

## CIRCUMSTANTIAL EVIDENCE IN NEBRASKA

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### I. INTRODUCTION

There are four lines of Nebraska civil cases judging the value of circumstantial evidence.<sup>1</sup> The oldest is the *Blid*<sup>2</sup> line, where the court says that circumstantial evidence will not support a verdict in a civil case unless the necessary inferences are the *only* reasonable inferences that can be drawn from the evidence.<sup>3</sup> The second oldest is the "reasonable certainty" line, where the court says that a verdict may be supported with circumstantial evidence if the necessary inferences can be drawn with reasonable certainty.<sup>4</sup> The third line contains cases holding that circumstantial evidence is "equally competent" with direct evidence; such evidence supports a verdict if a reasonable person could draw the necessary inferences.<sup>5</sup> The fourth line is less distinct, and somewhat schizophrenic. In the cases of this fourth line, the stated rule regarding the value of circumstantial evidence is a combination of any two or all three of the rules from the other lines.<sup>6</sup>

Sometimes the cases of the first three of these lines proceed along, parallel to and oblivious of each other. The *Blid* rule will be cited in one case, the reasonable certainty rule in another, and the equally competent rule in a third, more or less contemporaneous case. And in none of these cases is there any recognition of the fact that its rule is not the only one.

Sometimes the rules intersect, with one or more appearing in the

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1. The four lines are the "*Blid*" line, the "reasonable certainty" line, the "equally competent" line, and the "schizophrenic" line, each discussed below.

Bland v. Fox, 172 Neb. 662, 665-66, 111 N.W.2d 537, 540 (1961) defines direct and circumstantial evidence.

2. This line is named after its first case, *Blid v. Chicago & N.W. Ry.*, 89 Neb. 689, 131 N.W. 1027 (1911).

3. For the discussion of "the *Blid* line," see notes 7-49 and accompanying text *infra*.

4. For the discussion of "the reasonable certainty line", see notes 50-84 and accompanying text *infra*.

5. For the discussion of "the equally competent line," see notes 85-96 and accompanying text *infra*.

6. For the discussion of "the schizophrenic line," see notes 97-127 and accompanying text *infra*.

same case. At one point of intersection, one of the lines was overruled, only to reappear very soon thereafter. More often, when two or more of the lines show up in the same case, they are strung together as variations of their individual selves. These are the often-confused cases of the fourth line.

This article traces the history of each of these four lines of cases, and comes to this conclusion: When judged by what they say, each of these rules is inconsistent with each of the other three; when judged by how they are applied, however, the four of them are almost entirely consistent. Underneath it all, each of these rules is designed to accomplish exactly the same thing; it is just that three of the rules do not say what they mean. This article identifies the one correct line of cases, exposes the real meaning of the rules from each of the other lines, and suggests what should be done next.

## II. THE *BLID* LINE

On the subject of circumstantial evidence, there is one line of Nebraska civil cases which judges this evidence to be next to worthless. The most extreme statement from the cases in this line is this: "A material fact may be established by circumstantial evidence when it is such that reasonable and fair inferences therefrom produce moral certainty and conviction."<sup>7</sup> More typically, the cases in this line say that circumstantial evidence will not support a verdict "unless the circumstances proved by the evidence are [such] that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom."<sup>8</sup>

Circumstantial evidence will support a verdict only when there is no other conclusion to be drawn from the evidence, or when each of the other conclusions is unreasonable. It is not that a preponderance of the evidence must support the jury's conclusion, or even that the jury must be drawn to the conclusion beyond a reasonable doubt; rather, if the evidence is circumstantial, it must support the conclusion drawn to the exclusion of any other conclusion.

This is the oldest of the lines, and the most tangled. The first case in this line, *Blid v. Chicago & Northwestern Railway*,<sup>9</sup> was decided in 1911. That case and, along with it, the entire line, was overruled in 1956<sup>10</sup>—only to show up again in 1964.<sup>11</sup> The most recent

7. *Tongue v. Perrigo*, 130 Neb. 564, 568, 265 N.W. 737, 739 (1936) (dictum).

8. *Blid*, 89 Neb. at 691-92, 131 N.W. at 1028.

9. 89 Neb. 689, 131 N.W. 1027 (1911). A case decided earlier that same year used similar language, but to make a different point. The case is *White v. Slama*, 89 Neb. 65, 130 N.W. 978 (1911). See text accompanying notes 16-17 *infra*.

10. *Davis v. Dennert*, 162 Neb. 65, 75 N.W.2d 112 (1956).

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

case clearly in this line, and this line alone, was decided in 1974.<sup>12</sup>

This line has been particularly weak from its very beginning. In *Blid*, plaintiff sued the railroad to recover damages for the death of livestock killed by defendant's locomotive.<sup>13</sup> The trial court sent the case to the jury, which returned a verdict for plaintiff. On appeal, the supreme court said:

Circumstantial evidence may be received to establish a fact in contradiction to the positive testimony of alleged eye-witnesses to the transaction; but circumstantial evidence cannot be said to be sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom.<sup>14</sup>

It is this quotation that began the strictest of the value judgments regarding circumstantial evidence. And yet, in that same case, the court also said: "[N]ot only do those facts [*i.e.*, plaintiff's evidence]

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12. *So Soo Feed & Supply Co. v. Morgan*, 192 Neb. 277, 220 N.W.2d 25 (1974).

13. At the intersection of defendant's tracks and a highway, there were cattle guards placed so as to keep large animals off of the main part of the tracks, but not off of the part that crossed the highway. The plaintiff did not argue that the guards should have been placed so as to keep cattle off of the tracks where they crossed the highway; rather, he argued that the guards in place were insufficient to turn cattle, allowing his to get from the highway onto defendant's right-of-way. The way this case was framed, the essential question was "Where were the livestock when they were struck by the train?" Were they on the highway side of the cattle guard, or the other side, on railroad right-of-way?

Plaintiff's evidence on this point consisted of the following: The carcass of a bull and a cow were found, one on each side of the track, about 60 feet east of the highway crossing. A crippled calf was found 150 feet further eastward. Plaintiff produced a man who testified that he had witnessed three collisions between locomotive engines and livestock and, from that experience, he did not believe that defendant's locomotive could have carried this livestock that far from the highway.

Defendant's evidence on this point consisted of the testimony of the fireman and the engineer that the cow, the bull, and the calf were standing in the highway, on the planks between the tracks; that, at the time of the collision, the train had been slowed to 15 to 18 miles an hour; and that the locomotive carried the bodies of the cattle over the cattle guard and beyond, until they rolled or fell off of the engine. The engineer testified that in his experience "cattle have been . . . carried for 100 yards before . . . fall[ing] from the [locomotive]." *Blid*, 89 Neb. at 691, 131 N.W. at 1027. Two other witnesses testified that there were no cattle tracks on the railroad right-of-way side of the cattle guard, but that there were such tracks between the rails on the highway side of the cattle guard.

Further, "[t]here is no proof that the cattleguards at that crossing were out of repair or insufficient." *Id.* at 692, 131 N.W. at 1028. And finally, at a speed of 15 to 18 miles an hour, the train would have gone from the crossing to the spot where the two dead animals were found "in three seconds of time." *Id.*

In *Davis v. Dennert*, 162 Neb. 65, 75, 75 N.W.2d 112, 119 (1956) the court stated that the *Blid* rule should not have any application in civil cases, effectively overruling *Blid* as to those cases. *Id.*

14. *Blid*, 89 Neb. at 691-92, 131 N.W. at 1028.

not contradict the direct testimony, but they are consistent therewith. Defendant's motion at the close of the evidence for a directed verdict should have been sustained."<sup>15</sup>

What the court seemed to mean was that virtually all of the evidence, including much of plaintiff's, supported the defendant's theory of how this accident happened. Plaintiff's evidence (circumstantial or not) was so weak that the only way a jury could have found in his favor would have been through speculation: to disbelieve the defendant's evidence, to speculate regarding what really happened, and to find in favor of the plaintiff. It is not that it is wrong for a jury to disbelieve a defendant's witnesses. It is just that when a jury does so, the plaintiff still has the burden of proof. The burden cannot be carried by insufficient evidence. If plaintiff's evidence is insufficient, it does not matter that the defendant puts on evidence the jury chooses not to believe. Plaintiff's evidence is still insufficient.

"As a matter of law, the plaintiff failed to put on sufficient evidence from which a reasonable person could find in his favor—he failed to satisfy his burden of proof. Case dismissed." That is all the court needed to say. The rest was dicta; unfortunately, it was also the beginning of the line of cases within which it seems almost impossible to prove an essential element of a civil case with circumstantial evidence. And that is the first of *Blid*'s many weaknesses: the court did not need to lay down a new rule at all, let alone one with such far-ranging consequences.

A second weakness of the *Blid* rule is that it was simply announced, followed by three citations but no analysis. There is no indication that the choice of the rule was thoughtful. In fact, there is some indication that its choice was accidental: that the court simply lifted this *Blid* language from a case it had decided two months earlier, where the language had been used to support an entirely different conclusion. In *White v. Slama*,<sup>16</sup> the court said that where an inference to be drawn from circumstantial evidence "is the only one which can fairly and reasonably be deduced therefrom, the court should not hesitate to act upon circumstantial evidence and therefrom find the ultimate fact."<sup>17</sup> In *White*, the court said that conclusive circumstantial evidence is just that: conclusive. When the evidence on an issue is conclusive, then that issue should not be sent to the jury; rather, the party with the evidence is entitled to a directed verdict. Using virtually the same words two months later, the court said that circumstantial evidence is not good enough unless it is

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15. *Id.* at 693, 131 N.W. at 1028.

16. 89 Neb. 65, 130 N.W. 978 (1911).

17. *Id.* at 70, 130 N.W. at 980.

conclusive. And, of course, there is a huge and very basic difference. The timing of these two cases and the lack of analysis in *Blid* circumstantially indicate that the *Blid* rule was the result of the conversion of the rule from *White*, that the court simply called up the *White* language and asked it to support exactly the opposite conclusion.

A third weakness of this rule denigrating circumstantial evidence is this: the cases cited in support of the rule. One has been overruled; the second never did stand for the proposition cited; and the third, while it used language similar to the proposition for which it was cited, it clearly meant something else. The first case was from Iowa.<sup>18</sup> The Iowa Supreme Court said, "A theory cannot be . . . established by circumstantial evidence . . . unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. . . . The facts relied upon to prove [plaintiff's theory] are quite as consistent with [at least two other theories]. Plaintiff, then, has not shown the cause of the injury."<sup>19</sup> This may never have been anything more than a statement of the rule that evenly balanced evidence does not satisfy the burden of proof. To the extent that it ever did mean more than that, it has been specifically overruled.<sup>20</sup>

In *Blid*, the court also cited *American Freehold Land Mortgage Co. v. Whaley*,<sup>21</sup> a federal case from South Carolina. That case says that when "it is proposed to contradict the direct testimony of unimpeached witnesses by inferences from facts, this result cannot be reached unless the existence of these facts and the natural inferences from them cannot be reconciled with the conclusion that the direct evidence is true."<sup>22</sup> Stated affirmatively, here is what this sentence says: Circumstantial evidence discredits direct evidence only when it cannot be reconciled with the direct evidence. In other words, if there is an interpretation of the circumstantial evidence which is consistent with the direct evidence, then that interpretation must be adopted. Regardless of its merits as a rule of law, this is not the *Blid* rule: it does not say that an essential element of a case cannot be inferred from circumstantial evidence unless that is the only possible inference to be drawn therefrom.

The third case cited for the *Blid* rule was *Lopez v. Rowe*,<sup>23</sup> in

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18. *Asbach v. Chicago, B. & Q. Ry.*, 74 Iowa 248, 37 N.W. 182 (1888).

19. *Id.* at 250, 37 N.W. at 183.

20. *Bill v. Farm Bureau Life Ins. Co.*, 254 Iowa 1215, 1225-26, 119 N.W.2d 768, 774 (1963): Already "long . . . abrogated, . . . [w]e now overrule the holding of the *Asbach* case." *Id.*

21. 63 F. 743 (C.C.D.S.C. 1894).

22. *Id.* at 747.

23. 163 N.Y. 340, 57 N.E. 501 (1900).

which a New York court said:

There is no direct evidence showing it, nor were the circumstances sufficient to justify the court in finding it. While a material fact may be established by circumstantial evidence, still, to do so, the circumstances must be such as to fairly and reasonably lead to the conclusion sought to be established, and to fairly and reasonably exclude any other hypothesis. Where the evidence is capable of an interpretation which makes it equally consistent with the absence as with the presence of a wrongful act, that meaning must be ascribed to it which accords with its absence. In other words, it can only be established by proof of such circumstances as are irreconcilable with any other theory than that the act was done. As has been said: "Insufficient evidence is, in the eye of the law, no evidence."<sup>24</sup>

The first three sentences of this quotation are nothing more than a restatement of the well known rule that evenly balanced evidence does not satisfy the burden of proof. If the evidence on an issue is evenly balanced, the party with the burden of proof loses on that issue. The fourth sentence is an attempt to restate the first three; whether it exactly does that or not, it is clear that it was not intended to do anything more. Though similar to how the *Blid* rule is sometimes applied, that intention is a long way from the *Blid* rule as stated.

In any event, the *Blid* rule is cited nearly seventy-five years later,<sup>25</sup> not as the product of three-quarters of a century of reasoned discussion—or really, the product of any discussion—but rather as an example of the phenomenon that when a court says something often enough and over a long enough period of time, it becomes the law.

A fourth weakness of the *Blid* rule is that it is in general disfavor.<sup>26</sup> There is no good reason to denigrate all circumstantial evidence to the point where it is of no value if it is possible to draw from it more than one reasonable conclusion.<sup>27</sup>

Reason number five for retiring the *Blid* rule to the status of "the old rule" is that there is no burden anywhere in the law greater than the burden stated by the *Blid* rule. Short of outlawing the evidence altogether, it is the least favorable rule possible. It puts on the

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24. *Id.* at 348, 57 N.E. at 503 (quoting *Jewell v. Parr*, 13 C.B. 916 (n.d.)).

25. *Anderson v. Farm Bureau Ins. Co.*, 219 Neb. 1, 4-5, 360 N.W.2d 488, 491 (1985).

26. MCCORMICK ON EVIDENCE § 338, at 954 (3d ed. 1984). *E.g.*, *Console v. Nickou*, 156 Conn. 268, 240 A.2d 895 (1968); *Arterburn v. St. Joseph Hosp. & Rehabilitation Center*, 220 Kan. 57, 551 P.2d 886 (1976); *Smith v. Bell Tel. Co.*, 397 Pa. 134, 153 A.2d 477 (1959); *Parham v. Dell Rapids Township*, 122 N.W.2d 548 (S.D. 1963).

27. See text accompanying note 146 *infra*. Regarding the relative merits of direct and circumstantial evidence, see the Epilogue.

civil plaintiff a burden of proof greater than, or at best equal to, the burden put on the state in a criminal action.<sup>28</sup> In a criminal case, whether the evidence is direct or circumstantial, the burden of proof is "beyond a reasonable doubt."<sup>29</sup> Nebraska's pattern jury instruction defines reasonable doubt as "such a doubt as would [give pause to] . . . a reasonably prudent [person], in one of the graver and more important transactions of life, . . . such a doubt as will not permit . . . an abiding conviction, to a moral certainty, of the guilt of the accused . . . [a] substantial doubt . . . as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture."<sup>30</sup> "At the same time absolute or mathematical certainty is not required."<sup>31</sup> The Eighth Circuit defines it as "a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act . . . [but] not . . . proof beyond all possible doubt."<sup>32</sup> Whatever the precise definition, that burden is no greater than the burden of showing that the conclusion argued "is the only one that can fairly and reasonably be drawn"<sup>33</sup> from the evidence.

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28. This is the thrust of Chief Justice Krivosha's recent opinion concurring in the result in *Anderson v. Farm Bureau Ins. Co.*, 219 Neb. 1, 360 N.W.2d 488 (1985).

After recognizing that the law in this area is inconsistent, the Chief Justice said this about the *Blid* rule:

The "only reasonable conclusion" test requires that the circumstantial evidence must in effect disprove every theory other than the one upon which the party offering the evidence relies. This is a stricter standard than that which we now require in criminal cases. . . . The net effect of [*State v. Buchanan*, 210 Neb. 20, 28, 312 N.W.2d 684, 689 (1981)] was to declare that in criminal cases one may be convicted on the basis of circumstantial evidence even though the conclusion reached by the jury is not the *only* one that can fairly and reasonably be drawn therefrom. It seems inappropriate for us to continue to maintain a much more stringent rule in civil cases than in criminal cases, given the fact that criminal cases require proof beyond a reasonable doubt and civil cases require only that proof be established by a preponderance of the evidence. It appears to me that that is not a consistent or logical position for the law to take.

219 Neb. at 9, 360 N.W.2d at 493 (Krivosha, C.J., concurring in the result).

29. *State v. Eggers*, 220 Neb. 862, 865, 374 N.W.2d 36, 38 (1985). The court stated:

It has long been the rule in this jurisdiction that direct evidence of a crime is not essential for a conviction and that one may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. . . . Moreover, since [1981] . . . , we have held that in order to convict one on the basis of circumstantial evidence the State is not required to disprove every hypothesis but that of guilt.

*Id.* (citing *State v. Buchanan*, 210 Neb. 20, 28, 312 N.W.2d 684, 689 (1981)). This is the most recent Nebraska Supreme Court case on circumstantial evidence in a criminal case. It relied heavily on *State v. Buchanan*.

30. Nebraska Jury Instruction 14.08 (1969) [hereinafter cited as NJI].

31. *Id.*

32. Manual of Model Criminal Jury Instructions for the Eighth Circuit, Instruction 3.11 (1985).

33. *Blid*, 89 Neb. at 692, 131 N.W. at 1028.

A sixth reason for never hearing from the *Blid* rule again is illustrated in *Koutsky v. Bowman*.<sup>34</sup> Dirt piled against plaintiffs' brick building caused the side to be "pushed in." Plaintiffs alleged that one of the defendants dumped the dirt against their building, and did so with the permission of the other defendant, the owner of the vacant lot next door. At the close of plaintiffs' case, and citing "want of evidence" the trial court granted each defendant's motion to dismiss.<sup>35</sup>

On the question of who dumped the dirt, the supreme court recognized that all of plaintiffs' evidence was circumstantial. It quoted the *Blid* rule: circumstantial evidence can support a verdict if "the conclusion reached is the only one that can fairly and reasonably be drawn therefrom."<sup>36</sup> The court then said, "Tested by the above rules we think that a jury could properly find that the dirt against plaintiffs' building was placed there by defendant McDonald."<sup>37</sup> The supreme court found that plaintiffs had raised a jury question, and it reversed the trial court's dismissal of the case.

*Koutsky* seems to make perfect sense until the two just-quoted sentences are written as one. When the second sentence is rewritten, taking out the general reference to the "above rules," and substituting the specific statement of one of the rules to which the court was referring, the sentence reads as follows: "tested by the rule that says that circumstantial evidence can support a verdict if the conclusion in the verdict is *the only one that can fairly and reasonably be drawn therefrom*, we think that a jury could properly find for plaintiffs in this case." Given the rule of the first clause of that sentence, the second clause should have read as follows: "we think that a jury must find for plaintiffs, for no other decision would be reasonable." In other words, the sentence falls in upon itself. If the conclusion is the only one that can fairly and reasonably be drawn, then a jury would have to find for plaintiffs; no other conclusion would be reasonable. That being the case, the court could not submit the issue to the jury; rather, the court would be obliged to decide the question as a matter of law.<sup>38</sup> What the court really said in *Koutsky* was: the directed verdicts for defendants are reversed, because the case should have gone to the jury, because the only reasonable conclusion is that plaintiffs win, not defendants. Using the logic of the opinion, the supreme

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34. 157 Neb. 919, 62 N.W.2d 114 (1954).

35. *Id.* at 920, 62 N.W.2d at 115.

36. *Id.* at 921, 62 N.W.2d at 116 (quoting *Scarborough v. Aeroservice, Inc.*, 157 Neb. 749, 762, 53 N.W.2d 902, 910 (1952)).

37. *Id.* at 922, 62 N.W.2d at 116.

38. *Davidson v. Simmons*, 203 Neb. 804, 807-08, 280 N.W.2d 645, 648 (1979).

"Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination." *Id.*

court should not only have reversed the dismissal of plaintiffs' case, but, assuming such a motion had been made, should have instructed the trial court to direct a verdict in favor of plaintiffs.<sup>39</sup>

In other words, *Koutsky* is one more example of the fact that the *Blid* rule does not really mean what it says. The *Koutsky* court did not mean to say that the only reasonable conclusion would be one in favor of plaintiffs and, therefore, upon proper motion, they should be granted a directed verdict. What it did mean to say was that there was sufficient evidence from which it would have been reasonable to find in favor of plaintiffs; that is to say, a finding in favor of plaintiffs need not have been based on speculation, guess, or conjecture. Therefore, defendants' motions for directed verdicts should have been overruled and the case should have been allowed to go to the jury.<sup>40</sup>

If the *Blid* rule, as interpreted, were properly applied, then in every case where the plaintiff relies on circumstantial evidence there would be a directed verdict. The jury decides between competing reasonable interpretations of the facts;<sup>41</sup> the judge decides between

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39. In his concurring opinion in *Wolstenholm v. Kaliff*, Chief Justice White recognized that whenever the evidence on an issue was circumstantial, and perhaps when it was both direct and circumstantial, literal application of the *Blid* rule would require that the issue be decided by the court, as a matter of law:

If we apply the rule literally as stated in the majority opinion, what is there left for jury determination in a case where all of the evidence is undisputed and circumstantial? Is jury function eroded to mere credibility determination? We have said many times that where the facts adduced to sustain an issue, either by circumstantial or direct evidence, are such that reasonable minds *can draw but one* conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination.

*Wolstenholm v. Kaliff*, 176 Neb. 358, 368, 126 N.W.2d 178, 184 (1964) (emphasis original). This "does not permit choice by the jury." *Id.* at 367, 126 N.W.2d at 184.

40. Similarly, in *Hosford v. Doherty*, 198 Neb. 211, 252 N.W.2d 154 (1977) the court said that when a cause of action is established by circumstantial evidence, to get the case to the jury or to sustain a verdict, the conclusions urged must "fairly and reasonably arise[]" from the circumstantial evidence. *Id.* at 215, 252 N.W.2d at 156. The court then said that a plaintiff relying on circumstantial evidence is not required to exclude the possibility of other causes. And then *Hosford* concludes that "[t]he only reasonable inference that can be drawn from the evidence is that the damage sustained was attributable to the negligence of defendant's employees. A jury question was therefore presented [on the issue of proximate cause]. The motions for a directed verdict and judgment notwithstanding the verdict were properly overruled." *Id.* at 216, 252 N.W.2d at 157. But, of course, if there is only one inference that is reasonable, a jury question is *not* presented. If the only reasonable conclusion is that the negligence of defendant's employees proximately caused plaintiff's damage, then, rather than simply denying defendant's motion for a directed verdict, the trial court should have directed the issue of liability in favor of plaintiff. See note 94 and accompanying text *infra*.

41. *Flakus v. Schug*, 213 Neb. 491, 493, 329 N.W.2d 859, 862 (1983); *Schroll v. Fulton*, 213 Neb. 310, 313, 328 N.W.2d 780, 783 (1983); *Havelock Bank v. Borgen*, 212 Neb. 70, 77, 321 N.W.2d 432, 436 (1982); *Bentz v. Nebraska Pub. Power Dist.* 211 Neb.

the reasonable and the unreasonable.<sup>42</sup> If the plaintiff's contention is the *only* reasonable one, then a verdict should be directed for the plaintiff. If the plaintiff's contention is not the only reasonable one, then the *Blid* rule says that the plaintiff cannot win; therefore, a verdict should be directed for the defendant; and therefore there will be no jury instructions. The *Blid* rule says that circumstantial evidence will not support a verdict unless it supports a directed verdict; it does not prove any essential element, unless it proves that the plaintiff is entitled to a directed verdict.

A seventh problem with the *Blid* rule is that through its history it has been used in situations where other rules were more appropriate—where other, proper rules would achieve the same result with less confusion. There are fourteen cases in the *Blid* line.<sup>43</sup> Ten of those cases discuss another rule of evidence and misidentify it as the *Blid* rule. The *Blid* rule is cited in support of the judgment, but the rule discussed is not the *Blid* rule. The rule discussed is the rule that applies when, as a matter of law, the plaintiff has not satisfied his or her burden of proof; sometimes because the plaintiff has put on no credible evidence,<sup>44</sup> and sometimes because the best that can be said

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844, 850-51, 320 N.W.2d 763, 767-68 (1982); *State v. Rolling*, 209 Neb. 243, 248, 307 N.W.2d 123, 126 (1981); *State v. Carter*, 205 Neb. 407, 409, 288 N.W.2d 35, 36 (1980); *State v. Kimbrough*, 173 Neb. 873, 877-78, 115 N.W.2d 422, 425 (1962); *Haines v. State*, 170 Neb. 304, 315, 102 N.W.2d 609, 617 (1960); *Pueppka v. Iowa Mut. Ins. Co.*, 165 Neb. 781, 784, 87 N.W.2d 410, 412-13 (1958); *Colvin v. John Powell & Co.*, 163 Neb. 112, 117, 77 N.W.2d 900, 906 (1956).

42. Where only one reasonable inference can be drawn, the question is for the court. *Tank v. Peterson*, 219 Neb. 438, 448, 363 N.W.2d 530, 537 (1985); *Gerhardt v. McChesney*, 210 Neb. 351, 354-55, 314 N.W.2d 258, 261 (1982); *Exchange Bank v. Ashley*, 191 Neb. 259, 261-62, 214 N.W.2d 632, 633-34 (1974); *Colton v. Benes*, 176 Neb. 483, 492-93, 126 N.W.2d 652, 658-59 (1964); *Colvin v. John Powell & Co.*, 163 Neb. 112, 117, 77 N.W.2d 900, 906 (1956). In Chief Justice White's concurring opinion in *Wolstenholm*, he recognized the application of this rule to this very situation: "[W]here the facts adduced to sustain an issue . . . are such that reasonable minds *can draw but one* conclusion therefrom, it is the duty of the court to decide the question, as a matter of law." 176 Neb. at 368, 126 N.W.2d at 184.

43. *Blid v. Chicago & N.W. Ry.*, 89 Neb. 689, 131 N.W. 1027 (1911). See also cases cited at notes 44-46 *infra*.

44. *Anderson v. Interstate Transit Lines*, 129 Neb. 612, 262 N.W. 445 (1935), involved a collision between a truck and a bus. The plaintiff was the administratrix of the truck driver's estate. The defendant owned the bus and employed its driver. The plaintiff alleged that the defendant's driver was speeding, drove on the wrong side of the road, drove in a dangerous and uncontrollable manner, and failed to warn that he was crossing the center line. The trial court directed a verdict for the defendant. The Nebraska Supreme Court affirmed, stating:

The sole evidence as to the accident was given by witnesses who arrived after it occurred, and when the bus and the truck were in flames. There is no direct evidence [as to how the bus was being driven]. There is in fact a total absence of proof on each of the several claims of negligence. . . . The actual problem presented by the record in its present form is one of the resolution of forces, and we would be required to determine from the position of the two motor vehicles at the conclusion of the incident, just where they actually col-

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lided. With no evidence before us as to the weight, speed, location on the highway, or direction of movement thereon, of either truck or bus at the moment of impact, obviously this cannot be done.

*Id.* at 615, 262 N.W. at 446. There was a total absence of relevant evidence of any kind, direct or otherwise, said the court—and that is all the court needed to say. The plaintiff had not met her burden of production, let alone her burden of proof; the jury could not be allowed to speculate, guess, or indulge in conjecture; the trial court's directed verdict for the defendant had to be affirmed. This case has nothing to do with direct versus circumstantial evidence and any difference in value between the two. It does, however, quote from *Blid*, stating that circumstantial evidence alone is not sufficient to sustain a verdict "unless . . . the conclusion reached is the only one that can fairly and reasonably be drawn therefrom." 129 Neb. at 616, 262 N.W. at 446 (dictum) (quoting *Blid*, 89 Neb. at 691-92, 131 N.W. at 1028).

*Bixby v. Ayers*, 139 Neb. 652, 298 N.W. 533 (1941), was a wrongful death action. The deceased's bicycle and defendant's car collided. The supreme court set out a few basic legal principles, including the *Blid* rule; described and discussed the evidence; and concluded that this was "a case where evidence of controlling circumstances in no manner conflicts with the evidence of the defendant." *Id.* at 667, 298 N.W. at 541. The basic failure of the evidence was that most of it was post-collision evidence with nothing in the record to justify drawing inferences about relevant facts as they existed before and during the collision. In other words, rather than quoting from *Blid*, the supreme court could have sustained the trial court's directed verdict for the defendant by saying that, as a matter of law, the plaintiff failed to meet his burden of proof.

In *Shamblen v. Great Lakes Pipe Line Co.*, 158 Neb. 752, 64 N.W.2d 728 (1954), plaintiff alleged that a privately owned power line running across his land had been destroyed by a truck for which defendant was responsible. On April 9, defendant's employees came onto plaintiff's property and staked out a pipeline route. On April 14, a truck apparently drove onto plaintiff's property, hooked onto and dragged plaintiff's power line, and then drove to and followed the stakes for the pipeline route. Regarding the truck, plaintiff testified that it "might have been somebody else looking for their fence crew, I don't know who it was." *Id.* at 755, 64 N.W.2d at 730. The trial court had allowed this case to go to the jury, which returned a verdict for plaintiff. The supreme court cited the *Blid* rule, found that plaintiff's case was "solely one of suspicion and conjecture," and reversed. *Id.* at 756, 64 N.W.2d at 730. The supreme court said that this claim should have been dismissed because all the jury could do was to speculate as to whose truck this was. And why was that the case? Because plaintiff had failed to meet his burden of production. In spite of the quotation of the *Blid* rule the problem was not that the circumstantial evidence was not conclusive; rather, the problem was that it was so weak, there was no way it could have supported a verdict for plaintiff.

*Bowers v. Maire*, 179 Neb. 239, 137 N.W.2d 796 (1965), involved an automobile accident. The evidence regarding how the accident happened consisted of the location of the two cars after the accident and testimony by investigating police officers regarding certain physical facts that they observed after the accident. The court stated the *Blid* rule and then reviewed the evidence. The problem presented by this record, said the court, was one of physics: deciding how the accident happened, using evidence of how the cars ended up. That problem could not be solved on the record; there was insufficient data. "A verdict of a jury on the evidence presented in this case would be based on conjecture, surmise, and speculation and could not be permitted to stand. The district court was correct in directing a verdict for the defendant." *Id.* at 243, 137 N.W.2d at 798.

In *Norcross v. Gingery*, 181 Neb. 783, 150 N.W.2d 919 (1967), the key issue was whether a partnership existed. The plaintiff alleged the following: twenty-three years before filing the lawsuit, he had entered into a written contract of partnership with the late husband of the defendant; the written agreement had been lost or destroyed; the original agreement involved a 30-acre tract of farm land, which had been sold; a 40-acre tract had been purchased with the proceeds, with the deed recorded in the name

about the evidence is that it is evenly balanced.<sup>45</sup> Either way, the jury

of the defendant and her late husband. The evidence further showed that the defendant and her husband had lived on and farmed the land, the first piece, and then the second, for the entire 23 years, and not once had there been any sort of accounting between the alleged partners. The court cited the *Blid* rule—"Circumstantial evidence is not sufficient unless . . . the conclusion reached is the only one that fairly and reasonably can be drawn therefrom"—and used some of the language of the rule of evenly balanced evidence—"Where several [equally consistent, opposing] inferences may be drawn from the facts proved, . . . the plaintiff may not sustain his position by a reliance alone on the inferences which would entitle him to recover." *Id.* at 786, 150 N.W.2d at 921 (citation omitted). Nonetheless, on its facts, this seems to be a case where the plaintiff failed as a matter of law to satisfy his burden of proof. Everything but the plaintiff's testimony was against him and it was "difficult to imagine" that things could have been as the plaintiff testified. *Id.*

In *J.R. Watkins Co. v. Wiley*, 184 Neb. 144, 165 N.W.2d 585 (1969), the defendant, Bartee, had signed a contract as surety for the performance of one of the contracting parties. Bartee argued that his signature had been fraudulently obtained by an agent of the plaintiff. The court quoted the *Blid* rule and then said, about the case before it:

[A]n unidentified stranger is said to have perpetrated the fraud upon the defendant. Not only was such party not identified, but no connection between this person and plaintiff was shown. . . . The evidence merely establishes a possibility that such person was representing plaintiff. It is highly speculative and insufficient to support the verdict returned by the jury.

*Id.* at 147, 165 N.W.2d at 587. The jury had returned a verdict for the defendant. The supreme court reversed and "remanded with instructions to enter judgment for plaintiff for the amount due on the contract." *Id.* The quotation of the *Blid* rule was inapposite. When the plaintiff satisfies his or her burden of proof as a matter of law, that shifts the burden to the defendant; the burden shifted is either the burden of production or, in the case of an affirmative defense, the burden of proof. What really happened in this case was that as a matter of law the plaintiff satisfied his burden of proof (he proved the contract, the genuineness of the signature, and so forth); the defendant, again as a matter of law, failed to satisfy his burden of proof regarding his affirmative defense. In this situation, the defendant loses, as a matter of law. To send such a case to the jury would be to invite them to guess, speculate, and engage in conjecture.

In *So Soo Feed & Supply Co. v. Morgan*, 192 Neb. 277, 220 N.W.2d 25 (1974), the determinative issue was "the sufficiency of the evidence . . . that a defect in the drying unit caused the fire and the claimed . . . damage to the milo." *Id.* at 278, 220 N.W.2d at 26. There was almost no evidence as to how the fire started. There was evidence that on the evening before the fire a representative of the defendant "messed with the [drying bin's] wiring", *id.*, but no evidence that the wiring had anything to do with the start of the fire. *Id.* at 280, 220 N.W.2d at 27. The court stated the *Blid* rule and then said: "Conjecture, speculation, or choice of possibilities is not proof. There must be something more which will lead a reasoning mind to one conclusion rather than the other." *Id.* Again, the *Blid* rule is inapposite. As a matter of law the plaintiff failed to satisfy his burden of production, his burden of going forward with the evidence. To allow such a case to go to the jury is to ask the jury to speculate, guess, and engage in conjecture.

45. *Tongue v. Perrigo*, 130 Neb. 564, 265 N.W. 737 (1936) "is an action for damages brought by the father of a minor child for seduction resulting in an infection which caused death. . . . Under any theory of this case, it would be necessary to establish that defendant had sexual relations with plaintiff's daughter." *Id.* at 564-65, 265 N.W. at 737-38. The plaintiff's evidence on this essential element of the case consisted of: evidence of opportunity; the plaintiff's recollection of a three-way conversation which included him, his daughter, and the defendant; and expert testimony that the cause of death was traceable to a gonorrheal infection.

Regarding opportunity, the defendant and the deceased worked together alone. Sometimes they worked at the defendant's home. The defendant often gave her a ride

could only reach one conclusion over another through guess, specula-

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to her home and, when he did, often got her home late. Regarding the three-way conversation, the court seems to have said that there was no way to tell just what the conversation meant, except perhaps by guessing from among the possibilities. Regarding the expert, the court essentially threw out his opinion as worthless speculation: he was argumentative; his conclusions were based upon suspicion, speculation, and conjecture; and, at best, his conclusion was that the alleged condition was one of the things that could have caused the death of the girl.

Considering all of the evidence, a jury could not "reasonably and fairly infer that the defendant had sexual relations with [the deceased]." *Id.* at 568, 265 N.W. at 739. That was all the court needed to say. It went on, however, and said that "[a] material fact may be established by circumstantial evidence when it is such that reasonable and fair inferences therefrom produce moral certainty and conviction." *Id.* (Note that the literal meaning of this statement is that if circumstantial evidence produces a moral certainty, then that fact is established. This statement does not say what the rule is if circumstantial evidence produces something less than a moral certainty. See also text at notes 16-17 *supra* (discussion of *White v. Slama*)).

In *Jones v. Union Pac. R.R.*, 141 Neb. 112, 2 N.W.2d 624 (1942), it was alleged that, to burn off right-of-way, employees of the railroad had started a fire. A car and a truck, driving in opposite directions through the smoke created by this fire, collided. Plaintiff was the administratrix of the estate of two passengers in the car. Defendants were the railroad and the driver of the truck. The trial court directed a verdict for each defendant.

The supreme court affirmed the directed verdict for the railroad. There was not much evidence connecting the railroad with the fire. The court said that more than one equally justifiable, contradictory inference could be drawn from the evidence presented on this issue. (It could have added that the only way a jury could have accepted plaintiff's inference over the railroad's would have been through guess, speculation, and conjecture.) The court also stated the *Blid* rule:

The evidence falls short of that required by the rule of sufficiency for the submission of cases to a jury on circumstantial evidence . . . . "Circumstantial evidence cannot be said to be sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom."

*Id.* at 117, 2 N.W.2d at 627 (quoting *Anderson v. Interstate Transit Lines*, 129 Neb. 612, 616, 262 N.W. 445, 446 (1935)).

The supreme court reversed the directed verdict for the truck driver. Plaintiff's witnesses testified that the car was on the correct side of the highway; defendant's testified that the truck was on the correct side of the highway. In addition to this contradictory eye-witness testimony there were certain physical facts in evidence. The court said, "We are unable to say . . . that reasonable minds could not draw different conclusions as to the proximate cause of this accident." *Id.* at 121, 2 N.W.2d at 629. Therefore, the court continued, the directed verdict for the truck driver was in error. In the process of coming to this conclusion, the court discussed "the principles of and weight to be given to circumstantial evidence in [negligence] actions for damages." The court stated: "[I]f but one inference may be arrived at in the minds of reasonable [people] from an examination of the physical facts, then that inference must be accepted, but if with equal force and propriety an opposite inference or inferences may be drawn the question becomes one for the jury." *Id.* at 120, 2 N.W.2d at 628-29.

In three consecutive paragraphs in *Halsey v. Merchants Motor Freight*, 160 Neb. 732, 71 N.W.2d 311 (1955), the court: stated the *Blid* rule; stated the rule that "a plaintiff [is not] required to exclude the possibility that the accident might have happened some other way"; and then, without explanation, said "The[se] rules are not in conflict." *Id.* at 738, 71 N.W.2d at 315. The court cited the *Blid* rule but said, "The evidence suggests another conclusion as to what happened which is just as reasonable as the one which plaintiff pleaded and upon which his cause was submitted to the jury."

tion, or conjecture. In these cases, however, the court does not cite the rules regarding burdens of proof, or the rule of evenly balanced evidence, that is, the rule against jury speculation, guess, and conjecture; rather, the court cites the *Blid* rule.

In three other cases in this line, the court not only cites, but also discusses and applies the *Blid* rule, but in situations where it would have reached the same result by applying either the rules regarding the burdens of production and proof or the rule regarding evenly balanced evidence.<sup>46</sup>

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*Id.* at 739, 71 N.W.2d at 316. And again: "It is just as reasonable, if not more reasonable, to conclude that the accident happened in the [other way]." *Id.* at 740, 71 N.W.2d at 316. In other words, there was no way to tell which of these two ways the accident happened (except using the techniques of guess, speculation, and conjecture, and perhaps a bit of sympathy). The supreme court's conclusion was correct—the case should not have been sent to the jury, and the defendant's motion for a directed verdict should have been sustained instead—but it stated the wrong reason.

46. In the case of *In re Estate of Bingaman*, 155 Neb. 24, 50 N.W.2d 523 (1951), a charge of electricity killed one man (his estate was defendant) and injured four others (one of whom was plaintiff). "The shock appears to have in a measure destroyed the ability to recall some immediately preceding incidents." *Id.* at 30, 50 N.W.2d at 528. It was known that all of these men were involved in the unloading of a truckload of steel, using a boom attached to the truck, and that the boom made contact with electrical wires that were overhead. Because of the memory loss and the lack of other witnesses, evidence regarding how the boom made contact with the wires was circumstantial.

The evidence adduced at the trial was that the accident could have been caused by defendant's negligent operation of the controls that moved the boom, by a shift of the off-balance load that was attached to the end of the boom's cable, or by some movement of the truck. Defendant argued that choosing from among the three possible causes would require "conjecture and speculation." *Id.* at 33, 50 N.W.2d at 529. In its summary of the evidence, the court characterized important parts of plaintiff's case as involving "conjecture and speculation." *Id.* In its discussion of the law, the court said that the conclusion urged by plaintiff—that defendant negligently operated the boom's controls—is not "the only one that can fairly and reasonably be drawn" from the evidence. *Id.* Therefore, at the close of plaintiff's evidence, defendant's motion for a directed verdict should have been sustained. The case should not have been sent to the jury, said the court, and it remanded with directions to enter a judgment notwithstanding the verdict. *Bingaman* applies the *Blid* rule in a case where the court could just as easily have applied the rule advanced by defendant, *i.e.*, that the evidence in this case was evenly balanced in the sense that the only way to decide between conflicting theories was to guess (or, though the record does not indicate that defendant mentioned this, to let sympathy decide).

In *Mullikin v. Pedersen*, 161 Neb. 22, 71 N.W.2d 485 (1955), the plaintiff sought to establish a constructive trust on certain life insurance proceeds. "The burden of establishing a constructive trust is always upon the person who bases his rights thereon and he must do so by evidence that is clear, satisfactory, and convincing." *Id.* at 33, 71 N.W.2d at 491 (quoting *Peterson v. Massey*, 155 Neb. 829, 53 N.W.2d 912 (1952)). That statement is followed by the *Blid* rule, and then by this statement: "Appellant has not met the requirements of the law in these respects." *Id.* "There is no direct evidence that deceased paid any cost of the insurance with funds wrongfully secured by him." *Id.* at 31, 71 N.W.2d at 490. The court seems to have concluded that what circumstantial evidence there was, was insufficient as a matter of law to satisfy the clear and convincing evidence burden of proof.

*Koutsky v. Bowman*, 157 Neb. 919, 62 N.W.2d 114 (1954), is a third case where the

As a method of preventing verdicts based on speculation, guess, or conjecture, the *Blid* rule leaves a great deal to be desired. As McCormick says, this sort of rule "far exceeds what is needed to prevent verdicts based upon speculation and conjecture."<sup>47</sup>

The eighth reason for not mentioning the *Blid* rule ever again is that though it is stated in many of the most recent civil cases on circumstantial evidence, arguably none of them has applied it.<sup>48</sup> Applied or not, it clearly is stated; it lies in wait for another chance to do mischief.

Since the rule was begun thoughtlessly and in a situation where existing rules would have worked quite well; since the cited cases are of questionable to no value; since the rule is not a good rule; since the rule imposes in certain civil cases a burden of proof greater than that applied in criminal cases; since the rule requires a directed verdict in every case in which it is literally applied; and since, throughout its history, the rule has so often been misused in its application to situations where other rules would have been more appropriately used, the *Blid* rule should be overruled—and, in fact, it was,<sup>49</sup> but it refused to stay dead. It should be reoverruled. If not overruled again, it should be shunned, its name and all that it stands for never to be mentioned again.

### III. THE "REASONABLE CERTAINTY" LINE

There is a second series of cases that say that circumstantial evidence will not support a verdict unless the evidence and the inferences indicate the ultimate fact with "reasonable certainty."

Negligence is a question of fact, and, like any other fact, may be established by circumstantial evidence. All that the law requires is that the facts proved, together with the inferences that may be legitimately drawn from them, shall indicate with reasonable certainty the existence of the

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*Blid* rule was discussed to make a point that could have been made using the burden of production and the rules regarding evenly balanced evidence. See text accompanying notes 33-39 *supra*.

47. MCCORMICK ON EVIDENCE § 338, at 954 (3d ed. 1984). Such a rule "seems misplaced in civil litigation. It leaves little for the jury and far exceeds what is needed to prevent verdicts based upon speculation and conjecture." *Id.*

48. The most recent case to state and apply only the *Blid* line of circumstantial evidence cases (rather than stating two or three of the lines, including *Blid*'s, and twisting them into some new rule) is the 1974 case of *So Soo Feed & Supply Co. v. Morgan*, 192 Neb. 277, 220 N.W.2d 25 (1974). See note 43 *supra*. Since 1974, there have been a number of cases that have cited the rule as part of a survey of Nebraska law on the subject; arguably not one of those cases has applied it. See notes 115-124 and accompanying text *infra*.

49. See notes 59-62 and accompanying text *infra*.

negligence complained of.<sup>50</sup>

This is the second oldest of the lines, with the first case decided in 1922,<sup>51</sup> and the most recent, in 1978.<sup>52</sup>

As just discussed, in many of the cases in the *Blid* line, the *Blid* rule has been used to prevent verdicts based upon speculation, guess and conjecture.<sup>53</sup> More specifically, it has been used in situations where, if the jury got the case, all they could do would be to guess—and they could do no more than guess for one of two reasons: either the party with the burden failed to introduce any evidence on the point or the evidence that was introduced on the point was evenly balanced for each side. The same is true of at least one case in the “reasonable certainty” line: *Flory v. Holtz*.<sup>54</sup>

*Flory v. Holtz* involved the intersectional collision of two trucks. One driver, the plaintiff’s decedent, died and the other, the defendant, had no recollection of the collision. There was expert testimony as to how the collision happened, but it was based upon “considerable speculation.”<sup>55</sup> The court noted: “We are in the realm of pure speculation. . . . We should not confuse inferences drawn from facts and inferences which are based upon mere assumptions.”<sup>56</sup> The court said:

[N]egligence . . . may be proved by circumstantial evidence and physical facts. However, the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicate with reasonable certainty [sic] the negligent act charged. Are the facts and circumstances herein, and the inferences to be drawn therefrom, sufficient to indicate with reasonable certainty actionable negligence on the part of the defendant who had the directional right-of-way?

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50. *Rocha v. Payne*, 108 Neb. 246, 249, 187 N.W. 804, 805 (1922). *Accord* *Graves v. Bednar*, 171 Neb. 499, 503, 107 N.W.2d 12, 15 (1960) (quoting *Griess v. Borchers*, 161 Neb. 217, 72 N.W.2d 820 (1955)); *Griess v. Borchers*, 161 Neb. 217, 221, 72 N.W.2d 820, 824 (1955) (quoting *Pahl v. Sprague*, 152 Neb. 681, 687, 42 N.W.2d 367, 372 (1950)); *Shields v. County of Buffalo*, 161 Neb. 34, 47, 71 N.W.2d 701, 711 (1955) (quoting *Gilliland v. Wood*, 158 Neb. 286, 290, 63 N.W.2d 147, 149 (1954)); *Pahl v. Sprague*, 152 Neb. 681, 687, 42 N.W.2d 367, 372 (1950).

See also *Pearson v. Richard*, 201 Neb. 621, 271 N.W.2d 326 (1978). The court used “reasonable certainty” language in its “review of applicable legal principles.” *Id.* at 627, 271 N.W.2d at 329. The court found that circumstances in evidence were sufficient to support defendant’s verdict, and affirmed that verdict. *Id.* at 631, 271 N.W.2d at 331. “Reasonable certainty” language was not necessary to resolution of this appeal.

51. *Rocha v. Payne*, 108 Neb. 246, 187 N.W. 804 (1922).

52. *Pearson v. Richard*, 201 Neb. 621, 271 N.W.2d 326 (1978).

53. See notes 43-47 and accompanying text *supra*.

54. 176 Neb. 531, 126 N.W.2d 686 (1964).

55. *Id.* at 537, 126 N.W.2d at 691.

56. *Id.* at 539, 126 N.W.2d at 692.

. . . .

To permit the jury under the factual situation in the instant case to find that the deceased had the right-of-way would permit it to resort to speculation or guess work, for there is no sufficient evidence on which the jury could properly base such conclusion.

. . . .

[W]e cannot accept plaintiff's assumption without entering into the realm of speculation.

. . . .

We come to the conclusion that the facts and circumstances herein, and the inferences to be drawn therefrom, are not sufficient to indicate with reasonable certainty actionable negligence on the part of the defendant. The action of the trial court in sustaining defendant's motion [at the close of plaintiff's evidence to dismiss plaintiff's petition] was correct.<sup>57</sup>

This is a clear example of the use of the "reasonable certainty" language to enforce the "rule of evenly balanced evidence." Here the evidence was evenly balanced because there was almost none on either side. This is a clear application of the "reasonable certainty" language to the judge's decision<sup>58</sup> that all a jury could do with the evidence would be to speculate, and, therefore, the case should not be allowed to go to the jury.

#### A. *BLID* OVERRULED

Two other cases in the "reasonable certainty" line are particularly important and worth looking at in some detail. The first in time is *Davis v. Dennert*<sup>59</sup>—important because it said that the rule announced in *Blid* should not be applied to civil cases.

[A]ppellant's case, to a large extent depends [on circumstantial evidence]. We have said in this regard: "... plaintiff was required . . . to establish, to a reasonable probability, that the accident happened in the manner alleged in his petition, and where facts and circumstances are established from which the way the accident happened could be logically inferred, it was not error to submit that issue to the jury."

"Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. All that the law requires is that the facts and circumstances proved, together with the inferences that may be properly drawn therefrom,

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57. *Id.* at 540-42, 126 N.W.2d at 693-94 (citations omitted).

58. See notes 78-82 and accompanying text *infra*.

59. 162 Neb. 65, 75 N.W.2d 112 (1956).

shall indicate with reasonable certainty the negligent act charged."

However, as early as [*Blid*] . . . we held: "Circumstantial evidence . . . cannot be said to be sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom."

In support of this holding we cited [an Iowa case<sup>60</sup>]. However, since that time Iowa has materially modified this principle. . . .<sup>61</sup>

We have followed the principle announced in [*Blid*] on numerous occasions . . . .

On the other hand, in *Rocha v. Payne*, we held: "Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is 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."

Since the announcement thereof we have frequently followed [that] rule . . . .

We think that the following discussion from *Duncan v. Fort Dodge Gas & Electric Co.*, 193 Iowa 1127, 188 N.W. 865, 868, apropos here: "Appellant makes the point that, to sustain plaintiff's charge of negligence by circumstantial evidence, the circumstances shown must be such as are wholly inconsistent with any other reasonable theory of the death of the deceased. It may be admitted that cases are to be found, and possibly some of our own, in which the rule is stated as quoted by counsel. It is nevertheless a misleading statement as applied to disputed facts in a civil action. In its broadest sense it has no proper application, except in criminal cases where the evidence relied upon to establish the alleged crime is purely circumstantial."

. . . .

We think the rule as announced in [*Blid*] should only have application in criminal cases where the proof of guilt must be established beyond a reasonable doubt while the rule announced in *Rocha v. Payne*, *supra*, has application in civil cases where all that is required of plaintiff is to establish his cause of action by a preponderance of the evidence.<sup>62</sup>

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60. See notes 18-20 and accompanying text *supra*.

61. In fact, Iowa has overruled the principle to which the court is referring. See note 20 *supra*.

62. *Davis*, 162 Neb. at 73-75, 75 N.W.2d at 118-19 (citations omitted). *Davis v. Denert* is a fairly typical automobile accident case, except that plaintiff's memory of the actual collision was a blank. The evidence consisted of defendant's testimony and the

B. *WHITTINGTON* AND THE "REASONABLE CERTAINTY" JURY INSTRUCTION

As a practical matter, Nebraska trial attorneys will find *Whittington v. Nebraska Natural Gas Co.*<sup>63</sup> to be the most important case in this second line. In *Whittington*, the Nebraska Supreme Court said that the trial court committed reversible error when it refused a request that it give the following jury instruction:

The law requires 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.<sup>64</sup>

This led to Nebraska Jury Instruction ("NJI") 1.31 (1969). NJI 1.31 (1969) says that "[a] fact may be proved either by direct evidence or circumstantial evidence, or both"; it defines circumstantial evidence; and then it says:

Negligence is a question of fact and may be proved by circumstantial evidence. However, the law requires that the facts and circumstances proved, together with the inferences that may be properly drawn therefrom, indicate with reasonable certainty the negligent act charged.<sup>65</sup>

The trial judge is required in any event to instruct the jury that the general burden of proof is "by a preponderance of the evidence." *Whittington* requires that, when applicable and requested, the judge also instruct the jury that the burden when one attempts to prove negligence with circumstantial evidence is "reasonable certainty." (And, as discussed below, presumably there is some difference between the two.) Because of this, *Whittington* is worth a more detailed look.

In *Whittington*, the plaintiffs' home was damaged by an explosion and fire. They claimed that the explosion and fire were caused by the negligence of the company that supplied their home with natural gas. The supreme court said that "there was ample evidence" to justify submitting negligence and proximate cause to the jury.<sup>66</sup> What required reversal of the plaintiffs' verdict and judgment was the trial court's failure to instruct the jury on the defendant's claims

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testimony of others as to the post-accident conditions of the road and the cars. At the close of plaintiff's evidence, the trial court granted defendants' motion for a directed verdict. The supreme court found sufficient evidence to submit defendant's negligence to the jury and reversed and remanded for a new trial. *Id.* at 79, 75 N.W.2d at 121.

63. 177 Neb. 264, 128 N.W.2d 795 (1964).

64. *Id.* at 284, 128 N.W.2d at 807.

65. NJI 1.31 (1969). Unlike "preponderance of the evidence" and "beyond a reasonable doubt," "with reasonable certainty" is never defined for the jury. See notes 73-77 and accompanying text *infra*.

66. *Whittington*, 177 Neb. at 277, 128 N.W.2d at 803.

as to proximate cause. Having decided that, the court went on, in dicta, and said the following:

Inasmuch as the cause must be retried in district court, it will be necessary to refer to some other errors urged by the defendant. The defendant submitted instructions including a cautionary instruction upon circumstantial evidence which is here set out: "The law requires 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." . . . In *Norman v. Sprague*, 167 Neb. 528, 93 N.W.2d 637, this court held that such an instruction was not necessary unless it was requested by the party desiring it. In the present cause it was directly requested. . . . A great deal of evidence in this cause was of necessity circumstantial. There was no such instruction given by the court on its own motion although circumstantial evidence was defined. The clear implication of *Norman v. Sprague*, *supra*, is that the tendered instruction should have been given on request.<sup>67</sup>

Two comments: First, *Norman v. Sprague* does not 'clearly imply' that such an instruction should be given upon request.<sup>68</sup> *Norman v. Sprague* says only this: (1) no such instruction was requested; (2) this is not a situation where the court is bound to give such an instruction on its own initiative;<sup>69</sup> (3) therefore, there was no error in the fact that no such instruction was given.<sup>70</sup> *Norman v. Sprague* is an example of the familiar technique of deciding the case on the narrowest ground. The court did not reach the ultimate question of whether such an instruction ever is required—or even proper. It decided the case by saying that there was no error in not so instructing

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67. *Id.* at 284-85, 128 N.W.2d at 807.

68. The error is traceable to Appellant's brief in *Whittington*. See note 71 and accompanying text *infra*.

69. That is to say, omitting the instruction does not withdraw an issue or an essential element of the case from the jury's consideration. "Whether requested to do so or not, the trial court has the duty of instructing on issues presented by the pleadings and the evidence, and failure to do so constitutes prejudicial error." *Brown v. Kaar*, 178 Neb. 524, 529, 134 N.W.2d 60, 64 (1965). *Accord* *Ellis & Guy Advertising, Inc. v. Cohen*, 219 Neb. 340, 342-44, 363 N.W.2d 180, 183 (1985); *McCauley v. Briggs*, 218 Neb. 403, 407-08, 355 N.W.2d 508, 511 (1984); *Juniata Feedyards v. Nuss*, 216 Neb. 29, 32, 342 N.W.2d 1, 3 (1983); *Stephen v. City of Lincoln*, 209 Neb. 792, 798, 311 N.W.2d 889, 894 (1981); *Herman v. Midland Ag Serv., Inc.*, 200 Neb. 356, 367, 264 N.W.2d 161, 167-68 (1978); *Kresha Constr. Co. v. Kresha*, 184 Neb. 188, 191, 166 N.W.2d 589, 591 (1969); *Pool v. Romatzke*, 177 Neb. 870, 876, 131 N.W.2d 593, 597 (1964); *Whittington v. Nebraska Natural Gas Co.*, 177 Neb. 264, 279, 128 N.W.2d 795, 804 (1964).

70. *Norman v. Sprague*, 167 Neb. 528, 538, 93 N.W.2d 637, 643 (1958) cites two criminal cases that say the same thing: no such instruction is required in a case where it was not requested. *Clark v. State*, 151 Neb. 348, 358, 37 N.W.2d 601, 606 (1949); *Fetty v. State*, 121 Neb. 228, 230, 236 N.W. 694, 695 (1931).

the jury, because no such instruction was ever requested.<sup>71</sup>

In *Whittington*, the court was misled by an erroneous statement in Appellant's brief. The brief cites *Norman v. Sprague* for this proposition: "[W]hen a request [for such an instruction] is made by a defendant with respect to the nature and weight of circumstantial evidence then the court must give it."<sup>72</sup> *Norman v. Sprague* says no such thing. Picking up on that briefing error, the *Whittington* court said the following: "In *Norman v. Sprague* . . . this court held that such an instruction was not necessary unless it was requested by the party desiring it."<sup>73</sup> What *Norman v. Sprague* really said was that no such instruction was required in that case, because no such instruction was requested. It did not say that it would have been required, if it had been requested. *Whittington*, through its required jury instruction, converted the proposition from *Norman v. Sprague*, but the propositions are not truly converse.

A second comment on the *Whittington* instruction is this: the instruction the court held should have been given said that circumstantial evidence must "indicate with reasonable certainty the negligent act complained of."<sup>74</sup> Just how is that to be interpreted? Does it mean that circumstantial evidence must convince jurors by more than a preponderance of the evidence, and, if so, how is that standard measured? Or does it mean the same thing as the *Blid* rule: every other possible conclusion must be unreasonable? If neither is the case—if this instruction is neither redundant of the preponderance of the evidence instruction nor a restatement of the *Blid* rule—then we have a third burden of proof: (1) the preponderance of the evidence rule; (2) the *Whittington* rule that circumstantial evidence must convince the jury to a reasonable certainty; and (3) the *Blid* rule that circumstantial evidence must convince the jury that the conclusion drawn is the only one that reasonably can be drawn therefrom.

The *Whittington* instruction must mean more than that the jury shall be convinced by the preponderance of the evidence. Otherwise, in light of the instruction on the burden of proof by a preponderance of the evidence, it is surplusage; it is useless. Worse, if that is the

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71. This is akin to the general rule that an appellate court will not reverse a trial court for having admitted evidence to which no one objected. *E.g.*, *McClemens v. United Parcel Serv., Inc.*, 218 Neb. 689, 693, 358 N.W.2d 748, 751 (1984); *Lindgren v. City of Gering*, 206 Neb. 360, 370, 292 N.W.2d 921, 927 (1980); *Scudder v. Haug*, 201 Neb. 107, 111, 266 N.W.2d 232, 235 (1978); *Breiner v. Olson*, 195 Neb. 120, 127, 237 N.W.2d 118, 124 (1975).

72. Brief for Appellant at 84, *Whittington v. Nebraska Natural Gas Co.*, 177 Neb. 264, 128 N.W.2d 795 (1964) (citing *Norman v. Sprague*, 167 Neb. 528, 93 N.W.2d 637 (1958)).

73. *Id.* at 284-85, 128 N.W.2d at 807.

74. *Whittington*, 177 Neb. at 284, 128 N.W.2d at 807.

meaning of the phrase, then it is confusing: the jury is likely to think that, since it is given separately and worded differently, it must have a different meaning. And, if they are doing their job, the jurors will struggle to come up with and will apply some different meaning. The *Whittington* instruction must mean more than just another statement of the preponderance of the evidence instruction. Otherwise, it would not be reversible error to fail to add it to the instructions. The "reasonable certainty" cases must constitute a separate line from the cases that say there is no difference between direct and circumstantial evidence. It must be the case that the jury is to give the *Whittington* instruction some different meaning, and yet the trial judge will not help them by defining it for them. The judge instructs the jury on the preponderance of the evidence standard, and then defines the term. The judge instructs the jury on the reasonable certainty standard, but never defines that term.

### C. THE REAL MEANING OF THE "REASONABLE CERTAINTY" CASES

When these cases say that circumstantial evidence must convince to a reasonable certainty, what do they mean? Is this a new standard of proof, in addition to and somewhere between preponderance of the evidence on the one hand, and clear and convincing evidence or beyond a reasonable doubt on the other?

Just one of the problems with the reasonable certainty rule is that it has no meaning; at least, the court has never given it any meaning. It has whatever meaning it is given by various juries, unaided by any judicial definition. The jury is told the meaning of preponderance of the evidence.<sup>75</sup> The jury is told the meaning of beyond a reasonable doubt.<sup>76</sup> The jury is not told the meaning of "with reasonable certainty."<sup>77</sup>

What the reasonable certainty language seems to mean, as applied in some of these cases, is that evenly balanced evidence will not support a verdict. When circumstantial evidence supports both a reasonable inference that is consistent with the allegation and a reasonable inference that is inconsistent with the allegation; and when neither is anything more than a reasonable inference, that is, when there is a tie between the two inferences and the only way to resolve the tie would be through guess, conjecture, speculation, or chance;

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75. NJI 2.12 (1969).

76. NJI 14.08 (1969). See text accompanying note 30 *supra*.

77. NJI 1.31 (1969). Unlike those of the *Blid* rule, the words of the reasonable certainty rule do not have a particular meaning on their own. But even the words of the *Blid* rule are not given in practice the meaning they so clearly have in theory. See text at notes 34-42 *supra*. Since the *Blid* rule does not mean what it says, maybe it is not so bad that the reasonable certainty rule does not say what it means.

then, regarding that issue, no jury question is presented.<sup>78</sup> Jury guess, speculation, or conjecture is not allowed. Neither is a verdict determined by chance.<sup>79</sup> And the words "reasonably certain" seem to be a way of communicating this to the trial judge. To the extent that this language about circumstantial evidence proving negligence with reasonable certainty has a unique meaning, it has to do with a standard to be applied by the judge, and not the jury,<sup>80</sup> and that standard is this: before you send the case to the jury make sure that the evidence indicates the issues in controversy to a reasonable certainty; do not send to the jury an issue that a reasonable person could not resolve except through guess, speculation, or conjecture.<sup>81</sup>

When the evidence on an issue is largely or entirely circumstan-

78. See text accompanying notes 53-57 *supra*.

79. The Nebraska cases dealing with verdicts determined by chance all deal with quotient verdicts. *E.g.*, *Winston v. Davis*, 187 Neb. 522, 525, 192 N.W.2d 413, 415 (1971); *Haarberg v. Schneider*, 174 Neb. 334, 338-39, 117 N.W.2d 796, 799-800 (1962).

80. In each of the following cases the supreme court used the "reasonable certainty" language in connection with a discussion of whether the trial judge made the correct decision regarding the sufficiency of the evidence to submit the case to the jury. *Flory v. Holtz*, 176 Neb. 531, 542-43, 126 N.W.2d 686, 694 (1964) (supreme court affirmed trial court's dismissal of plaintiff's petition); *Howell v. Robinson Iron & Metal Co.*, 173 Neb. 445, 450, 113 N.W.2d 584, 587 (1962) (trial judge sustained defendant's motion to dismiss; supreme court reversed; "evidence was sufficient for submission . . . to a jury"); *Griess v. Borchers*, 161 Neb. 217, 221, 72 N.W.2d 820, 824 (1955) (affirming trial court's decision to submit case to jury); *Shields v. County of Buffalo*, 161 Neb. 34, 47, 71 N.W.2d 701, 711 (1955) (affirming trial court's decision to submit case to jury). See also *Pearson v. Richard*, 201 Neb. 621, 627, 271 N.W.2d 326, 329 (1978) (language used in the same paragraph as: ". . . whether the evidence is sufficient to submit the issues . . . to the jury").

81. Though not a reasonable certainty case, *Popken v. Farmers Mut. Home Ins. Co.*, 180 Neb. 250, 142 N.W.2d 309 (1966), does a good job of explaining what is really going on here:

In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

Where several inferences are deducible from the facts presented, which inferences are opposed to each other, but equally consistent with the facts proved, the plaintiffs do not sustain their position by a reliance alone on the inferences which would entitle them to recover.

Conjecture, speculation, or choice of quantitative possibilities are not proof. There must be something more which would lead a reasoning mind to one conclusion rather than to the other.

If, as plaintiffs contend, inferences [that support their right of recovery] may be fairly and reasonably drawn from the evidence . . . , equally justifiable inferences, consistent with the facts proved and inconsistent with the plaintiffs' right to recovery, may be fairly and reasonably drawn . . . .

In short, the proven facts go no further than to give equal support to at least two inconsistent inferences and the judgment must go against the parties upon whom rests the burden of proof.

*Id.* at 255-56, 142 N.W.2d at 313 (citations omitted). See text accompanying notes 145-46 *infra*.

tial, the judge applies this standard to determine whether to submit the issue to the jury or to direct a verdict. It is an application of the rule of evenly balanced evidence, *i.e.*, the rule against speculation, guess, and conjecture.

This interpretation of the "reasonable certainty" concept is consistent with what seems to be meant by the use of the language in one other area of Nebraska law, the area of damages. There are a number of cases in which the Nebraska Supreme Court says that damages must be proved with reasonable certainty.<sup>82</sup> These cases also raise the question of whether proof with "reasonable certainty" is a jury question, that is, must the jury be instructed that damages must be proved with reasonable certainty? Is the trial court required to submit to the jury a burden of proof greater than preponderance of the evidence? The answer seems to be "No."

In the damage area, the court has given the following definition of "reasonable certainty": not whether "damages are capable of mathematically exact measurement, but whether there is sufficient evidence and data to enable the trier of fact, the jury, with a reasonable degree of certainty and exactness to estimate the actual damages."<sup>83</sup> Invariably, the courts follow such a definition with the statement: "It is the duty of the district court to refrain from submitting to a jury the issue of damages when the evidence is such that it cannot determine such issue except by indulging in speculation and conjecture."<sup>84</sup>

In this area, the reasonable certainty standard is applied by the trier of law, not the trier of fact. When the judge decides whether the party claiming damages has raised a submissible issue, the standard the judge should apply is whether that party has proved facts that provide a reasonably certain basis for the calculation of damages. It prevents the judge from submitting to the jury damages that are speculative.

#### IV. THE "EQUALLY COMPETENT" LINE

The third line of circumstantial evidence cases consists of those that say that the evidence is just as good as, and to be treated just the same as, direct evidence. This line began in 1937,<sup>85</sup> and the most re-

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82. *Birkel v. Hassebrook Farm Serv.*, 219 Neb. 286, 289, 363 N.W.2d 148, 152 (1985); *Midlands Transp. Co. v. Apple Lines, Inc.*, 188 Neb. 435, 437-38, 197 N.W.2d 646, 648 (1972); *Frank H. Gibson, Inc. v. Omaha Coffee Co.*, 179 Neb. 169, 186, 137 N.W.2d 701, 711-12 (1965).

83. *Midlands Transp. Co.*, 188 Neb. at 438, 197 N.W.2d at 648.

84. *Id.* at 440, 197 N.W.2d at 649 (citation omitted). *See also* *Shotkoski v. Standard Chem. Mfg. Co.*, 195 Neb. 22, 28-29, 237 N.W.2d 92, 97 (1975).

85. *Markussen v. Mengedoht*, 132 Neb. 472, 272 N.W. 241 (1937).

cent case in the line was decided in 1984.<sup>86</sup>

*Leon v. Kitchen Brothers Hotel Co.*<sup>87</sup> is an early case in the line, and one of the two Nebraska cases most favorable to circumstantial evidence. The plaintiffs alleged that jewelry and money were taken from them while they were residents in the defendant's hotel. The evidence of the loss consisted of the testimony of one of the plaintiffs, *i.e.*, the husband. The plaintiffs argued that the evidence of loss was uncontroverted and, therefore, that no jury question was raised on that issue. The trial court agreed,<sup>88</sup> but the supreme court did not. The supreme court found controverting circumstantial evidence, and said: "Circumstantial evidence is equally competent with direct testimony; their relative convincing powers as against each other being for the jury's determination."<sup>89</sup>

The second of the two cases most favorable to circumstantial evidence uses almost identical language. The question in *Teresi v. Filley*,<sup>90</sup> was whether a plaintiff's mortgage lien was superior to a judgment lien. The trial court, sitting as the trier of fact, found that the mortgage was without consideration and void, and therefore not superior. The plaintiff appealed. She argued that uncontradicted evidence showed that there was consideration for the mortgage. She argued "that uncontroverted evidence ordinarily should be taken as true, and uncontradicted evidence which is not improbable or unreasonable cannot be disregarded. . . ."<sup>91</sup> The supreme court affirmed the judgment of the trial court. It said that whether or not there was direct evidence controverting plaintiff's contentions, there was circumstantial evidence, and "[c]ircumstantial evidence is equally com-

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86. *Chmelka v. Continental W. Ins. Co.*, 218 Neb. 186, 352 N.W.2d 613 (1984). The court stated: "The burden of establishing a cause of action by circumstantial evidence requires that the evidence be of such character and the circumstances so related to each other that a conclusion fairly and reasonably arises that the cause of action has been proved." *Id.* at 192, 352 N.W.2d at 618. Though using similar wording, this differs from the *Blid* rule because the court said that the conclusion must be fair and reasonable, and not that it must be the only fair and reasonable conclusion.

See also *Himes v. Carter*, 219 Neb. 734, 735, 365 N.W.2d 840, 841 (1985), in which the court stated: "Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred." *Id.* (quoting *Porter v. Black*, 205 Neb. 699, 705, 289 N.W.2d 760, 764 (1980)).

87. 134 Neb. 137, 277 N.W. 825 (1938).

88. The trial court allowed the case to go to the jury on other issues. The jury returned a verdict for defendant. The trial court granted plaintiffs' motion for judgment notwithstanding the verdict. *Id.* at 140, 277 N.W. at 825.

89. *Id.* at 142, 277 N.W. at 826.

90. 146 Neb. 797, 21 N.W.2d 699 (1946).

91. *Id.* at 803, 21 N.W.2d at 702. "Plaintiff did not appear at the trial. . . . Her absence was not explained." *Id.* Her evidence consisted of documents and the testimony of an old acquaintance, Mancuso. *Id.* at 799-800, 21 N.W.2d at 700. "Whether or not plaintiff is to prevail depends upon the weight and the credibility of Mancuso's testimony." *Id.* at 800, 21 N.W.2d at 700.

petent with direct testimony. The relative convincing powers of the two classes of evidence are for the determination of the triers of fact."<sup>92</sup>

Each of these two statements regarding the value of circumstantial evidence was made in connection with an assessment of the credibility of testimony. Each was made in contradiction to the contention that the court is compelled to accept as true every statement of a witness which is unopposed by direct evidence. But the statements favorable to circumstantial evidence were in no way limited to the issue of credibility. What the court said was that the issue in question goes to the jury and circumstantial evidence is just as good as direct evidence in connection with both the question of credibility and the ultimate resolution of the issue.

The two cases just described come right out and say that, as a class, circumstantial evidence is just as good as direct evidence. The other cases in this line, though not quite so direct, are equally strong in their support of circumstantial evidence. These other cases are well represented by *Petracek v. Haas O.K. Rubber Welders, Inc.*,<sup>93</sup> where the court said these two things: (1) if a cause of action is established by circumstantial evidence, then, to get the case to the jury or to sustain a verdict, the conclusions urged must "fairly and reasonably arise" from the circumstantial evidence; and (2) a plaintiff relying on circumstantial evidence is not required to exclude the possibility of other causes.<sup>94</sup>

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92. *Id.* at 804, 21 N.W.2d at 702.

93. 176 Neb. 438, 126 N.W.2d 466 (1964). In *Petracek*, the plaintiff claimed that the negligence of the defendant's employees in connection with the installation of his new tires was the cause of his one-car accident. The supreme court affirmed the jury's verdict in favor of the plaintiff.

94. *Id.* at 444, 126 N.W.2d at 469-70 (quoting *Howell v. Robinson Iron & Metal Co.*, 173 Neb. 445, 449, 113 N.W.2d 584, 587 (1962)). Other cases in this line are these:

*Chmelka v. Continental W. Ins. Co.*, 218 Neb. 186, 352 N.W.2d 613 (1984) involved some boys who were trying to get a car, apparently borrowed by one of them from the plaintiff, out of a ditch. The plaintiff, standing 10 to 15 feet to the right and 20 feet behind the car, was injured, apparently hit in the face by something. There were no witnesses and plaintiff did not remember how he was injured. There were rocks and chunks of cement in the ditch, near where the car was stuck. The court said:

A plaintiff may establish its case by direct or circumstantial evidence.

The burden of establishing a cause of action by circumstantial evidence requires that the evidence be of such character and the circumstances so related to each other that a conclusion fairly and reasonably arises that the cause of action has been proved.

*Id.* at 192, 352 N.W.2d at 618 (citations omitted).

In *Davidson v. Simmons*, 203 Neb. 804, 280 N.W.2d 645 (1979), a police officer, hit over the head during the investigation of a burglary in progress, sued the three men involved in the burglary. His cause of action was for damages resulting from a civil conspiracy. Regarding proof of the existence of a conspiracy, the supreme court said:

The burden of establishing a cause of action by circumstantial evidence requires that such evidence, to be sufficient to sustain a verdict or require sub-

To understand these cases, it is important to separate what is actually said, from what is not said. The court is saying this: circumstantial evidence establishes a cause of action if the necessary conclusions reasonably arise. It is not saying: the necessary conclusions only have to be among the reasonable conclusions, no more or no less reasonable than any of the others. The necessary conclusion must reasonably arise from among the rest. A tie is not enough. A tie, broken with speculation, guesswork, and conjecture, will not support a victory.<sup>95</sup> In other words, the cases of this line can enforce the rule of evenly balanced evidence just as well as the cases of the other lines: we do not need to denigrate circumstantial evidence in service of the rule of evenly balanced evidence.<sup>96</sup>

This is a most sensible approach.

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mission of a case to a jury, shall be of such character and the circumstances so related to each other that a conclusion fairly and reasonably arises that the cause of action has been proved.

*Id.* at 808, 280 N.W.2d at 648.

In *Hosford v. Doherty*, 198 Neb. 211, 252 N.W.2d 154 (1977), plaintiff had taken his van to a mechanic who did a few things to the van and then began a road test. During the road test, the van was consumed by fire. Plaintiff had some apparently well-founded expert testimony linking the fire to the actions of the mechanic. The supreme court made the same two points it made in *Petracek*, 176 Neb. at 444, 126 N.W.2d at 469-70. (Then, however, it concluded that “[t]he only reasonable inference that can be drawn from the evidence is that the damage sustained was attributable to the negligence of defendant’s employees. A jury question was therefore presented. The motions for a directed verdict and judgment notwithstanding the verdict were properly overruled.” *Hosford*, 198 Neb. at 216, 252 N.W.2d at 154. But, of course, if there is only one reasonable inference, then a jury question is not presented.)

In *Price v. King*, 161 Neb. 123, 128, 72 N.W.2d 603, 607 (1955), the court said: “Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred.” *Id.*

*Markussen v. Mengedoht*, 132 Neb. 472, 272 N.W. 241 (1937) involved a two and one-half year old boy who was found unconscious beneath a window of the first floor apartment in which he resided. The defendant argued there was not sufficient evidence from which jury could determine the boy had fallen. The supreme court disagreed, and said:

All that plaintiff was required to do was to establish, to a reasonable probability, that the accident happened in the manner alleged in his petition, and where facts and circumstances are established from which the way the accident happened could be logically inferred, it was not error to submit that issue to the jury.

*Id.* at 475, 272 N.W.2d at 243 (citations omitted).

95. See also *Himes v. Carter*, 219 Neb. 734, 735, 365 N.W.2d 840, 841 (1985), a two-page opinion supporting the district court’s dismissal of plaintiff’s petition because there was no evidence of negligence on the part of defendant. In the process, the court quoted *Porter v. Black* as follows: “‘Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred.’” *Id.* (quoting *Porter v. Black*, 205 Neb. 699, 705, 289 N.W.2d 760, 764 (1980)). The same quotation appears in *Macfie v. Kaminski*, 219 Neb. 524, 526, 364 N.W.2d 31, 32 (1985) (insufficient evidence to submit case to the jury; district court’s award of a directed verdict affirmed).

96. And, of course, the court is not saying that the conclusion must be the only one that is reasonable, *i.e.*, the *Blid* rule.

## V. THE SCHIZOPHRENIC LINE

Some cases have nothing but good to say about circumstantial evidence,<sup>97</sup> some nothing but bad,<sup>98</sup> and some are in between.<sup>99</sup> There is a fourth group of cases. These cases combine the rules from more than one of the other three lines. They state two or more of those rules as the rule of the case.

When two or more of the first three lines intersect, the court has a number of options: It can choose from between the intersecting lines by explicitly avowing one and disavowing the others. It can effectively choose by braiding the lines until they become one. It can make it unnecessary to choose between the intersecting lines by characterizing the case on appeal so that it fits under whichever statement of the rule is most difficult to satisfy given the intended outcome, *i.e.*, the court can order or affirm dismissal of the case by finding that dismissal is appropriate under the most lenient of the rules, or the court can order or affirm sending the case to the jury by finding that even under the strict rule the case is a proper one for the jury.

The course taken by the court has been a bit schizophrenic: it has taken each of these approaches. The court has overruled the strictest of the rules.<sup>100</sup> The court has stated the rule in a way that starts out with the strict approach and, sentence by sentence, turns it into the lenient approach.<sup>101</sup> And the court has found that its conclusion is the correct one no matter which statement of the rule is applied.<sup>102</sup>

What follows is a discussion of the cases that take the strict rule and turn it into the lenient one, and the cases that seem to say that, on the facts of the particular case, it does not matter which statement of the rule is the correct one, the result is the same either way.

*Wolstenholm v. Kaliff*<sup>103</sup> is an early and a good example of the latter: the court stated more than one rule regarding the value of cir-

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97. See notes 85-96 and accompanying text *supra* ("equally competent" line of cases).

98. See notes 7-49 and accompanying text *supra* (*Blid* line of cases).

99. See notes 50-84 and accompanying text *supra* ("reasonable certainty" line of cases).

100. See text accompanying notes 59-62 *supra* (discussing *Davis v. Dennert*).

101. See notes 115-24 and accompanying text *infra*.

102. See notes 103-114 and accompanying text *infra*.

103. 176 Neb. 358, 126 N.W.2d 178 (1964). The plaintiff was the administrator of the estate of the driver who had the right-of-way. The other driver was the defendant; she testified that she had stopped at the intersection and looked both ways, and had not seen any cars coming; that only then did she pull into the intersection; and that she first saw the other car as the two collided. The physical evidence showed that the defendant's car ran into the side of the car that had the right-of-way.

cumstantial evidence and concluded that, whichever statement of the rule was correct, its judgment was the same. The question regarding the value of circumstantial evidence was noted, but, since it did not affect the judgment, it was not resolved.

This case involved an automobile collision at the intersection of two county roads. The supreme court discussed the evidence and concluded that the defendant was guilty of negligence as a matter of law: she looked and did not see what had to have been in plain sight.<sup>104</sup> Regarding alleged contributory negligence of the plaintiff's decedent, the court said that there was no evidence from which such a conclusion could have been drawn, except perhaps for evidence of the happening of the accident itself, and contributory negligence cannot be inferred from the mere fact that an accident happened.<sup>105</sup> The judgment below was reversed and the case was remanded for a retrial of the damage issue only.<sup>106</sup>

In the context of the defendant's claim that the plaintiff's decedent was contributorily negligent, the court discussed circumstantial evidence as follows:

The first [rule] is that negligence is a question of fact and may be proved by circumstantial evidence and physical facts. However, the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicate with reasonable certainty the negligent act charged.

The second rule is 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. The physical facts and the inferences [defendant] would have us draw cannot meet either test.<sup>107</sup>

*Wolstenholm* runs together two lines of circumstantial evidence cases. In one paragraph, the court stated the more favorable of the two rules: circumstantial evidence must "indicate with reasonable certainty the negligent act charged." In the next paragraph, it stated the least favorable rule possible, short of outlawing the evidence altogether: the "inference [must be] the only one that reasonably can be drawn [from the evidence]." And then the court concluded that "[t]he physical facts and the inferences appellants would have us

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104. *Id.* at 366, 126 N.W.2d at 183.

105. *Id.*

106. *Id.* Based on the record of the first trial, negligence and lack of contributory negligence were found as a matter of law, and on remand, the trial court was to retry only the issue of damages.

107. *Id.* at 364-65, 126 N.W.2d at 182 (citations omitted).

draw cannot meet either test."<sup>108</sup> The two lines of cases were cited together. The court recognized that there are two rules, but there was no discussion of them, no attempt to reconcile them, no recognition that they are not consistent. The court avoided that sort of thing by saying that it did not matter here which of these rules was the correct one—defendant loses either way.<sup>109</sup>

The most recent case to take this approach—state more than one rule and conclude that a particular judgment is correct under either—is *Anderson v. Farm Bureau Insurance Co.*<sup>110</sup> In *Anderson*, the court summarized the law of circumstantial evidence as follows:

- (1) a case may be established by direct or circumstantial evidence;
- (2) circumstantial evidence alone will not support the verdict unless the inferences necessary to the verdict are the only ones that can fairly and reasonably be drawn;
- (3) from the evidence, the theory of the party with the burden must be reasonably probable;
- (4) where the evidence supports several inferences which "are opposed to each other, but equally consistent with the facts proved, the plaintiffs do not sustain their position by a reliance alone on the inferences which would entitle them to recover;"
- (5) conjecture and speculation are not enough;
- (6) "[t]here must be something more which would lead a reasoning mind to one conclusion rather than to the other."<sup>111</sup>

After summarizing the law, the court turned to the evidence and said that the plaintiffs had not presented enough evidence to get past a motion to dismiss no matter what part of this summary was applied. The Andersons' case failed both the strict and the lenient statement of the rule. "The Andersons have failed to meet their burden of proof in this case; for while an inference of theft is possible, it is not *the only conclusion which can reasonably be drawn*, nor is it the prime contender in this insurance terms tournament: mysterious disappearance, embezzlement, and wrongful conversion *are, at the very least, equally formidable.*"<sup>112</sup> No matter how the rule is stated, these plaintiffs were down for the count.

*Anderson* does not choose between the strictest of the rules and the most lenient. It states both and says that the plaintiffs fail under

108. *Id.*

109. For a discussion of the concurring opinion in *Wolstenholm*, see note 39 *supra*.

110. 219 Neb. 1, 360 N.W.2d 488 (1985).

111. *Id.* at 4-5, 360 N.W.2d at 491 (quoting *Popken v. Farmers Mut. Home Ins. Co.*, 180 Neb. 250, 255, 142 N.W.2d 309, 313 (1966)) (citations omitted).

112. *Id.* at 5, 360 N.W.2d at 491 (emphasis added).

either one. The majority opinion does not deal with the inconsistency in these statements of the rule, because it does not need to: when the plaintiffs fail to satisfy the lenient statement of the rule, then they cannot possibly have satisfied the strict statement, and choosing between the two is not necessary.<sup>113</sup>

The second kind of case in the "schizophrenic" line states the operative rule in a way that starts out with the strict approach and, sentence by sentence, turns it into the lenient approach.

*Halliday v. Raymond*<sup>114</sup> is the first case to state the rule and then state it again, but this time with a different meaning. The court recognized that the plaintiff's evidence was "to a large extent circumstantial."<sup>115</sup> It stated the *Blid* rule: circumstantial evidence is "[s]ufficient . . . if . . . the conclusion reached is the only one that can fairly and reasonably be drawn therefrom."<sup>116</sup> And then, in the very next sentence, the court said that "[i]t is a fair and reasonable deduction from the plaintiff's" evidence that his contention is correct.<sup>117</sup> The court did not say that the plaintiff's contention was the only conclusion that could "fairly and reasonably be drawn" from his evidence, which the *Blid* rule says is necessary to support a verdict. The court said that "[i]t is a fair and reasonable deduction." And, a page later, it said that reasonable minds could differ as to whether this plaintiff's contention is correct, and the question is one of fact for the jury.<sup>118</sup> This is a far cry from "the only [conclusion] that can fairly and reasonably be drawn therefrom." *Halliday* states the strict rule of circumstantial evidence, then twists it into something else entirely before applying it.

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113. On the other hand, though choosing was not required, it could have settled the lingering question of which statement of the rule is operative. It might also have TKOed this article, which was then in progress.

The Chief Justice's opinion concurring in the result in *Anderson* recognizes that the law in this area, as summarized by the majority, "is internally inconsistent." *Id.* at 7, 360 N.W.2d at 492 (Krivosha, C.J. concurring in the result). For a further discussion of this opinion, see note 28 *supra*.

114. 147 Neb. 179, 22 N.W.2d 614 (1946). The plaintiff in *Halliday*, a pedestrian crossing a street, was hit by a car driven by the defendant. The plaintiff's testimony on negligence favored his contentions: his hearing was good and he heard no horn; his eyesight was good and he looked both ways before and while crossing, and he saw no cars; he was knocked over; his next recollection was that he was lying by defendant's car; his right leg had tread marks on the trousers, a tire or rub burn on the skin, and it hurt. The defendant, and his passenger, gave testimony favorable to the defendant's side of the case. Basically, they testified that, in spite of the fact that the defendant's car was stopped and the horn was sounded, the plaintiff walked into the car. They also said that the plaintiff never fell down.

115. *Id.* at 183, 22 N.W.2d at 616.

116. *Id.* at 183, 22 N.W.2d at 616-17 (citations omitted).

117. *Id.* at 183, 22 N.W.2d at 617.

118. *Id.* at 184, 22 N.W.2d at 617.

In *Scarborough v. Aeroservice, Inc.*,<sup>119</sup> the court did the same thing: it stated the *Blid* rule regarding the value of circumstantial evidence, and, in the very next sentence, restated it inconsistently. Here is what the court said:

In addition to direct evidence, or in the absence of the same, circumstantial evidence can be sufficient to sustain a verdict depending solely thereon for support if the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom.

A plaintiff is not bound to exclude the possibility that the accident might have happened in some other way, but is only required to satisfy the jury, by a fair preponderance of the evidence that the injury occurred in the manner claimed.<sup>120</sup>

To the extent that each of those abutting statements refers to circumstantial evidence, they are only consistent if the first is given a much less than literal construction, if it means something much different than what it says.

*Barkalow Brothers Co. v. Floor-Brite, Inc.*<sup>121</sup> is a particularly

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119. 155 Neb. 749, 53 N.W.2d 902 (1952).

120. *Id.* at 762-63, 53 N.W.2d at 910 (citations omitted).

121. 188 Neb. 568, 198 N.W.2d 329 (1972). Floor-Brite Inc. was under contract to provide janitorial services to Barkalow Bros. Co. One Saturday, Barkalow Bros. Co. auditors had been working in Barkalow's building. They worked until some unspecified time. *Id.* at 569, 198 N.W.2d at 332. At least one of them smoked: he testified that he had lit his pipe "just before we quit." *Id.* at 570, 198 N.W.2d at 331. That evening, Floor-Brite employees cleaned the Barkalow building. They emptied waste baskets and ashtrays into a fabric collector-bag. They testified that, before dumping each ash-tray into the bag, they checked it for lighted cigarette or cigar stubs. *Id.* at 569-70, 198 N.W.2d at 331.

All ashtrays were on the first floor. After cleaning the first floor, they dumped the contents of the collector bag into steel barrels, which were in the garage. *Id.* at 570, 198 N.W.2d at 331.

After dumping the contents of the bag, they went down to and swept the basement. In the basement, they collected about a half cup of dust, which they put in the bag. They folded the bag and placed it in a storage room under the basement stairway. At this point, one of Floor-Brite's employees said that he thought he smelled smoke; another replied that it was just the dust they had collected; apparently satisfied, they went on about their business. *Id.* at 570, 198 N.W.2d at 331-32.

This storage room contained "many flammable [and] . . . junk items which had collected therein over many years." *Id.* at 574, 198 N.W.2d at 334. It also contained an electric light and wiring thereto. *Id.* at 575, 198 N.W.2d at 334.

A fire alarm was turned in approximately two and one-half hours after the Floor-Brite crew left the building. There was testimony that the flames were coming from the storage area under the basement stairs, the room in which the Floor-Brite people had stored the collector bags. *Id.* at 570, 198 N.W.2d at 332.

As the court said: "Admittedly, there was no fire in the garage where the steel barrels were located. . . . There is absolutely no evidence that a lighted cigarette or cigar (of which there is no evidence) stayed in the collector bag after it was emptied." *Id.* at 574, 198 N.W.2d at 334.

good example of this phenomenon. It starts with the *Blid* rule and, in the tradition of *The Amazing Kreskin*, transforms it into a rule of evenly balanced evidence.

In *Barkalow Bros.*, the plaintiff simply failed to meet its burden of going forward with the evidence and its burden of proof. As a matter of law, there was not sufficient evidence upon which a reasonable person could have found in favor of the plaintiff. "There is absolutely no evidence . . ." <sup>122</sup> said the court, with reference to one of the facts necessary to establish one of the essential elements of the case. *Barkalow Bros.* was not a case of not enough circumstantial evidence to establish an inference as *the only* one that could reasonably be drawn. It was a case of not enough circumstantial evidence to support this as *a* reasonable conclusion. Such a case should not go to the jury, and this case did not: the trial judge granted defendant's motion for a directed verdict, and the supreme court affirmed. And yet, the supreme court stated:

Plaintiff may establish its case by circumstantial evidence as well as by direct evidence, yet circumstantial evidence is not sufficient to sustain a verdict unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom. *Or, to phrase it differently*, the evidence must be sufficient to make the theory of causation reasonable and not merely possible. Conjecture, speculation, or choice of possibilities is not proof. There must be something more which will lead a reasoning mind to one conclusion rather than another.

. . . Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. However the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicate with reasonable certainty the negligent act charged.<sup>123</sup>

Again, in this line of the schizophrenic cases—and perhaps more

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122. *Id.* (This is explained more fully in the preceding footnote.)

123. *Id.* at 575-76, 198 N.W.2d at 334-35 (citations omitted) (emphasis added).

Raff v. Farm Bureau Ins. Co., 181 Neb. 444, 149 N.W.2d 52 (1967) does exactly the same thing as *Barkalow Bros.*, and does it just as openly:

Plaintiff may establish his case by circumstantial evidence as well as by direct evidence, yet circumstantial evidence is not sufficient to sustain a verdict unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom. *Or, to phrase it differently*, the evidence must be sufficient to make the theory of causation reasonably probable and not merely possible. Conjecture, speculation, or choice

often more clearly here than in any of the other lines of cases—what the court is really trying to do is not far beneath the surface. These statements of the value of circumstantial evidence are really used to enforce, and often said in the same breath with, the rule of evenly balanced evidence. The court has been doing this in the *Blid* line,<sup>124</sup> in the reasonable certainty line,<sup>125</sup> in the equally competent line,<sup>126</sup> and now in the schizophrenic line.<sup>127</sup>

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of possibilities is not proof. There must be something more which will lead a reasoning mind to one conclusion rather than another. . . .

In every jury trial [where it is properly raised], before the case is submitted there is a preliminary question for the court to decide[.] . . . whether there is any evidence upon which a jury can properly proceed to find a verdict for the party . . . upon whom the burden of proof is imposed.

*Id.* at 449-50, 149 N.W.2d at 56 (citations omitted).

See also text accompanying notes 144-45 *infra* (discussing *Popken v. Farmers Mut. Home Ins. Co.*, 180 Neb. 250, 142 N.W.2d 309 (1966)).

124. See notes 7-49 and accompanying text *supra*.

125. See notes 50-84 and accompanying text *supra*.

126. See notes 85-96 and accompanying text *supra*.

127. *Barkalow Bros. Co. v. Floor-Brite, Inc.*, 188 Neb. 568, 198 N.W.2d 329 (1972); *Raff v. Farm Bureau Ins. Co.*, 181 Neb. 444, 149 N.W.2d 52 (1967); *Popken v. Farmers Mut. Home Ins. Co.*, 180 Neb. 250, 142 N.W.2d 309 (1966).

In *Wilgro Inc. v. Vowers & Burbach*, 190 Neb. 369, 208 N.W.2d 698 (1973), plaintiffs sued to collect money allegedly owed for livestock feed supplement; defendants counterclaimed for breach of warranty, claiming that the feed supplement caused urea poisoning, which resulted in the death of defendants' cattle. The evidence indicated that there could have been a number of causes of the urea poisoning. It could have resulted from bad supplement; improper mixture of the feed and the supplement through human error, or through mechanical failure; overeating by the cattle of a proper mixture; or bad feed properly mixed with good supplement. "In short, there are several causative theories . . . other than the theory urged by the defendants, and in [none but one] is the breach of warranty the proximate cause of the injury." *Id.* at 374, 208 N.W.2d at 702. Having said that, the court stated the rule that circumstantial evidence will not support a verdict unless the conclusions necessary to the verdict are the only ones "that can fairly and reasonably be drawn therefrom." The evidence must make the defendants' theory "reasonably probable, not merely possible." *Id.* (quoting *Popken v. Farmers Mut. Home Ins. Co.*, 180 Neb. 250, 255, 142 N.W.2d 309, 313 (1966)). That is, said the court, several equally probable but opposite inferences do not sustain a position. "This is not to say [that one relying] on circumstantial evidence for proof of causation must always exclude any other possible causes." *Id.* at 375, 208 N.W.2d at 702. The court then slid into the rule that conjecture and speculation are not enough. "Thus, while the defendants were not required to exclude every other conceivable cause . . . , they were required to adduce some evidence which would lead the reasonable [person] to accept their theory of causation over those presented by the plaintiff. This they did not do, and their cause of action was properly dismissed." *Id.*

*Bohling v. Farm Bureau Ins. Co.*, 191 Neb. 141, 214 N.W.2d 381 (1974) is the same. First, the court stated the *Blid* rule. Second, it said that conjecture and speculation are not proof. Third, it said that there must be something to lead a reasonable person to one conclusion over another. *Id.* at 143, 214 N.W.2d at 383-84.

In *Sherman v. Travelers Indem. Co.*, 193 Neb. 104, 225 N.W.2d 547 (1975), the court stated the *Blid* rule; restated it as a rule of reasonable probability; said that conjecture and speculation are not enough; and, finally, said that there must be something present to "lead a reasoning mind to one conclusion rather than another." *Id.* at 106, 225 N.W.2d at 548 (citations omitted).

One of the questions in *Danielsen v. Richards Mfg. Co.*, 206 Neb. 676, 294 N.W.2d

## VI. WHAT DOES IT ALL MEAN?

Having identified four distinct lines of circumstantial evidence cases, what next? When studying these cases, it becomes apparent that in virtually every one of them the court is trying to do exactly the same thing. These four lines of cases represent four ways of achieving the same result. And the striking thing about these cases, other than that four different lines have developed, is that until the most recent of the cases, the court has been remarkably taciturn about what it is really trying to accomplish. Many of the cases read as though their agendas were hidden even from their authors.

What is this hidden agenda? A brief review of each line of cases will uncover it. First, the oldest cases, those of the *Blid* line, have been overruled,<sup>128</sup> only to show up again.<sup>129</sup> They should be reoverruled.<sup>130</sup> Overruled or not, the *Blid* rule is not the rule of the most recent cases. To the extent that the words are used in the most recent cases, their use is dicta.<sup>131</sup> That, however, is no excuse for still using them. They should be abandoned again, altogether and for all times.

But, whether the *Blid* rule is overruled or not, when it states that rule, the court never really means what it says.<sup>132</sup> To the extent that the rule takes meaning from its application, as opposed to its text, it has meant that if the evidence on an issue is evenly balanced, if there is no way that a reasonable person could choose from among conflicting interpretations of the evidence, then no jury question is presented—and, of course, that issue should not be sent to the jury.<sup>133</sup>

In the cases of the second line, the “reasonable certainty” line, the court is attempting to do the same thing: enforce the rule of evenly balanced evidence.<sup>134</sup> With the exception of the *Whittington*

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858 (1980) was whether the defendant was the manufacturer of the surgical instrument that fractured during plaintiff's surgery. The court stated the *Blid* rule, restated it as a rule of reasonable probability, as opposed to a rule of possibility, and then the court said: “Applying that principle to [this] case, and assuming that the evidence is wholly circumstantial, the evidence was sufficient to make the identification of the source of the broken [instrument] reasonably probable and not merely possible. . . . [T]he evidence was sufficient to permit the jury to find, with reasonable certainty, that [defendant] was the supplier of the [instrument] used.” *Id.* at 681, 294 N.W.2d at 861.

128. See text accompanying notes 59-62 *supra*.

129. See *So Soo Feed & Supply Co. v. Morgan*, 192 Neb. 277, 220 N.W.2d 25 (1974); *J.R. Watkins Co. v. Wiley*, 184 Neb. 144, 165 N.W.2d 585 (1969); *Norcross v. Gingery*, 181 Neb. 783, 150 N.W.2d 919 (1967). For a discussion of these cases, see note 43 *supra*.

130. See text accompanying note 49 *supra*.

131. See note 48 and accompanying text *supra*.

132. See notes 34-42 and accompanying text *supra*.

133. See notes 43-47 and accompanying text *supra*.

134. See text accompanying notes 54-58 *supra*.

case,<sup>135</sup> where the court said the "reasonable certainty" language is for the jury, these cases seem to be stating a standard for the judge to apply when he or she decides whether the evidence is sufficient to justify sending the case to the jury (not a rule to be applied by the jury).<sup>136</sup>

The important aberration in the "reasonable certainty" line is the *Whittington* case, in which the court said: where appropriate and requested, the jury must be instructed that for negligence to be proved by circumstantial evidence, the evidence must indicate the negligence with reasonable certainty.<sup>137</sup> But, in truth, this rule of jury instruction was never more than an aberration. It was never well-founded: *Whittington* announced the rule but gave no reasons for doing so—except for the citation to a case that does not stand for the point made and therefore, quite naturally, does not discuss the rule either.<sup>138</sup> In any event, the *Whittington* instruction is no longer appropriate: that part of *Whittington* has, it seems, been implicitly overruled;<sup>139</sup> it should be explicitly overruled (though, as we have seen, even that is not necessarily the last of it<sup>140</sup>).

The cases of the "equally competent" line present no problem in terms of their meaning. They say that circumstantial evidence is just as good, or as bad as, any other kind.<sup>141</sup> Its value does not inhere in its nature as circumstantial, as opposed to direct, but on the hundreds of other things that go into the credibility of evidence of all kinds. These cases have no special rule regarding the value of this evidence as a distinct type. The problem regarding what to do if the evidence on an issue is evenly balanced is handled by rules that were specifically designed to deal with that problem—rules that use the language of that problem, instead of the language of types of evidence. The rules specifically designed to deal with this problem say that if the evidence on an issue is evenly balanced, then the party with the burden of proof has not met that burden, and loses on that issue; the tie cannot be broken with guess, speculation, or conjecture because that

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135. See text accompanying notes 63-73 *supra*.

136. See text accompanying notes 44-45 *supra*. For example, the court in *Jones v. Union Pac. R.R.*, 141 Neb. 112, 2 N.W.2d 624 (1942) identified the *Blid* rule as a "rule of sufficiency for the submission of cases to a jury." *Id.* at 117, 2 N.W.2d at 627.

137. See text accompanying notes 63-65 *supra*.

138. See text accompanying notes 68-73 *supra*.

139. See text accompanying notes 77-83 *supra*.

140. Recall that the overruling of the *Blid* rule in its application to civil cases was not the last of that rule in that situation. See *So Soo Feed & Supply Co. v. Morgan*, 192 Neb. 277, 220 N.W.2d 25 (1974); *J.R. Watkins Co. v. Wiley*, 184 Neb. 144, 165 N.W.2d 585 (1969); *Norcross v. Gingery*, 181 Neb. 783, 150 N.W.2d 919 (1967). For a discussion of these cases, see note 44 *supra*.

141. See notes 85-92 and accompanying text *supra*.

sort of thing is not allowed.<sup>142</sup>

The cases of the "schizophrenic" line are among the sanest: they do the best job of uncovering the hidden meaning of these rules of circumstantial evidence. They do it by stating the rule, and then restating it, and restating it again, each time redefining it. The court peels away these statements until, finally, the real meaning of the rule is exposed.<sup>143</sup>

One of the cases of this line, *Popken v. Farmers Mutual Home Insurance Co.*,<sup>144</sup> expresses as well as any what the court is really doing in this area. *Popken* is probably the most often cited of the modern cases on circumstantial evidence. The court stated the strict rule and followed that with a statement that appears to be a further explanation of the rule, but really is a radical change—and then it restated the second statement of the rule, changing it, in turn. This case is of particular note because the restatement of the rule is particularly clear on the point of what the court is really doing in this area:

The plaintiffs may establish their case by circumstantial evidence as well as by direct evidence.

However, circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom.

The evidence must be such as to make the plaintiffs' theory of causation reasonably probable, not merely possible.

In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

Where several inferences are deducible from the facts presented, which inferences are opposed to each other, but equally consistent with the facts proved, the plaintiffs do not sustain their position by a reliance alone on the inferences which would entitle them to recover.

Conjecture, speculation, or choice of quantitative possibilities are not proof. There must be something more which would lead a reasoning mind to one conclusion rather than to the other.

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142. See notes 79-84 and accompanying text *supra*. See also NJI 1.01 (1969).

143. See notes 114-27 and accompanying text *supra*.

144. 180 Neb. 250, 142 N.W.2d 309 (1966).

If, as plaintiffs contend, inferences [that support their right of recovery] may be fairly and reasonably drawn from the evidence . . . , equally justifiable inferences, consistent with the facts proved and inconsistent with the plaintiffs' right to recovery, may be fairly and reasonably drawn . . . .

In short, the proven facts go no further than to give equal support to at least two inconsistent inferences and the judgment must go against the parties upon whom rests the burden of proof.<sup>145</sup>

*Popken* illustrates what the court is really doing in these cases. The court stated the oldest and strictest rule of all and redefined it into the newest and least strict of the rules. What it leaves us with is a rule that values circumstantial evidence no less than direct evidence; a rule that says that if the evidence on a point is evenly balanced, the burden of proof has not been satisfied; and a rule that says that jurors are not allowed to engage in guess, speculation, and conjecture. That is the modern rule. *Popken* recognizes that this is what was meant all along, and that is why *Popken* is so popular, so often cited and quoted today.

What has been created in this area of circumstantial evidence is four lines of cases, three of which denigrate circumstantial evidence in the service of the rule regarding evenly balanced evidence. What needs to be done in this area is to recognize that the rules regarding evenly balanced evidence serve themselves quite well. The three lines of cases denigrating circumstantial evidence should be retired.<sup>146</sup> The remaining line—direct and circumstantial evidence are “equally competent”—should be retained.

One line is bound to be less confusing than four, and a line that says that direct and circumstantial evidence are of equal value is bound to be less confusing than one that says that they are of different value, but never really explains the difference, or enforces it. (Perhaps not coincidentally, this is a situation where the least confusing rule happens to be the right rule.) Less confusion, and one less spurious issue to raise, should lead to fewer appeals. Fewer appeals

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145. *Id.* at 255-56, 142 N.W.2d at 313 (citations omitted).

146. The possible exception is retaining the “reasonable certainty” rule but making it clear that it is a rule for the judge only, and only to be used by the judge in deciding whether an issue goes to the jury, and, even then, it is only a reminder to the judge of the rule of evenly balanced evidence.

Retaining this rule under these circumstances would recognize that the *Whittington* instruction, NJI 1.31 (1969), is no longer proper. Cases where the evidence is evenly balanced as a matter of law will be taken care of by the judge, as a matter of law: they will be taken care of by the motion to dismiss or the motion for a directed verdict, or, for those that escape, the motion for judgment notwithstanding the verdict. In so far as the jurors are concerned, the current instructions that they are not to engage in guess, speculation, or conjecture, NJI 1.01 and 4.01 (1969), are sufficient.

will save the court time and the client expense, and allow everyone to move on to matters of greater importance.

What all of these cases mean to say is that when the evidence on an issue is evenly balanced so that there is no way to decide between conflicting interpretations of the evidence except through speculation, guess, conjecture, or chance then no jury question is raised regarding that issue, the court should resolve that issue, as a matter of law, against the party with the burden of proof. Whether the evidence is direct or circumstantial does not determine the applicable burden of proof.

That being what they mean, that is what the cases should say.

## VII. EPILOGUE

Two stories from the world of fiction illustrate the relative values of circumstantial and direct evidence. The first illustrates that circumstantial evidence can be as good as any. The second illustrates that direct evidence can be as bad as any.

One of these stories is by Daniel DeFoe, as filtered through the memory of trial attorney Craig Spangenberg. Spangenberg educates his juries as to the value of circumstantial evidence with this childhood recollection:

This reminds me of my father reading *Robinson Crusoe* to me when I was a little boy. Remember when Robinson Crusoe was on the island for such a long time all alone? One morning he went down to the beach and there was a footprint in the sand. Knowing that someone else was on the island, he was so overcome with emotion, he fainted.

And why did he faint? Did he see a man? He woke to find Friday standing beside him, who was to be his friend on the island, but he didn't see Friday. Did he see a foot? No. He saw a footprint. That is, he saw marks in the sand, the kind of marks that are made by a human foot. He saw circumstantial evidence. But it was true, it was valid, it was compelling, as it would be to all of you. We live with [circumstantial evidence] all our lives.<sup>147</sup>

The second story takes a bit more time to tell.<sup>148</sup> It takes place in "a large, bare, unpleasant-looking room. This is the jury room in the county criminal court of a large Eastern city. It is about 4:00 P.M. The room is furnished with a long conference table and a dozen chairs. The walls are bare, drab and badly in need of a fresh coat of

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147. Spangenberg, *Basic Values and the Techniques of Persuasion*, THE LITIGATION MANUAL 126 (1983) (A.B.A. section on litigation).

148. The following quotation is from Rose, *Twelve Angry Men*, in SIX TELEVISION PLAYS, 111, 116, 122, 131-33, 149-53 (1956).

paint. Along one wall is a row of windows which look out on the skyline of the city's financial district. High on another wall is an electric clock. . . ."

[JUROR] NO. 10: Look, what about the woman across the street? If her testimony don't prove it, then nothing does.

NO. 12: That's right. She saw the killing, didn't she?

. . . .

NO. 10 (*Loud*): . . . Here's a woman who's lying in bed and can't sleep. It's hot, you know. (*He gets up and begins to walk around, blowing his nose and talking*). Anyway, she looks out the window, and right across the street she sees the kid stick the knife into his father. She's known the kid all his life. His window is right opposite hers, across the el tracks, and she swore she saw him do it.

NO. 8: Through the windows of a passing elevated train.

NO. 10: Okay. And they proved in court that you can look through the windows of a passing el train at night and see what's happening on the other side. They proved it.

. . . .

NO. 4: The woman saw the killing through the windows of a moving elevated train. The train had five cars, and she saw it through the windows of the last two. She remembers the most insignificant details.

. . . .

NO. 8 (*To No. 4*): . . . How long does it take an elevated train going at top speed to pass a given point?

. . . .

NO. 11: I would think about ten seconds, perhaps.

NO. 2: About ten seconds.

NO. 4: All right. Say ten seconds.

. . . .

NO. 4 (*Quietly*): I still believe the boy is guilty of murder. I'll tell you why. To me, the most damning evidence was given by th[at] woman . . . .

NO. 3: That's right. As far as I'm concerned, that's the most important testimony.

NO. 8: All right. Let's go over her testimony. What exactly did she say?

NO. 4: I believe I can recount it accurately. She said that she went to bed at about eleven o'clock that night. Her bed was next to the open window, and she could look out of the window while lying down and see directly into the window across the street. She tossed and turned for over an hour unable to fall asleep. Finally she turned toward the window at about twelve-ten and, as she looked out, she saw the boy stab his father. As far as I can see, this is unshakable testimony.

NO. 3: That's what I mean. That's the whole case.

*No. 4 takes off his eyeglasses and begins to polish them, as they all sit silently watching him.*

NO. 4 (*To the jury*): Frankly, I don't see how you can vote for acquittal. (*To No. 12*) What do you think about it?

NO. 12: Well . . . maybe . . . there's so much evidence to sift.

NO. 3: What do you mean, maybe? He's absolutely right. You can throw out all the other evidence.

NO. 4: That was my feeling.

*No. 2, polishing his glasses, squints at clock, can't see it. No. 6 watches him closely.*

NO. 2: What time is it?

NO. 11: Ten minutes of six.

NO. 2: It's late. You don't suppose they'd let us go home and finish it in the morning. I've got a kid with mumps.

NO. 5: Not a chance.

NO. 6 (*To No. 2*): Pardon me. Can't you see the clock without your glasses?

NO. 2: Not clearly. Why?

NO. 6: Oh, I don't know. Look, this may be a dumb thought, but what do you do when you wake up at night and want to know what time it is?

NO. 2: What do you mean? I put on my glasses and look at the clock.

NO. 6: You don't wear them to bed.

NO. 2: Of course not. No one wears eyeglasses to bed.

NO. 12: What's all this for?

NO. 6: Well, I was thinking. You know the woman who testified that she saw the killing wears glasses.

NO. 3: So does my grandmother. So what?

NO. 8: Your grandmother isn't a murder witness.

NO. 6: Look, stop me if I'm wrong. This woman wouldn't wear her eyeglasses to bed, would she?

FOREMAN: Wait a minute! Did she wear glasses at all? I don't remember.

NO. 11 (*Excited*): Of course she did! The woman wore bifocals. I remember this very clearly. They looked quite strong.

NO. 9: That's right. Bifocals. She never took them off.

NO. 4: She did wear glasses. Funny. I never thought of it.

NO. 8: Listen, she wasn't wearing them in bed. That's for sure. She testified that in the midst of her tossing and turning she rolled over and looked casually out the window. The murder was taking place as she looked out, and the lights went out a split second later. She couldn't have had time to put on her glasses. Now maybe she honestly thought she saw the boy kill his father. I say that she saw only a blur.

NO. 3: How do you know what she saw? Maybe she's farsighted.

*He looks around. No one answers.*

....

NO. 3 (*Loud*): I think he's guilty!

....

NO. 8 (*To No. 3*): You're alone.

NO. 3: I don't care whether I'm alone or not! I have a right.

NO. 8: You have a right.

*There is a pause. They all look at No. 3.*

NO. 3: Well, I told you I think the kid's guilty. What else do you want?

NO. 8: Your arguments.

*They all look at No. 3.*

....

NO. 3 (*pleading*): . . . A guilty man's gonna be walking the streets. A murderer. He's got to die! . . .

NO. 8: We're waiting.

*No. 3 turns violently on him.*

NO. 3 (*Shouting*): Well, you're not going to intimidate me! (*They all look at No. 3*) I'm entitled to my opinion! (*No one answers him*) It's gonna be a hung jury! That's it!

NO. 8: There's nothing we can do about that, except hope that some night, maybe in a few months, you'll get some sleep.

NO. 5: You're all alone.

NO. 9: It takes a great deal of courage to stand alone.

*No. 3 looks around at all of them for a long time. They sit silently, waiting for him to speak, and all of them despite him for his stubbornness. Then suddenly, his face contorts as if he is about to cry, and he slams his fist down on the table.*

NO. 3 (*Thundering*): All right!

*NO. 3 turns his back on them. There is silence for a moment and then the foreman goes to the door and knocks on it. It opens. The guard looks in and sees them all standing. The guard holds the door for them as they begin slowly to file out. NO. 8 waits at the door as the others file past him. \* \* \* [T]aking a last look around the room, [NO. 8] exits, closing the door. The camera moves in close on the littered table in the empty room, and we clearly see a slip of crumpled paper on which are scribbled the words "Not guilty."*

*Fade out.*