

## Testimonial Admissions Do Not Preclude a Party from the Benefit of More Favorable, Contradictory Testimony by His Adversary

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ney has not foreseen.<sup>191</sup> Thus, it is submitted that the general admonition sanctioned by the *Lloyd* Court is insufficient to provide the basis for an intelligent waiver of the right to separate counsel.<sup>192</sup>

It is hoped that the Court will reconsider its holding in *Lloyd* and adopt a standard which requires the trial judge to point out the potential pitfalls of joint representation.<sup>193</sup> Although a defendant might not fully comprehend the points raised,<sup>194</sup> this would alert both counsel and client to consider the problem in greater depth. Thus, the defendant would be better informed and more capable of making an intelligent decision.<sup>195</sup>

*Ray T. Blank, Jr.*

*Testimonial admissions do not preclude a party from the benefit of more favorable, contradictory testimony by his adversary*

It is well settled in New York that a formal admission of an alleged fact made by a party in the pleadings or by stipulation in court is conclusive upon that party and precludes him from offering or relying on contradictory evidence.<sup>196</sup> A fact admitted by a

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<sup>191</sup> See *People v. Macerola*, 47 N.Y.2d 257, 263, 391 N.E.2d 990, 992, 417 N.Y.S.2d 908, 910 (1979); Lowenthal, *supra* note 156, at 971.

<sup>192</sup> See *United States v. Bernstein*, 533 F.2d 775 (2d Cir. 1976), *cert. denied*, 429 U.S. 998 (1977); Geer, *supra* note 156, at 140-41; Hyman, *supra* note 158, at 332.

<sup>193</sup> It has been suggested that the trial court's inquiry should address why the defendants and their attorney desire joint representation; whether potential conflicts have been discussed; what defenses will be raised at trial; and whether the proposed defenses will present conflicts. Girgenti, *supra* note 156, at 76. See also *Conflict of Interests*, *supra* note 158, at 246.

<sup>194</sup> One commentator has stated that "[a]bstract cautions are unlikely to be meaningful unless they are related to the specific problems that may arise in the defendant's particular case." Geer, *supra* note 156, at 141.

<sup>195</sup> See Hyman, *supra* note 158, at 344. Notably, some commentators have expressed doubt about whether a defendant is capable of making an informed decision despite the trial court's inquiry since many defendants, regardless of their degree of sophistication, do not understand the consequences of joint representation. See Geer, *supra* note 1, at 141-42; Lowenthal, *supra* note 156, at 971.

<sup>196</sup> *Thompson v. Postal Life Ins. Co.*, 226 N.Y. 363, 368, 123 N.E. 750, 751 (1919); *Stemmler v. Mayor of New York*, 179 N.Y. 473, 481-82, 72 N.E. 581, 584 (1904); *Clason v. Baldwin*, 152 N.Y. 204, 211, 46 N.E. 322, 324 (1897); *Coffin v. President*, 136 N.Y. 655, 660-61, 32 N.E. 1076, 1078 (1893); *Gill v. Logan*, 62 App. Div. 2d 1029, 404 N.Y.S.2d 28 (2d Dep't 1978) (mem.). W. RICHARDSON, EVIDENCE § 216, at 191-92 (10th ed. J. Prince 1973); 9 J. WIGMORE, EVIDENCE § 2588, at 586 (3d ed. 1940 & Supp. 1970). Admissions may be classified as either

party during his testimony, if uncontradicted by other evidence, also has been held to be conclusively established.<sup>197</sup> Whether a testimonial admission precludes a party from relying on contradictory testimony which is more favorable to his claim, however, has been "one of the most troublesome questions in the law of evidence."<sup>198</sup> Recently, in *Skelka v. Metropolitan Transit Authority*,<sup>199</sup> the Appellate Division, Second Department, held that a testimonial admission by a party was simply other evidence to be considered by the jury and did not prevent the party from relying on more favorable, contradictory testimony offered by the adverse party.<sup>200</sup>

In December, 1974, Ernest Skelka suffered personal injuries while attempting to disembark from a train as it was leaving the station.<sup>201</sup> In his subsequent negligence action against the defendant railroad, Skelka testified that at the time of the accident, the train conductor stood behind him on the steps of the train and that a push from behind caused him to fall to the station platform.<sup>202</sup> The conductor, on the other hand, offered testimony that

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judicial or extrajudicial. An admission made on the record of, or in connection with, judicial proceedings is a judicial admission; all other admissions are extrajudicial. W. RICHARDSON, *supra*, § 215, at 191; see 9 J. WIGMORE, *supra*, § 2588, at 586. Judicial admissions may be further classified as either formal or informal. Formal judicial admissions include pleadings and stipulations, while informal judicial admissions include facts admitted by a witness or a deponent. W. RICHARDSON, *supra*, §§ 215-217, at 191-94.

<sup>197</sup> *Andre v. Pomeroy*, 35 N.Y.2d 361, 365, 320 N.E.2d 853, 855, 362 N.Y.S.2d 131, 134 (1974); see *Mills v. 630 Park Assocs.*, 17 Misc. 2d 447, 184 N.Y.S.2d 48 (Sup. Ct. App. T. 1st Dep't 1958) (per curiam); *Giovanniello v. Horton*, 101 N.Y.S. 20 (Sup. Ct. App. T. 1906) (per curiam).

<sup>198</sup> *Koserkoff v. Chesapeake & O. Ry.*, 427 F.2d 1049, 1054 (6th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971); see notes 210-14 and accompanying text *infra*. See generally 9 J. WIGMORE, *supra* note 196, § 2594a at 597; Note, *Evidence—Party's Testimony as Judicial Admission*, 5 W. RES. L. REV. 398 (1954).

<sup>199</sup> 76 App. Div. 2d 492, 430 N.Y.S.2d 840 (2d Dep't 1980).

<sup>200</sup> *Id.* at 498, 430 N.Y.S.2d at 844.

<sup>201</sup> *Id.* at 493, 430 N.Y.S.2d at 841.

<sup>202</sup> *Id.* at 494, 430 N.Y.S.2d at 842. The plaintiff, approximately 68 years old at the time, was attempting to disembark after having carried his sister's baggage onto the train. *Id.* At trial, Skelka testified that as he descended the steps leading to the platform, he noticed that the train was moving. *Id.* He then testified that he informed the conductor that he wanted to get off, to which the conductor replied, "You know how to jump." *Id.* According to the plaintiff, the conductor then said, "Now," whereupon he felt a "bump" from behind and went "flying out." *Id.* On cross-examination, the plaintiff testified that he knew it was dangerous to alight from a moving train and that he had no intention of getting off the train when he reached the bottom step. *Id.* at 495, 430 N.Y.S.2d at 842. He further stated that under no circumstances would he have stepped off the moving train; that nothing the conductor said would have made him jump from a moving train; and that the push had caused him to fall. *Id.*

he was standing on the platform when Skelka fell from the steps,<sup>203</sup> but that he had told the plaintiff to "step down" just after the train had started to move.<sup>204</sup> The trial judge charged the jury that it could find for the plaintiff if it found either that Skelka had been pushed from behind or that the conductor had induced him to step from the moving train.<sup>205</sup> The jury rendered a general verdict for the plaintiff and the defendant appealed,<sup>206</sup> contending that the trial court erred in charging an inducement theory after the plaintiff had testified that he had been pushed.<sup>207</sup>

In a unanimous opinion written by Justice Titone, the Appellate Division, Second Department affirmed,<sup>208</sup> finding that the evidence permitted alternate theories of liability.<sup>209</sup> Acknowledging the dearth of controlling New York precedent,<sup>210</sup> the court ob-

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<sup>203</sup> *Id.* at 496, 430 N.Y.S.2d at 843. The conductor testified that he gave the all clear signal while standing on the platform and then ascended the steps to the car's vestibule. *Id.* at 495-96, 430 N.Y.S.2d at 842-43. Upon reaching the vestibule, he saw the plaintiff walking up the aisle of the car saying that he wanted to get off the train. *Id.* at 496, 430 N.Y.S.2d at 843. He further testified that he then stepped off the train while it was in motion and directed the plaintiff to follow him. *Id.* The plaintiff proceeded to step from the moving train, fell, and landed on the concrete platform. *Id.*

<sup>204</sup> *Id.* at 496, 430 N.Y.S.2d at 843.

<sup>205</sup> *Id.* The judge charged the jury that if it found that the conductor's words were calculated to induce the plaintiff to alight from a moving train, then it could consider such words as some evidence of negligence of the defendant's employee, provided that such action was a proximate cause of the accident. *Id.* at 496-97, 430 N.Y.S.2d at 843.

<sup>206</sup> *Id.* at 493, 430 N.Y.S.2d at 841.

<sup>207</sup> *Id.* Since the plaintiff's injuries were sustained on December 1, 1974, *id.* at 494, 430 N.Y.S.2d at 842, the comparative negligence rules were inapplicable. *See* *Quinlan v. Cecchini*, 41 N.Y.2d 686, 363 N.E.2d 578, 394 N.Y.S.2d 872 (1977); CPLR 1411, 1413 (1976); 2A WK&M § 1411.01. On appeal, the defendants contended that the plaintiff, by stating that he had been pushed from the train, had eliminated the issue of inducement and had avoided any cross-examination which might have established the plaintiff's contributory negligence in stepping from a moving train. Brief for Defendants-Appellants at 12-15, *Skelka v. Metropolitan Transit Auth.*, 76 App. Div. 2d 492, 430 N.Y.S.2d 840 (2d Dep't 1980). The defendant also contended that the trial court erred in charging the jury as to a railroad operating rule which provided that conductors must try to prevent "passengers" from getting on or off a moving train. 76 App. Div. 2d at 501-02, 430 N.Y.S.2d at 846. The defendant argued that the rule did not apply to a person who boarded a train to assist a passenger and who did not make his intention known. *Id.* at 502, 430 N.Y.S.2d at 846. The court, however, held that the plaintiff was a "passenger" within the meaning of the rule and that the defendant carrier owed him a duty of care, particularly because the plaintiff, in carrying his sister's luggage onto the train, was rendering a service which the railroad employees did not undertake to perform. *Id.* at 502, 430 N.Y.S.2d at 846-47.

<sup>208</sup> 76 App. Div. 2d at 503, 430 N.Y.S.2d at 847. Presiding Justice Mollen and Justices Hopkins and Martuscello concurred in Justice Titone's opinion.

<sup>209</sup> *Id.* at 501, 430 N.Y.S.2d at 846.

<sup>210</sup> *Id.* at 499, 430 N.Y.S.2d at 844-45. Recognizing that there was no case directly on point, the *Skelka* court inferred that the first department would at least allow the plaintiff

served that while some jurisdictions hold a party bound by admissions made during his testimony,<sup>211</sup> other jurisdictions allow the declarant the benefit of more favorable, albeit contradictory, testimony.<sup>212</sup> The rule permitting a party to rely on testimony contradictory to his own was particularly appropriate, the court noted, in accident cases where testimony is subject to the imprecision of observation and memory.<sup>213</sup> Justice Titone reasoned, moreover, that a party's in-court testimony, elicited under the stress of questioning by his adversary, logically should not be given the conclusive effect of a pleading or stipulation which is carefully drafted by counsel to

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the benefit of his adversary's more favorable testimony in personal injury actions where sharp factual issues were present. *Id.* at 500, 430 N.Y.S.2d at 845 (discussing *DeCarlo v. New York City Transit Auth.*, 42 Misc. 2d 751, 249 N.Y.S.2d 37 (Sup. Ct. N.Y. County 1964), *aff'd*, 23 App. Div. 2d 549, 256 N.Y.S.2d 543 (1st Dep't 1965); *Lazar v. Westchester St. Transp. Co.*, 268 App. Div. 387, 51 N.Y.S.2d 533 (1st Dep't 1944)); *cf.* *Schaffer v. Hirsch*, 52 App. Div. 2d 785, 383 N.Y.S.2d 23 (1st Dep't 1976) (mem.), *aff'd*, 41 N.Y.2d 960, 363 N.E.2d 588, 394 N.Y.S.2d 882 (1977) (mem.) (summary judgment against plaintiff granted where his motion papers raised no factual issue contradicting a damaging admission made in an examination before trial). In addition, the *Shelka* court inferred that the second department also had adopted a nonconclusive approach. 76 App. Div. 2d at 500-01, 430 N.Y.S.2d at 845-46 (citing *Bird v. Long Island R.R.*, 11 App. Div. 134, 42 N.Y.S. 888 (2d Dep't 1896)). In *Bird*, the court held that a plaintiff's estimate of distance was not conclusive where there was conflicting testimony from other witnesses. 11 App. Div. at 137-38, 42 N.Y.S. at 891. In *Lifton v. Title Guar. & Trust Co.*, 263 App. Div. 3, 31 N.Y.S.2d 94 (1st Dep't 1941), however, the plaintiff alleged that she tripped getting out of an elevator because the elevator floor was uneven with the building floor, while the defendant claimed that the plaintiff had tripped over the upward moving elevator door while it was closing. *Id.* at 4, 31 N.Y.S.2d at 95. The first department held that the plaintiff had to recover according to her own allegations and proof and that she could not recover if it was found that she tripped over the closing door. *Id.* at 5, 31 N.Y.S.2d at 96.

<sup>211</sup> 76 App. Div. 2d at 497, 430 N.Y.S.2d at 843 (citing *Grau v. Mitchell*, 156 Colo. 111, 397 P.2d 488 (1964); *White v. Doe*, 207 Va. 276, 148 S.E.2d 797 (1966)). In *Grau*, a plaintiff who sued for a half interest in an alleged partnership testified that he had refused to consummate the partnership agreement because he had not intended to assume any part of his partner's indebtedness. The court held that this testimony alone was sufficient to defeat the claim of partnership. 156 Colo. at 113-14, 397 P.2d at 489. Similarly, in *White*, the plaintiff testified that "he got up beside [the defendant's] rear wheel" at the intersection just before swerving and losing control of his motorcycle. The court held that the testimony was a binding admission which established contributory negligence as a matter of law, since a statute prohibited the overtaking and passing of other vehicles at intersections. 207 Va. at 278, 148 S.E.2d at 798-99. *See generally* Note, *Evidence—Cogdill v. Scates: Effect of a Testimonial Admission by a Party*, 55 N.C.L. Rev. 1155 (1977); Note, *Evidence—Conclusiveness of a Party's Self-Injuring Testimony*, 12 WAKE FOREST L. REV. 1113 (1976); *see also* *Elkin v. St. Louis Pub. Serv. Co.*, 335 Mo. 951, 74 S.W.2d 600 (1934); *Cogdill v. Scates*, 290 N.C. 31, 224 S.E.2d 604 (1976).

<sup>212</sup> 76 App. Div. 2d at 497, 430 N.Y.S. 2d at 843-44 (citing *King v. Spencer*, 115 Conn. 201, 161 A. 103 (1932) (discussed at notes 219-20 *infra*)).

<sup>213</sup> 76 App. Div. 2d at 497-98, 430 N.Y.S.2d at 844; *see* *Kanopka v. Kanopka*, 113 Conn. 30, 154 A. 144 (1931).

define the facts in issue.<sup>214</sup> Thus, the court adopted the view that "[t]he testimony of a party to a fact . . . is ordinarily no more conclusive upon him than the evidence given by any other witness" and, thus, does not preclude the jury from considering more favorable, contradictory evidence in the case.<sup>215</sup>

It is submitted that the holding in *Skelka* is sound when applied to a party's testimony as to opinion, observation, or estimate. Since such testimony is likely to be affected by emotion and the vagaries of memory,<sup>216</sup> a rule of conclusiveness could bind the unwitting declarant to honestly mistaken or innocently misstated impressions.<sup>217</sup> Such a harsh rule does not meaningfully advance the factfinding process, but merely penalizes a party for candor and susceptibility to stress under examination.<sup>218</sup>

<sup>214</sup> 76 App. Div. 2d at 498, 430 N.Y.S.2d at 844. The court reasoned that a rule of conclusiveness would not penalize an unscrupulous party, yet might penalize a party who could be forced into an admission by persistent counsel. *Id.* (citing C. McCORMICK, EVIDENCE § 266 (2d ed. E. Cleary 1972)); see *Alamo v. Del Rosario*, 98 F.2d 328, 331 (D.C. Cir. 1938).

<sup>215</sup> 76 App. Div. 2d at 497, 430 N.Y.S.2d at 844. The court also rejected the defendant's claim on appeal that the plaintiff's testimony removed inducement as an issue, see notes 205 & 207 *supra*, and held that the facts supported alternative theories of liability, either of which would allow the jury to find that the defendant's negligence was the proximate cause of the plaintiff's injuries. 76 App. Div. 2d at 501, 430 N.Y.S.2d at 846 (citing *Israelson v. New York City Transit Auth.*, 12 App. Div. 2d 799, 210 N.Y.S.2d 110 (2d Dep't), *aff'd*, 9 N.Y.2d 997, 176 N.E.2d 516, 218 N.Y.S.2d 68 (1961) (mem.)). The *Skelka* court offered *Gustavson v. Southern Blvd. R.R.*, 292 N.Y. 309, 55 N.E.2d 43 (1944) as analogous support. 76 App. Div. 2d at 501, 430 N.Y.S.2d at 846. In *Gustavson*, the plaintiff's witnesses testified that an automobile occupied by the plaintiff was stationary immediately prior to being struck by the defendant's trolley car. 292 N.Y. at 313, 55 N.E.2d at 44. The trial court charged the jury that if it found that the automobile was in motion at the time of the collision, as stated by the defense witnesses, it must find for the defendant. *Id.* at 314, 55 N.E.2d at 44. In reversing the judgment for the defendant, the Court of Appeals held that whether or not the car was in motion was not determinative of the negligence of the defendant and that the evidence would still support a finding against the defendant if the automobile were found to be in motion. *Id.* at 316, 55 N.E.2d at 45. The Court did note, however, that the trial court's "mandatory" instruction would be appropriate in cases where it addressed a factor which was essential to the plaintiff's case. *Id.* at 315, 55 N.E.2d at 45.

<sup>216</sup> See *DeCarlo v. New York City Transit Auth.*, 42 Misc. 2d 751, 755, 249 N.Y.S.2d 37, 39 (Sup. Ct. N.Y. County), *aff'd*, 23 App. Div. 2d 549, 256 N.Y.S.2d 543 (1st Dep't 1965); see note 218 *infra*. See generally 9 J. WIGMORE, *supra* note 196, § 2594a. In the cases relied on by the *Skelka* court, the contradictions in testimony concerned, for example, an estimate of distance, *Bird v. Long Island R.R.*, 11 App. Div. 134, 42 N.Y.S. 888 (2d Dep't 1896), whether a vehicle had stopped or was still in motion, *Gustavson v. Southern Blvd. R.R.*, 292 N.Y. 309, 55 N.E.2d 43 (1944); *Lazar v. Westchester St. Transp. Co.*, 268 App. Div. 387, 51 N.Y.S.2d 533 (1st Dep't 1944); *Alamo v. Del Rosario*, 98 F.2d 328 (D.C. Cir. 1938), and an estimate of time, *Kanopka v. Kanopka*, 113 Conn. 30, 154 A. 144 (1931).

<sup>217</sup> See note 214 *supra*.

<sup>218</sup> See, e.g., *DeCarlo v. New York City Transit Auth.*, 42 Misc. 2d 751, 249 N.Y.S.2d 37

It is suggested, however, that *Skelka* is overbroad in that it fails to distinguish between a party's opinion testimony and testimony as to facts solely within that party's knowledge.<sup>219</sup> It appears that certain facts peculiarly within a party's recollection, such as motive or intent, are not likely to be misstated,<sup>220</sup> and therefore testimony as to such facts may be unusually probative. Regarding such testimony, a rule of conclusiveness may be appropriate since there can be neither more favorable, contradictory testimony nor

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(Sup. Ct. N.Y. County 1964), wherein the court held that parties usually are not capable of giving conclusive testimony as to the details of "split-second" accidents and that a rule of preclusion would encourage them to withhold their impressions, thus frustrating the search for truth. *Id.* at 754-55, 249 N.Y.S.2d at 40.

<sup>219</sup> In ruling on the admissibility of testimonial admissions, courts frequently distinguish between opinion testimony and testimony which describes an event, such as an accident, and testimony on facts and motives which are solely within the party's knowledge. See *King v. Spencer*, 115 Conn. 201, 161 A. 103 (1932); *Kanopka v. Kanopka*, 113 Conn. 30, 154 A. 144 (1931); *Mitchell v. Lynn Fire & Police Notification Co.*, 292 Mass. 165, 197 N.E. 456 (1935); *Stodgell v. Mounter*, 344 S.W.2d 100 (Mo. 1961). *King v. Spencer* provides a useful illustration of this distinction. The plaintiff had been a guest in a car which the defendant was driving. The defendant testified that the brakes on his car were faulty and that he could have avoided the accident if the brakes were good. He further testified that he had not applied the brakes, and that he did not know why he had not. 115 Conn. at 206, 161 A. at 105. The court held that the defendant's statements as to the condition of the brakes and the possibility of stopping in time were merely opinions and, therefore, were not conclusive upon him. *Id.* The court pointed out, however, that the defendant's statement that he had not applied the brakes and that he did not know why he had not, "was an unequivocal concession of a fact peculiarly within his own knowledge, as to which he could not honestly be mistaken" and, thus, should be binding upon him. *Id.* at 206-07, 161 A. at 105; see notes 216 & 218 and accompanying text *supra*.

<sup>220</sup> See *King v. Spencer*, 115 Conn. 201, 206, 161 A. 103, 105 (1932); *Kanopka v. Kanopka*, 113 Conn. 30, 35-37, 154 A. 144, 147 (1931); *Harlow v. Leclair*, 82 N.H. 506, 512, 136 A. 128, 130 (1927). In stating the rationale for the rule that a party is bound by testimonial admissions of facts within his own knowledge, the court in *King v. Spencer* recognized that "it would be manifestly unjust to allow him to prevail after he had clearly and unequivocally given sworn testimony destructive of his right of action or defense." 115 Conn. at 207, 161 A. at 105. *But see* *Alamo v. Del Rosario*, 98 F.2d 328 (D.C. Cir. 1938). In *Alamo*, the court reasoned that a distinction based on whether a fact was peculiarly within the party's knowledge was elusive at best. "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 plaintiffs are infallible." *Id.* at 332.

It is submitted that *Skelka's* sworn assertion that the conductor's urgings could not and did not cause him to jump from a moving train, 76 App. Div. 2d at 495, 430 N.Y.S.2d at 842, should have been regarded as a recitation of motive about which the plaintiff could not have been mistaken.

honest mistake. It is urged, therefore, that the courts should scrutinize the nature and subject of a party's testimony before determining its conclusive effect.<sup>221</sup>

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<sup>221</sup> See also *Harlow v. Leclair*, 82 N.H. 506, 136 A. 128 (1927). In *Harlow*, the court held that the following factors were relevant in determining whether particular testimony should be deemed a conclusive admission:

- (1) Was the party at the time when the occurrence about which he testified took place, and when he testified, in full possession of his mental faculties?
- (2) Was his intelligence and command of English such that he fully understood the purport of the questions and his answers thereto?
- (3) What was the nature of the facts to which he testified? Was he simply giving his impressions of an event as a participant or an observer, or was he testifying to facts peculiarly within his own knowledge?
- (4) Is his testimony contradicted by that of other witnesses?
- (5) Is the effect of his testimony clear and unequivocal, or are his statements inconsistent and conflicting?

*Id.* at 512, 136 A. at 131. It is suggested that the New York courts develop similar standards to be utilized in their examination of testimony.