UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 8 | Number 3 Article 15

4-1-1930

Evidence -- Effect of Uncontradicted Rebutting Evidence on Presumption of Respondeat Superior in Automobile Accidents

J. Frazier Glenn Jr.

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

 Part of the Law Commons

Recommended Citation

J. F. Glenn Jr., *Evidence -- Effect of Uncontradicted Rebutting Evidence on Presumption of Respondeat Superior in Automobile Accidents*, 8 N.C. L. Rev. 298 (1930).
Available at: http://scholarship.law.unc.edu/nclr/vol8/iss3/15

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

be partial to junior shareholders the opportunity of discriminating against holders of non-cumulative preferred stock by allowing the profits of the corporation to accumulate over a period of years instead of declaring dividends from the profits as they accrue each year.[10] However, a court of equity will compel directors to declare a dividend where it is clear that a fraudulent accumulation of profits is being allowed.[11] But it is obvious that the relief to be obtained from such a remedy is more apparent than real because of the great difficulty in proving such a discrimination and the reluctance of equity to interfere with corporate management.[12] The result of the instant decision at least gives a definite legal meaning to "non-cumulative preferred stock" and requires, in order to protect the holders of such stock from discrimination by a partial corporate directorate, the insertion of express provisions in corporate charters and stock certificates entitling the holders of non-cumulative preferred stock to participate in those profits which have accumulated over a period of years upon which yearly dividends have not been declared.

J. FRAZIER GLENN, JR.

Evidence—Effect of Uncontradicted Rebutting Evidence on Presumption of Respondeat Superior in Automobile Accidents

Among the many problems that have arisen because of the widespread use of automotive transportation is the one dealing with the increasing number of automobile accidents. Statistics supplied by the National Safety Council of Chicago show that motor vehicle fatalities have increased at the rate of approximately two thousand per year since 1925 despite the more efficient precautionary methods

[10] See Berle, *Non-Cumulative Preferred Stock, supra* note 4, for detailed illustration of how the accumulation of profits over a period of years will affect holders of non-cumulative preferred stock.

It is true as a general proposition that directors of a corporation, in allowing profits to accumulate over a period of years, have some sound business reason for so doing, but it is not improbable that in many cases the real reason for allowing profits to accumulate is the desire of the directors to further their own financial interests—if they own junior stock, either directly or indirectly.

[11] Hazeltine v. Belfast, etc. Ry. Co., 79 Me. 411, 10 Atl. 328, 1 Am. St. Rep. 330 (1887); In re Brantman, 244 Fed. 101 (C. C. A. 2nd, 1917); Dodge v. Ford Motor Co., 204 Mich. 459, 170 N. W. 668, 3 A. L. R. 413 (1919); Cannon v. Wischassett Mills Co., 195 N. C. 119, 141 S. E. 344 (1928). It should be noted, however, that a declaration of dividends from those profits which are in excess of a working capital can be required by any shareholder under N. C. Cons. Stat. Ann (1919) §1178.

[12] Morse v. Boston and M. R. R., 263 Mass. 308, 160 N. E. 894 (1928); Fernald v. Frank Ridlon Co., 246 Mass. 64, 140 N. E. 421 (1923).

of avoiding them which are in use today. When one considers the fact that more United States citizens are killed every year by automobiles than were killed in the late war and that for every person killed there are approximately thirty-five persons injured,[1] it is quite easy to sympathize, not only with those who have been injured, but also with the courts of this country which are faced with the problem of dealing justice in the thousands of suits which have arisen as a result of automobile accidents. Some of the practical difficulties with which the courts and the parties are confronted in the handling of such suits under the present system are: (1) "The difficulty, delay, expense, annoyance, and uncertainty of litigation, in which the determination of negligence and the exact amount of damage are involved; (2) the failure of compensation in many cases because of the financial irresponsibility of many defendants; and, (3) the economic loss and personal hardship resulting from uncompensated injuries."[2] Expert committees, legislators, and lawyers have advocated the adoption of one or more of the following remedies:[3] (1) Special courts to try motor vehicle cases;[4] (2) shifting the burden of proof, not only in suits against drivers for negligent injuries caused by them, but also by extending the doctrine of *respondeat superior;*[5] (3) requiring automobile owners to take out liability insurance;[6] (4) compulsory liability laws to be administered by Special Boards.[7] The

[1] See Ballantine, *A Study of Compensation for Automobile Accidents* (Feb. 1930) 16 A. B. A. J. 97.

[2] *Supra* note 1.

[3] "Last June work was begun by a voluntary committee known as the Committee to Study Compensation for Automobile Accidents. Funds have been provided by the Rockefeller Foundation and the work is being conducted under the auspices of the Council for Research in the Social Sciences of Columbia University, with the aid of the School of Law of Yale University. The Committee is composed largely of lawyers and was initiated as an effort on the part of lawyers to determine whether an unsatisfactory legal situation can be met by new methods." *Supra* note 1, p. 97. The organization of this committee is probably a result of the beneficial work done by smaller committees in a number of the states.

[4] Special courts would reduce delay and tend to develop a simplified practice, but this remedy alone would not cure the difficulty of proving negligence or insure the financial responsibility of defendants. Also, only the populous districts could afford the expense of such courts.

[5] For a discussion as to the extent and method of shifting the burden of proof in such cases, see comment in this issue of the N. C. LAW REV., p. 309.

[6] Ten states have adopted laws tending to increase the financial responsibility of automobile owners for injuries caused by their automobiles. See Ballantine, *Study of Compensation for Automobile Accidents, supra* note 1, at page 99. See also, Elsbree and Roberts, *Compulsory Insurance Against Motor Vehicle Accidents* (1928) 76 U. of PA. L. REV. 690.

[7] In the "compulsory liability plan," it is believed, lies the ultimate solution to the automobile accident problem. Analogy can be found in the almost uni-

extensive employment of presumptions today in extending the doctrine of *respondeat superior* suggests a discussion of their effect in automobile accident cases.

A recent North Carolina case[8] not only approves the apparently general rule that proof of ownership of car plus proof that the driver was acting within the general employment of the owner creates a prima facie case that the driver was acting *within the course of his employment* at the time of the injury,[9] but also raises the question whether the direct, uncontradicted[10] evidence of a defendant when offered in rebuttal of such a prima facie case entitles him to a directed verdict.[11] In this case, a negro, employed by the defendant corporation to drive its truck, injured the plaintiff while driving the truck. Defendant offered direct, uncontradicted evidence that it had ordered the negro not to drive the truck without express orders, that the negro was driving the truck at the time of the injury without express orders, and that the driver was, at that time, on his way to see his sick mother during lunch hour. The Supreme Court held that defendant's motion for non-suit was properly overruled and that the jury was justified in finding for the plaintiff. In discussing this problem two questions arise at the outset, namely whether a defendant under such circumstances is always entitled as a matter of right to

versal enactment of Workmen's Compensation Acts and the efficacy of such acts (in which compensation is fixed by statute regardless of the fault of the parties) has been well established. This plan has also been suggested as a workable device in settling similar problems arising railroad accidents. Note (1929) 8 N. C. L. REV. 50, 51. See also Ballantine, *Study of Compensation for Automobile Accidents, supra* note 1; Elsbree and Roberts, *Compulsory Ins., etc., supra* note 6.

[8] Jeffrey v. Osage Manufacturing Co., 197 N. C. 724, 150 S. E. 503 (1929).

[9] It is generally held that proof of ownership plus proof of general employment creates a presumption of *respondeat superior*. In some courts, mere proof of ownership is sufficient to raise such a presumption. Still others impose the heavier burden of the risk of non-persuasion upon the defendant automobile owner. For discussion of above rules, see HUDDY on AUTOMOBILES (7th ed.) §§795, 796; (1930) 10 BOSTON U. L. REV. 83; comment in this issue of N. C. L. REV., p. 309.

[10] By "uncontradicted evidence of defendant" is meant that evidence of the defendant which has not been opposed by the contradicting, *direct* evidence of the plaintiff. It is clear that even the circumstantial evidence of a plaintiff might "contradict," in a sense, the evidence of a defendant.

[11] Although North Carolina does not allow a peremptory ruling in favor of the one having the burden of proof in the primary sense, i.e. the burden of the issue, Anniston Nat. Bank v. School Committee of Durham, 121 N. C. 107, 28 S. E. 134 (1897), there would apparently be no objection to allowing a directed verdict for a defendant automobile owner, because the burden of proof in the primary sense is not on him, but still remains upon the plaintiff to ultimately prove negligence.

a peremptory ruling of the court and, if not, when is he entitled to such a ruling.

At first glance it would seem that a defendant should always be entitled to a favorable ruling when he has offered uncontradicted evidence in opposition to a presumption because the rule that a presumption disappears upon the production of rebutting evidence[12] would seemingly leave the plaintiff, who has relied solely upon the presumption, without any case. However true the statement as to the presumption's disappearance may be, it does not always follow that the plaintiff is actually left without support, because, granting that the presumption does disappear, there are still left the proved facts upon which the presumption was based which are circumstantial or inferential evidence to be weighed against the direct evidence of the defendant. For example, proof of the fact that *X* has in his possession stolen goods, upon which the presumption that *X* stole them is based,[13] is strong circumstantial evidence, irrespective of the presumption, that *X* actually stole the goods; and, proof of the facts that a letter was duly addressed, stamped, mailed, upon which the presumption that said letter was received by the addressee[14] is based, is cogently inferential of the fact that the letter was received.

However, the facts upon which many presumptions are based are not always as persuasive as those illustrated by the situations in the foregoing paragraph, and in fact, there are some presumptions which are altogether devoid of any inferential force whose existence is justified solely upon the ground of policy. Thus, a statutory presumption[15] of negligence against a railway company upon proof that plaintiff was injured by its train is not based as much upon the probability that such injuries usually result from the negligence of the company as upon the policy of requiring the defendant railroad to come forward with certain facts peculiarly within its own knowledge which are essential to an expeditious and fair determination of the case. The presumption that goods damaged in transit were injured by the last connecting carrier is a striking example of a presumption

[12] 5 WIGMORE, EVIDENCE (1923) §2491; McCormick, *Presumptions and Burden of Proof* (1927) 5 N. C. L. REV. 291, 297.

[13] State v. Van Buren, 30 Del. 79, 102 Atl. 981 (1918); State v. Court, 225 Mo. 609, 125 S. W. 451 (1910).

[14] Dunlop v. U. S., 165 U. S. 486, 17 Sup. Ct. 375, 41 L. ed. 799 (1897); Holloman v. Sou. R. Co., 172 N. C. 372, 90 S. E. 292 (1916).

[15] Miss. Ann. Code (Hemmingway, 1927) §1645. Mobile, etc., R. R. v. Turnipseed, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. ed. 78 (1910).

based solely upon policy without any "logical core,"[16] because it is just as probable that the damage was done by any other of the connecting carriers. So, where the presumption is based upon a strong probability, it is clear that the plaintiff has made out a sufficient case to go to the jury despite the defendant's direct evidence. Likewise, it is equally obvious that where the presumption has no "logical core," the plaintiff, when opposed by direct, uncontradicted evidence, should be nonsuited because there are no legs upon which his case can stand once the presumption has disappeared.

But, in the more numerous cases where the presumptions are founded both upon probability and some basis of policy the decisions reach varying results because of (1) the mistaken view of some courts that the plaintiff has no case when the presumption disappears; (2) the varying degrees of weight given to the probability element in presumptions;[17] and (3) the presence or absence of peculiar circumstances weakening or fortifying the credibility of the direct evidence of the defendant.[18] Thus, where defendant offered uncontradicted evidence in rebuttal of the presumption of negligence against a railway company upon proof that its train killed plaintiff's cattle, the defendant was allowed a directed verdict,[19] whereas, in another jurisdiction, in a case identical to the one above, it was held that the case was one for the jury to determine.[20] Also, where defendant railway company offered evidence that its engines were equipped with improved spark arresters, it was allowed a directed verdict despite the presumption of negligence based upon proof that plaintiff's land adjoining defendant's tracks was burned.[21] Further,

[16] Chafee, *Progress of the Law, Evidence* (1921), 35 HARV. L. REV. 302, 311. See also, Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof* (1920) 68 U. OF PA. L. REV. 307, 317, 320. THAYER, TREATISE ON EVIDENCE, 314. 2 CHAMBERLAYNE, EVIDENCE, 1332, 1214.

[17] For example, Court *X* might consider it *highly probable* that defendant is guilty of manufacturing whiskey upon proof that a still was found upon his premises, whereas, on the other hand, Court *Y* might consider it *improbable* that defendant manufactured whiskey merely because a still was found upon his land, and justify such a presumption mainly upon the ground that the defendant can easily disprove it and thereby expedite trial procedure.

[18] Using same illustration, *supra* note 18, Court *X* might consider it *less probable* that defendant was distilling whiskey upon proof that defendant's premises comprised some thousand acres of land and that the still was found quite a distance from his residence; and, Court *Y* might consider it *probable* that defendant was guilty, if it were proved that the still was found in the basement of the house in which defendant was dwelling.

[19] Memphis, etc. R. Co. v. Shoecraft, 53 Ark. 96, 13 S. W. 422 (1890).

[20] Hardison v. Atl. etc. R. Co., 120 N. C. 492, 26 S. E. 630 (1897).

[21] Menomenie, R. S. & D. Co. v. Ry. Co., 91 Wis. 447, 65 N. W. 176 (1895); 4 WIGMORE, EVIDENCE (1923) §2487, page 3529.

most courts hold that defendant's uncontradicted evidence that he did not receive a letter offered against the presumption of receipt based upon proof of proper mailing does not entitle him to a peremptory ruling,[22] although some courts, under like circumstances, do allow a directed verdict.[23] The same divergence of opinion is found in cases involving the presumption that a person in control of defendant's motor vehicle is a servant acting within the course of his employment. Some states hold that defendant's uncontradicted evidence should entitle him to a directed verdict,[24] the majority hold that it should not.[25] In those states belonging to the latter class, however, there are numerous instances where plaintiff was nonsuited upon the defendant's uncontradicted evidence, not because of any rule that defendant was entitled to a favorable ruling as a matter of right, but because the weight and credibility of the defendant's evidence in the particular case clearly overbore the plaintiff's circumstantial evidence. For example, where the defendant proved that the accident occurred outside the working hours of the driver,[26] that the driver was exclusively employed in work other than that of driving defendant's car and was never permitted to drive it,[27] that the driver was clearly using the car for his own purpose and could not, under the circumstances, have been using it for the defendant[28] and where defendant's evidence is based upon the testimony of disinterested witnesses,[29] a peremptory ruling has been given for the defendant.

[22] Rosenthal v. Walker, 111 U. S. 185, 4 Sup. Ct. 382, 28 L. ed. 395 (1884); Standard Tr. etc. Co. v. N. Y. etc. Bank, 166 N. C. 112, 81 S. E. 1074 (1914).

[23] Grade v. Mariposa County, 132 Cal. 75, 64 Pac. 117 (1901); Ault v. Interstate Sav. etc. Ass'n., 15 Wash. 627, 47 Pac. 13 (1896).

[24] Frank v. Wright, 140 Tenn. 538, 205 S. W. 434 (1918); Nattans v. Cotton, 133 Atl. 270 (Md. 1926); Pollock v. Watts, 142 Md. 403, 121 Atl. 238 (1923). See also, Guthrie v. Holmes, 272 Mo. 215, 198 S. W. 854 (1917), but compare with Barz v. Fleishman Yeast Co., 308 Mo. 288, 271 S. W. 361 (1925).

[25] D'Aleria v. Shirey, 286 Fed. 523 (C. C. A. 9th, 1923); Dowdell v. Beasley, 17 Ala. App. 100, 82 Sou. 40 (1919); Crain v. Sumida, 59 Cal. App. 590, 211 Pac. 479 (1922); Ward v. Teller Reservoir and Irrigation Co., 60 Col. 47, 153 Pac. 219 (1915); Gallagher v. Gunn, 16 Ga. App. 600, 85 S. E. 930 (1915); Purdy v. Sherman, 74 Wash. 309, 133 Pac. 440 (1913).

[26] Guthrie v. Holmes, *supra* note 25.

[27] Reich v. Cone, 180 N. C. 267, 104 S. E. 530 (1920).

[28] Callahan v. Weybosset Pure Food Market, 47 R. I. 361, 133 Atl. 442 (1926).

[29] "It is undoubtedly the general rule that where unimpeached witnesses testify distinctly and positively to a fact and are uncontradicted, their testimony should be credited and have the effect of overcoming a mere presumption. But this rule is subject to many qualifications. There may be such a degree of improbability in the statements themselves as to deprive them of credit, however positively made. The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility. . . . And fur-

It is submitted, in conclusion, that in deciding whether or not defendant's uncontradicted direct evidence should entitle him to a peremptory ruling, a court should first determine whether or not the particular presumption has a logical core, i.e. a basis in probability. If it does not, the ruling should be given, providing there is no shadow upon the credibility of the defendant's evidence. If the presumption does have a basis of probability, then the weight of this probability should be balanced against the evidence of the defendant, as in any other case of conflict between circumstantial evidence (not raising a technical presumption) and direct evidence, and a peremptory ruling for defendant given or refused upon the usual test of whether or not reasonable minds could reach only one conclusion.

J. FRAZIER GLENN, JR.

Insurance—Insurable Interest in Life of Copartner

A and *H*, partners in an insurance business, each took out a policy on his life for the benefit of the partnership. The premiums were paid out of the earnings of the business. There was a partnership dissolution, *A* selling all of his interest, except accounts and notes receivable. *H* surrendered the policy on *A's* life and demanded the cash surrender value. *A* made demand for his proportionate share. *Held:* that the policy, together with its cash surrender value, was a partnership asset which passed to *H*.[1]

The instant case seems undoubtedly correct on the basis that if a partner has an insurable interest in the life of his copartner, then a partnership has an insurable interest in the life of a partner.[2]

Wagering policies were abolished in England by statutes.[3] American courts have generally held, irrespective of statutes, that wager-

thermore, it is often difficult to decide when a witness is, in a legal sense, uncontradicted. He may be contradicted by circumstance as well as by statements of others contrary to his own. In such cases, courts and juries are not bound to refrain from exercising their judgment and to blindly adopt the statements of the witness, for the simple reason that no other witness has denied them, and that the character of the witness is not impeached." By Rapallo, J., Elwood v. Western Union Co., 45 N. Y. 549, 553 (1871).

[1] Allen v. Hudson, 35 F. (2d) 330 (C. C. A. 8th, 1929).

[2] If a partner has an insurable interest in the life of his copartner, he has it whether it is the whole or a fractional part of the beneficial interest in the policy. Since he has a fractional interest in the partnership, it would seem that he had an insurable interest.

[3] 19 Geo. II, c. 37 and 14 Geo. III, c. 48.