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CASES NOTED

DIRECTED VERDICT—THE MULTIPLE DEFENDANT PARADOX

The plaintiffs' automobile was struck in the rear by the vehicle of one of the defendants. The latter automobile, in turn, had been struck in the rear by the vehicle of another defendant. At the close of all the evidence, the plaintiffs' motion for a directed verdict in their favor on the issue of liability was denied, and the jury returned a verdict in favor of the defendants. On appeal, *held*, reversed: the evidence was neither susceptible of a finding that the plaintiffs were contributorily negligent, nor of the possibility of an unavoidable accident. Thus, one of the defendants had been negligent, and the directed verdict should have been granted in favor of the plaintiffs. It was for the jury to decide which of the two defendants, or possibly both, was guilty of the negligent act which had caused the collision. *Sheehan v. Allred*, 146 So.2d 760 (Fla. 1st Dist. 1962).

It is well established in our system of jurisprudence that the jury is the trier of fact, and the court decides matters of law.¹ If the facts are of a nature that only one conclusion can be drawn, then the court can direct a verdict to be entered in accordance with that conclusion.² A direction of a verdict is not unconstitutional,³ and if properly exercised, is not an invasion of the province of the jury.⁴ A directed verdict has been equated to a demurrer to the evidence, which tests the legal sufficiency of the evidence.⁵ A party moving for a directed verdict admits, for purposes of the motion, not only the facts adduced, but every conclusion favorable to the non-movant that may be reasonably inferred. Only then, if the evidence is insufficient to support a verdict, is a directed

1. *Nudd v. Burrows*, 91 U.S. 426 (1875); *Richardson v. City of Boston*, 60 U.S. (19 How.) 263 (1856); *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794); *Mescall v. W.T. Grant Co.*, 133 F.2d 209 (7th Cir. 1943); *Southern Fruit Distribs. v. Fulmer*, 107 F.2d 456 (4th Cir. 1939); *First Nat'l Bank v. United States*, 102 F.2d 907 (7th Cir. 1939); *South Florida R.R. v. Rhoads*, 25 Fla. 40, 5 So. 633 (1889). "It may not be amiss . . . to remind you of the good old rul [*sic*] that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court, to decide." *Georgia v. Brailsford*, *supra* at 4 (J. Jay, J.).

2. *Marion & R. V. Ry. v. United States*, 270 U.S. 280 (1926); *Texas & Pac. Ry. v. Cox*, 145 U.S. 593 (1892); *Meguire v. Corwine*, 101 U.S. 108 (1879); *Kenney v. Langston*, 133 Fla. 6, 182 So. 430 (1938); *Atlantic Coast Line R.R. v. Alverson*, 95 Fla. 73, 116 So. 30 (1928); *Baro v. Wilson*, 134 So.2d 843 (Fla. 3d Dist. 1961).

3. *Galloway v. United States*, 319 U.S. 372 (1943).

4. *C. B. Rogers Co. v. Meinhardt*, 37 Fla. 480, 19 So. 878 (1896): "We do not see that this new statutory feature [directed verdict] has in any way curtailed, or attempted to curtail, the province of the jury . . ."

5. *Gunning v. Cooley*, 281 U.S. 90 (1930); *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913); *Mackey v. Thompson*, 153 Fla. 210, 14 So.2d 571 (1943); *Powell v. Jackson Grain Co.*, 134 Fla. 596, 184 So. 492 (1938); *Duval Laundry Co. v. Reif*, 130 Fla. 276, 177 So. 726 (1937); *Berger v. Mabry*, 113 Fla. 31, 151 So. 302 (1933).

verdict proper.⁶ If the inferences reasonably justify a verdict for the non-movant, a directed verdict for the moving party is improper.⁷ Direction of a verdict should be cautiously exercised,⁸ and never utilized unless "the evidence is such that under no view which the jury might lawfully take of the evidence favorable to the adverse party could a verdict for the adverse party be sustained."⁹ Thus, it generally has been held that a plaintiff is not entitled to a directed verdict where there is some evidence in support of a defendant's defense.¹⁰

If there is no evidence on a particular issue, the court can withdraw that issue from the jury's consideration and decide upon it as a matter of law.¹¹ This can be accomplished by directing a verdict on that issue¹² or by peremptory instruction.¹³ If the issue is that of negligence or contributory negligence, it should usually be submitted to the jury;¹⁴ and if joint tortfeasors are involved, the jury can render a verdict in favor of some defendants and against others.¹⁵ Consequently, if the evidence is sufficiently conclusive against some tortfeasors, a verdict may be directed against them, and consideration of the liability of the others

6. *Chesapeake & Ohio Ry. v. Martin*, 283 U.S. 209 (1931) (the court must resolve all conflicts in the evidence against the movant); *Gardner v. Michigan Cent. R.R.*, 150 U.S. 349 (1893) (dictum); *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961); *Eggenschwiler v. Midwestern Motor Lodge Corp.*, 286 F.2d 765 (7th Cir. 1961); *General Acc. Fire & Life Assur. Corp., v. Schero*, 160 F.2d 775 (5th Cir. 1947) (applying Florida law); *Cutchins v. Seaboard Air Line Ry.*, 101 So.2d 857 (Fla. 1958); *Katz v. Bear*, 52 So.2d 903 (Fla. 1951); *Burkett v. Belk-Lindsey Co.*, 137 So.2d 266 (Fla. 2d Dist. 1962); *Budgen v. Brady*, 103 So.2d 672 (Fla. 1st Dist. 1958) (quoted in instant case).

7. *Belden v. Lynch*, 126 So.2d 578 (Fla. 2d Dist. 1961); *Henderson v. Tarver*, 123 So.2d 369 (Fla. 2d Dist. 1960); *Russell v. Jacksonville Gas Corp.*, 117 So.2d 29 (Fla. 1st Dist. 1960).

8. *Hartnett v. Fowler*, 94 So.2d 724 (Fla. 1957); *Davis v. Equitable Life Assur. Soc'y of United States*, 149 Fla. 678, 6 So.2d 842 (1942); *Burkett v. Belk-Lindsey Co.*, 137 So.2d 266 (Fla. 2d Dist. 1962); *Belden v. Lynch*, 126 So.2d 578 (Fla. 2d Dist. 1961).

9. *Katz v. Bear*, 52 So.2d 903, 904 (Fla. 1951), as quoted in *Robbins v. Grace*, 103 So.2d 658, 661 (Fla. 2d Dist. 1958) (direction of verdict held to be error in both *Katz* and *Robbins* cases).

10. *United States Fid. & Guar. Co. v. McCarthy*, 33 F.2d 7 (8th Cir. 1929) (both parties moved for an instructed verdict); *Gilchrist v. Mystic Workers of the World*, 188 Mich. 466, 154 N.W. 575 (1915); *Vincent v. Raffety*, 344 S.W.2d 293 (Mo. App. 1961); *Clinchfield Coal Corp. v. Compton*, 148 Va. 437, 139 S.E. 308 (1927).

11. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) (no formal withdrawal required); *Writ v. Fraser*, 158 Fla. 777, 30 So.2d 174 (1947); *Farrington v. Richardson*, 153 Fla. 907, 16 So.2d 158 (1944).

12. *Goodrich v. Lawrence*, 138 Fla. 287, 189 So. 233 (1939); *Houlihan v. McCall*, 197 Md. 130, 78 A.2d 661 (1951); *Smith v. Armstrong*, 121 Mont. 377, 198 P.2d 795 (1948).

13. *O'Donnell v. Elgin, Joliet & E. Ry.*, 338 U.S. 384 (1949); *Chicago & N.W. Ry. v. Garwood*, 167 F.2d 848, 857-58 (8th Cir. 1948) (reversal for failure to give peremptory instruction to the effect that no evidence of negligence existed); *Zorn v. Britton*, 112 Fla. 583, 150 So. 801 (1933) (reversal for failure to instruct to the effect that certain allegations were immaterial).

14. See cases collected in 38 AM. JUR. *Negligence* § 344, n.1 (1941).

15. *Atlantic & Pac. R.R. v. Laird*, 164 U.S. 393 (1896); *James v. Evans*, 149 Fed. 136 (3d Cir. 1906) (by implication); *Dr. P. Phillips & Sons, Inc. v. Kilgore*, 152 Fla. 578, 12 So.2d 465 (1943).

may be submitted to the jury.¹⁶ Logically, a verdict cannot be directed for the plaintiff against all defendants if the evidence is sufficient in favor of any defendant.¹⁷ Thus, in *Murphy v. McAdory*¹⁸ an affirmative charge against two defendants was properly refused on the ground that the evidence was insufficient to justify the charge against one of them.

In the instant case, the court remanded the cause and ordered the lower court to direct a verdict for the plaintiffs on the issue of liability. The court reasoned that negligence did exist, but that since it was uncertain who was negligent, the jury must render a decision against either defendant, or possibly both. The rationale of the court was as follows:

The jury could not have lawfully concluded that plaintiffs' negligence, if any, contributed to or was the proximate cause of the collision. The only function which the jury could have properly performed under the evidence in this record was to determine whether Allred or Lee, or both, were guilty of the negligent act which proximately caused the collision out of which plaintiffs' damages arose. We reach this conclusion based upon an analysis of the evidence which affirmatively establishes that the collision in question resulted exclusively from an act of negligence committed either by Allred or Lee, or both. The evidence is not susceptible of the conclusion that the collision did or could have been the result of unavoidable accident.¹⁹

In effect, the court said that the accident could have been attributed to one of three factors: (1) contributory negligence; (2) unavoidable accident; or (3) the negligence of one or both defendants. If the first two factors were found not to exist, it was reasoned, the element of negligence remained as the only cause. The court refused to direct a verdict against either defendant, tacitly admitting that the evidence was *sufficient* to exonerate either from responsibility for the purported negligent act. In addition, the court seemed to recognize that a direction of verdict for the plaintiffs against both defendants would have been erroneous; to do so would have meant a finding that both were negligent

16. *Supra* notes 2 through 6 and accompanying text. If the court finds that the evidence cannot justify a conclusion in favor of a particular defendant, it may rule on that evidence as a matter of law.

17. 88 C.J.S. *Trial* § 257(h) (1955). A directed verdict for the plaintiff against all defendants would necessitate the implication that none of the defendants had any legally sufficient evidence in his favor. See generally Annot., 47 A.L.R.2d 803 (1954).

18. 183 Ala. 209, 62 So. 706 (1913). In *Miller v. Pennsylvania R.R.*, 368 Pa. 507, 84 A.2d 200 (1951) the court ruled that an instruction that the jury must find against one or more defendants was grounds for a new trial as to all defendants. The trial court's instruction, 368 Pa. at 514, 84 A.2d at 203, was as follows:

The passenger was injured. *He is entitled to a recovery at your hands* There is no contributory negligence on the part of plaintiff. *He is entitled to a verdict* I say to you in this case *someone was negligent—either the Railroad or this truck driver and the Lavatto Brothers was negligent, or all of them . . . were negligent* There is no evidence in this case from which you can say the plaintiff . . . is not entitled to a verdict at your hands. (Emphasis supplied by court.)

19. *Sheehan v. Allred*, 146 So.2d 760, 763 (Fla. 1st Dist. 1962).

as a matter of law, when in fact either defendant could have been justifiably exculpated by the jury.²⁰ However, if the evidence was sufficient to exonerate either, how can it be said that it was insufficient to exonerate both?²¹ As the dissenting opinion pointed out:

Viewing the favorable verdict and judgment from the position of either defendant . . . such verdict and judgment would be unassailable. . . . [I]f defendant Lee or defendant Allred had been sued separately and the same facts developed as in this case, each would have been entitled to the benefit of a verdict and judgment in his favor, but having been jointly sued, at least one is deprived of that benefit.²²

The reconciliation of this paradox stems from the principle that negligence does not exist in the abstract.²³ Lack of contributory negligence raises no presumption of a defendant's negligence,²⁴ nor does the mere occurrence of an accident establish the negligence of any particular person.²⁵ Negligence on the part of a defendant is never presumed, but is a matter requiring affirmative proof.²⁶ The burden of proof is upon the plaintiff to show negligence on a defendant's part.²⁷ The definition of negligence as the *absence* of certain circumstances, namely contributory negligence and unavoidable accident, produces the anomalous result that negligence on a defendant's part no longer need be affirmatively

20. *Id.* at 764: "The court could not, however, properly direct the verdict against either or both of the defendants under the evidence revealed by this record." The court reasoned that the jury could properly find that the negligence of either was the sole proximate cause of the collision, thereby precluding the other from liability, or the jury could find that the negligence of both was the proximate cause.

21. The evidence was sufficient to exonerate either when tried separately. When both defendants are tried together in the same action, their negligence must still be considered on an individual basis, so the same result should obtain.

22. *Sheehan v. Allred*, 146 So.2d 760, 767 (Fla. 1st Dist. 1962). See note 29 *infra* and accompanying text.

23. 65 C.J.S. *Negligence* § 1 (1950).

24. *Atkinson v. Coskey*, 354 Pa. 297, 47 A.2d 156 (1946); *Gardner v. Seymour*, 27 Wash. 2d 802, 180 P.2d 564 (1947); *Zurfluh v. Lewis County*, 199 Wash. 378, 91 P.2d 1002 (1939); *Twedt v. Seattle Taxicab Co.*, 121 Wash. 562, 210 Pac. 20 (1922).

25. *Interstate Circuit, Inc. v. Le Normand*, 100 F.2d 160 (5th Cir. 1938); *Ward v. Everett*, 148 Fla. 173, 3 So.2d 879 (1941) (fact of injury is not the test for negligence); *Wood v. Jones*, 109 So.2d 774 (Fla. 3d Dist. 1959); *Stolmaker v. Bowerman*, 100 So.2d 659 (Fla. 3d Dist. 1958). "The mere occurrence of an accident is not enough to establish the negligence of anyone." *Wood v. Jones*, *supra* at 775.

26. "That such negligence is an affirmative fact which must be shown by him who alleges it must be conceded." *Chicago, R. I. & P. R.R. v. McClanahan*, 173 F.2d 833, 837 (5th Cir. 1949); *Roth v. Dade County*, 71 So.2d 169 (Fla. 1954) (negligence cannot be presumed, but must be proved); *West Coast Hosp. Ass'n v. Webb*, 52 So.2d 803 (Fla. 1951); *DeSalvo v. Curry*, 160 Fla. 7, 33 So.2d 215 (1948).

27. In *Heps v. Burdine's, Inc.*, 69 So.2d 340, 342 (Fla. 1954) the court stated: "The person injured must point out and bring his action against the one who has caused the injury." *Florida Motor Transp. Co. v. Hillman*, 87 Fla. 512, 101 So. 31 (1924) (burden of proof is on the plaintiff to show negligence on the defendant's part). "Where the facts presented are such that it is apparent to reasonable men that there has been negligence, it is still necessary for the facts to point to the defendant as the probable creator of the dangerous situation." *Wagner v. Associated Shower Door Co.*, 99 So.2d 619, 620 (Fla. 3d Dist. 1958).

proved. Negligence no longer is a description of a defendant's conduct in a given set of circumstances, but is rather something which "exists" when a mishap has occurred and when the possibilities of both contributory negligence and unavoidable accident have been eliminated.

The writer maintains that the court erred in its implicit decision that negligence existed because of a lack of contributory negligence and unavoidable accident. But are there not other possible solutions? For instance, the jury could logically have found that either defendant's negligence was the sole proximate cause of the collision, thus absolving the other defendant from liability. The court's unwillingness to direct a verdict against either defendant shows that it considered this to be at least one possibility.²⁸ However, by directing a verdict for the plaintiffs on the issue of liability, the court, in effect, ruled on the issue of proximate cause as a matter of law, resulting from its implicit holding that one, but not both defendants, may avail himself of that defense. By the use of this technique the court may well be ruling against the defendant who is considered last by the jury. If the jury finds for the first defendant, the court has, in effect, directed a verdict against the second even though it has admitted that the evidence was sufficient for a jury to find in his favor.²⁹

The plight of multiple defendants is obvious in this situation: Each patiently waits for the plaintiff to bring forth proof that he was negligent so that he may properly rebut it. Instead, the plaintiff merely exonerates himself from contributory negligence and proves that unavoidable accident is inapplicable. Faced with an impending directed verdict for the plaintiff, the cautious defendant must then go forward with the burden of proof to show that he was not negligent.³⁰ The court

28. Under one view of the evidence which the jury might properly have taken it could have found the defendant Lee was guilty of an act of negligence which proximately caused the collision, in which event a verdict against Lee and in favor of defendant Allred would have been justified. Under another view which the jury may have taken of the evidence, it could have found that it was Allred's negligence which proximately caused the collision, in which event the verdict could have been against him and in favor of Lee. *Sheehan v. Allred*, 146 So.2d 760, 764 (Fla. 1st Dist. 1962).

29. The majority opinion stated that if a verdict were not directed in the plaintiffs' favor on the issue of negligence, he would be deprived of a fair trial. However, in effect, this directed verdict deprives the *defendants* of their right to trial by jury. This conclusion obtains from the fact that the jury *must* return a verdict against at least one of the defendants, even though the court admitted that a *jury* verdict exonerating that particular defendant would be unassailable. In effect, the court has ruled against this undesignated defendant as a matter of law.

30. This shifting of the burden of proof has been seen previously in Florida to a limited extent. The courts held in the following cases that violation of a traffic law was prima facie evidence of negligence (but not a presumption): *Gudath v. Culp Lumber Co.*, 81 So.2d 742 (Fla. 1955); *Clark v. Sumner*, 72 So.2d 375 (Fla. 1954); *Allen v. Hooper*, 126 Fla. 458, 171 So. 513 (1936) (specific rejection of doctrine of "negligence per se"); *Morrison v. C. J. Jones Lumber Co.*, 126 So.2d 895 (Fla. 2d Dist. 1961); *Alessi v. Farkas*, 118 So.2d 658 (Fla. 2d Dist. 1960). In each instance it was held that the prima facie evidence of negligence could be overcome by other facts and circumstances, and in each case the ques-

chose to rely upon this propounded theory of "negligence in the air" with the novel result that it has now created a "reverse interpleader." Thus, a plaintiff who is injured joins all parties who are possibly responsible. Then, after he frees himself from fault and removes the possibility of unavoidable accident, the parties must battle among themselves as to who is not liable. This writer feels that this procedural "plaintiff's holiday" is repugnant to the entire concept of directed verdict and may, in turn, effect a change in the substantive law of negligence heretofore unrecognized in our system of jurisprudence.

THEODORE KLEIN

LANDLORD AND TENANT—TENANT'S LIABILITY FOR INCREASED RENT DEMANDED AS A CONDITION OF HOLDING OVER

The plaintiff sold a 320-acre tract to the defendant, taking back a purchase money mortgage. The plaintiff continued to dwell on the property without objection by the defendant. Subsequently, the parties executed a written lease for a fixed term at a rental of one dollar. The plaintiff held over when the lease expired, and the defendant served written notice that if the plaintiff did not vacate at once, he would be charged rent at the rate of 300 dollars per month for as long as he continued to occupy the premises. The plaintiff remained silent as to the notice and one year later, notice was again served on him quoting the same terms. When the defendant defaulted on a mortgage installment, the plaintiff sued to foreclose. The defendant counterclaimed for rent at the rate of 300 dollars per month, electing to treat the plaintiff as a tenant rather than as a trespasser and choosing not to hold the plaintiff under Florida's double rent statute.¹ The trial court dismissed the counterclaim on the grounds that the rented premises were not worth 300 dollars per month. On appeal, *held*, reversed: when a landlord demands of the tenant different rent for continued possession of property after the expiration of a lease, and the tenant thereafter continues in possession without protest, he impliedly agrees to pay the rent demanded. *David Properties, Inc. v. Selk*, 151 So.2d 334 (Fla. 1st Dist. 1963).²

tion of negligence was ultimately left for the jury to decide. However, the *Sheehan* court did not avail itself of this theory. Even had it done so, it does not appear that the situation in the instant case would have been materially altered. The court admitted the fact of the legal sufficiency of the evidence as to either defendant which would have justified submission of the question of negligence to the jury.

1. FLA. STAT. § 83.06 (1961). This section provides that "when any tenant shall refuse to give up possession of the premises at the end of his lease, the landlord or his agent, attorney or legal representatives, may demand of such tenant double the monthly rent, and may recover the same at the expiration of every month, or in the manner pointed out hereinafter."

2. In the lower court the chancellor pointed out that the building was no more than