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COMMENTS

Directing The Verdict in Favor of the Party With the Burden of Proof

The North Carolina Supreme Court recently added another decision to the growing body of case law interpreting the state's new federal-like rules of civil procedure. The issue presented in *Cutts v. Casey*¹ was whether the party with the burden of proof was entitled to a directed verdict in his favor under rule 50.² On the facts of the case the court determined that the directed verdict was not warranted. The majority opinion went beyond the facts presented, however, and engaged in a discussion of the general propriety of directing a verdict in favor of a proponent. The opinion expressed doubt as to whether rule 50 would ever authorize such a procedure but grudgingly conceded that there might be some situations, to be identified in later cases, in which the trial judge could appropriately resolve a controversy in favor of the party with the burden of proof as a matter of law.³

Cutts illustrates the general judicial attitude toward a proponent's motion for a directed verdict or a judgment non obstante veredicto. Such motions are regarded as distinct from motions for directed verdicts against the party with the burden of proof and have traditionally been less available than have the converse procedures. This disparate treatment has little theoretical validity. Whichever party moves for a resolution of the case as a matter of law, the ultimate question is always whether reasonable minds could reach any other conclusion. And the law suffers no less when the party with the burden of proof loses because of jury prejudice than when he wins for the same reason. This is not to say that the motions for directed verdicts of the respective parties are identical. If the movant is the party not shouldered with the burden of proving his case, his motion will succeed if his opponent's evidence is so insufficient that no reasonable man could render a verdict for the opponent. On the other hand, if the movant has the burden of persua-

¹278 N.C. 390, 180 S.E.2d 297 (1971). *Cutts* is analyzed in Louis, *A Survey of Decisions Under the New North Carolina Rules of Civil Procedure*, 50 N.C.L. REV. 729, 746-54 (1972).

²N.C. GEN. STAT. § 1A-1, Rule 50 (1969). The precise issue presented in *Cutts* was whether the granting of the proponent's motion for a judgment notwithstanding the verdict was appropriate. The court, however, treated that motion as if it had been a motion for a directed verdict. This comment will also treat the two motions as identical since they are so closely analogous. Moreover, much of what is said here is applicable to similar procedures such as the demurrer to the evidence.

³278 N.C. at 421, 180 S.E.2d at 314.

sion, his motion can succeed only if the evidence is so overwhelmingly in his favor that no reasonable man could find for the adverse party.⁴ The consequence of this difference is that a verdict will less often be directed in favor of the party with the burden of proof than against him. Clearly, however, the difference can justify neither an absolute prohibition nor a curtailment of the availability of directed verdicts in favor of the party with the burden of proof.

In the past fifteen years⁵ all courts considering the question have apparently come to agree with the above conclusion, at least to the extent that no case has completely banned directed verdicts in favor of the party with the burden of proof. Nonetheless, there is considerable disagreement among jurisdictions as to what situations give rise to the duty of the trial judge to direct a verdict in favor of the proponent.

All post-1956 cases authorize direction of the verdict for the party with the burden of proof where the other party establishes the proponent's case by admitting "either in his pleadings or by counsel in open court or in his individual testimony on trial the truth of the basic facts upon which the claim of the proponent rests."⁶ In the most common admission case the opponent admits the prima facie case of the party with the burden of proof and interposes an affirmative defense that he fails to support evidentially⁷ or that is legally insufficient to relieve liability.⁸ Another recurrent situation that triggers the right of the party with the burden of proof to a directed verdict is where a plaintiff in a negligence action testifies to facts that clearly establish contributory negligence.⁹

*Stewart v. Gilmore*¹⁰ is an admission case in a somewhat different vein but one which underscores the necessity of preserving the availability of the directed verdict to the party with the burden of proof. In

⁴2B W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1075 (Wright ed. 1961).

⁵For a description of the state of the law before 1956, see authorities cited notes 18, 31, & 40 *infra*.

⁶Charles F. Curry & Co. v. Hedrick, 378 S.W.2d 522, 531 (Mo. 1964) (per curiam); accord, Coulthard v. Keenan, 256 Iowa 890, 129 N.W.2d 597 (1964); Vincent v. Raffety, 344 S.W.2d 293 (Mo. Ct. App. 1961); Smith v. Burleson, 9 N.C. App. 611, 177 S.E.2d 451 (1970).

⁷See, e.g., Lansdale Clothes, Inc. v. Wright, 217 Ga. 817, 125 S.E.2d 502 (1962); Acceptance Corp. v. Snider, 128 Ind. App. 447, 149 N.E.2d 698 (1958) (en banc).

⁸See, e.g., Commonwealth v. Pine Coal Co., 414 S.W.2d 134 (Ky. 1967); Auffenberg v. Hafley, 457 S.W.2d 929 (Mo. Ct. App. 1970) (per curiam); Somerville v. Pennsylvania R.R., 151 W. Va. 709, 155 S.E.2d 865 (1967).

⁹See, e.g., Mies v. Twietmeyer, 193 Kan. 97, 392 P.2d 118 (1964).

¹⁰323 F.2d 389 (5th Cir. 1963).

Stewart, a black sharecropper in Mississippi brought suit against his white employer, alleging that the defendant had pistol-whipped the plaintiff without provocation and forced him to flee with his family from Mississippi to Louisiana. The plaintiff's testimony at trial substantiated the allegations of the complaint. The defendant also testified, admitting that he had indeed struck the plaintiff and chased him from a store. No suggestion of legal provocation appeared anywhere in the evidence. After denying the plaintiff's motion for a directed verdict, the trial judge sent the case to the jury.

The jury deliberated for two hours before returning to the courtroom to inquire of the judge whether they could find for the plaintiff without awarding damages. After further instructions they retired again, returning shortly thereafter with a verdict for the defendant. On appeal the Fifth Circuit Court of Appeals reversed and directed the trial judge on remand to enter a judgment non obstante veredicto for the plaintiff, leaving open the questions of damages and whether the defendant had actually forced the plaintiff to flee Mississippi.¹¹ Had the appellate court been of the opinion that a verdict could never be directed for the party with the burden of proof, it would have been almost impotent to correct an obvious injustice precipitated by jury prejudice.¹²

In at least one other situation the courts appear unanimous in their approval of directing verdicts in favor of parties with the burden of persuasion. "[A] verdict may be directed in favor of the party having the burden of proof . . . where the controlling evidence is documentary, and its interpretation and construction a matter of law for the court, and leads to but one conclusion . . ." ¹³ For example, in *Commerce Trust Co. v. Howard*,¹⁴ the plaintiff sued on a surety contract, presenting as evidence the contract itself, the account cards of the principal debtor showing loans made and amounts due, and supportive retail installment contracts and chattel mortgages. The defendants did not contradict or

¹¹*Id.* at 392. One rather startling feature of this case is that apparently the plaintiff failed to move for a directed verdict at trial. Thus the court seems to hold that such a motion is not always a necessary prerequisite for a judgment n.o.v.

¹²Of course the court could have ordered a new trial. But there is no guarantee, especially in a situation such as this, that the second jury will be any less prejudicial than the first. Moreover, the new-trial route is much more costly to the litigants and to the judicial system than the directed verdict or judgment n.o.v.

¹³*Acceptance Corp. v. Snider*, 128 Ind. App. 447, —, 149 N.E.2d 698, 699 (1958) (en banc); *accord*, *Dr. Pepper Fin. Corp. v. Cooper*, 215 Ga. 598, 112 S.E.2d 585 (1960); *Charles F. Curry & Co. v. Hedrick*, 378 S.W.2d 522 (Mo. 1964) (per curiam).

¹⁴429 S.W.2d 702 (Mo. 1968).

deny the authenticity or correctness of these documents and the court held that a verdict should have been directed for the plaintiff.¹⁵

The documentary-evidence cases may be viewed as nothing more than subspecies of the admission cases. If the opponent does not deny the correctness or authenticity of the documents, he is deemed to have admitted them. But something more may be involved. At least one case has suggested that even though the correctness of the documents is denied, "[c]lear, uncontradicted, self-consistent, and unimpeached business records of a party having initial production and persuasion burdens may suffice for a directed verdict in his favor."¹⁶ Thus it is possible that some courts would require a litigant to contradict or impeach documentary evidence in order to avoid direction of the verdict for the party with the burden of proof.¹⁷

But the most spirited controversy in this area in the last fifteen years has arisen in the situation in which the proponent's evidence is oral and uncontradicted and unimpeached by other evidence.¹⁸ Courts that deny the trial judge's power to direct for the party with the burden of proof under such circumstances stress the historical separation of the functions of judge and jury. It is for the jury and the jury alone, these courts say, to pass upon the credibility of the witnesses. And if the judge takes the case from the jury and finds for the proponent as a matter of law on the basis of uncontradicted and unimpeached evidence, he usurps the jury's authority.

Missouri, Pennsylvania, and North Carolina have been the leading advocates of this view in the past fifteen years. The Missouri courts have employed very strong language in several cases against ever directing a verdict in favor of the party with the burden of proof in the absence of a judicial admission by the opposing party or unless the evidence is documentary and uncontroverted. "Where the evidence is oral . . . the party having the burden of proof on a controverted [in other words, not admitted] issue of fact is not entitled to a directed verdict as his adver-

¹⁵*Accord*, J.R. Watkins Co. v. Smith, 421 S.W.2d 527 (Mo. Ct. App. 1967).

¹⁶Watkins Prods., Inc. v. Keane, 185 Neb. 424, 427, 176 N.W.2d 231, 232 (1970).

¹⁷*Contra*, Hales & Hunter Co. v. Wyatt, 239 Ark. 19, 386 S.W.2d 704 (1965); *State ex rel. Hickory County v. Davis*, 302 S.W.2d 892 (Mo. 1958).

¹⁸For discussion of this problem before 1956, see Sunderland, *Directing A Verdict for the Party Having the Burden of Proof*, 11 MICH. L. REV. 198 (1913); Note, *A Query About Plaintiff's Right to a Directed Verdict As To Defendant's Negligence*, 11 MD. L. REV. 44 (1950); Note, *Practice and Procedure—Demurrer to Evidence—Directing Verdict in Favor of Party Having Burden of Proof*, 30 MICH. L. REV. 474 (1932); Annot., 62 A.L.R.2d 1191 (1958); Annot., 8 A.L.R. 796 (1920).

sary is entitled to have the trier of the facts pass on the credibility of the witnesses and the weight of their testimony, even though the testimony be uncontradicted."¹⁹ *Parsons Construction Co. v. Missouri Public Service Co.*²⁰ perhaps best demonstrates the steadfastness with which the Missouri courts cling to this view. The contention was there made that allowing the jury to reject uncontradicted and unimpeached evidence without restraint results in verdicts founded upon nothing more than jury passion and prejudice. This contention, said the court, is based upon the "erroneous assumption that the verdict against the party having the burden of proof must have 'tangible support' in the evidence."²¹ The language of the Pennsylvania decisions is equally forceful.²²

North Carolina is likewise insistent that "the judge cannot direct a verdict upon any controverted issue in favor of the party having the burden of proof 'even though the evidence is uncontradicted.'"²³ North Carolina, however, does not rely solely upon the distinction between the functions of judge and jury to support its position. The state's no-comment rule, which forbids the trial judge from opining as to "whether a fact is fully or sufficiently proved,"²⁴ is advanced as an additional justification for the conclusion that a proponent is never entitled to a directed verdict in the absence of an admission or documentary evidence.²⁵

Such restrictive holdings are quite anachronistic. Their logic would have been cogent at a time when juries were composed of citizens personally knowledgeable of the facts of the case. But under the conditions of modern-day jurisprudence, where only those ignorant of the facts surrounding a lawsuit are qualified to become jurors, such logic lacks vitality. Today jurors can decide controversies rationally only on the basis of evidence presented in the courtroom. If they be allowed to disregard such evidence, their verdict rests on speculation alone. Thus,

¹⁹*Hoerath v. Sloan's Moving & Storage Co.*, 305 S.W.2d 418, 421 (Mo. 1957) (per curiam); *accord*, *Boyd v. Margolin*, 421 S.W.2d 761 (Mo. 1967); *Nichols v. Blake*, 418 S.W.2d 188 (Mo. 1967).

²⁰425 S.W.2d 166 (Mo. 1968).

²¹*Id.* at 172.

²²*See, e.g.*, *Varallo v. Pennsylvania R.R.*, 424 Pa. 1, 3, 225 A.2d 552, 553 (1967): "It is well established that it is error for a trial court to direct a verdict for a plaintiff whose claim rests upon oral testimony even if that testimony is uncontradicted and unimpeached, because the credibility of the witnesses is always for the jury."

²³*Cutts v. Casey*, 278 N.C. 390, 417-18, 180 S.E.2d 297, 311 (1971).

²⁴N.C. GEN. STAT. § 1A-1, Rule 51(a) (1969).

²⁵*Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

as a New York court long ago stated, "If juries are permitted to discredit or disregard [uncontradicted and unimpeached] testimony, there is no safety in the administration of justice, and parties might just as well let the result of a litigation abide the cast of a die, or a game of chance."²⁶

Moreover, allowing a judge to direct a verdict for the party with the burden of proof where his evidence is uncontradicted and unimpeached in no way interferes with the province of the jury. All the judge decides in such circumstances is that on the evidence presented no jury, acting rationally, could fail to render a verdict for the movant. Once the judge decides this, no issue of fact exists and, therefore, the jury has no function to perform. The judge's decision "does indeed involve accepting (not assuming) credibility, but this is no more and no less a matter of law than deciding that only one inference may be drawn from the evidence, or that evidence assumed to be credible does not amount to a 'scintilla,' etc."²⁷ For this reason, North Carolina's reliance on its no-comment rule fails to bolster its conclusion that a directed verdict for the proponent is never appropriate on uncontradicted evidence. "The no-comment rule is one designed to prevent a judge's intrusion on the fact finding functions of the jury *after* he has decided the prior question of law: 'Is there a genuine issue of fact requiring jury determination?' It speaks not at all to the basis for deciding this preliminary question."²⁸

Most recent decisions recognize the above objections to the restrictive position exemplified by the Missouri, Pennsylvania, and North Carolina cases and agree generally that uncontradicted and unimpeached oral evidence may form a predicate for directing a verdict in favor of the party with the burden of proof.²⁹ Of course, the uncontrad-

²⁶Seibert v. Erie Ry., 49 Barb. 583, 586 (N.Y. 1867).

²⁷2 A. McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1488.20, at 25 (Supp. 1970) (footnote omitted).

²⁸*Id.* (emphasis in original) (footnote omitted).

²⁹*See, e.g.,* Chicago, R. Is. & Pac. Ry. v. Howell, 401 F.2d 752 (10th Cir. 1968); Gatenby v. Altoona Aviation Corp., 407 F.2d 443 (3d Cir. 1963); Campbell v. Prudential Ins. Co., 16 Ill. App. 2d 65, 147 N.E.2d 404 (1958); Bessman v. Harding, ___ Iowa ___, 176 N.W.2d 129 (1970); Virginia Collins Coal Co. v. Byrge, 340 S.W.2d 464 (Ky. 1960); Clark v. McCune, 361 P.2d 219 (Okla. 1961) (per curiam).

It should be noted that considerable disagreement exists among the federal courts of appeals over whether the state or the federal standard applies in a diversity case to determine the sufficiency of the evidence to go to the jury. *Compare* Gross v. Southern Ry., 446 F.2d 1057 (5th Cir. 1971); Weeks v. Latter-Day Saints Hosp., 418 F.2d 1035 (10th Cir. 1969); Gatenby v. Altoona Aviation Corp., 407 F.2d 443 (3d Cir. 1968); Safeway Stores v. Fannan, 308 F.2d 94 (9th Cir. 1962); United States Fire Ins. Co. v. Milner Hotels, 253 F.2d 542 (8th Cir. 1958), *with* Gullett v. St. Paul Fire

icted testimony must lead to but one rational conclusion and clearly establish the proponent's case. Thus it has been held that though the proponent's uncontradicted evidence clearly establishes a lack of reasonable care on the part of his opponent, a directed verdict on the issue of liability is not appropriate unless similarly strong evidence also establishes some injury and that the injury was proximately caused by the opponent's negligence.³⁰

But even though the evidence be uncontradicted and lead to only one rational conclusion, a directed verdict for the party with the burden of proof may still be inappropriate. Various factors may so taint the trustworthiness of the evidence as to make it improper for the judge to accept it. One such factor is the interest of the witness in the litigation.³¹ At least one court within the last fifteen years has given this factor controlling effect, holding that " 'a verdict upon an issue of fact should not be directed in favor of the party who has the burden of proof with respect thereto, unless such fact . . . is established by the undisputed testimony of one or more *disinterested* witnesses and different minds cannot reasonably draw different conclusions from such testimony.' " ³² Most recent decisions, however, give little weight to the interest of the witness in deciding whether the judge may find for the party with the burden of proof as a matter of law.³³

Modern courts are much more concerned with other circumstances which may give rise to conflicting inferences as to testimonial trustworthiness. Whether the testimony is contrary to reason, scientific facts, or common knowledge; whether it contains internal inconsistencies; whether it is equivocal; and whether it is improbable are the questions the post-1956 cases most frequently ask in adjudging the trial court's acceptance or rejection of the proponent's uncontradicted and unim-

& Marine Ins. Co., 446 F.2d 1100 (7th Cir. 1971); *Dean v. Southern Ry.*, 327 F.2d 757 (6th Cir. 1964). Only a definitive statement by the Supreme Court will correct this difficulty. See Moore, *A Century Old Problem: Federal or State Law As Determinative of a Directed Verdict in a Federal Court*, 4 U. RICH. L. REV. 282 (1970); Comment, *Directed Verdicts and the Right to Trial By Jury in Federal Courts*, 42 TEXAS L. REV. 1053 (1964).

³⁰*Hedges v. Conder*, — Iowa —, 166 N.W.2d 844 (1969); *Peroti v. Williams*, 258 Md. 663, 267 A.2d 114 (1970); *Ferguson v. Boyd*, 448 S.W.2d 901 (Mo. 1970). *But see Houchins v. Coggi*, 43 Ill. App. 2d 433, 193 N.E.2d 597 (1963).

³¹The older cases considering this factor are collected in Annot., 72 A.L.R. 27 (1931).

³²*Spink v. Mourton*, 235 Ark. 919, 922, 362 S.W.2d 665, 667 (1962) (emphasis added).

³³*See, e.g., Commonwealth v. Pine Coal Co.*, 414 S.W.2d 134 (Ky. 1967); *Ferdinand v. Agricultural Ins. Co.*, 22 N.J. 482, 126 A.2d 323 (1956); *Clark v. McCune*, 361 P.2d 219 (Okla. 1961) (per curiam).

peached evidence. In *Hager v. Over*,³⁴ for example, the court affirmed the trial judge's refusal to direct a verdict for the plaintiff because her evidence, though uncontradicted, was so equivocal that it would not have been unreasonable for the fact finder not to have been persuaded by it.³⁵

Another case illustrating the modern-day approach to the question of whether the proponent is entitled to a directed verdict upon uncontradicted evidence is *Ferdinand v. Agricultural Ins. Co.*³⁶ There the plaintiffs' story was that a thief had broken into their car as it sat outside a Florida motel and removed all the valuable pieces of jewelry contained in a jewelry box, leaving behind costume jewelry of trivial worth. A deputy sheriff partially corroborated this testimony, stating that when he arrived on the scene after the alleged theft one of the windows in the plaintiffs' car was shattered and jewelry was scattered over the car's interior. The defendant, insurer of the jewelry, offered no evidence and the trial court directed a verdict for the plaintiffs. The intermediate appellate court affirmed.³⁷ The supreme court noted that "where the uncontradicted testimony of a witness, interested or otherwise, is unaffected by any conflicting inferences to be drawn from it and is not improbable, extraordinary or surprising in its nature, or there is no other ground for hesitating to accept it as the truth, there is no reason for denying the verdict dictated by such evidence"³⁸ However, the court could understand neither why 12,000 dollars' worth of jewelry would be left unguarded overnight in a parked car nor why a thief would pause long enough to segregate expensive items from those less expensive, and thus reversed the trial court's decision, saying that plaintiffs' evidence was too improbable to form the basis of a directed verdict.

One final circumstance may influence a court in granting or denying the proponent's motion for a directed verdict. At least one court within the last fifteen years has suggested that the proponent's uncontradicted evidence must be capable of contradiction in order to form the predicate for a directed verdict.³⁹ And while most courts would not go to this extreme, the fact that the evidence is capable of contradiction

³⁴453 S.W.2d 752 (Ky. 1970).

³⁵*Cf. Ulrych v. General Accident Group*, 3 Mich. App. 268, 142 N.W.2d 36 (1966).

³⁶22 N.J. 482, 126 A.2d 323 (1956).

³⁷*Ferdinand v. Agricultural Ins. Co.*, 40 N.J. Super. 1, 122 A.2d 1 (1956).

³⁸22 N.J. at 498, 126 A.2d at 332.

³⁹*Chicago, R. Is. & Pac. Ry. v. Howell*, 401 F.2d 752, 754 (10th Cir. 1968).

may persuade a court to be less strict in requiring unquestionable trustworthiness.

Few legitimate objections can be advanced against the rule allowing directed verdicts in favor of the party with the burden of proof on uncontradicted and unimpeached evidence. Some commentators have viewed the rule with reservation, fearing that courts might expand it to cover cases in which the proponent's evidence is contradicted but only by evidence of minor probative force.⁴⁰ Apparently such fears were based upon cases tending to equate the requirements for motions for directed verdicts with those for motions for new trials.⁴¹ The experience of the last fifteen years, however, has demonstrated that the courts will not take so large a step. Though some courts have stated that the proponent should be granted a directed verdict whenever a verdict against him could never stand, the requirement that the proponent's evidence be uncontradicted has not been abandoned.⁴²

The rule allowing directed verdicts for parties with the burden of proof on uncontradicted evidence has also been challenged on the ground that the trial judge may not be able to identify all valid indications of evidential untrustworthiness that might be credited by the jury. The judge, however, may direct a verdict for the proponent only when the evidence is particularly persuasive. Furthermore, if the judge entertains the slightest doubt of the truthfulness of the uncontradicted evidence, he should leave the case to the jury.

Thus, the weight of recent authority and the better reasoning vest the trial judge with power to take direct control of litigation in clearly delineated situations and direct the verdict in favor of the party with the burden of proof. But since it is unanimously agreed that seldom will a proponent so persuasively make out his case as to be entitled to a verdict as a matter of law, one may well ask how the availability of such a procedure substantially improves the delivery of justice. The obvious response is that the procedure will insure that justice is done in the admittedly few situations in which its use is appropriate. Less obviously but more importantly, the availability of the directed verdict in favor

⁴⁰See, e.g., Note, *The Power of the Court to Determine Witness Credibility: A Problem in Directing a Verdict for the Proponent of the Evidence*, 107 U. PA. L. REV. 217 (1958).

⁴¹It has been suggested that such cases are not as radical as they seem because of the similarity in various jurisdictions of the tests for directed verdicts and new trials. James, *Sufficiency of the Evidence and Jury Control Devices Available Before Verdict*, 47 VA. L. REV. 218, 233-34 (1961).

⁴²See, e.g., *Chicago, R. Is. & Pac. Ry. v. Howell*, 401 F.2d 752 (10th Cir. 1968).