Wyoming Law Journal

Volume 10 | Number 2 Article 11

December 2019

Evidence Courts Considers on Motion to Direct Verdict

Thomas C. Bogus

courts would probably follow the majority rule of the state courts; i.e., that one remarrying within the Wyoming statutory period of seven years, believing, but not knowing, that the former spouse was in fact dead, would do so at his peril so far as concerns the crime of bigamy.

STERLING CASE

EVIDENCE COURT CONSIDERS ON MOTION TO DIRECT VERDICT

Formerly many courts applied the scintilla doctrine as a basis for determining the quantity of evidence required in order to defeat a motion for a directed verdict.[1] Under that doctrine the motion was denied if the party resisting it produced any evidence tending to support each material allegation in his pleadings.[2] The scintilla doctrine has been replaced by the substantial evidence rule which requires submission of a case to the jury if there is sufficient evidence upon which reasonable men could reach different conclusions.[3] The party opposing the motion must support each essential element in his pleadings with substantial evidence.[4]

Although the substantial evidence rule has been adopted in most states, there is a split of authority concerning how much evidence the courts will examine in applying the rule.[5] Here it should be mentioned that this article is considering only the motion for a directed verdict made after all the evidence has been introduced, and no consideration is given to a motion for a directed verdict or an involuntary non-suit entered by the defendant after the plaintiff has presented his case. In most jurisdictions only the evidence in favor of the party resisting the motion will be considered.[6] If the defendant moves for a directed verdict, the court looks at the plaintiff's evidence, and the motion is denied if the plaintiff has established a prima facie case.[7] In applying the majority rule there are two situations which present some difficulty.[8] One arises when the defendant's evidence helps the plaintiff establish his cause of action. The cases hold that any evidence in favor of the plaintiff will be considered

1. Louisville & N.R. v. Chambers, 165 Ky. 703, 178 S.W. 1041 (1915).
2. Hamden Lodge No. 517, I.O.O.F. v. Ohio Fuel Gas Co., 127 Ohio St. 469, 189 N.E. 246 (1934).
3. Nugent v. Nugent's Ex'r, 281 Ky. 263, 135 S.W.2d 877 (1940); Hamden Lodge No. 517, I.O.O.F. v. Ohio Fuel Gas Co., 127 Ohio St. 469, 189 N.E. 246 (1934). Contra, Birmingham Electric Co. v. Freeman, 32 Ala. App. 479, 27 So.2d 231 (1946).
4. Leary v. Macheski, 92 Ohio App. 452, 110 N.E.2d 800 (1951).
5. Note, 22 Tex. L. Rev. 359 (1944); McBaine, Trial Practice . . . 31 Cal. L. Rev. 454 (1943).
6. Yance v. Hoskins, 225 Iowa 1108, 281 N.W. 489 (1938); Hamden Lodge No. 517, I.O.O.F. v. Ohio Fuel Gas Co., 127 Ohio St. 469, 189 N.E. 246 (1934); Klein v. York, 149 Tenn. 81, 257 S.W. 861 (1924); Burghardt v. Detroit United Ry., 206 Mich. 540, 173 N.W. 360, 5 A.L.R. 1333 (1919); Karr v. Milwaukee Light, Heat & Traction Co., 132 Wis. 662, 113 N.W. 62 (1907).
7. Wilson v. Kansas City Life Ins. Co., 233 Mo.App. 1006, 128 S.W.2d 319 (1939). For a discussion of prima facie case see: 9 Wigmore, Evidence, § 2494 (3d ed. 1940).
8. 9 Wigmore, Evidence, § 2495 (3d ed. 1940).

including the evidence produced by the defendant.[9] Apparently the courts feel that a prima facie case must go to the jury, and it is immaterial which side establishes it. The other situation creates a more difficult problem and occurs when the defendant establishes an affirmative defense by uncontroverted evidence which destroys the plaintiff's prima facie case. The problem arises because the majority rule is largely based on the proposition that the weight of evidence and the credibility of witnesses are matters strictly within the province of the jury, and, if the court considers the defendant's evidence, it is thereby invading a field reserved for the jury.[10] However, the cases hold that it is proper to examine not only the plaintiff's evidence but also any uncontroverted evidence the defendant has introduced to establish an affirmative defense.[11] Courts should encounter no difficulty in deviating slightly from the majority rule to consider the uncontroverted evidence of the defendant, because such evidence presents no question of fact but rather concerns a matter of law in which no question of the credibility of witnesses or the weight of evidence remains.[12] Thus, in applying the majority rule unless one of the two situations just considered is present, it is obvious that a ruling on defendant's motion after plaintiff's evidence will always be the same as a ruling on the motion after all the evidence.

Under the majority rule, if the plaintiff moves for a directed verdict, only evidence presented by the defendant will be considered, and the motion will be denied if the defense is supported by substantial evidence.[13] Plaintiff's motion may present problems similar to those that may arise on defendant's motion, and courts usually resolve these problems in the same manner. If plaintiff's evidence favors the defendant, it will be examined along with defendant's evidence.[14] Also, if the uncontroverted evidence produced by the plaintiff tends to destroy defendant's case, the court will consider it on plaintiff's motion for a directed verdict.[15]

The reasons given for applying the majority rule are primarily based upon the right to trial by jury. The proponents of the rule maintain that it would be an invasion of the right to jury trial to consider all the evidence in ruling on a motion for a directed verdict.[16] Once the plaintiff has established a prima facie case or the defendant has supported his defense, the case can not be destroyed by conflicting evidence but must be sub-

9. LaBonte v. Mutual Fire & Lightning Ins. Co., 75 Mont. 1, 241 Pac. 631 (1925).
10. Burke v. United Electric Rys. Co., 79 R.I. 50, 83 A.2d 88 (1951); Christensen v. Utah Rapid Transit Co., 83 Utah 231, 27 P.2d 468 (1933).
11. Fuller v. DePaul University, 293 Ill.App. 261, 12 N.E.2d 213 (1938); Ritchie v. Long Beach Community Hospital Ass'n, 139 Cal.App. 688, 34 P.2d 771 (1934).
12. Note, 22 Cal. L. Rev. 230 (1934).
13. Serv-Us Chain Stores, Inc. v. Arden Realty & Investment Co., 106 Colo. 369, 105 P.2d 850 (1940).
14. Bay Island Drainage & Levee District No. 1 v. Nussbaum, 388 Ill. 131, 56 N.E.2d 615 (1944).
15. Cincinnati v. Board of Education of School District of Cincinnati, 63 Ohio App. 549, 27 N.E.2d 413 (1940), appeal dismissed, 137 Ohio St. 568, 31 N.E.2d 440 (1941). See Tucson v. Apache Motors, 74 Ariz. 98, 245 P.2d 255 (1952).
16. Marable v. State ex rel. Wackernie, 32 Tenn.App. 238, 222 S.W.2d 234 (1949); Tabor v. Continental Baking Co., 110 Ind.App. 633, 38 N.E.2d 257 (1941).

mitted to the jury.[17] Conflicting evidence presents issues of fact concerning the weight of evidence and the credibility of witnesses which are jury questions.[18] To further justify the majority rule a comparison is made between directing verdicts and setting aside verdicts on the grounds that the verdict is against the great weight of the evidence.[19] In setting aside a verdict the trial court considers all the evidence.[20] This is justified on the grounds that the setting aside of a verdict is merely procedural, because the losing party has the right to a new trial.[21] However, the consequence of a directed verdict is severe, becaues it is res judicata.[22] Therefore, the court should only consider the evidence of the party resisting a directed verdict to determine whether he shall be barred from bringing another action without the benefit of a verdict.

Contrary to the weight of authority, there are some jurisdictions which consider all the evidence in ruling on a motion for a directed verdict.[23] These courts apply the substantial evidence test to all the evidence and consequently must weigh the evidence and pass upon the credibility of witnesses.[24] Here it should be pointed out that although all jurisdictions use the substantial evidence test, they do not apply it in the same manner. In the states following the majority view the test is whether the evidence is substantial when looked at alone, while in the minority jurisdictions the test is whether the evidence is substantial in light of all of the evidence. The evidence of the movant will be examined even though it conflicts with the evidence offered by the resisting party. The court will direct a verdict if it feels that upon the entire evidence reasonable men could only find for the movant.[25] By this view a ruling on a motion for a directed verdict after plaintiff's evidence could be different than a ruling on a similar motion after all the evidence.

One argument for the minority rule is based upon a comparison with setting aside verdicts. In setting aside a verdict the court looks at all the evidence and decides as a matter of law that the verdict is unreasonable. Following this reasoning the court should be allowed to direct a verdict for the same unreasonableness.[26] It is submitted that the minority rule

17. Serv-us Chain Stores, Inc. v. Arden Realty & Investment Co., 106 Colo. 369, 105 P.2d 850 (1940); Wilson v. Kansas City Life Ins. Co., 233 Mo.App. 1006, 128 S.W.2d 319 (1939).
18. Burke v. United Electric Rys. Co., 79 R.I. 50, 83 A.2d 88 (1951); Christensen v. Utah Rapid Transit Co., 83 Utah 231, 27 P.2d 468 (1933); Young v. Tennesse Electric Power Co., 22 Tenn.App. 308, 122 S.W.2d 821 (1938).
19. Note, 22 Col. L. Rev. 256 (1922).
20. DeRobbio v. Hart, 71 R.I. 347, 45 A.2d 169 (1946); Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 170 P.2d 465 (1946).
21. Notes, 22 Tex. L. Rev. 359 (1944); 22 Cal. L. Rev. 230 (1934).
22. Smith, The Power of the Judge To Direct a Verdict . . . 24 Col. L. Rev. 111, 116 (1924).
23. Hanson v. Homeland Ins. Co. of America, 232 Minn. 403, 45 N.W.2d 637 (1951); Bank of United States v. Manheim, 264 N.Y. 45, 189 N.E. 776 (1934); Spaulding v. Mutual Life Ins. Co. of New York, 94 Vt. 42, 109 Atl. 22 (1920).
24. McBaine, Trial Practice . . . 31 Cal. L. Rev. 454 (1943).
25. Audette v. Lindahl, 231 Minn. 239, 42 N.W.2d 717 (1950).
26. Smith, The Power of the Judge To Direct a Verdict . . . 24 Col. L. Rev. 111, 124 (1924).

would put an end to litigation. By applying the majority rule a court might not be able to direct a verdict, although it could later set the verdict aside and grant a new trial. Under the minority rule a verdict can be directed whenever it would be the duty of the court to set aside a verdict.

In considering the position Wyoming takes on directing verdicts, it is well established that this state follows the majority rule.[27] If the evidence of the movant supplied a defect in his opponent's case, a Wyoming court would probably consider this evidence, because in stating the majority rule the Supreme Court of Wyoming has said that it will consider all the evidence in favor of the party resisting the motion.[28] In one Wyoming case the Court also mentioned that it would consider the uncontroverted evidence of the movant.[29]

Although Wyoming follows the weight of authority, the Supreme Court applied the minority rule in the case of *Smith v. Beard*.[30] This was a malpractice suit in which physicians testified for both sides, and, after all the evidence had been introduced, the court directed a verdict for the defendant. The Supreme Court cited many malpractice cases from other states in which the minority rule was used, but the court could only cite one Wyoming case which mentioned the rule in a dictum.[31]

There is very little case authority in Wyoming concerning what evidence the court will consider on a motion to set aside a verdict.[32] In two cases the trial court applied the same rule that was used in the *Smith* case and considered all the evidence in determining whether to set a verdict aside for insufficient evidence, but on appeal the Supreme Court only looked at one side of the evidence.[33] Also in *Branson v. Roelofsz*[34] the Supreme Court only examined the evidence of the resisting party. In that case the defendant appealed the overruling of his motions for a directed verdict, new trial, and judgment notwithstanding the verdict. The Court considered the motions together without making any distinctions among them and stated that only the evidence of the successful party

27. Chandler v. Dugan, 70 Wyo. 439, 251 P.2d 580 (1952); Meyer v. Culley, 69 Wyo. 285, 241 P.2d 87 (1952); Brown v. Wyoming Butane Gas Co., 66 Wyo. 67, 205 P.2d 116 (1949); Merback v. Blanchard, 56 Wyo. 152, 105 P.2d 272 (1940); Collins v. Anderson, 37 Wyo. 275, 260 Pac. 1089 (1927).

28. Chandler v. Dugan, 70 Wyo. 439, 251 P.2d 580, 584 (1952); Meyer v. Culley, 69 Wyo. 285, 241 P.2d 87, 89 (1952); Merback v. Blanchard, 56 Wyo. 152, 105 P.2d 272, 274 (1940); Collins v. Anderson, 37 Wyo. 275, 260 Pac. 1089, 1090 (1927).

29. See Dudley v. Montgomery Ward & Co., 64 Wyo. 357, 192 P.2d 617, 619 (1948).

30. 56 Wyo. 375, 110 P.2d 260 (1941).

31. See In re Lane's Estate, 50 Wyo. 119, 58 P.2d 415 (1936), rehearing denied, 50 Wyo. 119, 60 P.2d 360, 363 (1936).

32. In Hall Oil Co. v. Barquin, 33 Wyo. 92, 237 Pac. 255, 262 (1925), the Supreme Court stated that a motion to set aside a verdict was not authorized by the Wyoming statutes; the correct procedure would be to move for a new trial on the grounds that the verdict is not sustained by sufficient evidence. This writer refers to a motion to set aside a verdict merely to illustrate the effect of a successful motion for a new trial.

33. Kowlak v. Tensleep Mercantile Co., 41 Wyo. 144, 281 Pac. 1000 (1929); Kester v. Wagner, 22 Wyo. 512, 145 Pac. 748 (1915).

34. 52 Wyo. 101, 70 P.2d 589 (1937).

would be examined.[35] Thus, with few exceptions Wyoming applies the majority view to all three motions.

In this field the real problem confronting the court is to determine the bounds within which a jury should be allowed to act freely, and this problem is brought out in the *Smith* case. There the Court pointed out that in malpractice cases a great majority of the verdicts were rendered for plaintiffs, and the opinion indicated that in actions of this type juries were not qualified to reach verdicts on the conflicting facts.[36] The Court mentioned that if a respectable minority of practicing physicians in the community approved the methods used by the defendant, then as a matter of law the case was not for the jury.[37] In order to direct a verdict all the evidence had to be considered, so the Court upheld the direction of the trial court by applying the minority rule. As indicated by the cases decided after *Smith v. Beard,* Wyoming still follows the weight of authority.[38] It is submitted that the majority rule is preferred, because judges generally want to apply broad rules of procedures in order to keep from examining all the facts of each case. However, it appears that in a proper case the Wyoming Supreme Court would consider all the evidence to uphold a directed verdict, if the Court felt that the case was correctly taken from the jury.

The problem is in finding a means which will enable the court to consider all the evidence. A court has always had the power to look at all the evidence to determine where the great weight lay. As a closing thought it is suggested that a motion for a new trial based on misconduct of the jury in refusing to consider the weight of the evidence would enable the court to consider all the evidence. The court would have to examine the entire case in determining whether there had been misconduct by the jury. Conceivably a court might seize upon misconduct of the jury if it believed that the case should be withdrawn from the jury and that all the evidence was needed in order to withdraw the case.

THOMAS C. BOGUS

35. Branson v. Roelofsz, 52 Wyo. 101, P.2d 589, 593 (1937).
36. Smith v. Beard, 56 Wyo. 375, 110 P.2d 260, 269 (1941).
37. Smith v. Beard, 56 Wyo. 375, 110 P.2d 260, 267 (1941).
38. Chandler v. Dugan, 70 Wyo. 439, 251 P.2d 580 (1952); Meyer v. Culley, 69 Wyo. 285, 241 P.2d 87 (1952); Brown v. Wyoming Butane Gas Co., 66 Wyo. 67, 205 P.2d 116 (1949).