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Case Digests

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EVIDENCE; Circumstantial; Proof of Negligence

Wolstenholm v. Kaliff, 176 Neb. 358, 126 N.W.2d 178 (1964).

Action was brought for the wrongful death of a wife in an automobile collision. The district court sustained a motion by the plaintiff for a new trial after the jury had returned a verdict awarding damages. The defendant appealed from the granting of the motion. A cross appeal seeking to limit the new trial to the question of damages was made by the plaintiff. *Held*: Judgment affirmed as modified. On the question of the submission of contributory negligence to the jury, the court held that "circumstantial evidence sufficient to submit an issue of negligence to a jury must be such that a reasonable inference arises showing that the person charged was negligent and that such inference is the *only one* that reasonably can be drawn therefrom." *Id.* at 364-65, 126 N.W.2d at 182. (Emphasis added.) Chief Justice White, who concurred in the result, did not agree with the rule enunciated as to the sufficiency of the circumstantial evidence to make a jury case.

In *Blid v. Chicago & N.W. Ry.*, 89 Neb. 689, 131 N.W. 1027 (1911), the rule was first stated that, when circumstantial evidence is introduced for the purpose of proving negligence, the issue of negligence may be submitted to the jury provided it is the *only* inference that can be drawn from the facts. If any inference other than negligence can reasonably be drawn from such evidence the issue may not be submitted to the jury. But, in *Davis v. Dennert*, 162 Neb. 65, 75 N.W.2d 112 (1956), the court expressly limited the application of the *Blid* rule to criminal cases. Such a rule, the court felt, had no application in civil cases where it was unnecessary for the proof to exclude all reasonable doubt. The proper rule for civil cases was to be " 'that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of.' " *Id.* at 74, 75 N.W.2d at 119. This rule, in contrast with the *Blid* rule, requires only that the plaintiff establish his case by the preponderance of the evidence, and not that he exclude all reasonable doubt.

The courts of other states are divided on whether circumstantial evidence to prove negligence in a civil case must exclude all reasonable doubt, or whether the preponderance of the evidence is sufficient. See 20 *Am. Jur. Evidence* § 1189, at 1041 (1939); 32(a) *C.J.S. Evidence* § 1039, at 748 (1964).

The adoption of the *Blid* rule in the instant case may indicate an implied overruling of *Davis*. Until the court chooses to clarify the issue, however, the standard of proof required remains an open question.

COMPENSATION; Injury Defined

Campbell v. City of North Platte, 178 Neb. 244, 132 N.W.2d 876 (1965).

Appellant, widow of a fireman, brought an action under Neb. Rev. Stat. § 35-202 (Reissue 1960), which provides a pension for the widow and minor children of firemen if "death is caused by or is the result of injuries received while in the line of duty . . . ." The deceased had died as a result of coronary arteriosclerosis, a partial cause of which was shown to be the emotional stress and strain caused by answering fire and ambulance calls over a period of fifteen years. Appeal was taken from a judgment notwithstanding the verdict. *Held*: Judgment reversed. The death was a "result of injuries while in the line of duty" even though the heart attack occurred on the deceased's third consecutive day off duty and fifteen days after his last fire call. *Dissent*: The statute was not intended to provide compensation when death occurred because of coronary artery disease caused by stress and strain not peculiar to the occupation of a fireman.

This case is an extension of the holding in *Elliott v. City of Omaha,* 109 Neb. 478, 191 N.W. 653 (1922), which interpreted the phrase "where death is caused by or is the result of injuries received while in the line of duty" to include *disease* contracted in the line of duty (pneumonia in that case). While the Workman's Compensation Act provides for coverage only from an "accident," which is defined therein as an unexpected or unforeseen event happening suddenly and violently, the word "injury" as used in the Firemen's Pension Act has been interpreted to include "any hurtful effect which a fireman may receive in the line of his duty . . . ." *Id.* at 481, 191 N.W. at 654. This liberal construction of the statute would certainly include a coronary caused by the considerable stress to which firemen are subjected. Both the *Elliott* and the *Campbell* decisions illustrate the willingness of the court to effectuate the apparent legislative intent to provide broader coverage under the Firemen's Pension Act than under the Workman's Compensation Act.

EVIDENCE; Business Records; Computer

Transport Indem. Co. v. Seib, 178 Neb. 253, 132 N.W.2d 871 (1965).

Plaintiff insurance company brought an action to recover premiums due on a retrospective insurance contract. Under the terms of the contract, the earned premiums were calculated retrospectively according to a formula based on the loss experience of the defendant. Data concerning the defendant's losses were fed into an electronic computer by the plaintiff and the information was then stored on magnetic tape for later use by the computer in calculating the earned premiums. To establish the amount of premium due, plaintiff introduced into evidence an exhibit consisting of calculations prepared and printed by the electronic computer from the information stored on the magnetic tape. The district court received the exhibit into evidence over the defendant's objection as to its foundation. *Held:* Judgment affirmed. The information retrieved here by electronic computer from magnetic tape was properly admitted into evidence under the Uniform Business Records as Evidence Act, section 25-12,109 of the Nebraska Revised Statutes.

The act provides:

> A record of an act, condition, or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission.

The court noted that "the tape record and the information and calculations thereon were [essentially a bookkeeping record] made in the usual course of business . . . ." The court further stated: "No particular mode or form of record is required. The statute was intended to bring the realities of business and professional practice into the courtroom and the statute should not be interpreted narrowly to destroy its obvious usefulness." 178 Neb. at 259, 132 N.W.2d at 875. This is apparently the first reported decision in any jurisdiction on the issue. See Freed, "Evidence and Problems of Proof in a Computerized Society," 63 *Modern Uses of Logic in Law* 171, 181 (1963). [After the setting of this case in page proofs, a Fifth Circuit case has followed the *Seib* decision. Louisville & N.R.R. v. Knox Homes Corp., No. 21507, 5th Cir., April 1, 1965.]

WILLS; Construction; Venue

Father Flanagan's Boys' Home v. Graybill, 178 Neb. 81, 132 N.W. 2d 304 (1964).

Testator was the owner of two farms in Nebraska, one in Custer County and the other in Logan County. Two months prior to execution of his will, testator had entered into a contract to sell the Logan County farm. The contract was still executory at the time of testator's death. The will bequeathed the income from the farm to testator's widow with the "balance" to plaintiffs. All of testator's personal property was also bequeathed to his widow. Plaintiffs brought an original action for declaratory judgment to obtain a construction of the will, claiming that they were entitled to the benefits of the executory contract of sale. Testator's widow contended that the contract was personal property, all of which was given to her by the terms of the will. She also objected to venue of the action in Logan County district court since the will had previously been admitted to probate in Custer County. The district court overruled the objection to venue and entered judgment for plaintiffs. *Held:* Judgment affirmed. On the objection to venue the court ruled that the suit was a transitory action which may be brought in the county in which the defendant, or some one of the defendants, resides or may be summoned as provided in section 25-409 of the Nebraska Revised Statutes. The issue was one of first impression in Nebraska and the court noted that "a dearth of cases on this precise point appears to exist in other jurisdictions." 178 Neb. at 83, 132 N.W.2d at 308. The court recognized two other possibilities for venue in an original action for construction of a will: (1) the county in which the will is probated; and (2) the county in which real estate passed by the will is situated. However, since no statutory provision specifically fixed the venue of such an action, the residuary venue provision for transitory actions appearing in section 25-409 was held controlling.

Although recognizing that a contract of sale is personalty, the court held that under the circumstances of the case it was the intention of the testator that his interest in the farm, represented by the contract, was to pass to plaintiffs. "A general or specific devise of land passes the interest of the testator in the land which he had contracted to sell, unless the intent of the testator as demonstrated by the will and the attendant circumstances is shown to be otherwise." 178 Neb. at 87, 132 N.W.2d at 309-10. This holding is an extension of *Battey v. Battey,* 94 Neb. 729, 144 N.W. 786 (1913), where it was held that a devise of land in which the testator's only interest was a mortgage would serve to pass that interest to the devisee.

CRIMINAL LAW; Blood Alcohol Test

State v. Fox, 177 Neb. 238, 128 N.W.2d 576 (1964).

Defendant was charged with unlawfully operating a motor vehicle while under the influence of alcoholic liquor. At the time of defendant's arrest a blood sample was taken by a doctor of his own choice, and the sample was placed in a test tube which contained a special anticoagulant. Although there was evidence that the anticoagulant, composed of sodium citrate and calcium oxylate, was recognized as proper for blood alcohol tests, there was also testimony to the effect that an incorrect proportion of the anticoagulant could affect the test results as to the alcoholic content of defendant's blood. In addition, there was evidence that the doctor had used an antiseptic "that smelled like alcohol" to cleanse the defendant's arm before taking the blood sample. The defendant moved to strike all testimony regarding the chemical test of his blood and the result of the test on the ground that the evidence was insufficient to allow the test to go to the jury. The motion was denied by the district court. *Held:* Judgment affirmed. The objections urged by the defendant did not affect the admissibility of the test results but went only to the weight and credibility thereof.

Construing sections 39-727.01 to 39-727.06 of the Nebraska Revised Statutes, which provide for blood alcohol tests, the court concluded: "There is nothing in the statutes which, either expressly or inferentially, prohibits the use of an anticoagulant for the purpose of preserving the blood during the interim from withdrawal until the test." 177 Neb. at 249, 128 N.W.2d at 582. In this respect, the court followed *Rimpley v. State,* 169 Neb. 171, 98 N.W. 2d 868 (1959), where sodium chloride was used as the anticoagulant. However, the only testimony in *Rimpley* on the effect of the anticoagulant was by a laboratory chemist who said that it did not affect the alcoholic test.

The holding of *State v. Fox* has subsequently been applied in a case where the defendant raised similar objections to admission of the results of a urine alcohol test. *State v. Schwade,* 177 Neb. 844, 131 N.W.2d 421 (1964).

DISCOVERY; Examination of Defendant under Rule 35

Schlagenhauf v. Holder, 85 Sup. Ct. 234 (1964).

A diversity suit was brought in federal district court to recover damages for injuries sustained by passengers on a Grey-

hound bus when it collided with the rear of a semitrailer. The Greyhound Corporation, Schlagenhauf (driver of the bus), the owner of the trailer, the owner of the truck tractor, and the driver of the truck were joined as defendants. Greyhound then crossclaimed against the owner of the tractor and the owner of the trailer. The owner of the trailer alleged as a part of its answer that Schlagenhauf was not mentally or physically capable of driving a bus at the time of the accident. The owner of the tractor, in answering, alleged that Schlagenhauf proximately caused the accident and petitioned the district court for an order directing Schlagenhauf to submit to examinations by one specialist each in internal medicine, ophthalmology, neurology, and psychiatry, suggesting three specialists by name in neurology and two in each of the other areas from which the court could choose. The owner of the tractor and the owner of the trailer then crossclaimed against Greyhound and Schlagenhauf. The district court then ordered Schlagenhauf to submit to a total of nine mental and physical examinations, one by each of the suggested specialists, instead of choosing four as the moving party had apparently intended. Schlagenhauf petitioned the court of appeals for a writ of mandamus to have the order set aside on the grounds that (1) Rule 35 was unconstitutional as applied to defendants, (2) Schlagenhauf's physical and mental condition was not shown to be in controversy, and (3) good cause for ordering the examinations had not been shown. The court of appeals denied the writ and the United States Supreme Court granted certiorari.

Held: Defendants may be constitutionally required to submit to mental or physical examination under Rule 35 of the Federal Rules of Civil Procedure. The Court also said that the party to be examined need not be adverse to the moving party. After deciding that the record in the instant case did not make the required affirmative showing either that Schlagenhauf's mental or physical condition was *in controversy* or that there was *good cause shown* for the examinations ordered, the Court went on "to formulate the necessary guidelines" to which the federal district courts are to look in granting motions under Rule 35 in the future.

The principle which brings the Court's design into focus is that the moving party must make "an *affirmative showing* . . . that *each condition* as to which the examination is sought is really and genuinely *in controversy* and that *good cause* exists for ordering *each particular examination.*" 85 Sup. Ct. at 242-43. (Emphasis added.) What constitutes an "affirmative showing" will vary with the circumstances of each particular case, but will

always fall somewhere between fairly certain maximum and minimum requirements. The movant will not be required to make a showing which amounts to proving his case on the merits. On the other hand, the pleadings alone may constitute a sufficient affirmative showing where (a) the plaintiff in a negligence action claims mental or physical injury or (b) a defendant asserts his mental or physical condition as a defense to a claim. Between these extremes, there are several procedures which the court may impose as the circumstances require. An evidentiary hearing may be held, although it is not required in every case. The movant may make the necessary affirmative showing by affidavits or by "other usual means short of a hearing." The Court qualified the application of the foregoing requirements to the determination of good cause by cautioning that "what may be good cause for one type of examination may not be so for another" and by adding that "the ability of the movant to obtain the desired information by other means is also relevant." *Id.* at 243.

It is apparent that the discretion of federal district judges to determine when to order examinations under Rule 35 has been left substantially unimpaired by the new "guidelines." The Court emphasized this by its admonition that "any future allegation that the District Court was in error in applying these guidelines to a particular case" will not constitute cause for issuing a writ of mandamus. *Id.* at 239. The principal change effected by the *Schlagenhauf* holding will probably be to make the judicial determination a more discriminating one.

Although Rule 35 has been in effect for seventeen years, this is the first case in which it has been expressly held applicable to defendants. By its nature, Rule 35 is most frequently invoked in personal injury suits. In personal injury suits, attention is almost always focused upon the mental or physical condition of the plaintiff. But as the Court in *Schlagenhauf* has now affirmed, the fact that this has been true historically is not a valid reason for refusing to give the plain language of Rule 35 its full meaning in a proper case.

Section 25-1267.40 of the Nebraska Revised Statutes is identical with Rule 35(a). The Nebraska Supreme Court has not as yet been called upon to construe this section, but the same considerations which prompted the *Schlagenhauf* holding should lead to a construction of the state statute under which both defendants and plaintiffs may be subject to physical or mental examination in proper cases and under adequate safeguards.