North Dakota Law Review

Volume 23 | Number 4 Article 5

1947

Evidence - Admission of Party Opponent - Application of Opinion Rule

Keith W. Blinn

CASE NOTES

EVIDENCE—ADMISSION OF PARTY OPPONENT—APPLICATION OF OPINION RULE. In an action for damages for injury to plaintiff's automobile arising out of a motor vehicle collision through the alleged negligence of defendant, a statement made by defendant driver, about ten minutes after the accident, that the collision "was his fault and that he had insurance" was admitted over objection by the trial court. HELD, on appeal, that the statement was properly admitted as an admission of a party opponent. Judgment affirmed. *Zigler v Kinney et al*, 27 N. W. (2d) 433 (Wis. 1947).

Although not infrequently confused and applied without proper discrimination by the courts, there are fundamental distinctions between the admissibility of evidence on the basis of an admission of a party opponent and a statement of facts against interest. See 4 CHAMBERLAYNE, EVIDENCE (1913) sec. 2770; 4 WIGMORE, EVIDENCE (3rd ed. 1940) sec. 1049. It is clear in the instant case that the admission of the above quoted testimony was approved under the reasoning of the former. Extrajudicial statements made by a party opponent are universally deemed admissable when offered against him. Thus, it might be broadly stated that anything said by the party opponent may be used against him as an admission provided it exhibits the quality of inconsistency with the fact now asserted by him in his pleadings or in testimony. 1 JONES, EVIDENCE (4th ed. 1938) sec. 236; 4 WIGMORE, EVIDENCE (3rd ed. 1940) sec. 1048. Admissions of a party opponent have not been limited to written documents or express utterances but the courts have readily found an implied admission based upon the conduct of the party. *Kotler v Lalley*, 112 Conn. 86, 151 Atl. 433 (1930); *Harmon v Haas*, 61 N. D. 772, 241 N. W. 70 (1932); 4 WIGMORE, EVIDENCE (3rd ed. 1940) sec. 1060 and 1060a. Admissions are generally admissable as original or substantive evidence of the truth of the matter stated or of the existence of any facts which they may tend to establish. *Waldron v. Evans*, 1 Dak. 11, 46 N. W. 607, (1867); *Luikart v Korbmaker*, 128 Neb. 199, 258 N. W. 263 (1935); *Peterson v Richards*, 73 Utah 59, 272 Pac. 229 (1928); Morgan, "The Law of Evidence, 1941-1945" (1946) 59 Harv. L. Rev. 481, 556. But cf. *Erickson v Barnes et al*, 6 Wash. (2d) 251, 107 P. (2d) 348, 352 (1940). The weight of authority appears to admit a statement of facts as an admission of a party opponent although the admitter had no personal knowledge of the facts at the time the admission was made. *London Guarantee and Accident Co., Limited v Woelfle*, 83 F. (2d) 325 (C.C.A. 8th, 1936); *Kitchen v Robbins*, 29 Ga. 713 (1860); 3 JONES, COMMENTARIES ON EVIDENCE (2nd ed. 1926) sec. 1071; 4 WIGMORE, EVIDENCE (3rd ed. 1940) sec. 1053. But cf. *Hilton v Hayes*, 154 Wis. 27, 141 N. W. 1015 (1913). Accordingly, it follows

---

(Continued from preceding page)

such actual intent, creditors shall have all the remedies provided by said article ten. Where a policy of insurance, theretofore payable to the estate of the insured, is, by assignment, change of beneficiary or otherwise, made payable to a third person beneficiary, such assignment, change of beneficiary or other transfer shall be valid, unless made with such actual intent. Subject to the statute of limitations, the amount of premiums or other consideration paid with actual intent to defraud creditors as provided in said article ten, together with interest on such amount, shall enure to the benefit of creditors from the proceeds of the policy or contract; but the insurer making or issuing such policy or contract shall be discharged of liability thereunder by making payments thereunder in accordance with its terms, or in accordance with any assignment, change of beneficiary or other transfer, unless before any such payment such insurer shall have received written notices, by or on behalf of any such creditor, of a claim to recover any such benefits or portion thereof on the ground of a transfer or payment made with intent to defraud such creditor. Such notice shall specify the amount claimed or such facts as will enable the insurer to ascertain such amount, and shall set forth such facts as will enable the insurer to ascertain the insurance or annuity contract, the person insured or annuitant and the transfers or payments sought to be avoided on the ground of fraud.

"5. The term creditor as used in this section shall include every claimant under a legal obligation contracted or incurred after the effective date of this chapter. The term execution as used in this section shall include execution by garnishee process and every action, proceeding or process whereby assets of a debtor may be subjected to the claims of creditors. . . (The remainder of this section protects the rights of prior creditors.)

"6. The provisions of this section applicable to any insurance policy or annuity contract shall likewise apply to group insurance policies or annuity contracts, to the certificates or contracts of fraternal benefit societies, and to the policies or contracts of cooperative life and accident insurance companies."

that the opinion rule should have no application with respect to the admissibility of an admission of a party opponent but should go only to the weight to be given it. Especially is this so since an opponent's admissions may naturally include both facts and opinions or be couched solely in the terms of an opinion. *Strickland v Davis*, 221 Ala. 247, 128 So. 233 (1930); *Read v Reppert*, 194 Iowa 620, 190 N. W. 32 (1922); *Hege & Co v Tompkins*, 69 Ind. App. 273, 121 N. E. 677 (1919); *N. J. Swain v Oregon Motor Stages*, 160 Ore. 1, 82 P. (2d) 1084 (1938); 4 WIGMORE, EVIDENCE (3rd ed. 1940) sec. 1053; Morgan, "The Law of Evidence, 1941-1945" (1946) 59 Harv. L. Rev. 481, 556. However, there is considerable authority to the contrary. *Coca-Cola Bottling Co. of Henderson, Inc. v Munn*, 99 F. (2d) 190 (C.C.A. 4th, 1938); *Miller v Weck*, 186 Ky. 552, 217 S. W. 904 (1920); *Wright v Quattrochi*, 330 Mo. 173; 49 S. W. (2d) 3 (1932). The Wisconsin court in an action against the master for injuries sustained by third party guest, while riding in master's automobile at servant's invitation, and resulting from servant's negligent operation of master's automobile, the court, in affirming judgment for the master, commented upon a statement made by the master to the Industrial Commission that the accident occurred in the course of the servant's employment that the statement constituted "only a conclusion of law to that effect as distinguished from an admission of fact." *Hanson v Engebretson* et al, 237 Wis. 126, 294 N. W. 817 (1940). While the *Hanson case* has been frequently cited as authority for applying the limitations of the opinion rule to admissions of a party opponent, careful analysis of the case indicates that such a conclusion is unwarranted and the mere fact that the admission violates the opinion rules does not necessarily affect the admissibility of it but only the weight to be given to it. Cf. *Hilton v. Hayes*, 154 Wis. 27, 141 N. W. 1015 (1913).

While the principal case cannot be cited as an express approval of the priniciple that the opinion rule has no application to party opponent admissions, it can be considered as representing a clear trend in that direction.

KEITH W. BLINN,
Professor of Law,
University of North Dakota.

ASSIGNMENT OF CHOSES IN ACTION-TROVER AND CONVERSION-CHATTEL MORTGAGES. Fleming gave a promissory note secured by a chattel mortgage on a quantity of corn to the Williams Bank, said Bank selling the note to the Farmer's National Bank, without formal assignment of the chattel mortgage which continued to stand in the name of the Williams Bank. The purchaing Bank then sold the note to the Plaintiff. Subsequent to the first purchase, but previous to the Plaintiff's purchase of the note, Fleming sold the corn covered by the chattel mortgage to Beal, with the knowledge of the Williams Bank. In an action to recover the amount of the unpaid note, it was *held*, that the sale of the corn amounted to a conversion, and the subsequent purchase of the note by the Plaintiff carried with it, as an incident thereto, a cause of action for the precedent impairment of the lien. The Plaintiff could recover in conversion, or recover damages for impairment to his lien, the ultimate result being the same. However, in the principal case, the Plaintiff had elected to ratify the sale of the corn and to recover the proceeds of the sale; accordingly, Beal, the purchaser, is absolved, and the Williams Bank is liable for the proceeds of the sale, the action not being prosecuted against Fleming as he was insolvent. *United States v. Fleming*, 69 F. Supp. 252 (Iowa 1946).

Many jurisdictions, in the absence of applicable statutes, adhere to the rule of the common law that a cause of action for conversion is not assignable and this line of early decisions promulgating the resultant rule that an assignment of a chattel mortgage does not operate as an assignment of a cause of action for conversion of the security occurring previous to the assignment of the note. *Bowers v. Bodley*, 4 Ill. App. 279 (1879); *Gabbert*