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A. T. Klemmens & Sons v. Reber Plumbing and Heating Co., 360 P.2d 1005 (Mont. 1961)

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ON APPEAL CONTRADICTORY STATEMENTS BY A PARTY ARE ACCEPTED IN THE VIEW MOST FAVORABLE TO HIM.—The contract under which plaintiff claimed relief was never reduced to writing. Plaintiff testified on direct and redirect examination that the contract was intended to become effective when orally stated. However, on cross-examination his statements[1] indicated that a written agreement was considered necessary to bring the contract into existence. A verdict was rendered for the plaintiff and judgment given accordingly. On appeal to the Montana Supreme Court, *held,* affirmed.[2] In considering whether the contradictory testimony of a party, standing alone, will support a verdict in his favor, the view of his testimony most favorable to him must be accepted by an appellate court. *A. T. Klemmens & Sons v. Reber Plumbing and Heating Co.,* 360 P.2d 1005 (Mont. 1961) (Justices Angstman and Adair specially concurring in the result only).

This case expressly overrules *Wilson v. Blair*[3] and *Hanson v. Lancaster*[4] which had adopted the so-called minority rule that contradictory statements made by *a party,* as a witness, are to be taken in the view least favorable to him on appeal.[5] The instant case committed the Montana Court to the view of the majority of the American courts, to wit: In considering whether the contradictory testimony of *a party,* standing alone, will support a verdict in his favor, the view most favorable to him must be accepted by an appellate court.[6]

The Montana Supreme Court has always followed the general rule that in testing the sufficiency of evidence needed to sustain a lower court decision the appellate court will view such evidence from all sources and witnesses in the light most favorable to the party prevailing in the lower

[1]The testimony on cross-examination was as follows:

"Q. But I say you didn't take Mr. Reber's word for it, you wanted it in writing before it became final, did you not? A. At the request of Mr. Reber that he wanted it—

"Q. Yes. Then both you and Mr. Reber contemplated that agreement was in writing before it was effective, did you not? A. We wanted a record—

"Q. That is right, and before it was effective they both had to be in writing?

"Mr. Burton: Just a moment counsel. I wonder if you would be kind enough to let Mr. Klemmens finish his answers before you commence your new question.

"Q. Did you have something you wanted to add to any part here? A. I have lost my train of thought now.

"Q. All right, let me start over part of it. Both you and Mr. Reber, acting for and on behalf of your organizations, contemplated before it was a final contract it would be in writing, is that not true? A. That is right.

"Q. And isn't that why you sent him the offer for him to accept it in writing? A. We agreed to do it.

"Q. That is right, and both of you contemplated it would be reduced to writing before it became effective? A. No question about that, certainly. A. T. Klemens & Son v. Reber Plumbing & Heating Co., 360 P.2d 1005, 1008 (Mont. 1961).

[2]The court found an error in the calculation of damages, but since the correct sum could readily be calculated the court directed the judgment be modified accordingly and affirmed the judgment as modified.

[3]65 Mont. 155, 211 Pac. 289 (1922).

[4]124 Mont. 441, 226 P.2d 105 (1931).

[5]Aside from these two cases, several other cases indicate approval of the minority rule in Montana. Casey v. Northern Pac. Ry. Co., 60 Mont. 56, 198 Pac. 141 (1921); Putnam v. Putnam, 86 Mont. 135, 282 P.2d 855 (1929); Cullen v. Peschel, 115 Mont. 187, 142 P.2d 559 (1943).

[6]Mathis v. Tutweiler, 295 Fed. 661 (6th Cir. 1924); Clark v. Torrington, 79 Conn, 42, 63 Atl. 657 (1906).

court.[7] This, in effect, creates a presumption that the lower court decision is correct unless the evidence sustaining the decision, even though viewed most favorably to the respondent, would not convince a reasonable man. Until the instant case, Montana subjected this general rule to an exception which provided that when the evidence to be reviewed includes conflicting testimony by the prevailing party as a witness on his own behalf on a point not otherwise corroborated, the appellate court is bound to view this testimony in the light which is the least favorable to him. The Montana Supreme Court justified its position by stating:[8]

> It cannot be unfair to this plaintiff to deal with his case from the standpoint of his own statements. A party testifying in his own behalf has no right to be deliberately self-contradictory, and whenever he is so the courts are justified in judging his case from that version of his testimony which is least favorable to him.

Prior to the instant case Montana shared the minority rule with only one other state—Georgia.[9] Utah permits, but does not require, the appellate court to consider that part of the testimony which mitigates most strongly against the interests of the prevailing party.[10]

Where the prevailing party is the plaintiff the minority rule has merit in at least one respect—it requires the plaintiff to know his own case and to present it without contradicting himself. This seems reasonable since it is the plaintiff who is asking the court to use its power to effect a recovery from the defendant. Certainly if the plaintiff cannot keep his facts straight he should not call upon the judicial power of the courts to help him recover.[11] Similar logic could be applied where the prevailing party is the defendant and he asks the court to release him from an obligation which the law would otherwise impose upon him.

The minority position, therefore, has some merit, but, as Dean Wigmore points out, "A rule which binds a party to a particular statement uttered on the stand becomes an artificial rule."[12] Confusion while testifying on the stand or failure to understand counsel's questions may cause any witness to utter contradictory statements. As one court tersely states, "Often we little note nor long remember our motives, purposes, or knowledge. There are few if any subjects on which plaintiffs are infallible."[13] The minority rule places a premium on quick thinking somewhat analogous to the formulary systems of oral pleading which considered a slip of the tongue fatal to the cause of the litigant. When the minority rule is placed in the context of actual trial conditions the fallacy of its application becomes apparent. Fortunately the Montana Supreme Court was also aware

[7]Gibbons v. Hunshinger, 105 Mont. 562, 74 P.2d 443 (1937); Toole v. Wervick, 39 Mont. 359, 102 Pac. 590 (1909); *In re* Myer's Estate, 92 Mont. 474, 15 P.2d 846 (1932).
[8]Casey v. Northern Pac. R. Co., 60 Mont. 56, 69, 198 Pac. 141, 145 (1921).
[9]Atlanta R. & Power Co. v. Owens, 119 Ga. 833, 47 S.E. 213 (1904).
[10]"The court may consider such testimony as bears most strongly against the interests of the plaintiff." Fowler v. Pleasant Valley Coal Co., 16 Utah 348, 52 Pac. 594, 596 (1898).
[11]Cullen v. Peschel, 115 Mont. 187, 142 P.2d 559 (1943).
[12]9 WIGMORE, EVIDENCE § 2594a, at 601 (3d ed. 1940).
[13]Alamo v. Del Rosario, 98 F.2d 328, 332 (1938).

of the difficulties involved in ascertaining the truth from a witness on the stand:[14]

> We believe the majority rule to be preferable both from a legal and a common-sense standpoint. We can visualize many situations where a party may be the only witness who can testify as to certain facts supporting his claim or defense. Many times counsel, in aggressive cross-examination, can elicit answers from parties which are inconsistent with their claim or defense. This is especially true where a party is a layman and not familiar with the niceties of legal terminology. It would seem grossly unjust if one or two answers could defeat a party's claim or defense where the party testified otherwise on both direct and redirect examination. The trier of fact should be entitled to decide which portions of the testimony should be given weight and which should be disregarded since it is in a much better position than this court to decide these questions.

The view in the instant case is preferable to the minority position because it gives full province to the fact-finding function of the lower court where the witnesses and parties may be scrutinized and their demeanor and testimony weighed in the light of this face-to-face relationship. While most of these cases will be tried by juries, the same rule would apply to a trial by the court.[15]

The entire rationale of the majority rule was succinctly stated by the court in *Alamo v. Del Rosario*:[16]

> Obviously, the testimony of a party may be incorrect. The rule we are asked to adopt [here referring to the minority rule] means, then, that the truth should not help a plaintiff who has testified to an error. . . . The underlying notion 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. Since his testimony was adverse to his interests, he is more likely to have been mistaken than lying. The proposed rule actually punishes him for two things, his honesty and his error.

The problem involving the weight to be given contradictory testimony of a party is further complicated when there is other evidence presented than that of the party's own testimony. The rules set forth above are applied only where the matter testified to by the party was not contradicted or corroborated by other significant evidence. Where other evidence is available the courts have also been in disagreement. By the older and still prevailing rule the party is allowed the benefit of such other testimony to counter his own unfavorable testimony, if the party has not made a formal and binding judicial admission of the fact in question.[17]

[14]Instant case at 1009.

[15]McCORMICK, EVIDENCE § 60, at 137 (1954).

[16]Note 13 *supra*.

[17]Connelly v. Connecticut Co., 107 Conn. 236, 140 Atl. 121 (1928); Hill v. West End St. Ry. Co., 158 Mass. 458, 33 N.E. 582 (1893).

The rule calls for a definition of the term "judicial admission." One court has defined it as follows:[18]

> A stipulation, or judicial admission, conceding for the purposes of the trial the truth of some alleged fact, has the affect of a confessory pleading in that the fact is thereafter to be taken for granted. But, it is of the nature of an admission, plainly, that it be by intention an act of waiver, relating to the opponent's proof of the fact, and not merely a statement of assertion or concession, made for some independent purpose; in particular, a statement made for the purpose of giving testimony is not a judicial admission.

Thus, the majority rule allows consideration of all other testimony unless the party has made a judicial admission on the point in question in a formal statement made for the purpose of being bound thereby. If a judicial admission were made he would be bound thereby and could not rely on any other evidence which may tend to contradict it.

This majority rule is tempered by another exception where test testimony given by the party concerns a subjective matter solely within his knowledge—what he knew, what his intention was, or how he felt at a certain time. To these matters it is assumed a party cannot honestly be mistaken, and evidence contradicting a positive and unqualified statement of this nature is not accepted.[19]

Under the minority rule a party is bound by definite statements of fact within his own knowledge, whether objective or subjective, against not only his own conflicting statements, but as against testimony of his own witnesses, of the other party's witnesses, and of the other party himself.[20] Thus, as one court said:[21]

> This court has held in a number of cases that the testimony of a party to a suit or action as to facts within his own knowledge, which were adverse to him, were binding upon and conclusive against him as a matter of law. . . . Where the testimony of a party is of such a nature that it must be either true or false, the law does not allow a party to recover, or defeat recovery, by an affirmative defense upon which he has the burden of proof, when his testimony, if true, utterly destroys his case.[22]

There have been no litigated cases in Montana involving the problem of how to treat a party's contradictory testimony on appeal if other evidence is present. It is suggested that Montana will probably follow the majority rule because it is consistent with what is believed to be the more

[18]Alamo v. Del Rosario, 98 F.2d 328, 330 (1938). For other definitions see 23 WORDS AND PHRASES 272 (1940).
[19]Canadian Pac. Ry. Co. v. Sullivan, 126 F.2d 433 (1st Cir. 1942).
[20]Fraser v. Berlin St. Ry., 84 N.H. 107, 146 Atl. 714 (1929); 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); Virginia Ry. & Power Co. v. Godsey, 117 Va. 167, 83 S.E. 1071 (1915).
[21]Chakales v. Djiovanides, 161 Va. 48, 170 S.E. 848, 860 (1933).
[22]The case of Chakales v. Djiovanides, *supra* note 21, illustrates that even under the minority rule a party will not be held to all statements made by him which are against his interest. In this case the plaintiff was an immigrant and could not accurately express himself in English. In addition, the questions asked were not clear and could easily have led to ambiguous answers. The court held that when a plaintiff's unfamiliarity with the English language is coupled with confusing questions from counsel, the plaintiff should not be bound to his answers.

enlightened view taken by the court in the principal case. The majority view places greater reliance on the trial court's finding of facts and permits a broader view of the evidence without rules of limitation based on artificiality. The same arguments which permit the appellate court to view a party's testimony in its most favorable light when there is no other corroborating evidence can be used to permit the court to consider other testimony introduced for the purpose of rebutting a party's own damaging statement. If the witness is confused by skillful cross-examination, the damaging effect of the contradictory statements may be reduced by introducing other eivdence. Certainly if the court will accept the party's *own* favorable statements to offset his damaging testimony, it should accept evidence from outside sources to offset such testimony. Where there is outside information there could be no contradiction *per se*, as there is in the party's own statements.

While it would not seem illogical for a court which accepts the minority rule on contradicting testimony by the party in the absence of other evidence to accept the majority rule in cases involving other evidence; it would seem incongruous for a court which accepts the majority rule where no evidence but the party's statement was available to accept the minority rule when other evidence was available.

The decision in the instant case is accompanied by a special concurring opinion of Justices Angstman and Adair who claimed that it was unnecessary to overrule *Wilson v. Blair*[23] and *Hanson v. Lancaster*.[24] While these two justices were not explicit, they apparently took the position that there was no contradictory testimony in the instant case and distinguished it from the *Wilson* case and the *Hanson* case on that basis. It is true that the majority of the Court recognized that the testimony in the instant case might not be truly contradictory when considered in the context of the cross-examination, when it stated:[25]

> The quoted excerpt,[26] when considered with other testimony and the manner in which it was elicited, appears to have been a slip of the tongue. However, looking at the problem as if the plaintiff's testimony were contradictory we shall further examine the Montana rule.

The proposition of the two concurring justices in regard to the majority rule is not clear, however. Were they contending that it was unnecessary to overrule the prior Montana cases which had adopted the minority rule because the issue was not properly raised by this case and that the discussion of it by the majority of the court was dictum? Or did they feel that the prior Montana cases should not be overruled because the minority rule should be retained? If the latter is the correct interpretation, it appears that these two justices insist on a rule that is unrealistic and unfair. If the first possibility is the correct interpretation of the concurring opinion, and if this view had been adopted by the court, counsel contemplating an appeal might be misled into thinking the supreme court would follow the minority rule; whereas under this view of the concurring

[23]65 Mont. 155, 211 Pac. 289 (1922).
[24]124 Mont. 441, 226 P.2d 105 (1931).
[25]Instant case at 1009.
[26]See testimony quoted *supra* note 1.

opinion, the court in a proper case would reject the minority rule. Because the question of how much weight should be given on appeal to contradictory testimony of a party seldom arises in Montana, the supreme court wisely took this opportunity to clarify its position.

It is submitted that the decision in this case was proper; the former rule followed in Montana created a presumption of falsehood as to the party's statements and invaded the province of the lower court as to the findings of fact. The adoption of the majority rule is a step toward uniformity among the states and recognition of the practicalities in the presentation of evidence at the trial.

JACQUE W. BEST

MASTER PLAN ZONING STATUTES HELD TO BE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY—The Master Plan Act,[1] enacted by the 1957 legislature, provided for a system of zoning involving the cooperation of the city and county governments. The Act provided for the establishment of a city-county planning board which would be empowered to recommend a plan to include such property in the county as "in the judgment of the board bears reasonable relation to the development of the city";[2] the plan was subject to approval by the county and city governments insofar as their respective lands were affected; the purposes provision also provided "that additional powers be granted legislative bodies of cities and counties to carry out the purposes of this act."[3] Pursuant to these powers and after the adoption of a *Master Plan* for the City of Billings and the County of Yellowstone, the County of Yellowstone sought to enjoin acts violative of the *Plan* as it affected the county areas. Defendant's demurrer to the complaint challenging the constitutionality of the Act and actions taken pursuant to it, was sustained by the district court. On appeal to the Montana Supreme Court, *held,* affirmed. The Master Plan Act does not adequately set the standards and define the bounds within which an administrative body must act and is an unconstitutional delegation of legislative authority. *Plath v. Hi-Ball Contractors, Inc.*, 362 P.2d 1021 (Mont. 1961).[4]

The decision involves a consideration of two basic questions. First, did the legislature intend to grant legislative powers to counties? And second, was the power delegated legislative or were sufficient standards set forth in the statute so that the power delegated could be considered administrative?

Section 11-3801 of the Revised Codes of Montana, 1947, after stating the purposes of the Master Plan Act provides "that additional powers be granted legislative bodies of cities and counties to carry out the purposes of this act." The Montana Supreme Court stated that the legislature in-

[1]REVISED CODES OF MONTANA, 1947, §§ 11-3801 to -3858, as amended. Hereinafter REVISED CODES OF MONTANA are cited R.C.M.
[2]R.C.M. 1947, § 11-3830.
[3]R.C.M. 1947, § 11-3801.
[4]Petition for Clarification of Opinion was denied July 1961.