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A Query About Plaintiff's Right to a Directed Verdict as to Defendant's Negligence - Vogelsang v. Sehlhorst

A QUERY ABOUT PLAINTIFF'S RIGHT TO A DIRECTED VERDICT AS TO DEFENDANT'S NEGLIGENCE

Vogelsang v. Sehlhorst[1]

Plaintiffs, the driver of an automobile and his passenger, sued defendants, the owner and the driver of a taxicab, for personal injuries sustained in a collision due to the alleged negligence of the taxicab driver. The jury returned a verdict for the plaintiffs and the defendants appealed from judgments entered thereon. Both vehicles at the time of the collision had been travelling west on that part of Edmondson Avenue in Baltimore City which is classified as a dual lane highway. The portion of the highway used by westbound traffic is designated as a one-way street (with signs so indicating) and is separated from the portion for eastbound traffic by a parkway and streetcar tracks. The automobile was proceeding next to the parkway at a moderate speed, when the taxi driver sounded his horn to signal his intention to pass. The automobile driver held to the left and the cab driver then attempted to pass on the right. The collision occurred when the taxi driver had to swerve to his left to avoid hitting a parked car. As he did so, the left rear fender of the cab came in contact with the right front fender of the automobile causing it to jump the curb of the parkway and strike a pole.

The driver of the automobile testified that the accident was due to the fact that the cab driver cut to his left before he had completely passed his automobile. He also testified that if he had pulled over to the right when the taxi driver sounded his horn, he might have hit a parked car. Both plaintiffs asserted that the automobile did not alter its course nor increase its speed prior to the collision. The taxi driver admitted that he had swerved to his left to avoid a parked car, but claimed that he had fully passed the plaintiff's car before doing so, as he had seen the plaintiff's lights in his rearview mirror. He did not testify that he signaled before cutting to the left. He testified that

[1] 71 A. 2d 295 (Md. 1950).

"the skirt" of his left rear fender was "pulled out" and that he "pushed it down" after the collision.

Construing Sections 162 and 165 of Article 66½ of the Code,[2] the Court of Appeals concluded that, by a proper interpretation of these sections, vehicles are not required to keep to the right on one-way streets, and that by implication passing on the right is permitted on such streets. The automobile driver was not therefore under any duty to give way to his right when the taxi driver sounded his horn. Nor did the taxi driver violate the law when he attempted to pass on the right. Therefore, the only real issue for the consideration of the jury was whether or not both parties exercised due care under the circumstances. In affirming the decision below, the Court stated that the jury could have properly found that the cab driver's negligence was the proximate cause of the collision and that the plaintiffs had not in any way contributed thereto. The lower court, in its charge to the jury, instructed them that, in deciding whether or not there had been any negligence, they were to take into consideration the rules of law governing traffic at the time of the accident, and read sections 164 and 165 of Article 66½[3] to them. Counsel for the defendants stated, out of the presence of the jury, that he thought the court was going to explain these sections to the jury rather than merely quote them, but no formal objection was taken on the court's failure to do so. With reference to this, the Court of Appeals said:

> "The interpretation of the statute was, of course, a question for the court and not the jury. However, in the circumstances we do not find that the refusal to amplify the charge was prejudicial. The fact that the court read Section 165 to the jury was an indication that it was applicable, and, if applicable, permitted passing on the right if it could be done with safety. There is nothing in the record to indicate that the jury was misled. The appellees did not contend that the taxicab driver violated the statute in passing to the right; the issue was whether he used due care under the circumstances. These circumstances pointed so strongly to negligence on his part that we think *the court might properly have directed a verdict against him if a request had been made, for the testimony is undisputed that the cab cut in front of the automobile*

[2] Md. Code Supp. (1947).
[3] *Ibid.*

> *and hooked fenders.* The appellants argue that it may be inferred from the cab driver's testimony about seeing the lights that the automobile was behind him when he swerved, although this is completely contradicted by the physical facts, including the injury to the skirt of the cab's left rear fender. Even accepting that inference as a fact, there is nothing to show that the automobile could have stopped before the contact, or that its driver was negligent. *Thus it might have been ruled as a matter of law that the cab driver's failure to allow sufficient clearance was the sole cause of the accident."*[4]

It is to be noted that no request for a directed verdict was actually made by the plaintiffs in the court below and neither brief considered the point of whether it would have been proper to grant one. Nevertheless in the above quotation, the Court of Appeals states in its opinion that it would have been proper for the lower court, on plaintiffs' motion, to have granted a peremptory instruction against the defendants. It is with this portion of the opinion that the remainder of this note will be concerned.

The Maryland rule as to when a verdict might properly be directed in favor of a particular party litigant was clearly stated in the case of *Alexander v. Tingle.*[5] In that case, an action was brought by the plaintiff-appellant, as statutory liquidator of a reciprocal insurance exchange to enforce an assessment against the defendant-appellee, a subscriber to the exchange. The plaintiff showed that the assessment had been ordered by a court of competent jurisdiction, and offered evidence by way of witnesses and underwriting records proving that certain insurance policies had been issued to the defendant. The defendant had filed the general issue plea to the declaration, but, at the trial, was only able to testify that he did not remember about the particular policies and that he destroyed the old ones as soon as the new ones were received by him. He did not deny that the policies in question had in fact been issued to him. At the close of all the evidence, the plaintiff offered a prayer for a directed verdict in his favor. The court rejected the prayer and the plaintiff excepted. The jury returned a verdict for the defendant, and one of the grounds of the appeal was the court's refusal to direct the verdict as

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[4] *Supra*, n. 1, 298. Italics supplied.
[5] 181 Md. 464, 30 A. 2d 737 (1943).

prayed.[6] Plaintiff-appellant based his contention, that the court erred in refusing his request for a directed verdict, on the language of Trial Rule 4 of The General Rules of Practice and Procedure which in part provides:

> "In any proceeding tried by jury *any* party may move, at the close of the evidence offered by an opponent or at the close of all the evidence, for a directed verdict in his favor on any or all of the issues . . ."[6a]

The Court of Appeals however held that, although ". . . the language of Rule 4 is sufficiently broad to warrant the grammatical construction thereof urged by the appellant, it must be read in the light of the well-established practice theretofore prevailing".[7] The well-settled rule, as established by Maryland case law, was that a party bearing the burden of proving a particular fact or issue could not get a directed verdict that he had met the burden of proof as to that fact or issue. The Maryland cases had clearly established the rule that even though the evidence be practically uncontradicted, the court still could not withdraw an issue from the consideration of the jury at the motion of the party who had the burden of proof on that issue.[8] The reason for this rule, as pointed out by the Court over 100 years ago,[9] is that the credibility of the witnesses, even though their testimony be uncontradicted, is a matter which the jury, and not the court, must determine.

But there is a difference between *testimony* which is *uncontradicted* and *facts* which are *uncontroverted* or *ad-*

[6] See n. 13, *infra*, for discussion of the other ground of appeal.

[6a] Italics supplied.

[7] *Supra*, n. 5, 467.

[8] See, in general: ASHMAN, DIRECTED VERDICTS AND INSTRUCTIONS (1939), Tit. 9, Sec. 96: NILES, NOTES ON TRIAL PRACTICE, NEGLIGENCE CASES AND EVIDENCE (1946), 15-16; POE, PLEADING AND PRACTICE (1925), V. II, Secs. 293-296. Cited in the decision were: Travelers Ins. Co. v. Connolly, 145 Md. 554, 125 A. 900 (1924); Spence v. Bethlehem Steel Co., 173 Md. 539, 197 A. 302 (1937); Calvert Bank v. Katz Co., 102 Md. 56, 61 A. 411 (1905); McCosker and Malloy v. Banks, 84 Md. 292, 35 A. 935 (1896). See also: Smith v. Whitman, 159 Md. 478, 150 A. 856 (1930); Pennsylvania R. Co. v. Stallings, 165 Md. 615, 170 A. 163 (1933) citing other authorities at 619.

[9] In Charleston Ins. Co. v. Corner, 2 Gill 410, 426 (Md. 1844), the Court said: "The instructions asked by the appellee, who was plaintiff below, were not based on an assumed state of facts, to be submitted to the consideration of the jury. They were moved, it would seem, in the confidence, that as the evidence was uncontradicted, the jury would not do otherwise than find the facts accordingly . . . Doubtless the jury would have found these facts according to the testimony, but the sufficiency of the evidence to satisfy the jury, or the circumstance that it is all on one side, does not authorize the court to direct the jury that it proves the fact. They have the power to refuse their credit, and no action of the court should control the exercise of their admitted right to weigh the credibility of evidence."

mitted. Several cases have recognized that where the *facts* are undisputed, in the sense of having been agreed upon or admitted by the opposite party and there is no dispute as to the inferences to be drawn from them, the court may properly withdraw such facts from the jury's consideration, even at the instance of the party who would normally have the burden of proving them.[10] Thus Maryland cases have assumed that the court may direct a verdict in the *plaintiff's* favor only where the *facts* are *uncontroverted,*[11] or where the defendant has the burden of proof as to such facts.[12] Reasoning therefrom, the Court of Appeals in *Alexander v. Tingle* ruled that plaintiff's request for a directed verdict was properly refused and affirmed the judgment of the trial court,[13] saying:

> "Our conclusion, therefore, is that the correct interpretation of Rule 4 is that any party may properly move for a directed verdict in his favor on any issue as to which his opponent has the burden of proof, but not for an instructed verdict on any issue as to which the moving party has the burden of proof unless the *facts* are uncontroverted or the parties have agreed as to the facts.

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[10] In Harrison v. Central Construction Co., 135 Md. 170, 180; 108 A. 874, 878 (1919), the Court said: "When the facts have been ascertained and agreed upon by the parties, or are undisputed, and there is no dispute as to the inferences to be drawn from the facts, the question becomes one of law and may be decided by the court." And in Pennsylvania R. Co. v. Stallings, 165 Md. 615, 619, 170 A. 163, 164 (1933): " 'Undisputed' as used in these cases must be taken to mean 'uncontested' rather than 'uncontradicted'." See also: Bethlehem-Fairfield Shipyard, Inc. v. Nettie Rosenthal, 185 Md. 416, 45 A. 2d 79 (1945), in which it was held that even though the facts were not disputed, verdict should not be directed in favor of party bearing burden of proof since there was a dispute as to a material inference to be drawn from the facts. Verdict directed for party with burden of proof in following cases since facts were uncontroverted: Hercules Powder Co. v. Harry J. Campbell Sons Co., 156 Md. 346, 144 A. 510, 62 A. L. R. 1497 (1928); Moore v. Clark, 171 Md. 39, 187 A. 887, 107 A. L. R. 924 (1936); Albright v. Pennsylvania R. Co., 183 Md. 421, 37 A. 2d 870 (1944); National Hauling Contractors Co. v. Baltimore Transit Co., 185 Md. 158, 44 A. 2d 450 (1945), in which verdict was held to have been properly directed for defendant on issue of plaintiff's contributory negligence.

[11] *Ibid.*

[12] Cited in the decision were: Tweeddale v. Fowler, 114 Md. 344, 79 A. 519 (1911); Peane v. Grossnickle, 139 Md. 274, 115 A. 49 (1921); Frey and Sons, Inc. v. Magness, 161 Md. 375, 157 A. 400 (1931). See also, Garozynski v. Daniel, 57 A. 2d 339 (Md. 1948) upholding a peremptory instruction for the plaintiff on issue of contributory negligence.

[13] The plaintiff also assigned as error the lower court's refusal to grant a judgment n. o. v. in his favor. The Court of Appeals held that the motion was properly refused, holding that only a party who could properly have been granted a directed verdict could be given judgment n. o. v.

> "As the plaintiff in the instant case had the burden of proving all of the issues raised by the pleadings, and as the defendant had filed the general issue pleas and, although not expressly denying, did not admit the truth of plaintiff's *testimony*, it could not be said that the *facts* were uncontroverted, therefore the trial court correctly ruled when plaintiff's first prayer was rejected.[14]

The cases in other jurisdictions can be divided into three general categories. There are first those which, like prior Maryland cases, lay down the rule that a verdict cannot be directed in favor of the party having the burden of proof, even though his evidence be uncontradicted, as long as the facts are not admitted or agreed upon.[15] Secondly, there are those cases which do not deny the right of the party carrying the burden of proof to a directed verdict, but which impose certain restrictions upon this right, such as the rule that such party's evidence must not be oral,[16] or that such evidence must not be that of an "interested" witness.[17] Finally there are those cases which make no distinction between the party having the burden of proof and his adversary and hold that a verdict may be directed for the former under the same conditions that a verdict will be directed for the latter.[18] This last view appears to represent the weight of authority and the growing tendency among the courts has been to adopt it. American Jurisprudence summarizes the view of these cases, as follows:

> "While it is the province of the jury to determine not only the weight and sufficiency of the evidence, but the credibility of the witnesses who testify, this

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[14] Italics supplied. *Supra*, n. 5, 470.

[15] Gwyn Harper Mfg. Co. v. Carolina Central R. Co., 128 N. C. 280, 38 S. E. 894, 83 Am. St. Rep. 675 (1901); Printz v. Miller, 233 Mo. 47, 135 S. W. 19 (1911); McGlinn Distilling Co. v. Dervin, 260 Pa. 414, 103 A. 872 (1918).

[16] This apparently is the rule in Massachusetts. Goldstein v. D'Arcy, 201 Mass. 312, 87 N. E. 584 (1909); Giles v. Giles, 204 Mass. 383, 90 N. E. 595 (1910).

[17] Cases collected in 72 A. L. R. 27.

[18] Boudeman v. Arnold, 200 Mich. 162, 166 N. W. 985, 8 A. L. R. 789 (1918), and *Anno.*, 8 A. L. R. 796; Chesapeake and Ohio R. Co. v. Martin, 283 U. S. 209 (1931), noted in *Practice and Procedure—Demurrer to Evidence—Directing Verdict in Favor of Party Having Burden of Proof* (1932), 30 Mich. L. Rev. 474. See also: PROSSER, TORTS (1941), 279 *et seq.; Sunderland, Directing a Verdict for Party Having the Burden of Proof* (1913) 11 Mich. L. Rev. 198 (in which the learned author concludes that the better rule is that which permits a directed verdict for the party bearing the burden of proof irrespective of the character of the evidence).

> rule is not to be taken as necessarily requiring the trial court to overrule a motion for a directed verdict and submit a case to the jury in order to permit the jury to pass upon the credibility of a witness whose testimony is unimpeached and uncontradicted, and reasonably susceptible to but one conclusion. It is true that in some jurisdictions the rule appears to be that verdict cannot be directed in favor of the party having the burden of proof . . . but the more generally approved rule is that it is not only permissible, but proper, for a trial court to direct a verdict upon unimpeached oral testimony given in behalf of the party having the burden of proof, where such testimony is direct, positive, and unequivocal, is not contradicted either directly or indirectly, and is not susceptible of inherent weakness, improbability, or incredibility."[19]

Returning once again to that portion of the opinion in the instant case in which the Court of Appeals states that a verdict might have properly been directed in plaintiff's favor, the *query* naturally arises as to whether the Court has indicated a departure from the rule of *Alexander v. Tingle,*[20] thus bringing Maryland closer to the rule prevailing in the majority of other jurisdictions as quoted above. In all of the earlier Maryland cases herein referred to, the Court of Appeals indicated the possibility for directed verdicts for parties having the burden of proof only when the *facts* were uncontroverted or undisputed, whereas the language of the instant opinion is in the terms of "the *testimony* is undisputed that the cab cut in front of the automobile and hooked fenders".

As to its own earlier rule, in *Dunstan v. Bethlehem Steel Co.,*[21] the Court in 1946 recognized the difficulty of its application to individual cases but seemed to indicate firm adherence to it, saying: "In *Alexander v. Tingle* . . . the Court distinguished between (a) *uncontradicted evidence* which a jury might disbelieve and (b) *uncontroverted or undisputed facts* which present only a question of law . . . In some of the many cases involving this distinction, including *Alexander v. Tingle,* it may be difficult to reconcile the application of the principle to the facts, but the principle is beyond question."[22]

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[19] 53 Am. Jur., Trial, Sec. 361. See also Secs. 385-389.
[20] *Supra,* n. 5.
[21] 187 Md. 571, 51 A. 2d 288 (1946).
[22] Italics supplied. 187 Md. 571, 578, 51 A. 2d 288, 291 (1946).

The practitioner must for the time being attempt to judge whether the language in the instant case is but illustrative of the difficulty of the application of the existing rule or whether it represents a move of the Court toward frank recognition that unimpeached and uncontradicted *evidence* may under proper circumstances call for a directed verdict even in favor of the party having the burden of proof.