

**DIRECTED VERDICT:
DEFENDING AGAINST IT AND PURSUING IT
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I. INTRODUCTION

As Plaintiff's attorneys who practice personal injury, we rarely give a second thought to directed verdict. After all, how hard is it to prove a typical auto accident case? You show negligence, you show causation, you show damages, and you've met your burden. Not too difficult. In fact, rarely do we have to argue to the judge our positions; directed verdict motions by the defense attorney are usually summarily denied in our auto accident cases.

Why are these over with so quickly? And without the judge wanting to hear our pearls of wisdom? It is because the Defendant bears an extremely heavy burden in establishing grounds for a directed verdict. These motions are frowned upon by the courts and are rarely granted in negligence cases.

We have become accustomed to this in the courtroom and we can take that for granted. There will come the day when you may inadvertently leave out an element, or it may be an extremely close issue on negligence, and you will be called upon to defend against this motion. It is best to be prepared and know the general case law should the need arise.

More importantly, as Plaintiff's attorneys, we can use directed verdict in our favor; that is, go on the offensive and make these motions in appropriate circumstances. We bear an equally heavy burden when making a motion for directed verdict, but these motions can be won.

II. PURPOSE OF DIRECTED VERDICT

Rule 50 of the North Carolina Rules of Civil Procedure provides the framework for motions for Directed Verdict and for Judgment Notwithstanding the Verdict (JNOV). Directed verdict was designed to save the time and trouble involved in a jury determination by enabling the court to determine whether a question of fact exists and whether the law requires a particular result.¹ The purpose of directed verdict was to "test the legal sufficiency of the evidence to take the case to the jury and to support a verdict for the plaintiff".² While this manuscript makes mention of the JNOV motion, it concentrates mainly on directed verdict.

Directed verdict is now typically a tool used by the Defendant to challenge the sufficiency of the Plaintiff's evidence to go to the jury. But that was not always the case. It used to be that the directed verdict was more popular with the Plaintiff's bar than with the Defendant's (use in attacking Defendant's affirmative defenses). Directed verdict was hardly used by Defendants because of the Plaintiff's absolute right to take a voluntary nonsuit at any time prior to verdict. If the Plaintiff's attorney felt that a judge was going to direct verdict against him, he could take a voluntary nonsuit and refile his case.³ Because the Plaintiff's had this right to a

voluntary nonsuit at any time prior to verdict, the Defendant's abandoned their directed verdict practice as it was seemingly futile.

However, under Rule 41 of the North Carolina Rules of Civil Procedure, a Plaintiff can take one voluntary dismissal **only** at some time prior to resting his case. After the Plaintiff rests, he cannot take a voluntary dismissal without leave of Court. This has made the directed verdict more appealing to Defendants and is now the only device by which an adverse party can challenge the sufficiency of the evidence to go before a jury.⁴ When directed verdict is granted, it is judgment on the merits.⁵

Rule 50 is fairly benign when trying to figure out how to use the Rule and who may use it. Case law is helpful and instructive. Since the State and Federal Rules on directed verdict are virtually the same, federal law is also instructive. It is important to know at the outset that the directed verdict is not solely a tool for the Defendant. Any party can move for directed verdict at the close of all the evidence.⁶

III. STANDARD FOR DIRECTED VERDICT

As stated above, it is very difficult for a Defendant to get a verdict directed in his favor in a negligence action. The general standard is the same as in summary judgment: "consider the evidence in the light most favorable to the non-movant."

The Courts have refined and added to this generalized standard. There are dozens of cases available to quote the standard the Court uses on motions for directed verdict; but it is summed up accurately in *McFeters v. McFeters*, 98 N.C. App. 187, 390 S.E.2d 348 (1990). There the Court summarized the standard that should be applied when deciding directed verdict.

In deciding the motion, "the trial court must treat non-movant's evidence as true, considering the evidence in the light most favorable to the non-movant, and resolving all inconsistencies, contradictions and conflicts for non-movant, giving non-movant the benefit of all reasonable inferences drawn from the evidence."

Also of import, the *McFetter* Court pointed out that evidence which raises a mere possibility or conjecture will not defeat a motion for directed verdict. BUT, if there is more than a scintilla of evidence, the Court must deny the motion.

The *McFetter* Court, as well as other Courts, have consistently held that directed verdict should rarely be granted in negligence cases.⁷ One reason is because application of the prudent man test is generally to be applied by a jury.

The jury determines the facts; the judge determines the law. Almost always there is a dispute to the facts, and if not, at least to the credibility of the witnesses. These conflicts are to be resolved by the jury. Directed verdict is never proper unless it appears as a matter of law that

recovery cannot be had by the Plaintiff upon any view of the facts which the evidence reasonably tends to establish.⁸ When defending against a motion for directed verdict, point out to the court that the facts are to be viewed by applying the *McFetter* standard itemized above.

IV. DEFENDING AGAINST DIRECTED VERDICT – DOES THE PLAINTIFF HAVE A CASE?

In an automobile accident case, the Plaintiff has to prove that he or she was injured as a result of the Defendant's negligence, and that they suffered damages there from. Negligence is the failure to exercise the proper care in performance of a legal duty which the Defendant owes to the Plaintiff.⁹ The Plaintiff will have verdict directed against him if he fails to establish the elements of actionable negligence.¹⁰ The Plaintiff must establish:

1. Defendant owed Plaintiff a duty of care
2. Defendant's actions or failure to act breached that duty
3. Defendant's breach was the actual and proximate cause of Plaintiff's injury
4. Plaintiff suffered damages as a result of such breach¹¹

Negligence is a broad term encompassing the four elements above. However, it is often easier to think of proving your personal injury case by establishing 1) Negligence (duty/breach of duty), 2) Causation (Actual and Proximate) and 3) Damages.

Remember: The Plaintiff only has to show a scintilla of evidence, but more than mere conjecture or speculation, of the elements of negligence. The easiest thing to do to ensure that you put forth all of your evidence is to write out your elements, and summarize the evidence (witnesses, documents, etc) you will put on in support of those elements. You can keep this list in your Trial Notebook to have at your fingertips when you are arguing to the Court that you have succeeded in proving your claim. You may wish to write out your elements and supporting evidence in this way:

NEGLIGENCE:

1. Investigating Officer – will testify as to speed limit and observations at the scene
2. Plaintiff – will testify as to speed, defendant's comments at scene that he did not see the Plaintiff
3. Defendant – will testify that he was going approximately 5 miles over speed limit; he did not see the Plaintiff before making a turn
4. Accident Report – positions of the vehicles
5. Citation/Conviction – Defendant pled guilty to safe movement violation

CAUSATION:

1. Expert witness – opinion question on causation
2. Plaintiff – prior health; injuries after this accident
3. Medical Records – diagnosis and treatment
4. Lay Witnesses – Plaintiff's prior good health; injuries from the accident

DAMAGES:

1. Plaintiff – medical bills, lost wages, pain and suffering
2. Medical Bills –accrued \$3,498.00 in medical bills
3. Employer/Lost wages – missed 2 weeks of work
4. Lay witnesses – pain and suffering
5. Photographs

The above listing of evidence is fairly standard for an automobile accident case. With these items offered, it is clear that there is more than a scintilla of evidence to put forth the case to the jury. If there is any doubt at all to any element of negligence, always argue the *McFetter* standard above.

THREE PART DEFENSE OF DIRECTED VERDICT:

If you run into a situation where you have to legitimately argue against the Defendant's motion for directed verdict, keep these three simple arguments in mind:

1. ELEMENTS: Show to the Court that you have easily proven your case. You have showed all of the actionable elements of negligence. Point out what evidence supported each element.
2. MCFETTER STANDARD: If it is a closer issue on a particular element, point the Court to the standard it must use to review the evidence
 - Treat non-movant's evidence as true
 - Considering the evidence in the light most favorable to the non-movant
 - Resolving all inconsistencies, contradictions and conflicts for non-movant
 - Giving non-movant the benefit of all reasonable inferences drawn from the evidence.
3. ADDITIONAL ARGUMENT: You may also feel compelled to advise the Court of the following:
 - "It is a well established principle that proximate cause is ordinarily a question for the jury". *Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706 (1989).
 - "Only in exceptional cases is it proper to enter directed verdict . . . in a negligence case. Issues arising in negligence cases are ordinarily not susceptible of summary adjudication in that application of prudent man test, or any other applicable standard of care, is generally for the jury. Greater judicial caution is therefore called for in actions of negligence as the basis for recovery . . ." *Taylor v. Walker*, 320 N.C. 729, 360 S.E.2d 796 (1987); *Crane v. Caldwell*,

113 N.C. App. 362, 438 S.E.2d 449 (1994); Smith v. Wal-Mart Stores, Inc., 128 N.C. App. 282, 495 S.E.2d 149 (1998).

- Because the trial court runs the risk of invading the province of the jury, directed verdicts are to be sparingly granted. *Dunn v. Herring, 67 N.C. App. 306, 313 S.E.2d 22 (1984)*
- Credibility of witnesses is almost exclusively a question for the jury. *Murray v. Murray, 296 N.C. 405, 250 S.E.2d 276 (1979)*
- When reasonable men can reach different results or conclusions on issues of negligence and proximate cause, the case is for the jury. *Eatman v. Bunn, 72 N.C. App. 504, 325 S.E.2d 50 (1985)*

V. DEFENDING AGAINST DIRECTED VERDICT – ISSUE OF PLAINTIFF’S CONTRIBUTORY NEGLIGENCE

As you can see, it is fairly easy to defend against a motion for directed verdict when determining if the Plaintiff has met its burden of showing the elements of negligence. A more dangerous motion for directed verdict will come when the Defendant moves the Court to direct verdict on the issue that you, the Plaintiff, were contributorily negligent as a matter of law. If that happens, and the judge does direct verdict on that issue, it is a judgment on the merits and your case is over. Therefore, if you have a close case on the issue of contributory negligence, you must be prepared to defend against this motion.

When alleging contributory negligence, or any other affirmative defense, the burden of proof is on the Defendant to show said defense. As such, the Defendant has to prove by the greater weight of the evidence that the Plaintiff was negligent and that his negligence was a proximate cause of the Plaintiff’s own injuries.¹²

When the Defendant moves for directed verdict on the issue of contributory negligence, he is asking the Court to find that the Plaintiff was contributorily negligent as a matter of law. He must also argue that there is no dispute as to how the facts of the accident happened, and therefore, the question of the Plaintiff’s contributory negligence is one for the Court, and not the jury. Where a defendant establishes its defense as a matter of law, then there are no issues for the jury to decide and the Plaintiff has no right to recovery.¹³

Just as when a Defendant moves for directed verdict on the issue of his own negligence, it is also rare for a Court to grant directed verdict when the Defendant moves regarding the issue of Plaintiff’s contributory negligence. This is even more so because the Defendant has the burden of proof in showing that the Plaintiff was contributorily negligent (see discussion on directed verdict in favor of party with burden of proof below). Directed verdict may only be granted when the evidence, taken in the light most favorable to the non movant (Plaintiff), establishes his negligence so clearly that no other reasonable inference or conclusion may be drawn there from. If there are contradictions or discrepancies in the Plaintiff’s evidence, the jury must resolve those issues.¹⁴

Also remember, if the issue of contributory negligence boils down to a he said/she said situation (ie, where credibility will determine who the jury finds negligent), then always

point out to the Court that credibility is to be determined by the jury. Most cases will boil down to who is more credible and it is not the court's job to judge the credibility of the witnesses; that is the province of the jury.

VI. GOING ON THE OFFENSE – PLAINTIFF REQUESTING DIRECTED VERDICT

Directed verdict is not solely the province of the Defendant. The Plaintiff is equally entitled to move for directed verdict. Plaintiff can move for directed verdict in a number of situations:

- regarding the Defendant's negligence
- finding the Plaintiff was not contributorily negligence
- regarding a counterclaim Defendant has made against the Plaintiff

Prior to 1979, the Courts were very reluctant to grant directed verdict in favor of the party with the burden of proof. Particularly, the Court in *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297, (1971) held that directed verdict cannot be entered in favor of the party with the burden of proof if the Plaintiff's right to recover depends upon the credibility of his witnesses. This ruling severely limited the Plaintiff's ability to pursue directed verdict, as there is almost always some type of credibility issue to be argued.

Fortunately, eight years later, the Supreme Court handed down its decision in *North Carolina National Bank v. Burnette*, 297 N.C. 524, 256 S.E.2d 388, (1979) and the holding of the *Cutts* case was limited to its facts. The Court (quoting from *Kidd v. Early*)¹⁵ stated that the standard for determining if the evidence of the party with the burden of proof is credible as a matter of law should be "whether the fact in issue is so clearly established that no reasonable inference to the contrary can be drawn.

The Court then annunciated three particular situations where credibility would be manifest as a matter of law:

1. Where non movant establishes the movant's claim by admitting the truth of the basic facts of movant's claim
2. Where non movant does not deny the authenticity or accuracy of controlling documentary evidence
3. Where the non movant failed to indicate specific areas of impeachment and contradictions when there are only latent doubts as to the credibility of oral testimony. (NOTE: there is an affirmative duty on the non movant to point out the areas of impeachment and contradictions. This means Plaintiff can rely on his own oral evidence if the Defendant fails to impeach or contradict him).

(Latent doubt was defined by the *Kidd* Court as doubts which result from the fact that the affiant is an interested party).

When confronted with the need to determine if a directed verdict is proper in favor of the party with the burden of proof, the standard is essentially the same for both Plaintiff and Defendant, summarized simply as this: Whether a reasonable person could reach only one conclusion as to the verdict. As you might imagine, this is a very tough hill to crest for either side. And while the standard is essentially the same, the Courts do look at the motion differently depending upon who makes the motion. When the Defendant makes the motion, the Court looks at the evidence for insufficiency; when the Plaintiff makes the motion, the Court looks to the overwhelming effect of the evidence.¹⁶ The *Burnette* Court still cautioned that directed verdicts should rarely be granted in favor of the party with the burden of proof because the credibility will normally remain an issue, even though the movant may have established an uncontradicted prima facie case.

The case law is heartening and discouraging. The case law is heartening if we are defending against a motion made by the defendant. It is discouraging if we are making the motion. You might say that it is futile to even make the motion, if they are rarely granted. While this may be true, you should be prepared in case the circumstances arise where a directed verdict motion would be proper.

For example, there are instances that occur when the defense counsel will not admit liability, even though it is seemingly clear. This often happens in contributory negligence cases. If the facts show that the Defendant was clearly negligent (without regard at this time for the contrib. issue), then a motion will probably be beneficial, at least to the issue of duty and breach of duty. This scenario happened in the *Lassiter v. English* case. In that situation, the Defendant made admissions that made negligence on the part of the Defendant clear. The Plaintiff moved for directed verdict on the issue of “negligence” and argued that the Defendant admitted to not seeing the Plaintiff, even though her field of vision was unobstructed. The court granted directed verdict on the issue of negligence, and sent the case to the jury on the issue of proximate cause and damages.

The *Lassiter* jury entered verdict in favor of the Defendant, finding that the Plaintiff was not injured as a result of the Defendant’s negligence. The Plaintiff then moved for judgment notwithstanding the verdict under Rule 50 and this was granted on the issue of proximate cause. The Court of Appeals said this was improper as proximate cause was not the basis for the motion for directed verdict.

Although *Lassiter* was later overruled on other grounds (dealing with a new trial issue), the case is important for two reasons. The first reason is that it is clear that the Courts will entertain a motion for directed verdict by splitting the issues of negligence. That is, if the duty and breach of duty elements of negligence are proven, the case can go to the jury on the remaining negligence issue of causation. The second important thing about *Lassiter* was that it summarized the proper procedure for directed verdict and JNOV. That is, in order for JNOV to be properly considered by the Court, the basis for your JNOV motion must be stated in your directed verdict motion. That is, grounds for your directed verdict motion must encompass everything that you may wish to later argue on JNOV.

Don't forget! You can also go on the offensive by making a motion for directed verdict to find that Plaintiff was not contributorily negligent as a matter of law. Remember: the Defendant has the burden of proof in this instance. Contributory negligence is an affirmative defense. The Courts have said that "motion for directed verdict is properly granted against the Defendant where the Defendant fails to present more than a scintilla of evidence in support of each element of his defense" This was the finding of the Court of Appeals in *Snead v. Holloman*, 101 N.C.App. 462, 400 S.E.2d 91 (1991).

The facts of *Snead* were simple. The Plaintiff and Defendant were traveling in opposite directions. The Defendant made a left hand turn in front of the Plaintiff, and the vehicles collided. The Defendant did not put on any evidence. At the close of the evidence, Plaintiff moved for directed verdict on the issue of Plaintiff's contributory negligence and the trial court granted said motion. The Court of Appeals upheld the trial court, stating that there was not a scintilla of evidence produced that the Plaintiff failed to keep a proper lookout and failed to avoid the accident. The Court also reiterated the proposition that evidence which merely raises conjecture on the issue of contributory negligence is insufficient to go the jury. Based upon Plaintiff's evidence, which was uncontradicted by the Defendant, the Court held that reasonable minds could not have differed on the issue of Plaintiff's contributory negligence.

VII. OTHER THINGS YOU NEED TO KNOW

As a short summary of procedure and other points of law concerning directed verdict, I offer you the following:

PROCEDURE:

- Directed verdict motion is made at the close of the opposing party's evidence or at the close of all evidence
- If the Defendant introduces evidence after having made a motion for directed verdict at the close of Plaintiff's evidence, he has waived that motion. He must then make a new motion for directed verdict at the close of all evidence
- It is not proper for Defendant to make a motion for directed verdict at the close of his own evidence as the Plaintiff may have rebuttal evidence
- It is mandatory that you state the specific grounds for your motion for directed verdict. Failure to do so is enough basis to have the motion denied.

Note: Purpose of this rule is to allow the opponent to the motion the opportunity to correct the defect in their evidence with further proof

- If the Plaintiff fails to object to the fact that no specific grounds were offered in support of Defendant's motion for directed verdict, the Plaintiff loses that objection on appeal

DID YOU KNOW?

- Directed verdict made at the close of evidence is an absolute prerequisite to a motion for JNOV. *Smith v. Price*, 74 N.C.App. 413, 328 S.E.2d 811 (1985)
- Standard for JNOV is the same as directed verdict *Smith v. Price*
- Whether the presumption that a child between the ages of 7 and 14 was not contributorily negligent has been rebutted, is a question for the jury and directed verdict on the basis that the presumption has been rebutted is improper *Johnson v. Clay*, 38 N.C.App. 542, 248 S.E.2d 382 (1978)
- In reviewing the trial court's decision to grant directed verdict, the scope of review is limited to those grounds asserted by the moving party at trial *Crane v. Caldwell*, 113 N.C.App. 362, 438 S.E.2d 449 (1994)

IF DIRECTED VERDICT IS GRANTED AGAINST YOU

- Ask the judge to allow the evidence to be re-opened so that you can correct the defect in your evidence
- Ask the judge for a voluntary dismissal under N.C. Rules of Civil Procedure 41(a)(2) in the interests of justice. Remember, your dismissal as a matter of right under 41(a)(1) is gone once you have rested your case.

VIII. CONCLUSION

Directed verdict can easily be summarized as follows: It is rarely granted in negligence cases. It is even more difficult for the party with the burden of proof to have verdict directed in their favor. Such is the case when the defendant moves for directed verdict on the issue of Plaintiff's contributory negligence, or when the Plaintiff moves for directed verdict on the issue of Defendant's negligence. In those instances, the trial court will closely scrutinize the evidence to see if credibility is manifest as a matter of law. That will rarely happen.

However, it is important to remember that directed verdict is not just a tool for the Defendant. As Plaintiff's attorneys, we should analyze each case we take before a jury to see whether the merits and circumstances will dictate the need for a motion for directed verdict.

CASES REFERENCED

1. 6 Wake Forest L.Rev. 267
2. Wallace v. Evans, 60 N.C.App. 145, 298 S.E.2d 193 (1982)
3. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971)
4. 6 Wake Forest L.Rev. 267
5. Kelly v. International Harvester Co, 278 N.C. 153, 179 S.E.2d 396 (1971)
6. Snipes v. Snipes, 55 N.C.App. 498, 286 S.E.2d 591 (1982)
7. Thomas v. Dixon, 88 N.C.App. 337, 363 S.E.2d 209 (1988); Alva v. Cloninger, 51 N.C.app. 602, 277 S.E.2d 535 (1981)
8. Manganello v. Permastone, Inc., 291 N.C. 666, 231 S.E.2d 678 (1977)
9. McMurray v. Surety Federal Savings and Loan Association, 82 N.C.App. 729, 348 S.E.2d 162 (1986)
10. Felts v. Liberty Emergency Services, 97 N.C.App. 381, 388 S.E.2d 619 (1990); McMurray v. Surety Federal Savings and Loan Association, 82 N.C.App. 729, 348 S.E.2d 162 (1986)
11. Smith v. Wal-Mart Stores, Inc., 128 N.C.App. 282, 495 S.E.2d 149 (1998)
12. Enns v. The Zayre Corporation, Inc., 116 N.C.App. 687, 449 S.E.2d 478 (1994)
13. Goodwin v. Investors Life Insurance Co, 332 N.C. 326, 419 S.E.2d 766 (1992)
14. Clark v. Bodycombe, 289 N.C. 246, 221 S.E.2d 506 (1976); Dunn v. Herring, 67 N.C.App. 306, 313 S.E.2d 22 (1984)
15. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1979)
16. Mihalchak v. American Dredging Co, 266 F.2d 876 (3d Cir) cert. Denied, 361 U.S. 901 (1959)