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NOTE

Evidence—Cogdill v. Scates: Effect of a Testimonial Admission by a Party

In *Cogdill v. Scates*[1] the North Carolina Supreme Court dealt with the question whether testimony by a plaintiff that was both unequivocal and diametrically opposed to the allegations of her complaint precluded her from recovering the damages she claimed despite the presentation of evidence supporting her right to recover. The court, carefully limiting its decision to the facts of the case,[2] held that she was precluded from recovery and reversed a jury verdict in her favor.

Plaintiff in *Codgill* was a passenger in a car driven by her husband that collided with another automobile. Plaintiff filed suit against both her husband and the driver of the other car alleging that she was injured by their concurrent negligence.[3] The bases on which she sought recovery from her husband at trial were (1) that he failed to keep a proper lookout and operated his car at an excessive speed without having it under proper control and (2) that he suddenly made a left turn across the highway without signaling.[4]

Several actions arising out of the collision were consolidated for trial in superior court. Evidence was introduced by the other parties in the action sufficient to support a finding that the drivers of both cars were negligent.[5] In the course of presenting their evidence, two of the other parties called plaintiff to the stand. While testifying, she stated that her husband had given a left turn signal and that his car was sitting still, in the proper lane, waiting for an opportunity to turn when the collision occurred. Then, in the absence of the jury, she testified that she had not read her complaint and that if she had she would not have made several of the statements in it. After consultation with her attorney and after the return of the jury, she repeated on cross-

1. 290 N.C. 31, 224 S.E.2d 604 (1976).

2. *Id.* at 43, 224 S.E.2d at 611.

3. Plaintiff settled out of court with the other driver before trial. *Id.* at 32, 224 S.E.2d at 605.

4. Plaintiff's complaint originally alleged also that her husband was driving while intoxicated and in such a manner as to be guilty of careless and reckless driving. Both these allegations were deleted from the complaint before trial. *Id.* at 32-33, 224 S.E.2d at 605.

5. For a summary of this evidence, see *id.* at 33, 224 S.E.2d at 606.

examination the substance of her earlier testimony as to the circumstances surrounding the collision.

At the close of presentation of evidence, plaintiff's husband moved for a directed verdict against her. This motion was denied[6] and the case was sent to the jury, which returned a verdict of forty thousand dollars for plaintiff.[7] This judgment was reversed by the North Carolina Court of Appeals[8] in a decision that held that "plaintiff Cogdill is conclusively bound by her unequivocal testimony that her husband . . . was not negligent in any way . . . ."[9]

The North Carolina Supreme Court unanimously upheld the decision of the court of appeals. Chief Justice Sharp, writing for the court, saw the case generally as a "question to what extent and under what circumstances a party is bound by his own adverse testimony in the trial of his case."[10] While the court's statement of the question was broad, its answer was narrow. After considering a number of rules of general applicability,[11] the court settled on a rule that had specific application to the factual situation of *Cogdill*. When deliberate testimony is given by a party establishing a fact fatal to his case, and a statement is made by his counsel, on inquiry from the trial judge, that he intends to elicit no contradictory testimony, then " 'the party and his counsel advisedly manifest an intention to be bound.' "[12]

The court in *Cogdill* considered itself unconstrained by prior North Carolina case law in its resolution of the issue of the binding effect of a party's adverse testimony.[13] Consequently, it looked to courts

6. As was a later motion for a judgment notwithstanding the verdict. *Id.* at 38, 224 S.E.2d at 608.

7. The jury's verdict was inconsistent, awarding damages to every person involved in the accident including the two drivers whom it found simultaneously negligent and not contributorily negligent. In the words of the court, the jurors "seem to have assessed damages on the theory they were dividing the proceeds of no-fault insurance policies." *Id.* at 44, 204 S.E.2d at 612.

8. Cogdill v. Scates, 26 N.C. App. 382, 216 S.E.2d 428 (1975) (Judge Hedrick dissented on the ground that plaintiff's testimony was not so unequivocal as to require a directed verdict).

9. *Id.* at 385-86, 216 S.E.2d at 430.

10. 290 N.C. at 39, 224 S.E.2d at 608.

11. *See* text accompanying notes 15-25 *infra*.

12. 290 N.C. at 44, 224 S.E.2d at 612 (quoting MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 266, at 638 n.82 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]). The facts, as stated by the court, give strong support to the holding. Plaintiff made her damaging admissions both on *voir dire* and before the jury. She repeated her testimony after warnings about the consequences of perjury. Her attorney did not seek remedial testimony; instead, his only action was to assure the court that if plaintiff said she did not read the complaint, then she did not read it. *Id.* at 43, 224 S.E.2d at 611.

13. Only two prior cases seem to have given the matter any thought, and neither

of other jurisdictions and to leading authorities on evidence for guidance.[14] It found three basic approaches to the question, none of which had been articulated before in North Carolina cases.

The first approach does not differentiate between the testimony of a party and the testimony of anyone else.[15] A damaging testimonial admission by a party is thus evidence for the consideration of the trier of fact. While proponents of this approach recognize that a party's testimonial admission could be so detrimental to his case that a directed verdict would be appropriate,[16] they argue against a rule of general applicability binding the party despite the presence of other evidence.[17] The rationale for this approach has been stated as follows: "Obviously, the testimony of a party may be incorrect. . . . [A rule that binds a party who has given incorrect testimony] means, then, that the truth should not help a [party] who has testified to an error."[18]

The second approach treats the party's testimony as conclusive against contradiction only "when he testifies unequivocally to matters 'in his own personal knowledge.' "[19] This approach thus follows the first except when a party is testifying to something peculiarly within his own province. This approach has been most commonly taken in regard to testimony concerning knowledge[20] or motivation,[21] although it has been extended so far as to include a party's account of the circum-

of them gave it very much. Arthur v. Henry, 157 N.C. 393, 73 S.E. 206 (1911), and Ireland v. Mutual Life Ins. Co., 226 N.C. 349, 38 S.E.2d 206 (1946), both dealt with the issue of a party's damaging testimonial admissions. They reached opposite results. The court in *Cogdill* dismissed *Arthur v. Henry* as precedent because of its "terse and imprecise rationale." 290 N.C. at 40, 224 S.E.2d at 609. The same could be said of *Ireland.*

14. A good deal of the court's discussion of the law in this area consists of quotation from and summarization of McCORMICK, *supra* note 12, § 266, at 637-39.

15. This approach is favored by both McCormick and Wigmore. McCORMICK, *supra* note 12, § 266, at 638; 9 J. WIGMORE, EVIDENCE § 2594a, at 601 (3d ed. 1940).

16. "[T]he problem of persuasion may be a difficult one when the party seeks to explain or contradict his own words, and . . . the trial judge would often be justified in saying, on motion for directed verdict, that reasonable minds . . . could only believe that the party's testimony against his interest was true." 290 N.C. at 41, 224 S.E.2d at 610 (quoting McCORMICK, *supra* note 12, § 266, at 637).

17. If the only evidence a party offers on an issue is his own testimony, and if that testimony contains an admission fatal to his case, then it makes no difference whether the admission is treated as binding or non-binding. A directed verdict would be proper in either case. *See* Fulghum v. Atlantic Coast Line R.R., 158 N.C. 555, 74 S.E. 584 (1912).

18. Alamo v. Del Rosario, 98 F.2d 328, 331 (D.C. Cir. 1938).

19. McCORMICK, *supra* note 12, § 266, at 637.

20. *E.g.*, Monsanto Chem. Co. v. Payne, 354 F.2d 965 (5th Cir. 1965); Findlay v. Rubin Glass and Mirror Co., 350 Mass. 169, 213 N.E.2d 858 (1966).

21. Peterson v. American Family Mut. Ins. Co., 280 Minn. 482, 160 N.W.2d 541 (1968).

stances surrounding an accident.[22] The distinction between so-called "personal knowledge" testimony and other testimony has been justified as follows: "[W]hen a party testifies to facts in regard to which he has special knowledge, such as his own motives, purposes, or knowledge, or his reasons for acting as he did, the possibility that he may be honestly mistaken disappears. His testimony must either be true or deliberately false."[23]

Finally, some courts refuse to allow any explanation or contradiction of a party's damaging testimonial admission. In effect, the subject of the testimony is removed from controversy in the case. Underlying this third approach seems to be a judicial distaste for allowing a party to win on a claim whose merits he has contradicted: "[A party] cannot make out a better case for himself than he himself has testified to . . . for if this were to be allowed, it would be tantamount to permitting him to say for his own advantage that his own testimony should be regarded as false, and that of some other witness as true."[24] While in theory this approach is the most severe of the three, it is difficult to say if the same is true in practice, for the rule has been limited by numerous exceptions.[25]

Analytically, the rule accepted in *Cogdill* and the three approaches considered but bypassed should be measured against the law of evidence relating to admissions. Admissions have been divided into two categories by the courts—evidential admissions and judicial admissions. The two are distinguishable definitionally, although in practice more difficulties may arise.

The scope of evidential admissions has been stated rather broadly as follows: "The rule is universal that whatever a party does or says shall be evidence against him, to be left to the jury."[26] The most obvious evidential admissions are statements made by a party or his

22. Bell v. Harmon, 284 S.W.2d 812 (Ky. App. 1955).

23. Harlow v. Laclair, 82 N.H. 506, 512, 136 A. 128, 131 (1927). This rationale has been disputed: "Knowledge may be 'special' without being correct. Often we little note nor long remember our 'motives, purposes, or knowledge.' There are few, if any, subjects on which [parties] are infallible." Alamo v. Del Rosario, 98 F.2d 328, 332 (D.C. Cir. 1938).

24. Mollman v. St. Louis Pub. Serv. Co., 192 S.W.2d 618, 621 (Mo. App. 1946).

25. *See* Bradshaw v. Stieffel, 230 Miss. 361, 92 So. 2d 565 (1957); McCORMICK, *supra* note 12, § 266. A study of these two sources reveals no fewer than seven major exceptions to the rule. It is interesting to note that Judge Hedrick of the court of appeals would have applied one of them (equivocal nature of testimony) to *Cogdill*. *See* note 8 *supra*.

26. McRainy's Ex'rs v. Clark, 4 N.C. 498, 499, Term 698, 699 (1818).

agent.[27] Beyond the obvious, such things as superseded pleadings,[28] judicial admissions at a prior trial[29] and offers of compromise[30] have been included within this category. Essentially, however, the hallmarks of evidential admissions are that they are evidence and that they should be left to the consideration of the trier of fact.

A judicial admission, in contrast to an evidential admission, "is not evidence, but rather removes the admitted fact from the field of evidence by formally conceding its existence."[31] The most common methods of making judicial admissions are by pleadings or by stipulations;[32] their effect is to prevent the party making them from introducing contradictory evidence and to relieve the opposing party of the burden of proof on the subject they encompass.[33] A judicial admission is thus an act[34] whose purpose and effect is to remove a subject from controversy in a trial.

The problem of the effect of a damaging testimonial admission by a party is thus one of classification. Once a party's testimonial admission is declared either judicial or evidential,[35] the result that should follow is clear. Evaluation of the approach taken and those not taken in *Cogdill* should therefore rest on whether they have correctly classified an admission as judicial or evidential.

Cogdill involved testimony by a plaintiff in direct contradiction to her complaint; further, she stated that she had not read her complaint and that she would not have signed it if she had. In the course of this damaging testimony, she was given an opportunity to consult with her attorney. Neither she nor her attorney expressed any reservations as to the truth of her testimony.[36] It would seem that plaintiff's deliberate and repeated statements, in the face of inquiry by the trial judge and with opportunity to consult with her attorney, expressed an intention

27. On this complex subject, see MCCORMICK, *supra* note 12, § 267; 2 STANSBURY'S NORTH CAROLINA EVIDENCE §§ 168-171 (2d ed. H. Brandis rev. 1973) [hereinafter cited as STANSBURY].

28. Davis v. Morgan, 228 N.C. 78, 44 S.E.2d 593 (1947).

29. Allen v. Allen, 213 N.C. 264, 195 S.E. 801 (1938).

30. American Potato Co. v. Jeanette Bros. Co., 174 N.C. 236, 93 S.E. 795 (1917).

31. 2 STANSBURY, *supra* note 27, § 166, at 1.

32. *E.g.*, N.C.R. CIV. P. 8(d), 16, 36.

33. Powers v. Robeson County Memorial Hosp., Inc., 242 N.C. 290, 87 S.E.2d 510 (1955); 2 STANSBURY, *supra* note 27, § 166.

34. This act may be one of omission as well as of commission. *See* N.C.R. CIV. P. 8(d).

35. There appears to be no compelling reason for declaring a testimonial admission by a party sui generis and classifying it as neither.

36. *See* note 12 *supra.*

to deny the averments of her complaint. Her behavior amounted to a formal concession of the non-existence of the facts on which she based her complaint. In short, her testimony was in the nature of a judicial admission,[37] and the North Carolina Supreme Court was justified in treating it as such.[38]

The outcome in *Cogdill v. Scates* is thus arguably correct. There is, however, still left the question of the approach that should be taken in less extreme cases.[39] Testimonial admissions by a party are statements. As such, they fall within the broad definition of an evidential admission—"whatever a party does or says."[40] Short of the *Cogdill* situation, they would appear to lack the nature of a formal concession required for a judicial admission.[41] The most logical approach would therefore seem to be to treat them as what they are—evidence—and allow them to be weighed by the trier of fact. This use of an admission is reflected in the first approach discussed in *Cogdill*.[42] When coupled with the rule adopted in *Cogdill* to deal with extreme cases, it would seem to offer the best solution to what has been described as " 'one of the most troublesome questions in the law of evidence . . . .' "[43]

The second approach to the problem of testimonial admissions by a party is distinguished from the first by its treatment of statements from the "personal knowledge" of the party.[44] In terms of classifying an admission as evidential or judicial, this distinction simply makes no sense. Further, it can be said of this rule that it rests on a doubtful rationale[45] and that it has shown a tendency toward over-elasticity.[46]

The third approach noted in *Cogdill* makes all testimonial admissions by a party binding.[47] This approach thus gives the result of judicial admissions to what are by nature evidential admissions. The

37. For the definition of a judicial admission, *see* text accompanying note 31 *supra*.

38. Even Professor McCormick, who in general favors treating testimonial admissions by a party as evidential, would appear to concede the correctness of this result. McCORMICK, *supra* note 12, § 266, at 638 n.82.

39. Two points should be made here. First, the court in *Cogdill* was careful to limit its holding to the facts of the case. 290 N.C. at 43, 224 S.E.2d at 611. Second, the court was emphatic in its rejection of prior North Carolina case law as providing any precedent of value. *See* note 13 *supra*. The case thus marks a starting point without deciding in which direction to proceed.

40. McRainy's Ex'rs v. Clark, 4 N.C. 498, 499, Term 698, 699 (1818).

41. *See* text accompanying note 31 *supra*.

42. *See* 290 N.C. at 41, 224 S.E.2d at 610.

43. *Id.* at 39, 224 S.E.2d at 608 (quoting 32A C.J.S. *Evidence* § 1040(3) (1964)).

44. *See* text accompanying note 23 *supra*.

45. *See* note 23 *supra*.

46. *See* text accompanying note 22 *supra*.

47. *See* 290 N.C. at 41, 224 S.E.2d at 610.

breadth of the rule is compensated for by the number of exceptions to it.[48] While adoption of this approach might be justifiable if its rationale were unassailable, such is not the case.[49] Moreover, the number of exceptions to this rule raises a serious question about whether it could be administered fairly and uniformly.[50]

The decision in *Cogdill v. Scates* is a good one when applied to the narrow factual situation with which it dealt. As precedent, it represents more than anything else the road not taken. It should not be misread as adopting for North Carolina a rule that testimonial admissions by a party should be treated as judicial admissions. It did not. If, however, the rule it adopted is combined in future cases with a rule treating other testimonial admissions by parties as evidential admissions, *Cogdill v. Scates* would represent an important step in the development of a coherent, well-articulated law of evidence relating to admissions in North Carolina.

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48. *See* note 25 *supra.*

49. "The underlying notion [of a rule that makes a party's testimony binding] seems to be that a party who has testified incorrectly should be punished by losing his case. But if he has committed perjury he should not be punished without trial, and if he has not committed perjury he should not be punished at all." Alamo v. Del Rosario, 98 F.2d 328, 331 (D.C. Cir. 1938).

50. *Cf.* Cogdill v. Scates, 26 N.C. App. at 387, 216 S.E.2d at 431 (Hedrick J., dissenting) (this dissent—on the ground that plaintiff's testimory was not unequivocal—is one demonstration of the inconsistency that can follow from the application of the many exceptions to the rule).