Civil Procedure
Law 6212 - Section 13A
Fall 2023

Supplementary Materials
Part 2

Jonathan R. Siegel
GW Law School

SKOGEN v. DOW CHEMICAL COMPANY
375 F.2d 692 (8th Cir. 1967)

Before VAN OOSTERHOUT, GIBSON and HEANEY, Circuit Judges.

GIBSON, Circuit Judge: This is a product liability case concerning the use of an insecticide, Purina Spray and Dip. [The product was manufactured by defendant Ralston Purina Company using Ronnel, a chemical manufactured by defendant Dow Chemical Company.] The jury, in answering a special interrogatory, found no causal connection between the exposure to the insecticide and the severe and permanent injuries suffered by the minor plaintiffs. The Court entered judgment for defendants based upon the special interrogatory to the jury, and the plaintiffs filed a timely appeal. * * *

[Plaintiff Harold Skogen was a farmer. He and his sons, plaintiffs Douglas and David Skogen, applied the insecticide Purina Spray and Dip in the course of their farm work. Both boys subsequently developed permanent brain damage. Plaintiffs sued defendants for their injuries.]

As noted by the experienced trial judge, the case presents essentially a factual issue on causation. * * * This case was extensively and aggressively tried and defended during seventeen trial days, with the jury being called upon to consider voluminous medical and scientific testimony, the medical testimony being directed toward the condition of the boys and their symptoms as either evidencing viral encephalitis [the defendants' theory] or organo-phosphate poisoning [the plaintiffs' theory]. * * *

[P]laintiffs object to not being allowed to cross-examine two witnesses under Rule 43(b), Fed.R.Civ.P. * * *

To begin, we must note the overwhelming nature of the evidence that supports the jury's verdict. Without going into the maze of technical data, the great weight of the evidence indicated that the chemical Ronnel and Purina Spray and Dip were low in toxicity to humans, though it is an economic poison effective in killing flies and similar insects. Poisoning of the Skogen boys does not appear probable from a chemical of such low toxicity. Secondly, and more importantly overexposure to chemicals causing organo-phosphate poisoning has definite symptoms. Viral encephalitis has definite symptoms which differ markedly from symptoms of organo-phosphate poisoning. The overwhelming weight of the medical evidence indicated that the Skogen boys had all of the symptoms of viral encephalitis, which symptoms would not be found in a case of organo-phosphate poisoning. The conclusion is inescapable that the evidence does not show the boys suffered from organo-phosphate poisoning as they alleged.

* * * [The court reviewed the medical evidence in detail and concluded that the boys' symptoms were not consistent with organo-phosphate poisoning but were consistent with viral encephalitis, which can be contracted from farm animals.]

Admitting sufficiency of the evidence [to support the jury's verdict], the plaintiffs contend that they should have a new trial because of alleged prejudicial errors which denied them a fair and impartial trial. We now examine their objections to the trial. * * *

Plaintiffs called as witnesses, Bernard F. Beaver and Dr. Warren O. Haberman for the purpose of cross-examining these men under Rule 43(b), Fed.R.Civ.P. * * *

[Normally, a party conducts "direct" examination of witnesses it calls and "cross"

examination of the other side's witnesses. "Leading" questions are normally permitted only on cross-examination. However, at the time of this case, Rule 43(b) (now Fed. R. Evid. 611(c)) permitted a party to conduct cross-examination and therefore to ask leading questions when the party has called, as a witness, an adverse party, or "an officer, director, or managing agent of a . . . corporation . . . which is an adverse party."]

Beaver was a chemist in charge of the chemical formulization of Ralston Purina Spray and Dip. There were two or more persons who worked under Beaver's direction in the Chemistry Department. Dr. Haberman was the Manager of the Entomology and Parasitomology Laboratories of Ralston Purina. He had a staff of three or more individuals under him.

After lengthy cross-examination (some 85 pages) of Beaver, at the suggestion of the trial court an objection was made on the basis that Beaver was not a proper adverse party being called for purposes of cross-examination, which objection, of course, was sustained.

Dr. Haberman was called for cross-examination by plaintiffs. After a few questions the objection was made and sustained that he, too, was not a proper party for cross-examination under Rule 43(b).

Rule 43(b) authorizes the calling of an adverse party for cross-examination. In this situation the calling party is free to ask leading questions and to impeach the testimony of his witness. However, a corporation, being an artificial entity, cannot be physically placed on the witness stand. To resolve this problem the Rule authorizes the calling of an 'officer, director, or managing agent' as a representative of the adverse corporate party. Obviously, since Beaver and Dr. Haberman are not officers or directors, to be able to call these men and cross-examine them as adverse witnesses, it must be shown that they are 'managing agents' of the defendant and not 'mere employees' of the corporation.

In this age of large corporate operations, it is often difficult to accurately classify individuals within a business into neat groups of 'managing agents' and 'mere employees.' The past few years have seen a mushrooming of corporations with highly technical and scientific departments. The individuals who head these departments are men of considerable education and extensive scientific knowledge and ability. * * * Nonetheless, in a strict literal sense, these technicians and scientists are not general 'managing agents' of the corporation. * * * Yet it is probably unrealistic to classify these men along with the filing clerks, assembly line worker, and maintenance men, as 'mere employees.' * * * We believe that this situation demands a liberal construction of the Rules that takes into account the practicalities of the business world, the litigation which the business world must face and the underlying rationale of the Rule. * * *

The liberal interpretation of the rule which we favor would hold that an individual is a 'managing agent' if: (1) His interests in the litigation are identified with his principal, and (2) He acts with superior authority and general autonomy, being invested with broad powers to exercise his discretion with regard to the subject matter of the litigation. * * *

If this test were applied, we believe that Beaver and Dr. Haberman would probably be considered managing agents within the meaning of Rule 43(b). * * * [I]t would seem that these two men were probably subject to call for cross-examination under the Rule and the trial court may have committed error in sustaining the objection that they were not 'managing agents' of the adverse corporate party.

Our tentative feeling on this point does not demand a reversal of this case. The rule is clear

that 'harmless error' by the trial court will not warrant a reversal of its judgment. An error is harmless if it is not 'inconsistent with substantial justice' or 'does not affect the substantial rights of the parties.' Rule 61, Fed.R.Civ.P. * * * We feel that any error of the trial court on this particular issue was harmless.

Beaver was called for cross-examination by plaintiff and was in fact cross-examined without objection for a considerable length of time (85 pages of record). Only after this substantial cross-examination was an objection made and sustained that he was not a proper party. We feel, as did the trial court, that by this time the witness was 'exhausted * * * as a practical matter.' Although plaintiffs had fully deposed the witness in pre-trial discovery proceedings, at no stage in the proceeding have plaintiffs shown, by offer of proof or otherwise, what additional testimony they expected to elicit from this witness or what real prejudice they suffered by not being allowed to cross-examine the witness further. At the time Beaver's testimony was interrupted, plaintiffs were apparently trying to prove through Beaver, Purina's negligence in testing and labeling the product, an issue that was not even reached by the jury as evidenced by the response to the special interrogatory.

Almost immediately, defendants objected to Dr. Haberman being called for cross-examination. However, after the objection was sustained, plaintiffs' counsel questioned him at great length on a direct examination. No attempt was made to have him declared a hostile witness so that leading questions might be asked. Later in the trial, Dr. Haberman was called by the defendant Ralston Purina in presenting their case in chief, and plaintiffs were then able to fully conduct a lengthy cross-examination of him. Therefore, it is difficult to see any possible prejudice to plaintiffs. As with Beaver, plaintiffs have demonstrated no additional evidence they hoped to receive, nor prejudice they have suffered from the trial court's limitation. When we view the vast amount of evidence that was received on this subject and how the great weight of it supports the finding of the jury, it further convinces us that the almost theoretical limitation on plaintiffs' examination of these two witnesses could not have deprived plaintiffs of any 'substantial rights' nor was the limitation 'inconsistent with substantial justice.'[6] * * *

Judgment is affirmed.

---

[6] Plaintiffs, in their brief, contend that Beaver and Dr. Haberman are at least hostile witnesses within the meaning of Rule 43(b). ["Hostile" witnesses may be asked leading questions.] This contention might be well taken as the witnesses' identity of interest is very close to their corporate employer. * * *

The fact that defendants' counsel allowed Beaver to be cross-examined for some 85 pages indicates acceptance of the fact that Beaver was an unwilling or hostile witness for plaintiffs' cause.

However, at the trial, plaintiffs did not attempt to qualify either Beaver or Dr. Haberman as a hostile witness under the Rule, and thus did not afford the trial judge an opportunity to rule on that point. It is elementary that we should not rule upon a point of law not presented to the trial judge. A trial judge ordinarily should not be charged with error in not deciding correctly a question that he was never asked to decide.

We, however, feel this issue is not material, for, regardless of plaintiffs' failure to present the issue to the trial court, even if it had been presented and ruled adversely to them, no prejudice would have resulted for the same reasons set forth in our consideration of the 'managing agent' issue.

Notes and Questions

1. The trial court ruled that Mr. Beaver and Dr. Haberman were not "managing agents" of the defendant corporation and so the plaintiffs could not call them as witnesses for purposes of cross-examination. Was this wrong? If it was, why shouldn't the trial court's judgment be reversed?

2. The plaintiffs also complain that the trial court should have recognized that Mr. Beaver and Dr. Haberman were "hostile" witnesses, which would have been another ground for allowing plaintiffs to cross-examine them. See footnote 6 in the court of appeals' opinion. The court of appeals thought this was probably true, and yet this also was not ground for reversal. Why not? Note that the court gives two different reasons why this likely error could not lead to reversal.

3. Plaintiff sues defendant for breach of contract and the case goes to trial by jury. During jury selection, the plaintiff moves to strike juror X for cause, on the ground that during voir dire juror X demonstrated an unacceptable bias that would favor the defendant. The trial court denies this motion and juror X is seated. Juror X sits silently throughout the presentation of evidence. The trial lasts only a few hours and the jury is present in the court the entire time. At the close of evidence, juror X is taken ill and is excused from further service. The remaining jurors deliberate without juror X. The jury returns a verdict for the defendant, upon which judgment is entered. The plaintiff appeals. On appeal, the plaintiff argues that the trial court should have struck juror X for cause. The court of appeals agrees with the plaintiff on this point. What will the court of appeals do?

4. The scenario is the same as in the previous question, except that juror X is not taken ill and deliberates with the rest of the jury, and this time the jury returns a verdict for the plaintiff. The defendant appeals. On appeal, the defendant argues that the trial court should have struck juror X for cause. The court of appeals agrees with the defendant on this point. What will the court of appeals do?

5. Plaintiff sues defendant over a right-angle car accident and the key question is which party ran a red light when entering an intersection. During the trial, plaintiff testifies that she has no memory of the accident itself, but that a witness at the scene, who cannot now be located, told the plaintiff after the accident that the defendant ran a red light. The defendant makes no objection. The jury returns a verdict for the plaintiff and defendant appeals. On appeal, the defendant argues that the plaintiff's testimony constituted inadmissible hearsay. The court of appeals agrees with the defendant on this point. What will the court of appeals do?

6. If a trial court commits error, why should its judgment not be reversed? Separately consider the two reasons for not reversing illustrated by the case and questions above. What would happen if we did not have these two principles? Suppose a court of appeals were required to reverse a trial court's judgment if the court of appeals determined that the trial court made any error. What would be wrong with that?

BILL'S COAL COMPANY, INC. v. BOARD OF PUBLIC UTILITIES
887 F.2d 242 (10th Cir. 1989)

Before McKAY, LOGAN, and TACHA, Circuit Judges.

McKAY, Circuit Judge. . . . [The plaintiffs (referred to by the court as "the sellers") were suppliers of coal, and the defendant (referred to by the court as "the purchaser") was a public utility. The parties contractually agreed that the defendant would purchase from the plaintiffs all the coal it needed to operate its power plants each year from 1979 to 1985. The contract provided that the plaintiffs would, at the end of each year, inform the defendant of the price they would charge for coal the following year. The defendant would then be obliged to purchase the coal at that price, except that if it found another seller that could sell it the coal it needed for at least 25% less than the plaintiffs' price, it could terminate the contract. Pursuant to this clause, the defendant terminated the contract in 1980. Plaintiffs sued the defendant and claimed that the defendant had wrongfully terminated the contract without finding another supplier that met the conditions of the termination clause. The case was tried by a bench trial and the court found that the plaintiffs' claim was valid.

A question arose as to the proper measure of damages. The plaintiffs asserted that they should receive their lost profits under § 2–708(2) of the Uniform Commercial Code (UCC). The defendant asserted that under § 2–708(1) of the UCC, the plaintiffs should receive only the difference between the contract price of the coal and the market price at which they could sell the coal to another purchaser. The difference between these two measures of damages can be understood as follows: Suppose it cost the plaintiffs $20 per ton to produce and deliver the coal to the defendants, and the plaintiffs informed the defendant that they would charge $25 per ton for the coal. The plaintiffs would then have made a profit of $5 per ton, and the plaintiffs would have claimed damages of $5 per ton multiplied by the number of tons the defendant had purchased from another seller during the contract term. Suppose, however, that during the term of the contract the plaintiffs could sell their coal to another purchaser for $23 per ton. The defendant would have asserted that the plaintiffs should be entitled to recover only $2 per ton from the defendant.

The district court determined that the defendant was correct and awarded the plaintiffs only the difference between the contract price and the market price at which they could sell they coal to other purchasers during the term of the contract. The plaintiffs appealed.]

I. Standard of Review

. . . [The parties] challenge the trial court's findings of fact and of law. We do not disturb the district court's findings of fact unless they are "clearly erroneous." Fed. R. Civ. P. 52(a). . . . A finding of fact will not be reversed as clearly erroneous unless "it is without factual support in [the] record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made." . . . The district court need not be "correct" in its finding, but its conclusion must be "permissible" in light of the evidence. . . .

We review issues of law, decided by the district court, de novo. . . . An appellate court is not constrained by a trial court's conclusions of law. . . .

II. Lost Profit Damage Measure

The district court determined that UCC § 2–708(1) applied in determining the proper measure

of damages. . . . Sellers fall into section 2–708(2) only if they can demonstrate that they would receive inadequate damages under section 2–708(1). Section 2–708(2) is basically designed for specific categories of sellers, such as lost volume sellers. . . . A lost volume seller is one who has the capacity to perform the contract which was breached as well as other potential contracts, due to their unlimited resources or production capacity. Although sellers seek to portray the analysis of lost volume seller as a question of law subject to de novo review (sellers characterize their appeal as being limited to "questions of law"), it is a decision dictated by the underlying facts and thus ultimately a question of fact reviewed under the clearly erroneous standard.[2] Even where there is a mixed question of law and fact that involves primarily a factual inquiry, the "clearly erroneous" standard is appropriate. . . .

Evidence presented at trial indicated that sellers did not have the production capacity to perform purchaser's contract as well as to sell to other potential purchasers. During the years following 1980, sellers often fell behind in shipping to purchaser the amount of coal required under the contract. In fact, one of the two principal mines on which sellers relied for shipments to purchaser was out of production for several months during this period. In order to meet purchaser's needs, sellers found it necessary to purchase coal from other suppliers. In addition, sellers claimed in the district court that they had lost sales to other customers because it was necessary to ship coal to purchaser . . . . This contention is in direct conflict with sellers' position that it had the capacity to perform the contract in dispute and also to sell to third parties. Mr. Hirlinger, sellers' president, admitted that sellers were able to make the sale of 11,609 tons of coal to another customer only because purchaser ceased accepting coal from sellers. Based on this evidence, the trial court found that the sellers did not have the ability to perform the contract in dispute and sell to potential third parties at the same time. Based on our review of the evidence, the district court was not clearly erroneous in its finding that sellers were not lost volume sellers, and thus section 2–708(1) was the proper measure of damages. . . .

[Affirmed.]

Notes and Questions

1. The court articulates the basic principles that an appellate court reviews findings of fact by a trial court deferentially and overturns them only if they are *clearly* erroneous, but reviews rulings of law de novo and overturns them if they are erroneous, whether the error is clear or not. Review your notes from our study of appeal in our initial course overview, in which we derived these principles from reading baseball's Pine Tar Case. Why are the standards of review different for questions of fact and questions of law?

2. Is it always easy to distinguish a question of fact from a question of law? The plaintiffs in the *Bill's Coal Co.* case argued that the question of whether they should receive "lost profits" damages or only the difference between the contract price and the market price of the coal was a

[2] The district court's finding was based to a large extent on the credibility of sellers' witnesses. A reversal would require this court to "second guess" the district court's evaluation of the credibility of those witnesses and the weight to be given to their testimony.

question of law, not fact. Why were they wrong?

3. Suppose a car accident case is tried by a jury, and the court calls for a general verdict with answers to questions. Most of the questions ask for the jury's findings regarding specific facts about the accident: how fast each of the parties was going, in what lanes, whether each party watched the road properly, whether either party was intoxicated, and so on. The final two questions ask whether the defendant did anything negligent, and then, if so, whether that negligence caused the plaintiff's injuries. If the case were appealed, would the jury's findings on the last two questions be findings of fact, law, or something else? By what standard would they be reviewed? *See* Nunez v. Superior Oil Co., 572 F.2d 1119, 1123 (5th Cir. 1978).

KERN v. TXO PRODUCTION CORPORATION
738 F.2d 968 (8th Cir. 1984)

Before McMILLIAN, Circuit Judge, HENLEY, Senior Circuit Judge, and ARNOLD, Circuit Judge.

ARNOLD, Circuit Judge: * * *

I.

The plaintiff owns the surface of five acres of land in Logan County, Arkansas. TXO holds an oil-and-gas lease granted by the owner of the mineral interest. Plaintiff brought this action for damages, claiming that a gas well drilled on her property by TXO had reduced the value of her surface ownership more than reasonably necessary in the exercise of a mineral lessee's rights. Suit was filed in the Circuit Court of Logan County, Arkansas, Northern District, for $15,000.00 in damages, later increased by amendment to $25,000.00. TXO removed the case to the District Court on the basis of diversity of citizenship. After some discovery had taken place, the District Court set the case for trial. Plaintiff then moved to dismiss her complaint without prejudice under Fed.R.Civ.P. 41(a)(2). The District Court informed counsel by letter that it would grant the motion, but "only upon the express condition that, if the case is refiled in any court, the defendant will be awarded all costs of this action, including all attorney's fees incurred in preparing this case for trial." * * * Plaintiff, evidently believing this condition too burdensome, withdrew her motion to dismiss, and the case went to trial before a jury about two weeks later.

After plaintiff had presented four out of the five witnesses she intended to call, the court and counsel conferred out of the presence of the jury. The intended testimony of the fifth witness, a real-estate expert, was fully discussed. The court informally indicated the view that plaintiff would be unable to make out a submissible fact question for the jury: "at the close of your [the plaintiff's] case, the court will more than likely direct a verdict in favor of the defendant." Tr. 137. After a 15-minute recess to allow plaintiff's lawyer to consult with his client, the plaintiff renewed her motion for dismissal without prejudice. This time the motion was granted, and no conditions as to costs and expenses were imposed. The court said (Tr. 143):

> The court sees Ms. Kern, sees TXO. Under the circumstances, I think that if I'm going to err, I want to err in favor of giving Ms. Kern another chance because TXO will survive. I'm just certain of that.

TXO objected to this action, and it now appeals.

II.

Under Fed.R.Civ.P. 41(a)(1) a plaintiff may voluntarily dismiss her complaint, without prejudice to the filing of a new action based on the same claim, as a matter of right, provided only that the dismissal must occur before the defendant has either answered or moved for summary judgment. Otherwise,

> an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.

Fed.R.Civ.P. 41(a)(2).

Motions to dismiss without prejudice are addressed to the sound discretion of the district courts. But "the discretion vested in the court is a judicial and not an arbitrary one ...." *International Shoe Co. v. Cool,* 154 F.2d 778, 780 (8th Cir.) *cert. denied,* 329 U.S. 726 (1946). That is, when we say that a decision is discretionary, or that a district court has discretion to grant or deny a motion, we do not mean that the district court may do whatever pleases it. The phrase means instead that the court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law. An abuse of discretion, on the other hand, can occur in three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment. And in every case we as an appellate court must be mindful that the district courts are closer to the facts and the parties, and that not everything that is important about a lawsuit comes through on the printed page.

At common law, dismissals without prejudice were, in general, freely allowed at any time before the case was ready for decision. That is still the rule in the Arkansas state courts. Ark.R.Civ.P. 41. But in the federal courts, after answer, such dismissals should be granted only "if no other party will be prejudiced." 9 Wright & Miller, *Federal Practice & Procedure—Civil* § 2362 (1971). By "prejudice" in this context is meant something other than the necessity that defendant might face of defending another action. That kind of disadvantage can be taken care of by a condition that plaintiff pay to defendant its costs and expenses incurred in the first action. One sort of prejudice that cannot be cured by the attachment of conditions is the loss by defendant of success in the first case. If defendant has already won its case, reimbursement of fees and expenses cannot make it whole from the injury of being sued again, perhaps this time to lose.

A series of cases in this Court has applied this principle. The most recent example is *Williams v. Ford Motor Credit Co.,* 627 F.2d 158 (8th Cir.1980). The jury verdict had gone for plaintiff. Defendant moved for judgment notwithstanding the verdict. Plaintiff opposed the motion, but asked the court, if it decided the verdict could not stand, to grant her a voluntary nonsuit, so that she could sue again in a state court. The motion for nonsuit was granted. We reversed. "Under the circumstances we feel the court abused its discretion in granting the motion to dismiss without prejudice at such a late time in the proceedings." *Id.* at 160. We noted, among other things, that the dismissal might prejudice the defendant with respect to a third-party claim it had asserted in the first action.

TXO urges that *Williams* is controlling. It must be admitted that the differences between that case and this one are not great. Certainly if the District Court had refused the plaintiff's motion for voluntary dismissal, or insisted that the dismissal, if suffered, would be with prejudice, it would not have abused its discretion. * * *

That the denial of the motion would not have been reversible as an abuse of discretion, however, does not mean that granting it was such an abuse. The very concept of discretion presupposes a zone of choice within which the trial courts may go either way.

We think the differences between this case on the one hand, and *Williams* and its precursors on the other, are great enough, though perhaps not by much, to justify a decision not to interfere with the choice made by the District Court. The trial here was not so far along as in *Williams* and the

other cases cited. The plaintiff had not yet rested, and defendant had not yet moved for directed verdict. Although it was likely that that motion, when made, would have been granted, we cannot say that it was certain. The final witness's testimony might have differed somewhat from the parties' expectations. The District Court might have decided, as trial courts often do, to let the case proceed despite its initial view as to the insufficiency of plaintiff's case. Furthermore, by granting the nonsuit without prejudice the District Court allowed the plaintiff the opportunity to seek a state-court ruling on a state-law issue. The District Court's action here was immediately preceded by a thorough discussion of Arkansas law on surface damages. The court and plaintiff's counsel differed on the meaning of certain opinions of the Supreme Court of Arkansas. We have no reason to suppose that the District Court's view was not wholly reasonable, but its decision would still have been only a forecast, an educated guess about what the Arkansas state courts would do. The state courts, by contrast, can give an authoritative answer. This factor cuts in favor of the decision to allow plaintiff to try again.

In short, we cannot bring ourselves to say that it was an abuse of discretion to allow the dismissal without prejudice, and to that extent the judgment will be affirmed.

III.

We turn now to defendant's alternative contention that it was an abuse of discretion not to impose a condition with respect to costs and attorneys' fees. In *New York, C. & St. L.R.R. v. Vardaman,* 181 F.2d 769, 771 (8th Cir.1950), we said:

> Our view is that payment to the defendant of the expenses and a reasonable attorney fee may properly be a condition for dismissal without prejudice under Rule 41(a) but that omission of such condition is not necessarily an arbitrary act.

In *Vardaman* the trial court had required payment of costs but not fees. We affirmed on the ground that much of the defendant's fee request was attributable to services rendered in other cases, and that during the argument on the motion to dismiss without prejudice no specific request for fees had been made. We added the comment that, whatever the state of the record in the particular case, "it would not have necessarily been an abuse of discretion to omit payment of expenses and attorney fees as a requirement for the dismissal." *Id.* at 772.

In *Vardaman,* though, the case had not gone to trial. The time and effort invested by the parties, and the stage to which the case had progressed, are among the most important factors to be considered in deciding whether to allow a dismissal without prejudice, and, if so, on what conditions. A closer case is *Home Owners' Loan Corp. v. Huffman,* 134 F.2d 314 (8th Cir.1943). There, plaintiff had gained a verdict. We reversed and remanded for a new trial. Prior to the commencement of the new trial, plaintiff was granted a nonsuit without prejudice and without payment of costs. We approved the dismissal without prejudice but held that "the court abused its discretion in permitting dismissal without prejudice unless conditioned on payment of costs." *Id.* at 319. "The rule has long prevailed in both law and equity that a plaintiff may dismiss the case without prejudice only by payment of the costs ...." *Id.* at 317. The question of lawyers' fees is not covered by our opinion.

This case is in some ways between *Vardaman* and *Huffman.* The trial had begun but was not over. In all the circumstances presented here, we think it was an abuse of discretion not to

compensate defendant in some fashion both for costs proper and for attorneys' fees. Such a condition will almost always be appropriate in cases where dismissal is allowed after the trial has begun. In addition, with all deference to the District Court, we believe it considered an improper factor in making its ruling. The only reason the court gave for dismissing without prejudice and without condition was that "TXO will survive." The fact that a party is a corporation, or is thought to be rich, or both, is and must be irrelevant in courts of justice. The courts' duty is to "administer justice without respect to persons, and do equal right to the poor and to the rich ...." 28 U.S.C. § 453.

The District Court's refusal to impose conditions must be reversed. On remand, it should determine the amount of defendant's costs * * * and fees reasonably incurred up through the order of dismissal. Plaintiff need not be required to pay any amount now. But she should be required to make a payment to defendant as a condition of maintaining a second action, if she decides to file one and does so within the relevant period of limitations. * * *

We leave to the District Court the ascertainment of this amount. It may not be appropriate to include all of the lawyers' fees reasonably incurred by TXO. Some of its lawyers' work may not have to be repeated in a second action. We assume, for example, that any discovery taken in the first action should be freely usable in the second, whether the refiling is in a state or a federal court. Plaintiff should be required to pay only for those lawyers' services that will have to be repeated if the case is refiled. * * *

IV.

The order of the District Court, to the extent that it allowed dismissal of the complaint without prejudice, is affirmed. The decision not to impose conditions is reversed, and the cause remanded for further proceedings consistent with this opinion.

It is so ordered.

Notes and Questions

1. Many matters are committed to the discretion of the trial court. For example, Federal Rule 49 provides that the trial court "may" require the jury to return a special verdict or a general verdict with answers to written questions. Suppose the defendant in a case requests that a trial court require the jury to return a general verdict with answers to written questions, but the trial court chooses to call for a general verdict only. The jury returns a general verdict for the plaintiff, upon which judgment is entered, and the defendant takes an appeal. If the court of appeals thinks that the decision to call for a general verdict only was *reasonable*, but that it would have been *better* to submit the requested written questions to the jury, what should it do?

2. Why are any matters committed to the discretion of a trial court? If a court of appeals believes it would have been best to conduct a trial differently from the way the trial court conducted it, why shouldn't the court of appeals order the trial court to do things the better way?

3. In the *Kern* case, what distinguished the point as to which the court of appeals determined that the trial court had not abused its discretion from the point as to which it had?

The Required Quality of Judgment for Preclusion

It is usually said that for a judgment to give rise either to claim or issue preclusion, the judgment must be "valid, final, and on the merits." Each of these terms requires some interpretation.

Valid. The requirement that a judgment be valid does not mean that the judgment must be *correct*. As noted earlier in our study of preclusion, judgments later determined to be incorrect still have preclusive effect. For the most part, the requirement that the judgment be "valid" is satisfied by any judgment except a *default* judgment issued by a court that either lacked personal jurisdiction over the defendant or as to which personal jurisdiction was not perfected by serving the defendant with proper notice. If the defendant appeared in Case 1 and challenged personal jurisdiction, then the defendant is bound by the decision in Case 1 on that issue; if the defendant appeared in Case 1 and failed to challenge personal jurisdiction, the defendant waived the issue. Thus, only default judgments issued without personal jurisdiction or notice fail to be "valid" for preclusion purposes.

A judgment by a federal court is generally considered "valid" for preclusion purposes even if the court lacked subject matter jurisdiction. Some state systems take a different view on this question and regard a judgment entered by a court that lacked subject matter jurisdiction as invalid.

Final. The requirement that the judgment in Case 1 be final has the same significance as the requirement of finality in determining appealability. Interlocutory decisions of trial courts do not have preclusive effect; final decisions do. Thus, in the federal system, if a district court issues a final judgment in Case 1, preclusive effect may be given to that judgment in some other Case 2 even while an appeal of the judgment in Case 1 is pending. Most state systems follow a similar rule. If judgment is entered in Case 2 based on the preclusive effect of Case 1 and then the judgment in Case 1 is overturned on appeal, Federal Rule 60(b)(5) allows the losing party in Case 2 to seek relief from the judgment in Case 2.

On the Merits. The requirement that the judgment in Case 1 be "on the merits" is potentially misleading because some judgments that are not on the merits do receive preclusive effect. But the basic concept is that preclusive effect attaches only to cases decided on their merits; it does not attach to most judgments dismissing a case for preliminary, non-merits-related reasons. For example, if in Case 1 the plaintiff's suit is dismissed for lack of subject matter jurisdiction, the plaintiff is free to refile the case in a court that has subject matter jurisdiction. Similarly, if Case 1 is dismissed for lack of personal jurisdiction, improper venue, or insufficient service of process, the plaintiff is free to bring the suit again in a way that cures the defect. By contrast, if Case 1 is tried, the judgment entered following trial is on the merits and has preclusive effect. Preclusive effect would also attach if Case 1 is decided by summary judgment without trial, as summary judgment is a decision on the merits of a case, and the same result would apply to a judgment as a matter of law entered under Rule 50 (whether before or after a jury's verdict).

The more complicated point is that claim preclusive effect attaches to some judgments that are not on the merits, but that are entered as a sanction for a party's improper conduct. For example, if a plaintiff fails to comply with a court's scheduling orders, the court may, as a sanction, dismiss

the plaintiff's case. See Federal Rule 41(b) (involuntary dismissal). Such a dismissal "operates as a judgment on the merits." *Id*. Accordingly, the plaintiff is not permitted to refile the case; i.e., claim preclusion applies. Issue preclusion, however, would not apply in such a case as no issue was "actually litigated." Similarly, if the defendant never responds to the complaint and a default judgment is entered against the defendant, the judgment has claim preclusive effect even though the judgment is not based on the merits (again, issue preclusive effect would not apply).

Thus, the requirement that a judgment be "on the merits" is best understood as meaning that the judgment resulted from a proceeding in which the parties had an opportunity to get to the merits of the case. If either side failed to seize that opportunity, with the result of either an involuntary dismissal or a default judgment, that judgment is treated as a judgment on the merits for preclusion purposes.

Mark Twain, *Life on the Mississippi*:

Chapter IX
Continued Perplexities

* * * Now I had often seen pilots gazing at the water and pretending to read it as if it were a book; but it was a book that told me nothing. A time came at last, however, when Mr. Bixby seemed to think me far enough advanced to bear a lesson on water-reading. So he began:

'Do you see that long slanting line on the face of the water? Now, that's a reef. Moreover, it's a bluff reef. There is a solid sand-bar under it that is nearly as straight up and down as the side of a house. There is plenty of water close up to it, but mighty little on top of it. If you were to hit it you would knock the boat's brains out. Do you see where the line fringes out at the upper end and begins to fade away?'

'Yes, sir.'

'Well, that is a low place; that is the head of the reef. You can climb over there, and not hurt anything. Cross over, now, and follow along close under the reef—easy water there—not much current.'

I followed the reef along till I approached the fringed end. Then Mr. Bixby said:

'Now get ready. Wait till I give the word. She won't want to mount the reef; a boat hates shoal water. Stand by—wait—*wait*—keep her well in hand. *Now* cramp her down! Snatch her! snatch her!'

He seized the other side of the wheel and helped to spin it around until it was hard down, and then we held it so. The boat resisted, and refused to answer for a while, and next she came surging to starboard, mounted the reef, and sent a long, angry ridge of water foaming away from her bows.

'Now watch her; watch her like a cat, or she'll get away from you. When she fights strong and the tiller slips a little, in a jerky, greasy sort of way, let up on her a trifle; it is the way she tells you at night that the water is too shoal; but keep edging her up, little by little, toward the point. You are well up on the bar, now; there is a bar under every point, because the water that comes down around it forms an eddy and allows the sediment to sink. Do you see those fine lines on the face of the water that branch out like the ribs of a fan? Well, those are little reefs; you want to just miss the ends of them, but run them pretty close. Now look out—look out! Don't you crowd that slick, greasy-looking place; there ain't nine feet there; she won't stand it. She begins to smell it; look sharp, I tell you! Oh blazes, there you go! Stop the starboard wheel! Quick! Ship up to back! Set her back!'

The engine bells jingled and the engines answered promptly, shooting white columns of steam far aloft out of the 'scape pipes, but it was too late. The boat had 'smelt' the bar in good earnest; the foamy ridges that radiated from her bows suddenly disappeared, a great dead swell came rolling forward and swept ahead of her, she careened far over to larboard, and went tearing away toward the other shore as if she were about scared to death. We were a good mile from where we ought to have been, when we finally got the upper hand of her again.

During the afternoon watch the next day, Mr. Bixby asked me if I knew how to run the next few miles. I said:

'Go inside the first snag above the point, outside the next one, start out from the lower end

of Higgins's wood-yard, make a square crossing and—'

'That's all right. I'll be back before you close up on the next point.'

But he wasn't. He was still below when I rounded it and entered upon a piece of river which I had some misgivings about. I did not know that he was hiding behind a chimney to see how I would perform. I went gaily along, getting prouder and prouder, for he had never left the boat in my sole charge such a length of time before. I even got to 'setting' her and letting the wheel go, entirely, while I vaingloriously turned my back and inspected the stem marks and hummed a tune, a sort of easy indifference which I had prodigiously admired in Bixby and other great pilots. Once I inspected rather long, and when I faced to the front again my heart flew into my mouth so suddenly that if I hadn't clapped my teeth together I should have lost it. One of those frightful bluff reefs was stretching its deadly length right across our bows! My head was gone in a moment; I did not know which end I stood on; I gasped and could not get my breath; I spun the wheel down with such rapidity that it wove itself together like a spider's web; the boat answered and turned square away from the reef, but the reef followed her! I fled, and still it followed, still it kept—right across my bows! I never looked to see where I was going, I only fled. The awful crash was imminent. Why didn't that villain come! If I committed the crime of ringing a bell, I might get thrown overboard. But better that than kill the boat. So in blind desperation I started such a rattling 'shivaree' down below as never had astounded an engineer in this world before, I fancy. Amidst the frenzy of the bells the engines began to back and fill in a furious way, and my reason forsook its throne—we were about to crash into the woods on the other side of the river. Just then Mr. Bixby stepped calmly into view on the hurricane deck. My soul went out to him in gratitude. My distress vanished; I would have felt safe on the brink of Niagara, with Mr. Bixby on the hurricane deck. He blandly and sweetly took his tooth-pick out of his mouth between his fingers, as if it were a cigar—we were just in the act of climbing an overhanging big tree, and the passengers were scudding astern like rats—and lifted up these commands to me ever so gently:

'Stop the starboard! Stop the larboard! Set her back on both!'

The boat hesitated, halted, pressed her nose among the boughs a critical instant, then reluctantly began to back away.

'Stop the larboard! Come ahead on it! Stop the starboard! Come ahead on it! Point her for the bar!'

I sailed away as serenely as a summer's morning. Mr. Bixby came in and said, with mock simplicity:

'When you have a hail, my boy, you ought to tap the big bell three times before you land, so that the engineers can get ready.'

I blushed under the sarcasm, and said I hadn't had any hail.

'Ah! Then it was for wood, I suppose. The officer of the watch will tell you when he wants to wood up.'

I went on consuming, and said I wasn't after wood.

'Indeed? Why, what could you want over here in the bend, then? Did you ever know of a boat following a bend up-stream at this stage of the river?'

'No, sir—and I wasn't trying to follow it. I was getting away from a bluff reef.'

'No, it wasn't a bluff reef; there isn't one within three miles of where you were.'

'But I saw it. It was as bluff as that one yonder.'

'Just about. Run over it!'

'Do you give it as an order?'

'Yes. Run over it!'

'If I don't, I wish I may die.'

'All right; I am taking the responsibility.'

I was just as anxious to kill the boat, now, as I had been to save her before. I impressed my orders upon my memory, to be used at the inquest, and made a straight break for the reef. As it disappeared under our bows I held my breath; but we slid over it like oil.

'Now, don't you see the difference? It wasn't anything but a *wind* reef. The wind does that.'

'So I see. But it is exactly like a bluff reef. How am I ever going to tell them apart?'

'I can't tell you. It is an instinct. By and by you will just naturally *know* one from the other, but you never will be able to explain why or how you know them apart.'

It turned out to be true. The face of the water, in time, became a wonderful book—a book that was a dead language to the uneducated passenger, but which told its mind to me without reserve, delivering its most cherished secrets as clearly as if it uttered them with a voice. And it was not a book to be read once and thrown aside, for it had a new story to tell every day. Throughout the long twelve hundred miles there was never a page that was void of interest, never one that you could leave unread without loss, never one that you would want to skip, thinking you could find higher enjoyment in some other thing. There never was so wonderful a book written by man; never one whose interest was so absorbing, so unflagging, so sparkingly renewed with every re-perusal. The passenger who could not read it was charmed with a peculiar sort of faint dimple on its surface (on the rare occasions when he did not overlook it altogether); but to the pilot that was an *italicized* passage; indeed, it was more than that, it was a legend of the largest capitals, with a string of shouting exclamation points at the end of it; for it meant that a wreck or a rock was buried there that could tear the life out of the strongest vessel that ever floated. It is the faintest and simplest expression the water ever makes, and the most hideous to a pilot's eye. In truth, the passenger who could not read this book saw nothing but all manner of pretty pictures in it painted by the sun and shaded by the clouds, whereas to the trained eye these were not pictures at all, but the grimmest and most dead-earnest of reading-matter.

Now when I had mastered the language of this water and had come to know every trifling feature that bordered the great river as familiarly as I knew the letters of the alphabet, I had made a valuable acquisition. But I had lost something, too. I had lost something which could never be restored to me while I lived. All the grace, the beauty, the poetry had gone out of the majestic river! I still keep in mind a certain wonderful sunset which I witnessed when steamboating was new to me. A broad expanse of the river was turned to blood; in the middle distance the red hue brightened into gold, through which a solitary log came floating, black and conspicuous; in one place a long, slanting mark lay sparkling upon the water; in another the surface was broken by boiling, tumbling rings, that were as many-tinted as an opal; where the ruddy flush was faintest, was a smooth spot that was covered with graceful circles and radiating lines, ever so delicately traced; the shore on our left was densely wooded, and the somber shadow that fell from this forest was broken in one place by a long, ruffled trail that shone like silver; and high above the forest wall a clean-stemmed dead tree waved a single leafy bough that glowed like a flame in the unobstructed splendor that was flowing from the sun. There were graceful curves, reflected images, woody heights, soft distances; and over the whole

scene, far and near, the dissolving lights drifted steadily, enriching it, every passing moment, with new marvels of coloring.

I stood like one bewitched. I drank it in, in a speechless rapture. The world was new to me, and I had never seen anything like this at home. But as I have said, a day came when I began to cease from noting the glories and the charms which the moon and the sun and the twilight wrought upon the river's face; another day came when I ceased altogether to note them. Then, if that sunset scene had been repeated, I should have looked upon it without rapture, and should have commented upon it, inwardly, after this fashion: 'This sun means that we are going to have wind to-morrow; that floating log means that the river is rising, small thanks to it; that slanting mark on the water refers to a bluff reef which is going to kill somebody's steamboat one of these nights, if it keeps on stretching out like that; those tumbling 'boils' show a dissolving bar and a changing channel there; the lines and circles in the slick water over yonder are a warning that that troublesome place is shoaling up dangerously; that silver streak in the shadow of the forest is the 'break' from a new snag, and he has located himself in the very best place he could have found to fish for steamboats; that tall dead tree, with a single living branch, is not going to last long, and then how is a body ever going to get through this blind place at night without the friendly old landmark?'

No, the romance and the beauty were all gone from the river. All the value any feature of it had for me now was the amount of usefulness it could furnish toward compassing the safe piloting of a steamboat. Since those days, I have pitied doctors from my heart. What does the lovely flush in a beauty's cheek mean to a doctor but a 'break' that ripples above some deadly disease? Are not all her visible charms sown thick with what are to him the signs and symbols of hidden decay? Does he ever see her beauty at all, or doesn't he simply view her professionally, and comment upon her unwholesome condition all to himself? And doesn't he sometimes wonder whether he has gained most or lost most by learning his trade?