *Mulka* case, the manner of counsel in making his statements could not be made a part of the record, and under the *Coppo* case the trial judge’s discretion should have controlled. The supreme court recognized this in stating,

> We are cognizant that there may be situations in which the attitude and demeanor of an attorney, which cannot be made a part of the record, or other circumstances which cannot be captured or reproduced in what we refer to as a “cold record,” may satisfy the trial court that justice has not been done. It was not our intention to limit the prerogative of the trial court to grant a new trial under such circumstances. see *Coppo v. Van Wieringen*. . . .

The court went on, however, to say that in the instant case the trial court had made no showing or statement in its order that it was based upon facts and circumstances outside the record that could not be made a part thereof. Thus, although extra-record factors were implicit in the trial court’s determination, the supreme court reviewed solely on the basis of record factors.

There is the suggestion that if the trial court had stated that its order was based upon non-record factors there would have been a different result. But again, is that not implicit in the trial judge’s order? Does the supreme court mean that a formal statement of the obvious would

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33 40 Wn.2d 894, 246 P.2d 853 (1952).
34 44 Wn.2d 590, 269 P.2d 584 (1954).
35 Id. at 597, 269 P.2d at 588.
alter the result? On the basis of the *Mulka* case, one may question whether even the formal statement would have sufficed.

*Johnson v. Howard.* The trial court granted a new trial upon three grounds: (1) The verdict was so excessive as unmistakably to indicate passion or prejudice; (2) misconduct of plaintiff's attorney by suggesting in argument that the defense was not honest; (3) "substantial justice has not been done" in view of the following factors: (a) the suggestion of liability insurance during voir dire examination of jurors; (b) comment by plaintiff's attorney concerning the demeanor of a witness, claimed to be improper; (c) the short jury deliberation; and (d) the entire proceedings in the case. In conclusion the trial court stated:

9. Based upon the appearance, demeanor and testimony of each of the parties plaintiff to the action, based upon the medical testimony and record of special damages incurred by the parties plaintiff, and based upon the twenty-seven years of experience I have had on the bench, I do not think I have ever received a verdict that I thought was so unconscionably excessive and so far beyond the real claim of damages, as was returned in this case.

10. Based upon the entire proceedings in this case and the foregoing reasons set forth herein, it is the opinion of this court that substantial justice has not been done in this case.

The supreme court reversed, six to three, after reviewing each reason in light of the record and concluding that the record did not support the new trial. No weight was given to any non-record factors. This resulted from the following assumption:

It is no longer necessary for us to assume that, where the trial judge has said that the damages were excessive (or inadequate), he was influenced by conditions existing and circumstances occurring during the trial, which could not be made part of the record. If he was actually so influenced, he is to say so in giving his reasons for granting a new trial. Where he does not say so, and even though he gives as an additional reason that substantial justice has not been done, it will be assumed that the justification for the action taken is to be found in the record.

As in the *Rung* case, a formal statement of extra-record factors was required.

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37 Id. at 452, 275 P.2d at 747.
38 Id. at 437, 275 P.2d at 739.
As to the trial court’s express reference to the extra-record factors of the appearance and demeanor of the plaintiffs, this was not deemed adequate in that, as in the Mulka case, the trial court failed to state how those factors prejudiced the respondents. It is not apparent what more the trial court could have done that would have been of any consequence. Certainly it might have said that the plaintiffs laughed or frowned or cried and that this affected the jury. How this would have aided the supreme court is not clear. Nor it is clear what difference it would have made. It would still have been for the trial court to judge the effect on the jury and, as a practical matter, regardless of what the trial court might have said, no review of this factor was realistically possible.

The dissent believed the record supported a finding of excessiveness in the verdict. Moreover, it felt that the trial judge might properly exercise his discretion in finding that substantial justice had not been done on the basis of the cumulative effect of his stated reasons.

There were numerous occurrences at the trial which should not happen at a trial, and probably would not reoccur at a new trial of this case. Some of them are not approved by the majority. Considering all of them together, I doubt that we can say that their cumulative effect upon the verdict is not apparent, particularly in view of the expressions of the trial court to the contrary.

For us to sustain the verdict upon the evidence and circumstances of this case, leaves no room for discretionary action by the trial courts upon motions for a new trial. We should not thus invade their province in the performance of this important function lodged with them by the legislature and by our rules. 9

McUne v. Fuqua. 10 Following a verdict in which no damages were awarded, the trial judge granted the plaintiff a new trial, stating “... that the uncontradicted evidence at the time of trial disclosed that the plaintiff sustained injury requiring the attentions of a physician to give medical care, particularly to a laceration on the forehead requiring five sutures and from all the evidence introduced at the time of trial it appearing that substantial justice has not been done.” 41 The supreme court reversed, replying upon the assumption stated in Johnson v. Howard, 42 that where the trial court is not specific in giving its reasons, it will be assumed that the justification for granting a new trial is to be found in the record. The supreme court reviewed the record and con-

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9 Id. at 452, 275 P.2d at 747.
10 45 Wn.2d 650, 277 P.2d 324 (1954).
41 Id. at 651, 277 P.2d at 324.
cluded that there was sufficient evidence to support the verdict of no damages.

*Johnson v. Department of Labor & Indus.*[^43] The trial judge granted a new trial "for the reason that justice has miscarried." The supreme court reversed. Though there is language suggesting that the trial court lacked the power to evaluate the evidence in ruling on a motion for a new trial, in actuality the reversal seems to be based on the trial court's failure to state any reasons for its conclusion of failure of substantial justice. If the trial court had specified wherein justice had been miscarried as by defining in what way the verdict was against the weight of the evidence, review would have been had of the record, as in the *McUne* case.

*Owens v. Scott Publishing Co.*[^44] Following a verdict for the plaintiff of $40,000 in a libel action, the trial judge granted a new trial on eight grounds. The first six related to erroneous instructions. The other two were stated as follows:

7. That the amount of the verdict rendered by the jury herein is so excessive as to unmistakably indicate that it was given under the influence of passion or prejudice and such passion or prejudice has so permeated the deliberations of the jury as to render it unjust to hold the defendants foreclosed by any of the jury findings, thus justifying a new trial.

8. For the foregoing reasons particularly substantial justice has not been done in this cause, thus justifying a new trial.[^45]

The supreme court reviewed each of the alleged errors as to instructions and found that the jury was properly instructed. As to the finding of passion and prejudice by the trial judge, the supreme court reviewed the record and concluded that while the jury used the wrong formula in determining damages, there was no passion and prejudice. The order granting a new trial was reversed and the case remanded for a new trial on the issue of damages alone. The court disposed of the substantial justice point with the simple statement, "It is evident that the court did not give definite reasons as required by Superior Court Rule 16, 34A Wn.(2d) 117, for holding that substantial justice had not been done. Paragraph 8 of the order was merely a recap of the other seven grounds for a new trial."[^46]

It is apparent that the trial judge believed that the cumulative effect

[^44]: 46 Wn.2d 666, 284 P.2d 296 (1955).
[^45]: Id. at 672, 284 P.2d at 301.
[^46]: Id. at 673, 284 P.2d at 301.
of the first seven grounds resulted in a failure of substantial justice. Once the supreme court disposed of each of the seven grounds, however, and found none of them to constitute error in any respect, it followed that likewise, cumulatively, there was no error in this instance. This would not always be true. There might well be occasions where individual grounds by themselves might not justify a new trial, but cumulatively there would be such error as to result in a failure of substantial justice. Whether the majority would decide differently under such circumstances is not clear. It does seem clear that a statement by the trial judge of the failure of substantial justice adds nothing to a prior recitation of reasons for a new trial. It is the reasons which are of consequence and not the conclusion relating to substantial justice. It is interesting to compare the cases wherein the conclusion of passion and prejudice is stated, which evidently is deemed to be adequate.

What more might have been said by the trial judge? He stated that "for the foregoing reasons particularly," the new trial was granted, thereby indicating that other factors influenced him. What these were is perhaps indicated in two dissenting opinions. Judge Donworth in dissent observed:

During the first oral argument in this court the attorneys for each side stated that it would be difficult for this court to conceive of the supercharged atmosphere in which the case was tried. Under circumstances such as these where the trial judge, who was able to observe the demeanor of the parties, attorneys, witnesses, jurors, prospective jurors, and spectators in the court room, concluded that the verdict was so excessive as to unmistakably indicate that it was given as a result of passion and prejudice, I believe this court should be extremely reluctant to set aside the trial court's order granting a new trial on all issues. By so doing, this court substitutes its judgment for that of the trial judge, merely from reading a cold record which, as the attorneys have stated, cannot convey the supercharged atmosphere in which the action was tried.

In my opinion, there is a considerable difference between asking this court to grant a new trial on grounds of excessive damages in a case where the trial court has refused to do so and in asking this court to affirm an order granting a new trial when the trial court has concluded that, taking all of the circumstances into consideration (including the admittedly supercharged atmosphere in which the case was tried), the verdict is so excessive as to unmistakably indicate that it was given as a result of passion and prejudice. Though it would not be correct to say that there is a presumption that the trial judge correctly found that

passion and prejudice existed in a given case, it certainly is true that the trial judge's finding of passion and prejudice is entitled to some weight when this court is reviewing his order granting a new trial. In the present case the majority opinion gives slight weight, if any, to the trial court's finding of passion and prejudice and erroneously grants respondents a new trial limited solely to the determination of the amount of damages.48

Judge Ott observed in dissent:

The learned and experienced trial judge, who observed the conduct and demeanor of the jury during the entire trial, and who was present and observed the myriad of incidents that occasioned the trial of this strongly contested case, concluded that, from all he saw and heard, the defendant had not been afforded a fair and impartial trial by a fair and impartial jury.

The laws of the state of Washington guarantee to all litigants appearing before the courts a fair trial. In my opinion, whether this guarantee has been accomplished in any given case can best be determined by the qualified jurist who tries the case.49

Perhaps if the trial judge had attempted to define the nature of the "supercharged atmosphere" in his conclusion of an excessive verdict or failure of substantial justice, a different result would have been reached. Without such attempted definition, it is clear that any grant of a new trial will be reversed.

Snyder v. General Elec. Co.50 Following a verdict for the plaintiff of $2,412.50 for special damages and $39,944 for general damages, the trial court entered an interlocutory order providing that unless the plaintiff consented to a reduction of the general damages to $19,500, a new trial would be ordered. The plaintiff refused and a new trial was granted upon the basis that the evidence showed that plaintiff's shoulder disability was 10%, that the permanent partial disability to the knee was 25% to 30% of the amputation value, that if $10,000 were allocated to pain and suffering, the award for the shoulder and knee disabilities would be $29,944,

which total verdict under all the circumstances is so excessive as to constitute an injustice and it further appearing to the court that, although the verdict does not unmistakably indicate passion and prejudice on the part of the jury, in the opinion of the court, the total amount of the verdict under the circumstances indicates that undue significance

49 Id. at 699, 284 P.2d at 316.
was attached to the mathematical formula for damages as propounded by the plaintiff with the result that the verdict awarded by the jury is out of reasonable proportion to the injuries shown, is punitive in nature, and unjust to the defendants and that unless a new trial is granted an injustice will be done. . . .

The supreme court, after recognizing the trial judge's inherent power to grant a new trial for failure of substantial justice though no such ground was included in the moving party's motion, reversed the order. Inasmuch as no reference was made by the trial court to anything outside the record, the court stated this was the type of case which, under Coppo v. Van Wieringen, was subject to review. The supreme court found the reasons stated to be definite but a review of the record did not disclose factors to support the action taken. If there was anything not in the record to substantiate the trial judge's conclusion that the wrong formula had been used by the jury, such as the effectiveness of counsel's arguments or the reactions of the jury during arguments, some reference should have been made thereto in the order to comply with the rule.

Casey v. Williams. A new trial was granted to the plaintiff because . . . one of the jurors was asleep on several occasions during the course of the trial and . . . that counsel for the plaintiff interrupted the trial and called the court's attention to the conduct of said juror, and . . . that such conduct coupled with the obvious fact that the jury did not properly deliberate on the question of contributory negligence, . . . (gave the result) that substantial justice was not done. . . .

The supreme court reviewed the two stated reasons for failure of substantial justice, the conduct of the juror which was found to have been waived and the speed of the verdict which was not found to support the result, and reversed the order. No consideration was given to the conclusion that "substantial justice was not done," but only to the stated reason for the conclusion.

Boyle v. Clark. In an action for alienation of affections, the plaintiff husband recovered a verdict of $20,000. The trial judge granted a new trial for the reasons that the damages were so excessive as to unmistakably indicate passion and prejudice and that "substantial

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51 Id. at 62, 287 P.2d at 109.
52 36 Wn.2d 120, 217 P.2d 294 (1950).
54 Id. at 256, 287 P.2d at 344.
justice was not done in this case in that the verdict of the jury is against the overwhelming weight of the evidence. The court then spelled out in considerable detail its reasons for these conclusions, which reasons were based solely upon evidentiary grounds.

Inasmuch as the order granting the motion for new trial did not refer to anything not shown in the record, the supreme court assumed that nothing dehors the record affected the order. After reviewing the evidence, and finding no indication of passion or prejudice or failure of substantial justice, the supreme court reversed. This is a case clearly covered by the rationale of the *Coppo* case, that is, where the basis for the new trial was solely in the record, properly reviewable by the supreme court.

*Ide v. Stoltenow.* A new trial was granted for the reason that the verdict was inadequate. On appeal the supreme court pointed out that prior to the adoption of the rule requiring reasons, review in such a case was limited to the questions of whether there was a case for the jury and whether there was evidence to support a verdict other than the one rendered. If the answers were affirmative, the order granting a new trial was affirmed. Since the adoption of the rule, however, inquiry in such a case is directed to whether there was sufficient evidence to sustain the verdict of the jury. If so, the trial court abused its discretion in granting a new trial.

The supreme court reviewed the evidence and concluded that in view of the damages which were conceded, undisputed and beyond legitimate controversy, the evidence did not sustain the verdict. "The trial judge did not abuse his discretion in entering an order granting a new trial. . . ." This case recognizes the very limited discretion of the trial judge to grant a new trial if the evidence is insufficient to support the verdict under any circumstances.

*Lunz v. Newman.* The trial court granted the plaintiff a new trial on two grounds: (1) error in instructions and (2) substantial justice had not been done because two witnesses were allowed to testify for the defendants, although the defendants did not include them in their list of witnesses furnished in discovery proceeding before the trial. The supreme court confined its review to the record since no other reasons were stated and found that the plaintiff had not been prejudiced by the defendant's failure to disclose. This is another instance where the

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trial judge relied solely upon the record and where the review was properly restricted thereto.

_Lakoduk v. Cruger._68 The trial judge granted the plaintiffs a new trial for the reasons that certain instructions were erroneously given, requested instructions were denied, the plaintiffs were not contributorily negligent, the negligence of the defendants as a matter of law was the proximate cause of the accident, "substantial justice has not been done," and the jury failed to follow the court's instructions.

The supreme court reversed and readily disposed of the substantial justice ground in that no definite reasons were given. The reference to substantial justice in the order "... whether intended as a summary of the other reasons therein or as a reason in itself, is not a sufficient reason for granting the new trial." The court then reviewed each of the other grounds and found that they likewise did not support a new trial.

_Lanegon v. Crauford._ Following a verdict for the plaintiff for $1,500, the trial court granted the defendant a judgment notwithstanding the verdict and, in the alternative, a new trial, without specifying any ground therefor as required by the rule. The supreme court reversed the judgment notwithstanding the verdict but remanded for a new trial on the issue of damages on the ground that after allowing for the undisputed special damages as in _Ide v. Stoltenow,_61 the general damages were so inadequate as to shock one's idea of fair play.

The case illustrates that if a new trial is granted with no ground stated, it may be affirmed if supported by the record. The same should be true if only the ground of "failure of substantial justice" is stated with no reason specified to support that conclusion. This is inconsistent with the court's statement in _Johnson v. Department of Labor & Indus._62 that "since the order granting the motion for a new trial does not state any 'definite reasons of law or facts for so doing,' as required by Rule 16, we cannot review it and have no alternative but to reverse the order."63 Certainly it can be reviewed and if the ground is apparent from the record as in the _Lanegon_ case, the order should be affirmed, with the proviso that no obligation should be imposed upon the supreme

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68 48 Wn.2d 642, 296 P.2d 690 (1956).
69 Id. at 643, 296 P.2d at 697.
60 49 Wn.2d 562, 304 P.2d 953 (1956).
63 Id. at 466, 281 P.2d at 996.
court to search every record for support of the trial court’s order, if not otherwise directed by the order itself or by counsel on appeal.

*Powell v. Continental Baking Co.* Following a verdict of $3,000 for the plaintiff in a personal injury action, the trial court granted a new trial on the ground that substantial justice had not been done. The order continued as follows:

> This order granting a new trial on the above mentioned ground is based upon the following reasons: That the plaintiff . . . in the opinion of this trial court was wilfully false and fraudulent and that any amount over $500.00, including automobile damage, is outrageous; that the court is of the opinion that the plaintiff’s alleged injuries and suffering were nonexistent; that this opinion is formed partly on the basis of many little clues and symptoms about her appearance and demeanor which the court is unable to describe in detail other than to say that they were the sort commonly considered in discriminating between the true and the false, and partly upon the entire evidence in the case and its appraisal of the overwhelming weight of the credible testimony; that it is the court’s opinion that the jury was deceived because of its lack of experience and discrimination, being below average in both of these respects; that for five jurors the case was their first case; that the court feels the average jury would have detected the lack of substance, if not the entire falsity, of plaintiff’s claimed injuries, and would have found either a nominal amount for plaintiff or a verdict for defendant; that the appearance and demeanor of the parties and witnesses and their impact on the jury and its reaction to them can not be captured for the record; that the verdict was against the weight of the evidence and was a miscarriage of justice.\(^{66}\)

It is difficult to imagine how the trial judge could have been much more specific in outlining his reasons and in clearly stating that his determination was in part based upon factors outside the record, which could not be made a part thereof.

The supreme court concluded that the jury was qualified on the basis of the voir dire, that it was of no concern that this was the first case for five jurors, and that there was evidence to support the jury’s verdict. The order was thus reversed. No apparent weight was given to the trial judge’s observations of this particular jury under the conditions of the particular trial nor of his observations of the parties and witnesses which could not be made part of the record. The supreme court concluded, “It is our opinion that the verdict was not against the weight of the evidence, was not a miscarriage of justice, but rather, was the

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\(^{64}\) 49 Wn.2d 753, 306 P.2d 757 (1957).

\(^{65}\) 65 Id. at 756, 306 P.2d at 759.
result of calm deliberation, keen discrimination, and good judgment on the part of the jury.\textsuperscript{66}

A comparison of the memorandum decision of the trial judge and of the opinion of the supreme court makes one wonder whether they were talking about the same case. While the trial judge relied primarily upon non-record factors, the supreme court relied solely upon the record. If the supreme court gave any consideration to its observation in the \textit{Coppo} case that "there is no desire to interfere with the inherent right of a trial judge to grant a new trial, subject only to the limited review now possible, where the reasons for granting the new trial cannot be made a part of the record,"\textsuperscript{67} it does not appear in the opinion. If the trial judge was allotted any discretion, it does not appear in the opinion of the supreme court. If a trial judge still has the power to grant a new trial on the ground of the failure of substantial justice, it does not appear in the opinion of the supreme court.

\textit{Davenport v. Taylor.}\textsuperscript{68} The trial court granted a new trial on the grounds of newly discovered evidence and the failure of substantial justice, the latter being based upon evidentiary factors. On appeal, the supreme court reversed. The trial judge had in effect concluded that the evidence did not support the verdict. There were no non-record factors involved, and consequently the supreme court properly directed its review solely to the evidence. This is a case which fits exactly within the category wherein review should be had on the record.

There is language in the opinion, however, which is subject to question. The court first points out that prior to the adoption of the rule requiring reasons, appellate review of orders granting new trials was in fact non-existent in many instances.

The \textit{Coppo v. Van Wieringen} decision (36 Wn.2d 120, 217 P.2d 294) pointed this out, and thus posed the problem of whether a practicable rule should be promulgated to facilitate and to permit in all instances a realistic appellate review of trial court orders disposing of motions for new trial. The alternatives were (a) appellate review or (b) finality of decision in the trial courts. It had to be one or the other, whether or not the latter was euphemistically described as involving an exercise of sound judicial discretion within the inherent powers of the trial court. The choice was one of policy, delicate and difficult. It was made in favor of appellate review and Rule 16, supra, resulted.\textsuperscript{69}

This language suggests that there are only two alternatives—com-

\textsuperscript{66} Id. at 760, 306 P.2d at 762.
\textsuperscript{68} 50 Wn.2d 370 311 P.2d 990 (1957).
\textsuperscript{69} Id. at 376, 311 P.2d at 994.
plete appellate review in every instance or complete finality of decision in the trial courts. One questions whether this was the intent of the rule as indicated by the Coppo case, or whether the intention was to provide generally for review, but to allow for instances wherein practically, and of necessity, the trial court's determination should be final. If the former was the intent, one questions whether the rule should not be amended or re-interpreted as now written to provide for the latter. This will be discussed in detail later.

Cote v. Allen. After a verdict for the plaintiff of $1,500, the trial court granted a new trial on the issue of damages alone because of the inadequacy of the verdict. The supreme court affirmed in view of the conceded damages of $2,100. "It is impossible for this court to say, therefore, that the trial judge abused his discretion in granting a new trial in which the verdict was less than one-half of the conceded damages." Once again the supreme court sustained the trial judge's discretion, when there was obviously no other conclusion to be reached.

Follis v. Brinkman. The trial judge granted a new trial to the plaintiff on the grounds of irregularities in the proceedings and that substantial justice had not been done. In support of the latter ground, the trial judge stated that he had specified the number of days for trial, that this may have hampered the plaintiffs in presenting proof and that with more time available the plaintiffs might have presented additional proof to sustain their allegations. In a per curiam opinion, the supreme court reversed after examining the record and concluding that it did not support the proposition that the plaintiffs were hampered in the trial of the case.

Judge Ott dissented, pointing out that the trial judge allotted only two days for the plaintiffs to prove the existence of an oral partnership extending over a period of fifteen years and to establish an oral agreement to make a will, and for the defendant to resist such evidence and to prove the allegations of a cross-complaint in which five promissory notes were involved. In addition, the trial judge stated that he reached his judgment without having actually examined the partnership records.

It is difficult to see how the supreme court by examining only the record could ascertain whether the plaintiffs were unfairly interfered with in presenting their case. Only the trial judge who was present to

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70 50 Wn.2d 584, 313 P.2d 693 (1957).
71 Id. at 586, 313 P.2d at 695.
72 51 Wn.2d 310, 317 P.2d 1061 (1957).
see the effect of his imposed time limitation could evaluate this factor. This is not something that can be satisfactorily set forth in the record. In several of the cases wherein the supreme court has reversed the grant of a new trial for failure of substantial justice, reference has been made to the factor of deference to the jury's determination. In this instance, however, the trial was to the court. Still, the supreme court applied the same strictness on review as in jury-tried cases.

_Nelson v. Martinson._ Following a verdict for the defendant, a new trial was granted to the plaintiff. In the order, the trial court recited several instances of misconduct by defendant's counsel during cross-examination and closing argument and concluded that such instances of misconduct were cumulatively prejudicial so that a new trial was granted because (1) of the irregularities and misconduct of the defendant and (2) substantial justice had not been done. The supreme court reversed on the ground that the plaintiff had waived any objection to the misconduct by failing to object at the time and request corrective instruction or to move for a mistrial. The court treated the failure of substantial justice as a ground separate from that of misconduct and, finding no specific reasons to support the ground, it looked solely to the record which failed to support the conclusion.

The result seems proper on a waiver analysis in that the plaintiff should have moved for a mistrial and should not have gambled on a favorable verdict. However, the statement of lack of reasons is subject to question. It appears that what the trial court had in mind was the cumulative effect of the several instances of misconduct. While no single instance might justify a new trial, the cumulative effect might well constitute a failure of substantial justice. While the substance of counsel's statements which constituted misconduct might have been in the record, the manner of statement and effect on the jury were not. Thus, without the waiver factor a different result should have been reached so far as substantial justice was concerned. On the basis of the prior cases examined, however, it is doubtful that the supreme court would have so held.

_Pritchett v. Seattle._ The supreme court reversed the trial judge's order granting a judgment notwithstanding the verdict and in the alternative a new trial. The court was principally concerned with the grounds of insufficiency of the evidence and error in instructions. The opinion concluded, "It is also stated in the order [granting the new

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73 52 Wn.2d 684, 328 P.2d 703 (1958).
74 53 Wn.2d 521, 335 P.2d 31 (1959).
that, in the opinion of the court, substantial justice was not done, but this statement refers to the court's previous determination that the evidence preponderated against the jury's verdict. The order cannot be sustained on any of the grounds stated herein. ... A reference to evidentiary matters as the reason is clearly reviewable on the record.

Greene wood v. Bogue. The only reason given by the trial court for granting the plaintiffs' motion for a new trial was in these words: "... the court having heard the argument of counsel and having examined the records and files for his notes and finding there was no evidence to justify a verdict except on behalf of the plaintiffs." The supreme court reversed on the basis that this did not constitute a definite reason and was of no assistance to the appellate court. It was simply an invitation to search the record with no indication of wherein the defendant's case was deficient. The supreme court made it clear that no such search would be made in the future. That this type of reason is too indefinite is unquestionable under the rule.

Agranoff v. Morton. Following a verdict for the defendant in a personal injury action, the trial judge granted the plaintiff a new trial on two grounds, "... that there is no evidence or reasonable inference from the evidence to justify the verdict or decision or that it is contrary to law, and that substantial justice has not been done." In a memorandum opinion the trial judge indicated that the basic reason for its conclusion was that the defendant had admitted liability and yet the jury may have decided that the defendant was free of liability without getting to the damage issue. The supreme court reversed upon the basis that plaintiff's counsel should have requested a direction on the issue of liability. Not having done so, this matter was not properly considered in the motion for a new trial. Otherwise, the record was found to support the verdict. This case was properly reviewed solely on the record.

State v. McKenzie. In an eminent domain proceeding, the trial judge granted the private party a new trial on six grounds: (1) irregularities in the proceedings; (2) misconduct of the jury; (3) surprise; (4) error in the assessment of the amount of recovery; (5) insufficiency of the evidence to justify the verdict; (6) substantial justice had not
been done. On appeal the supreme court found definite reasons to support the grounds, but that "none of the matters relied upon by the trial judge as reasons for granting a new trial in this case (whether viewed separately or together under the heading 'substantial justice has not been done') support or justify the trial judge's conclusion that respondent is entitled to a new trial."  

In each instance, the supreme court reviewed the matters in the record. So far as appears from the appellate decision this was proper, as there were apparently no non-record factors of significance.

_Martin v. Foss Launch & Tug Co._ The trial judge held the verdict to be excessive and gave the plaintiff the option of accepting a reduced sum of $11,028 or submitting to a new trial. The trial judge set forth his reasons for his conclusion that the verdict was excessive, which reasons were based upon record matters. The supreme court reviewed the record and concluded that the trial judge had underestimated the damages. Consequently, the supreme court offered the plaintiff the option of a verdict of $30,234 or a new trial.

Though the supreme court modified the trial judge's determination, this was not an improper interference with the trial judge's power since his reasons were properly reviewable. Moreover, there was a deference paid to the trial judge's discretion which has not been present in many of the cases decided since the enactment of the rule requiring reasons. After finding that the verdict was not as excessive as the trial judge held it to be, the court continued:

> On the other hand, we cannot disregard the fact that the trial court had the witnesses before it and was in a position to make evaluations that cannot be made in this court. Among the facts to which the court undoubtedly attached considerable importance was the plaintiff's reluctance to enter a hospital and submit to surgery. We think that inasmuch as our review of the evidence has disclosed factors which the trial court evidently overlooked, the amount which the plaintiff is required to accept in lieu of a new trial should be raised, but due regard for the discretion of the trial court prevents the reinstating of the verdict.

_State v. Taylor._ In a criminal case the trial court granted the defendant a new trial following a conviction for second-degree burglary. This was based upon a voluntary statement by a member of the police

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81 Id. at 900, 355 P.2d at 835.
83 Id. at 322, 367 P.2d at 985.
department in his direct testimony that the defendant had a parole officer. In ordering the new trial, the trial judge clearly stated his reasons for concluding that this resulted in an unfair trial.

On appeal the supreme court affirmed and again used language relating to the discretion of the trial judge which has not been apparent for several years. Two parts of the opinion should be particularly noted. The first was as follows:

Pure questions of law offer no difficulty, but when, as here, the order is granted because of the very atmosphere of the courtroom, there is unanimity of judicial opinion that an appellate court will not substitute its judgment for that of the trial court.85

The second part of the opinion of particular consequence was as follows:

There is a fundamental difference between the question presented on an appeal from an order granting and one denying a new trial, and especially is this so where the trial court has granted the motion because of its peculiar advantage in observing the effect on the jury of prejudicial evidence. If this were an appeal from an order denying a new trial, the cases cited by the state would be applicable because the appellate court in those instances relied upon the determination of the trial court that there was no prejudice.

On the other hand, when the court has granted a new trial, it has decided that prejudice did ensue. The trial judge, by his very presence, is in a favored position. It has been reiterated in appeals from orders granting new trials in both civil and criminal cases that a much stronger showing is required to overturn an order granting the new trial than denying a new trial. The question is: Did the respondents have a fair trial? The trial judge thought that they did not. The question is not whether this court would have decided otherwise in the first instance, but whether the trial judge was justified in reaching his conclusion. In that respect, he has a very wide discretion.86

The supreme court has not spoken in such terms since the Coppo case. Does this signify a change in the supreme court’s review of the trial judge’s determination that there has not been a fair trial, that substantial justice has not been done? Does this indicate the beginning of a greater deference to the discretion of the trial judge?

The question may also be posed whether the decision is limited to criminal cases. The court quoted language with apparent approval from a California case which suggests that greater discretion should

85 Id. at 38, 371 P.2d at 621.
86 Id. at 39, 371 P.2d at 622.
be recognized in the trial judge in a criminal case than in a civil case.87 However, since in Washington the same grounds are established for new trial in civil as in criminal cases,88 the same power should be recognized in both instances. If the trial judge is qualified to determine whether there has been a fair trial in a criminal case because of the "very atmosphere of the courtroom" and the demeanor of the participants, he is likewise qualified to determine if substantial justice has been done in a civil case.

Reference is made in the Taylor opinion to the oft-stated idea that a stronger showing is required to overturn an order granting a new trial than one denying a new trial. Particular mention is made of Judge Hill's observation in an earlier case, State v. Brent,89 that he had found but twenty-eight cases, both civil and criminal, in the history of that court in which an order granting a new trial had been reversed. It is important to note that this count was made in 1948. Since the adoption of the rule requiring reasons in 1951, numerous orders granting new trials have been reversed, as has been pointed out in the preceding discussion. As the rule requires specific reasons in granting new trials but not in denying, it appears that in the years since 1951 in several instances it has actually taken a lesser showing to get a reversal of an order granting a new trial than one denying a new trial. This has been true despite the reiteration by the supreme court to the contrary.

That the reiterated statement should represent the policy rather than the policy that actually exists is supported by language in a Kentucky case, quoted with approval by the Washington court in the Taylor case.

... A decision by the trial judge granting a new trial, is viewed

87 "The judge who presided at the trial of the cause, who heard the testimony, who observed the jurors and had an opportunity also of testing the truth of the defendant's statements by noticing his demeanor, was in a peculiarly favorable position for determining justly the question whether or not the defendant had been accorded a fair trial. We cannot follow the mental processes of the judge. He may have been profoundly impressed with the influence upon the jury, to Canfield's injury, of the introduction of the evidence tending to prove another offense. Or he may have doubted the identification by the witnesses for the prosecution of Canfield as the man who passed as Rabild in the transactions leading to the sale of the note and mortgage. We can hardly manufacture in fancy a hypothetical situation in which a reviewing court would be justified in questioning the discretion of a trial court who should grant a new trial in a case involving a criminal charge. Surely there is no basis in the case before us for the substitution of the discretion of this court for that of the superior court. We must assume that the learned judge of the trial court acted with a full appreciation of his duties and obligations, with the cited section of the constitution in mind, and that the conclusion which he reached was not governed by any idle nor any mere technical reasons." People v. Canfield, 173 Cal. 309, 159 Pac. 1046, 1048 (1916).


89 30 Wn.2d 286, 296, 191 P.2d 682, 685 (1948).
less critically and more effect is given to it, than a decision denying a new trial. The reason of this is, that a new trial places the parties, where they were before, while a decision denying a new trial concludes their rights, and hence, a broad discretion is necessarily vested in the trial judge, who sees the witnesses, and knows of the degree of intelligence they have, and their apparent candor, and must necessarily see and know much of a trial, which a record in writing, will not impart to us, and therefore, unless it appears, that the trial judge abused his discretion in granting a new trial, his decision to that effect, will not be disturbed.9

This reference to non-record factors may portend a return to the concept of the Coppo case and the original purpose of the rule and a retreat from the position exemplified by the decisions in the intervening twelve years. It is to be noted, however, that only four of the judges concurred in all of the above quoted language. Four others concurred only in the result and the single statement, "We are not disposed to interfere with the discretion the trial court exercised." The ninth judge dissented.

COMPARISON OF OTHER JURISDICTIONS

As might be expected, there is a considerable diversity of opinion among the states as to whether reasons are required in orders relating to new trials. In the absence of some statute or rule, it seems generally accepted that an order granting or denying a motion for a new trial need not recite the ground upon which the court bases its action.91 It has also been generally recognized, however, that though there may be no requirement for a statement of reasons in granting a new trial, the practice of so doing is to be commended in that it is most helpful to an appellate court and may often deter the taking of needless appeals.92

In those states in which statutes or rules provide for reasons, some regard the provision as mandatory,93 while others regard it as merely directory.94 Likewise, the degree of specificity varies. A statutory requirement that the order shall specify grounds has been held not to necessitate a statement of the reasons or process by which the con-

93 Booker v. Saunders Realty Co. ex rel. Jones, 53 So. 2d 912 (Fla. 1951); Gitelson v. Weisburg, 36 Misc. 214, 73 N.Y.S. 195 (1901); Hiller v. McManama, 59 S.D. 148, 238 N.W. 570 (1931); Buetow v. Hietpas, 253 Wis. 64, 33 N.W.2d 201 (1948).
clusion that the grounds exist is arrived at, but merely an explicit statement disclosing the specific grounds for the decision. Such statutes have been held complied with by general specifications as, that the verdict was not against the weight of the evidence, that the damages were inadequate, and that the verdict is not justified by the evidence and is contrary to the law.

Other states have required specific statements of reasons to support the ground relied upon. Thus it has been held that more is required than a reliance upon the weight of the evidence or the interests of justice, or that the evidence was insufficient, or that a new trial was required in the interests of justice. In none of the states, however, do there appear to be any more strict requirements than in Washington in the way of necessity of recitation of reasons in the event of the grant of a new trial.

In the federal system, there is only one instance in which the rules specifically require a statement of reasons. Ordinarily when the court grants or denies a party's motion for new trial, the grounds therefor may be ascertained from a perusal of the party's motion, and thus, there is no express requirement in the rules that the court specify the grounds upon which it is acting, although in practice the district judge will often do so. On the other hand, when the court acts on its own initiative, Federal Rule of Civil Procedure 59(d) requires that the court "in the order shall specify the ground therefor." In the absence of such specification, the order for new trial may be considered a nullity in that it may not be possible to have an intelligent review by the appellate court.

As an indication of the degree of specificity required, in Fried v. McGrath the trial judge granted a new trial on his own initiative for the reason that "the damages found by the jury were inadequate." Though the order was reversed on the basis of not being timely, the statement of grounds was regarded as sufficient. In United States v.

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95 Anti v. Boston El R. Co., 247 Mass. 1, 141 N.E. 598 (1923); Sawyer v. Winterholder, 195 S.W.2d 659 (Mo. 1946).
101 Gillard v. Aaberg, 5 Wis. 2d 216, 92 N.W.2d 856 (1958).
102 G. Moore, FEDERAL PRACTICE 3873 (1953).
103 National Farmers Union Auto. & Cas. Co. v. Wood, 207 F.2d 659 (10th Cir. 1953).
104 133 F.2d 350 (D.C. Cir. 1942).
105 Id. at 354.
64.88 Acres of Land, a motion was made for a new trial on the following grounds: (1) improper admission of testimony; (2) government counsel was prejudiced; (3) refusal to admit proper testimony; (4) refusal to permit cross-examination; (5) the verdict is excessive. Only the fifth ground was held to be stated with sufficient particularity to advise the court and opposing counsel of the theories upon which the government sought a new trial.

The same conclusion may be drawn with respect to the federal courts as with other states in comparing them with Washington. Certainly the requirement of particularity is no greater elsewhere and in fact appears to be less strict.

CONCLUSIONS AND RECOMMENDATIONS

Prior to 1951 a situation had developed whereby there was no effective review if the trial court ordered a new trial and stated no reason therefor or else simply said that substantial justice had not been done. The supreme court in the Coppo case recognized that there were times when review was not realistically possible since the reasons were based upon non-record factors which could not be made part of the record. This did not concern the supreme court. Rather, the court was concerned with those instances wherein the reasons were actually based upon record matters, readily available for review. It was the purpose of the rule to require that the trial court state whether its reasons were based upon record or non-record circumstances and if the former, that those reasons be specified with particularity. Certainly, it made no sense to deny the parties the potential benefits of review when the reasons for which the trial court acted could readily be made available for consideration by the supreme court. Thus, the rule, in requiring reasons, was properly directed to correcting an unfortunate situation. It is important to recognize, however, that the rule was not intended to provide for review of that which is realistically unreviewable, namely, non-record matters not subject to being made a part of the record. This was stated by the supreme court in the Coppo case, which provided the setting for the rule. "There is no desire to interfere with the inherent right of a trial judge to grant a new trial, subject only to the limited review now possible [whether there is a case for the jury and whether the verdict is the only one possible as a matter of law], where the reasons for granting the new trial cannot be made a part of the record."

Why did the supreme court distinguish between record and non-record factors? By its very nature a motion for a new trial is essentially an appeal to the discretion of the court. The judge must decide whether the error requires relitigation or not. This is not an automatic judgment, but one which requires a balancing. In some instances this balancing, this exercise of discretion, may be as easily performed by the appellate court as the trial court, as for example, where the motion is based upon grounds shown by the record, such as errors of law in rulings or in instructions. In such instances, there is no reason why review should not be had by the appellate court.

In other instances, however, the need for the court to exercise its discretion applies with peculiar force to the trial court and with little, if any, force to the appellate court. The trial judge sees the witnesses, their facial expressions, and their mannerisms, hears their testimony and the inflections in their voices, observes their demeanor, their hesitation to answer when pushed into a corner by cross-examination, and their glances to counsel for moral support. He likewise observes the conduct and demeanor of the parties and of counsel. He obtains an insight into the emotions and personalities of all the participants. He observes the reactions of the jurors. He is able to judge the capabilities, the experience, the background and the judgment of the particular jury composed of twelve different persons of peculiar make-up and to form an impression as to whether they were unfairly influenced in some manner. In short, he observes the entire atmosphere of the trial.107

The trial judge has the opportunity not only of studying the participants in the particular trial, but over a period of time of observing the procession of people who pass before him while under oath. He has an opportunity to become a character analyst and may become conscious of perjured and colored testimony while the fact that it is perjured or colored cannot yet be proved by any available evidence in the record. On the other hand, if a witness adheres to standards of truth and fair play this often shows in his features and conduct. None of these things go into the court reporter's report of the trial; nor can they realistically be made a part of the record. As a matter of fact, the trial judge may not even be able to recall and describe the fleeting glimpses into the character of the participants that he obtains from the bench during the course of the trial. Yet they certainly are a part of the trial which bear

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107 See 2 DUGGAN & ORLAND, WASHINGTON PRACTICE 278 (1957).
upon the character of the parties and witnesses and which at times determine whether substantial justice has been done.

In most instances this will not be true. Usually the extra-record factors will not be such as to change the result as supported by the record. A review of the record alone and a reversal if the appellate court finds an abuse of discretion is proper from a power standpoint. On the other hand, in cases where non-record factors substantially contribute to an unjust result or deprive the trial of essential fairness, the written record does not represent the trial and an examination which is based solely thereon is not fair to the participants. A review of the record alone is in effect a new trial by a different tribunal on different facts.

The point then is that, of necessity, there are times when review is impossible and when deference must be paid to the trial court. And who is to decide when this deference must be paid? Again, by necessity, this must basically depend upon the trial judge. He is the one who must decide whether the factors upon which he relies can be made available for review, for only he knows what entered into his judgment that a new trial was necessary. It is perfectly appropriate to require the trial judge to state whether his order is based upon record or non-record factors. It is also proper to make the assumption that if nothing is said to the contrary, then only record factors are involved. But if the trial judge specifies that he is relying upon non-record factors or if such reliance is implicit in the order, then deference should, and must, be paid by the supreme court if the review is to be a realistic one.

Should there be a fear of deference to the trial court? Can the trial judge be trusted in this regard? The answer is self-evident. There is no reason to regard the trial judge as less qualified or capable or trustworthy than the appellate judge. It is true that in those instances wherein review is possible it is to be encouraged, since the more minds there are working upon a problem the better the result is apt to be. But there are times when it is not possible to get more than one judgment on a problem and a failure to recognize this is a failure to meet the problem as it exists. We are confronted with a situation wherein the collective judgment of several would be desirable, but wherein the discretion of only one can function properly.

With the above-stated purpose of the rule in mind, we may now consider the actual decisions under the rule. In the twenty-six cases decided since the adoption of the rule in 1951 in which a new trial has
been granted in whole or in part for failure of substantial justice, nineteen have been reversed and seven affirmed.

Of the seven affirmances, in five very little, if any, discretion on the part of the trial court was recognized by the supreme court. The five cases were decided, in effect, on the basis that a new trial was the only result that could be reached on the record. In *Anderson v. Dalton*, the trial court granted a conditional new trial, which the supreme court modified after concluding that a complete new trial was required. In *Mieske v. PUD No. 1*, the trial court granted a conditional new trial and while the supreme court affirmed, it indicated that the record would have supported an even greater reduction in the verdict than that ordered by the trial court. In *Ide v. Stoltenow*, and *Cote v. Allen*, the supreme court affirmed the grant of a new trial because of inadequate damages when the verdict was less than the conceded and undisputed damages. In effect, the evidence would not support the verdict and there was "discretion" to grant a new trial. Likewise, in *Lanegon v. Crawford*, the supreme court concluded that a new trial on damages was proper where, after deducting the items beyond legitimate controversy, the allowance for general damages was so small as to shock one's idea of fair play.

Only in the two most recent cases, *Martin v. Foss Launch & Tug Co.* and *State v. Taylor*, has there been a true deference to the trial court's discretion in affirming the grant of a new trial. The five earlier cases were decided solely on the record and the record in each supported one result. Only in the two most recent cases has there been a recognition of the potential significance of non-record factors and a willingness to allow for the exercise of discretion by the trial judge in granting a new trial. The significance of these cases will be further noted shortly.

Of the nineteen cases of reversal, interpreted in the light most favorable to the supreme court and with every benefit of the doubt resolved in its favor, thirteen were properly decided.\(^{108}\) In view of the trial

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court's failure to indicate that any non-record considerations were involved, the trial judge's order was properly reviewable on the record.

In the following six cases, however, the supreme court misconstrued the rule as stated in the *Coppo* case: *Mulka v. Keyes*, *supra*, in which the trial court relied upon the non-record factors of the manner of plaintiff's counsel in making statements in the presence of the jury and the appearance and demeanor of witnesses; *Rung v. Radke*, *supra*, wherein the trial court relied upon the extra-record factor of the appearance and demeanor of counsel; *Johnson v. Howard*, *supra*, in which the trial court stated several reasons for his conclusion of failure of substantial justice including the non-record factor of the appearance and demeanor of the plaintiffs; *Powell v. Continental Baking Co.*, *supra*, wherein the trial court relied upon the non-record factors of the appearance and demeanor of the parties and witnesses and the character of the particular jury, which factors the trial judge expressly stated could not be made part of the record; *Follis v. Brinkman*, *supra*, in which the trial court relied upon the effect of a court-imposed time limitation on the plaintiff's presentation of his case; and *Nelson v. Martinson*, *supra*, wherein the trial court relied upon the cumulative effect of several statements by counsel. In each of these cases there was a clear exercise of discretion based upon extra-record considerations to which the supreme court should have deferred.

Instead the supreme court in each of the six cases required the trial judge to show in his opinion what facts there were outside the record which influenced his decision when he exercised his discretion. This approach places the trial judge on trial. It requires him to make a description of the innumerable expressions of appearance, hesitations, bravado, timidity, conduct of the parties, witnesses and counsel; in short, the atmosphere of the court room. It requires something that cannot adequately be done. To require the trial judge to defend his position successfully with facts outside the record, or be reversed, in effect repeals the well-established judicial discretion to grant a new trial for failure of substantial justice. This was not the purpose of the rule when enacted, as has been previously explained.

The pertinent paragraph of the rule now reads: "In all cases wherein the trial court grants a motion for a new trial, it shall, in the order granting the motion, give definite reasons of law and facts for so doing."

In order to restore the original purpose and effectuate its proper function, the rule could be amended to read as follows:
In all cases wherein the trial court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record which cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall indicate the nature of the facts and circumstances.

Such an amendment would place a mandatory obligation upon the trial judge to state whether his order was based upon extra-record factors. A failure to so indicate might well be interpreted as meaning that only matters which are in the record entered into his consideration. This would be in accord with the present law of review. In addition, if the order was based upon record factors, the rule would require a definite statement of reasons. A failure to be definite would usually result in a reversal as at the present time. The principle change from the present law would result from the third sentence wherein the trial court would only be required to state the nature of the factors involved in the event non-record matters were of consequence. For example, a statement by the trial judge that the appearance and demeanor of the witnesses, or the parties, or counsel affected his decision should suffice. It would not be necessary for the trial judge to attempt to detail the physical appearance or the reactions of the jury thereto.

If the supreme court in future cases interprets the present rule as it was originally intended, there would of course be no need for an amendment. Mention is made of this because of the two most recent cases involving the problem, both of which suggest that there may be a change taking place within the supreme court. In Martin v. Foss Launch & Tug Co., the trial judge imposed a remittitur which the supreme court modified. In so doing, the court recognized the discretion of the trial judge and the fact that he had an opportunity to observe the witnesses and make evaluations not available to the appellate court. Thus the original verdict was not reinstated. To this extent there was an express deference to the trial judge in view of the non-record factors involved. In the most recent case, State v. Taylor, there is an even clearer statement of the trial judge's wide discretion in relation to the granting of new trials based upon non-record factors. The language is reminiscent of that in the Coppo case, twelve years earlier.

What conclusions are to be drawn? In 1950 the supreme court spoke of the trial judge's wide power to grant new trials for the failure of substantial justice. In 1962 there has been a return to this position, at
least in the court's language, if not yet in its holdings. One difficulty in assuming that this represents the law lies in the decisions in the intervening twelve years which have not supported the above language. Another difficulty lies in the fact that *State v. Taylor* was a criminal case and thus may not apply to civil litigation. Finally, only four of the nine judges expressly concurred in the language referred to above.

It appears then that in order to assure the proper recognition of the trial judge's power in relation to the granting of new trials, *Pleading, Practice and Procedure Rule 59.04W* should be amended as previously stated. Such an amendment, coupled with interpretations thereof based upon the two most recent cases in point, will provide for the proper division of power as between the appellate and trial courts and for the proper doing of justice as between the parties.

A final note of caution should be added. Until a change occurs, either in the wording of the *rule* or in the interpretation thereof, counsel should exercise extreme care in the drafting of orders granting new trials. A situation could easily develop in which counsel might convince the trial judge of the necessity of a new trial because of some extrarecord factors and in which the trial judge might properly grant the requested relief. If counsel in drafting the formal order for the trial judge's signature fails to specify in great detail the basis for the conclusion that substantial justice has not been done, a reversal is certain. As a matter of fact, it is advisable to use one of the other eight grounds in the order, rather than relying solely upon the substantial justice ground. This apparently has been the practice within recent years in view of the supreme court's treatment of the latter ground. Though this defeats the purpose of the *rule* and eliminates a considerable portion of the trial judge's rightful power, the present judicial climate requires this approach by counsel.