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Evidence—Party's Testimony As Judicial Admission

WHERE A PARTY concedes in his pleadings or by express stipulation in court the truth of some alleged fact, his action amounts to a judicial admission which operates as a waiver of proof, thereby removing the proposition in question from the field of disputed issue.[1]

The purpose of this article is to examine the extent and merits of the corollary that testimony of a party which is adverse to his own interests also operates as a judicial admission, thereby conclusively establishing the truth of the matter asserted and removing the issue from the province of the jury.

Where a party unequivocally testifies to a fact injurious to his own cause and no other evidence is offered to contradict his own unfavorable testimony, he is generally held bound by his statement.[2] But where a party testifies adversely to his own interest and is contradicted by other evidence, either in the form of his own inconsistent testimony or that of other witnesses,[3] the courts are not in agreement as to whether and in what instances such testimony has the force of a conclusive judicial admission.

It is frequently declared, by way of dicta, that a party's self-injuring testimony always concludes him on that point.[4] And, indeed, all jurisdictions undoubtedly recognize that the adverse testimony of a party, although contradicted by other evidence, may operate as a judicial admission. However, an examination of the cases indicates that this result is limited in most jurisdictions to situations where the party deliberately and unequivocally concedes a fact which is within his own peculiar knowledge. The rule is not invoked where the party testifies equivocally, or

[1] 9 WIGMORE, EVIDENCE 586 (3d ed. 1940).

[2] Broad River Co. v. Middleby, 194 Fed. 817 (4th Cir. 1912); Gray v. Pankey, 211 Ala. 539, 100 So. 880 (1924); Perry v. Hanover, 314 Mass. 167, 50 N.E.2d 41 (1943); Folan v. Price, 293 Mass. 76, 199 N.E. 320 (1936); Roddy Co. v. Dixon, 21 Tenn. App. 81, 105 S.W.2d 513 (1937); Daugherty v. Lady, 73 S.W 837 (Tex. Civ. App. 1903)

[3] Some jurisdictions apparently require that the contradicting evidence be other than the party's own inconsistent testimony in order to avoid the effect of a judicial admission. Louisville & N. R.R. v. Lusk, 37 Ga. App. 99, 139 S.E. 89 (1927); Casey v. Northern P. Ry., 60 Mont. 56, 198 Pac. 141 (1921); Fowler v. Pleasant Valley Coal Co., 16 Utah 348, 52 Pac. 594 (1898)

[4] Van Meter v. Zumwalt, 35 Idaho 235, 206 Pac. 507 (1922); Feary v. Metro. Street Ry., 162 Mo. 75, 62 S.W 452 (1901); Hodges v. Ettinger 127 Ohio St. 460, 189 N.E. 113 (1934); Southern Surety Co. v. Inabnit, 1 S.W.2d 412 (Tex. Civ. App. 1927); Va. Elec. & Power Co. v. Vellines, 162 Va. 671, 175 S.E. 35 (1934); Massie v. Firmstone, 134 Va. 450, 114 S.E. 652 (1922)

to a matter of estimate or opinion, or merely as an observer of an objective occurrence wherein he might honestly be mistaken.[5]

In considering what the effect of a party's adverse testimony should be, in *Hill v. West End St. Ry.* the Massachusetts Supreme Judicial Court reasoned:

> There is no sound reason why the familiar doctrine that a party may contradict, though not impeach, his own witness, should not, *if the circumstances are consistent with honesty and good faith* (italics supplied), be applied when he is himself the witness. In other words the law recognizes the fact that parties, as well as other witnesses, may honestly mistake the truth, and requires juries to find the facts by weighing all the testimony, whatever may be its source.[6]

Endorsing this principle, the New Hampshire Supreme Court has stated:

> It appears that among the circumstances which should be considered are the following: (1) Was the party at the time when the occurrence about which he testified took place, and when he testified, in full possession of his mental faculties? (2) Was his intelligence and command of English such that he fully understood the purport of the questions and his answers thereto? (3) What was the nature of the facts to which he testified? Was he simply giving his impressions of an event as a participant or an observer, or was he testifying to facts peculiarly within his own knowledge? (4) Is his testimony contradicted by that of other witnesses? (5) Is the effect of his testimony clear and unequivocal, or are his statements inconsistent and conflicting?[7]

Where a party's self-injurious testimony concerns his description of the details of an objective occurrence in which he participated or which he observed, most courts have recognized the fact that he may honestly be mistaken in his observation. His testimony, therefore, is not held to be conclusively binding. Thus, in *McHardy v. Standard Oil Co.*,[8] the plaintiff testified that she saw the defendant's truck parked in a position facing her when she came over the crest of a hill a quarter of a mile away, and that it remained in that position as she traveled the intervening distance. The occupants of a car traveling in the same direction as the truck testified that the truck stopped suddenly, forcing the driver of their car to swerve into the path of the plaintiff's car at a point near the truck. The testimony of the plaintiff, if taken as true, would clearly establish that the parking of the truck for such a substantial period of time prior to the collision was not the proximate cause of the accident. The court held that the plaintiff was not bound by her testimony since it consisted of a narrative of events which she observed, about which she

[5] See 20 AM. JUR. 1032 and Note, 169 A.L.R. 798 (1947).

[6] 158 Mass. 458, 459, 33 N.E. 582 (1893)

[7] Harlow v. Laclair, 82 N.H. 506, 512, 136 Atl. 128, 131 (1927).

[8] 231 Minn. 493, 44 N.W.2d 90 (1950).

might honestly be mistaken. On the same ground, a party's contradicted testimony on the question of whether a train was in motion,[9] whether a car was starting,[10] stopping[11] or at rest,[12] whether a railroad apron lurched right or left,[13] whether a car was traveling upon the right or left side of the road,[14] whether the party had stepped forward[15] and whether a control button had been inadvertently depressed,[16] have all been held not conclusively binding.

However, a significant minority of the jurisdictions have held a party bound by his description of an objective occurrence. Thus, in *Mollman v. St. Louis Pub. Service Co.*,[17] the question was whether the driver of the taxicab in which the plaintiff was riding negligently injured her by swerving into the path of a streetcar closely approaching from the rear and by stopping suddenly. The plaintiff testified that the taxicab traveled over the streetcar tracks for the distance of a city block, was gradually brought to a stop at a traffic light and was struck from the rear after being at a standstill for an appreciable length of time. The streetcar motorman testified contrarily. The court held the plaintiff conclusively bound by her testimony and reversed a lower court decision in favor of the plaintiff.[18]

Another instance where the courts often rule that the self-injurious testimony of a party does not constitute a judicial admission is the situation where the party s testimony is in the nature of an opinion or estimate regarding certain facts of the case. In *King v. Spencer*,[19] in holding that the defendant's testimony to the effect that his brakes were bad and that if he had had good brakes he could have avoided the collision did not conclusively bind him, the Connecticut Supreme Court said:

> Where also the testimony of a party is in the nature of an estimate or opinion as to which he may honestly be mistaken, he does not unequivocally concede that the fact is in accord with the opinion expressed, and there is no injustice in permitting the court to consider the other evidence in the case, and determine from all the evidence what the actual facts are.[20]

On this basis it was held that a father's testimony that his son's earnings were not sufficient to pay for his board and clothing, being in the nature of an opinion or conclusion, did not bind him.[21] And a plaintiff's statement to the effect that his fall into a coal-hole was due to his own lack of care was held not to bind him.[22] Similarly, parties' testimonial statements concerning their health,[23] sobriety[24] and the proximate cause of injuries[25] have been held not binding. Estimates as to time, speed and distances, matters of judgment about which a party is as prone to err as any other witness, furnish frequent occasion to relieve against the conclusive effect of a judicial admission.[26]

But, on the theory that a party cannot honestly be mistaken as to subjective facts such as his intent, feeling or knowledge at a certain time,

some of the courts which hold that a party's adverse testimony does not always conclude him have held that testimony concerning such matters does have the effect of a judicial admission. In *McFaden v. Nordblom*,[27] in holding the plaintiff bound by her testimony as to her feelings and intentions regarding a settlement agreement, the Massachusetts Supreme Judicial Court declared:

> A plaintiff might honestly be mistaken in his narration of the physical facts constituting his cause of action and may properly ask a jury to find as true the facts as set forth in the testimony of the other witnesses. But he has no such right to ask the jury to disbelieve his testimony concerning his knowledge, motives, purposes, emotions or feelings — matters concerning which he alone can have any personal experience or information and upon which he should be able to speak with reasonable assurance of the truth.[28]

A few jurisdictions have held that a party is always bound by his ad-

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[9] Bond v. Chicago, B. & Q. Ry., 110 Mo. App. 131, 84 S.W 124 (1904).

[10] Hill v. West End St. Ry., 158 Mass. 458, 33 N.E. 582 (1893).

[11] Whiteacre v. Boston Elevated Ry., 241 Mass. 163, 134 N.E. 640 (1922)

[12] Alamo v. Del Rosario, 69 App. D.C. 47, 98 F.2d 328 (1938).

[13] Watkins v. Boston & M. R.R., 83 N.H. 10, 138 Atl. 315 (1927)

[14] Ross v. Burnham, 91 N.H. 80, 13 A.2d 733 (1940).

[15] Mathis v. Tutweiler, 295 Fed. 661 (6th Cir. 1924)

[16] Isabelle v. Crystal Laundry, 93 N.H. 264, 41 A.2d 241 (1945).

[17] 192 S.W.2d 618 (Mo. App. 1946)

[18] *Cf.* Stearns v. Chicago, R. I. & P. Ry., 166 Iowa 566, 148 N.W 128 (1914); McCoy v. Home Oil & Gas Co., 60 S.W.2d 715 (Mo. App. 1933); Miller v. Stevens, 63 S.D. 10, 256 N.W 152 (1934); Stark v. Hubbard, 187 Va. 820, 48 S.E.2d 216 (1948). New Hampshire cases have held, mistakenly it seems, that a party's testimony as to his own movements and actions is a "subjective matter," discussed infra. Sarkise v. Boston & M. R.R., 88 N.H. 178, 186 Atl. 332 (1936). In *Morris v. Boston & M. R.R.*, 85 N.H. 265, 160 Atl. 52 (1932), the plaintiff testified that he stopped his car on the railroad tracks. Four eye-witnesses testified that a locomotive hit the car as it was moving across the tracks. The court declared: "Whether or not the car came to a stop was a fact peculiarly within the plaintiff's knowledge."

[19] 115 Conn. 201, 161 Atl. 103 (1932)

[20] *Id.* at 205, 161 Atl. at 105.

[21] State *ex rel.* Fleckenstein v. District Ct., 134 Minn. 324, 159 N.W 755 (1916).

[22] Sheffield v. Chicago, 328 Ill. App. 321, 65 N.E.2d 486 (1946)

[23] Pullman Co. v. Tuetschman, 169 F.2d 979 (9th Cir. 1948).

[24] McLean v. University Club, 327 Mass. 68, 97 N.E.2d 174 (1951)

[25] Leonard v. Manchester, 96 N.H. 115, 70 A.2d 915 (1950)

[26] Gulf, M. & O. R.R. v. Williamson, 191 F.2d 887 (8th Cir. 1951); Hansberger Motor Transp. Co. v. Pate, 51 Ga. App. 877, 181 S.E. 796 (1935); Davis v. Kansas City Pub. Service Co., 361 Mo. 168, 233 S.W.2d 669 (1950); Lamontagne v. Canadian Nat. Ry., 97 N.H. 6, 79 A.2d 835 (1951); Bird v. Long Island R.R., 11 App. Div. 134, 42 N.Y. Supp. 888 (1896); Clayton v. Taylor, 193 Va. 555, 69 S.E.2d 424 (1952).

[27] 307 Mass. 574, 30 N.E.2d 852 (1940).

[28] *Id.* at 575, 30 N.E.2d at 853.

verse testimony, regardless of the nature of the facts to which he is testifying, unless the court allows him to subsequently change his testimony under a claim of confusion, mistake or lack of definite recollection.[29] Frequently such a rule is announced in a case, only to be later distinguished on the basis that the testimony therein was uncontradicted or related to subjective facts.

In Ohio, it is not clear what the rule is regarding the effect of a party's adverse testimony. In the case of *Pope v. Mudge*,[30] the first Ohio Supreme Court case to consider the matter, the plaintiff's claim was based on the allegedly fraudulent misrepresentations made by the defendants upon which the plaintiff relied to his detriment. The plaintiff at one point in his testimony (in a deposition) categorically denied that he believed the misrepresentations made to him. The court held that the admission did not conclusively bind him and that the jury could consider the physical and mental condition of the plaintiff at the time of the statement and the other contradictory testimony and conduct of the plaintiff and of other witnesses in determining whether the plaintiff was deceived by the misrepresentations.

In the recent case of *Winkler v. Columbus*,[31] holding the plaintiff conclusively bound by an admission which she made on cross-examination to the effect that she knew and realized at the time of the accident that the sidewalk upon which she fell was in a defective condition, the Ohio Supreme Court said:

> The Court of Appeals assumed that because plaintiff testififed one way in chief and contrarily on cross-examination, the case should be left to the jury to choose between her conflicting statements. That would be proper in the case of an ordinary witness, but where the testimony involved is that of the plaintiff and the plaintiff's testimony whether in chief or cross-examination, discloses negligence on the part of plaintiff contributing directly to her injury the fact has been settled and the matter becomes a question of law to be determined by the court.[32]

Thus, the court's latest pronouncement, apparently, is that the adverse testimony of a party always operates as a judicial admission. However, the *Winkler* case is doubtful authority for such a sweeping rule. In the first place, the court did not expressly overrule the *Pope* case, but merely limited it to its peculiar facts. Furthermore, the character of the plain-

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[29] Stearns v. Chicago, R.I. & P R.R., 166 Iowa 566, 148 N.W 128 (1914); Steele v. Kansas City Ry., 265 Mo. 97, 175 S.W 177 (1915); Miller v. Stevens, 63 S.D. 10, 256 N.W 152 (1934); McMath Co. v. Staten, 42 S.W.2d 649 (Tex. Civ. App. 1931) However, Missouri and Texas except estimates and opinions from the operation of this rule. Haddow v. St. Louis Pub. Service Co., 38 S.W.2d 284 (Mo. App. 1931); Quanah, A. & P Ry. v. Bone, 208 S.W 709 (Tex. Civ. App. 1919).

[30] 108 Ohio St. 192, 140 N.E. 501 (1923).

[31] 149 Ohio St. 39, 77 N.E.2d 461 (1948)

[32] *Id.* at 44, 77 N.E.2d at 464.