Evidence

Dale Alan Bruschi*
Evidence: 1991 Survey of Florida Law

Dale Alan Bruschi*

TABLE OF CONTENTS

I. INTRODUCTION ................................ 297
II. RELEVANCE .................................... 298
III. WITNESSES .................................... 302
   A. The Deadman's Statute ................. 302
IV. OPINION AND EXPERT TESTIMONY ............ 305
V. HEARSAY ........................................ 310
   A. Inconsistent Statements as Substantive Evidence ........... 310
   B. Prior Consistent Statements .............. 313
   C. Statements Made for the Purpose of Identification .......... 315
   D. Statements for Purposes of Medical Diagnosis .......... 317
   E. Records of Regularly Conducted Business Activity .......... 320
   F. The Public Records Exception .............. 322
   G. Statements of a Child Victim .............. 324
   H. Dying Declarations ....................... 329
VI. CONCLUSION ................................... 331

I. INTRODUCTION

This year's survey of Florida evidence has once again followed the same predictable patterns as seen in previous survey years.1 Hearsay

* J.D., Nova University Shepard Broad Law Center, 1987 (with honors); B.A., University of Florida, 1978; Assistant State Attorney Broward County, 1987-90; Partner in the firm of Bruschi, Eng & Koerner, P.A. 1990-92.

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1. This is the sixth annual survey of Florida evidence that the Nova Law Review has published. A break in the annual survey of evidence occurred in 1988-89. The 1990 Survey of Florida Evidence was brought up to date and included Florida evidence decisions from October 1988 through October 1990. In order to make the Survey of Flor-
generated the most case law during the survey period, while criminal
decisions outnumbered civil cases in evidentiary case law. The survey
period has been moved up from last year and, consequently, fewer cases
were decided during the survey period.

The only legislative change in the rules of evidence came in section
90.803, the public records exception. The change affects the criminal
case exclusion in public records for matters observed by police officers.
The change appears to affect only drunk driving criminal cases and is,
once again, a legislative overreaction to the public outcry of drunk
driving.

II. Relevance

An interesting relevance case reached the Florida Supreme Court
during the survey period. The Florida Supreme Court decided the case of Sims v. Brown which involved medical malpractice. In the Sims
case, Mary Brown sued David Sims, a gynecologist, Christian Keedy, a
neurosurgeon, and South Miami Hospital claiming the defendants' negli-
gence caused her to suffer a stroke either during, or shortly after, an

ida law more useful, the Nova Law Review has changed the publication date of the
survey from the last issue published during the year to the first issue published during
the year.

(1989).
3. Relevance involves the following three sections of the evidence code:
  FLA. STAT. § 90.401 (1989).
  Definition of Relevant Evidence.
  Relevant evidence is evidence tending to prove or disprove a material fact.
  FLA. STAT. § 90.402 (1989).
  Admissibility of Relevant Evidence.
  All relevant evidence is admissible, except as provided by law.
  FLA. STAT. § 90.403 (1989).
  Exclusion on Grounds of Prejudice or Confusion.
  Relevant evidence is inadmissible if its probative value is substantially out-
  weighed by the danger of unfair prejudice, confusion of issues, misleading
  the jury, or needless presentation of cumulative evidence. This section shall
  not be construed to mean that evidence of the existence of available third-
  party benefits is inadmissible.

Though sections 90.404 to 90.410 involve relevance, no significant cases were reported
during the survey period. Therefore, only the above-referenced sections will be ex-
amined in this article.
4. 574 So. 2d 131 (Fla. 1991).
operation performed by Sims to remove an ovarian cyst. Sims requested Keedy to perform a preoperative neurological examination of Ms. Brown prior to Ms. Brown's surgery. Keedy cleared Ms. Brown for surgery, but did not write a report until after the operation. Another doctor for the hospital, a Doctor Albanes, also cleared Ms. Brown for the surgery. Sims removed the ovarian cyst, and either during, or after, the surgery, Ms. Brown suffered a stroke. Ms. Brown contended that had a proper preoperative examination been conducted, any condition which could have been a factor in the stroke would have been discovered and corrected before surgery.

Ms. Brown's counsel attempted to enter into evidence a 1979 report of the Joint Commission of Accreditation of Hospitals (JCAH) which found a deficiency in the hospital's recording of a patient's current history and their physical examination. The trial judge rejected this evidence because it was remote in time, a subsequent report issued by the same commission did not indicate any deficiency in the hospital's record keeping, and the trial court found the report irrelevant and confusing.

In upholding the trial court's rejection of this evidence, the supreme court examined two areas. First, the supreme court stated that for evidence to be relevant, especially when it is remote, "a prior dangerous condition or negligent cause of conduct must be shown to continue uncorrected up to the time of the act sued upon." Because of the passage of time, the probative value of the report was minimal since the cause of conduct could not be shown to be continuous. Since the 'subsequent' report did not indicate that the prior deficient conduct was continuing, the probative value of the evidence was minimal, thus rendering it inadmissible. The court examined the logical relevance of the evidence and stated:

5. Id. On a jurisdictional basis, the supreme court did not hear argument regarding Doctor Sims. However, the supreme court granted review in the case regarding Doctor Keedy and South Miami Hospital and reversed the district court's order vacating the jury verdicts for Doctor Keedy and South Miami Hospital.

6. Id. Doctor Albanes report was documented but there is no indication in the record if it was written before the surgery.

7. Id.
8. Id. at 133.
9. Sims, 574 So. 2d at 133.
10. Id.
11. Id.
The chief object in introducing evidence is, to secure a rational as-
certainment of facts; therefore facts should not be submitted to the
jury unless they are logically relevant to the issues. A fact in a
cause must be both logically and legally relevant, for even logical
relevancy does not in all cases render proposed evidence admissible.
A fact which in connection with other facts, renders probable the
existence of a fact in issue, should still be rejected where, under the
circumstances of the case, it is essentially misleading or too remote. 12

Second, the supreme court found that the excluded report was not
legally relevant under section 90.403, since the excluded report was
more prejudicial than probative and created needless confusion which
could mislead the jury. Since the report was remote in time and the
activity was not continuous, the report’s probative value was minimal.
The jury could have given undue weight to this marginal evidence and
arrived at an erroneous verdict. 13

Another point in issue was whether the trial judge should have
excluded a manual of the JCAH. 14 The manual contained standards
for hospitals and interpretive commentaries. The trial judge was willing
to admit the standards but not the commentaries. Brown chose an all
or nothing position and the manual was excluded. In reversing the dis-
trict court, and upholding the trial court’s decision to exclude the man-
ual, the supreme court pointed out that there was already testimony in
the record regarding what is required for a patient preoperative exami-
nation. Therefore, the supreme court found that the exclusion of cumu-
lative testimony, the standards and the commentaries, is not an ade-
quate basis for vacating a jury verdict. 15

In Carr v. State 16 the district court demonstrates the interplay be-
tween section 90.403 and section 90.404(2), 17 in reversing the defend-
ant’s conviction for possession of cocaine. In Carr, a deputy sheriff ob-
served the defendant talking with other persons in front of a home in

12. Id. at 133-34 (quoting Atlantic Coast Line v. Campbell, 139 So. 886, 890
(1932)).
13. Id. at 133-34.
14. Id. at 134.
15. Id.
17. FLA. STAT. § 90.404(2) (1989) covers similar fact evidence otherwise known
as Williams Rule after Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S.
847 (1959).
Lake City. The deputy called the defendant over and asked permission to search him. After obtaining permission to search, and finding no contraband, the deputy ran a computer check on the defendant which revealed an outstanding warrant for a violation of probation. The defendant was handcuffed and taken to a detention center where a second search revealed two plastic baggies of cocaine allegedly found in the defendant’s left shirt pocket. 18

At trial, defense witnesses testified that the street search of the defendant was thorough and no contraband was discovered during this initial search. 19 The assistant state attorney, outside the presence of the jury, sought and received permission to elicit testimony that the defendant was a cocaine user and that he had previously been convicted of cocaine possession. 20 The assistant state attorney argued that the defendant’s prior conviction and cocaine use were admissible to prove knowledge of the presence of the drug on his person and “that a person who had possessed cocaine in the past would possess cocaine on the occasion at issue.” 21 Over the defendant’s objections, the trial court allowed the State’s use of the prior conviction and indicated that the 10-day rule for use of similar fact evidence was not needed since the evidence was offered as impeachment and rebuttal of the defendant’s defense that the cocaine was planted on him. 22

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18. Carr, 578 So. 2d at 398.
19. Id. at 398-99.
20. Id. at 399. It is hard to imagine a more egregious error than to elicit the type of prior crime the Defendant was convicted of and then use the conviction of the prior crime to link up evidence needed in the present trial. Unless proper notice and care is given for this unauthorized use of similar fact evidence, a reversal is almost sure to follow. One of the most common reasons for reversal of criminal cases is the improper use of similar fact, Williams Rule, evidence.

Even when notice is properly given for the use of this type of evidence, care must be taken not to misuse it or allow it to become a feature of the trial. The prosecutor walks a tightrope, with essentially devastating evidence, when similar fact evidence is utilized. A proper understanding of the pitfalls of using similar fact evidence must be understood by the proponent, otherwise, a reversal is inevitable.

21. Id.
22. Id. How the court determined that a previous conviction of cocaine would in any way rebut whether the cocaine was planted on the defendant in this particular case is beyond common imagination. It can only be assumed that a complete misunderstanding of the use of Williams Rule pervades or that the trial court record was unclear.

In any event, a common rule of thumb is that if the State in any way perceives the need for similar fact evidence it should file the ten-day notice. Generally, only if the similar fact evidence in the case is inextricably interwoven with the facts of the case will the 10 day notice be inapplicable. See Austin v. State, 500 So. 2d 262 (Fla. 1st
The district court disagreed with the trial court and reversed the defendant's conviction. The district court found that the credibility of the defendant was the real jury issue and that the evidence of the defendant's prior conviction for possession of cocaine was not related to the charge being tried. The jury was permitted to infer guilt regarding the present charge because the "Williams Rule" evidence suggested that the defendant had a propensity to commit this type of crime. Since the evidence of guilt was not overwhelming, the "Williams Rule" evidence should have been excluded because the probative value was outweighed by the danger of unfair prejudice.

III. Witnesses

A. The Deadman's Statute

The "Deadman's Statute" concerns an area of evidence which has not generated much case law over the past few years. The "Deadman's Statute" is codified in section 90.602 of the evidence code and is basi-
Bruschi cally a narrow prohibition which prevents the testimony of an interested person regarding transactions and communications between the interested person and an individual who has since died. The "Deadman's Statute" protects the estate of a decedent against false and fraudulent claims, since the decedent is not able to testify, and refute oral evidence of claims against his estate.

In *Sun Bank v. Saewitz*, the Third District Court of Appeal, in a two to one decision, discussed the proper application of the "Deadman's Statute," since its revision and recodification from section 90.05 to section 90.602. In *Sun Bank*, the plaintiff, who was the son of the decedent, brought an action against Sun Bank, as personal representative of the decedent's estate, to recover money the son allegedly loaned to his mother, the decedent. In the plaintiff's complaint he attached a copy of a check for $100,000.00 payable to the decedent and signed by the plaintiff's wife from their joint account. The word 'loan' appeared on the check to the decedent. Additionally, the son claimed in the complaint that the check was a loan to his mother with whom he had a business relationship. Both parties stipulated that the plaintiff and his wife were interested parties.

At trial, the check and the testimony of the plaintiff and his wife were admitted into evidence over the objection of Sun Bank. The trial court entered a final judgment in favor of the plaintiff for $100,000.00 and Sun Bank appealed. Sun Bank argued on appeal that the trial court erred in admitting the check as evidence, since checks are used for a variety of reasons and do not demonstrate clear evidence of debt sufficient to avoid the application of the 'Deadman's Statute.' The appellate court distinguished Sun Bank's argument by demonstrating that

the time of the examination.

(2) This section does not apply when:

(a) A personal representative, heir-at-law, assignee, legatee, devisee, or survivor of a deceased person, or the assignee, committee, or guarding of an insane person, is examined on his own behalf regarding the oral communication.

(b) Evidence of the subject matter of the oral communication is offered by the personal representative, heir-at-law, assignee, legatee, devisee, or survivor of a deceased person, or the assignee, committee, or guarding of an insane person.

**FLA. STAT.** § 90.602 (1989).

26. *See* **FLA. STAT.** § 90.05 (1975). This statutory section was where the original "Deadman's Statute" was codified.


28. *Id.* at 255-56.
the check in the case *sub judice* evidenced a debt because of the inscription of the word ‘loan’ on its face, which was endorsed without restriction. The appellate court felt that under these circumstances the check constituted a writing which demonstrated an indebtedness and, thus, was admissible into evidence.29

The appellate court also rejected Sun Bank’s second argument that the trial court erred in admitting the testimony of the interested plaintiff and his wife. The appellate court pointed out that section 90.602 only excludes testimony that refers to conversations between an interested party and a deceased person.30 It does not exclude testimony by an interested party regarding written transactions or written communications with a deceased person.31

The *Sun Bank* case drew a sharp dissent from Justice Ferguson of the Third District Court of Appeal.32 Justice Ferguson stated that since the ‘Deadman’s Statute’ bars critical communications, regarding omitted contract terms, the plaintiff in the case *sub judice* simply went through the back door by having inferences drawn from testimony of dealings with the deceased and other transactions.33 Justice Ferguson pointed out that the notation on the check does not answer the main question, that is, whether the decedent rather than the plaintiff, was the borrower.34 Justice Ferguson adhered to the court’s earlier decision in *Fabian v. Ryan*35 and stated “that where the inescapable inference from the testimony of an interested party would show that the decedent agreed to a material term or condition which is missing from the written contract, the testimony would violate the Deadman’s Statute, section 90.602.”36

29. *Id.* at 256. The appellate court also distinguished between the old “Deadman’s Statute,” FLA. STAT. § 90.05 (1975), which precluded interested persons from acting as witnesses regarding “transactions” and “oral communications” between the interested person and the deceased, and the revised language of FLA. STAT. § 90.602, which only prohibits such testimony from an interested person insofar as it concerns “oral communications.” Section 90.602 omits any language regarding “transactions” which is not impermissible.

30. *Id.*

31. *Id.*

32. *Sun Bank*, 579 So. 2d at 258 (Ferguson, J., dissenting).

33. *Id.*

34. *Id.*


36. *Sun Bank*, 579 So. 2d at 258 (Ferguson, J., dissenting).
IV. OPINION AND EXPERT TESTIMONY

During the survey period the Florida courts decided, and reversed, cases based on improper expert testimony. An architect, Mr. Seibert was charged in a complaint filed by the Bayport Beach Condominium Association for damages arising from a defective roofing design and construction, defective fire exit design, defective stucco design and construction, and defective ceiling slab design. The jury returned a verdict finding Mr. Seibert not guilty of negligence or building code violations with respect to the roof, the stucco, and the ceiling slabs, but found him liable for the defective fire exit design.

At trial, the Condominium Association presented an expert witness to testify regarding Mr. Seibert's liability. Mr. Robert Crain, a structural engineer, testified that under his interpretation the fire exit design did not comply with the Standard Building Code. Mr. Seibert, in turn, testified that in his professional opinion the fire exit design did meet the requirements of the code and had two additional experts, Mr. Herbert Lovett and Mr. Gary Walker testify on his behalf.

Mr. Lovett testified that he interpreted the code as requiring only the type of fire exit that Mr. Seibert had designed. Mr. Walker testified that he had been employed by the Southern Building Congress which had promulgated the Standard Building Code. Mr. Walker testified that the official interpretation of the code indicated that Mr. Seibert's design of the fire exit was appropriate. After hearing the testimony the jury returned a verdict against Mr. Seibert for damages regarding the design of the fire exit.

The Second District Court of Appeal made short shrift of the expert testimony presented in the lower court and reversed. During trial,
the jury was asked to decide if the fire exits were designed in compliance with the Standard Building Code. To make this determination the jury needed to know what the code required. This information was presented to them by expert testimony concerning the interpretation of the code. This was improper. Expert testimony may only be presented if scientific, technical, or other specialized knowledge which will assist the jury in understanding the evidence, or determining a fact in issue. Expert testimony is improper when its only use will be to interpret a legal question of law. The interpretation of the building code was a question of law. Therefore, the trial court erred by not interpreting the meaning of the code and instructing the jury accordingly. Conflicts in interpretation of the Building Code should have been resolved by the trial court and not the jury.

In addition to reversing the case for submitting a question of law to the jury, the Second District Court of Appeal found that the trial court should have interpreted the Building Code as accepting the design submitted by Mr. Seibert and then should have directed a verdict in his favor. The district court came to this conclusion because Mr. Lovett, who was the chief building inspector when Mr. Seibert submitted his fire exit design, interpreted the code to require only one exit as designed by Mr. Seibert. The district court stated that "[w]hen an agency with the authority to implement a statute construes the statute in a permissible way, that interpretation must be sustained even though

43. Siebert, 573 So. 2d at 891; see Fla. Stat. §§ 90.702, .703 (1989). Though testimony has been allowed to explain the character of an object in order to determine if it complies with a statute, ordinance, or code, the actual language of the statute, ordinance or code was not being interpreted for the jury. The jury, in these cases, had before it the necessary legal language, the expert testimony was only used to determine the character or type of object in issue and then to determine its application to the legal language. See Noa v. United Gas Pipeline Co., 305 So. 2d 182 (Fla. 1974); Grand Union Co. v. Rocker, 454 So. 2d 14 (Fla. 3d Dist. Ct. App. 1984).

The experts in the case sub judice did not testify regarding the character of an object but instead presented conflicting opinions as to how the building code should be interpreted.

44. Id. In this case the jury was permitted to determine the meaning of the code and then decide whether Mr. Seibert violated the code in his design of the fire exit. This was improper since an expert cannot testify regarding questions of law, as this is the court's function. See Devin v. Hollywood, 351 So. 2d 1022 (Fla. 4th Dist. Ct. App. 1976).

45. Id. at 892.
46. Id.
47. Id.
another interpretation may be possible." This case is a good illustration of the proper and improper use of expert testimony.

In *Holiday Inns, Inc. v. Shelburne* the Fourth District Court of Appeal decided an interesting issue regarding experts. The *Holiday Inn* case involved a wrongful death and personal injury action against Holiday Inn resulting, in part, from the negligent supervision of an adjacent parking lot next to a bar run by the hotel. Two groups of individuals went to the Rodeo Bar operated by the Holiday Inn. Upon leaving the bar, the two groups exchanged words, which eventually erupted into a fight. During the course of the fight, one of the individuals was shot and killed.

At trial, the judge permitted the plaintiff's expert on grief and bereavement to testify and explain the plaintiff's response to the death of their son. The expert's qualifications indicated that he had obtained a Bachelor's Degree, a Master's Degree and a Ph.D. in sociology, and was working on a post-doctorate at Harvard University in the field of grief and bereavement. The expert testified that he had been researching and studying grief for fifteen years, and had received federal and state grants in order to do so. The expert was the author of several books and publications on death, dying, and grief and bereavement. The expert had taught at seminars and had provided training as a consultant to hospital staffs, nurses, physicians and social workers. The expert was clearly qualified in the area of grief and bereavement and the trial court correctly found the witness an expert.

The expert witness testified that his research over a fifteen-year period, and the research of others in the field, indicate that there are patterns of responses to grief, stages of grief, and factors that intensify one's responses to grief. The expert explained to the jury that people can be categorized as falling into either normal patterns of grief or

48. Siebert, 573 So. 2d at 892 (citing Humhosco v. Department of Health and Rehabilitative Servs., 476 So. 2d 258 (Fla. 1st Dist. Ct. App. 1985)). Since the city's building inspector's interpretation was entitled to great weight and was not shown to be clearly erroneous, the trial court erred by not accepting the city's interpretation and directing a verdict for Mr. Seibert.
50. Id. at 324. The individual who was killed was David Rice. His family brought the wrongful death action.
51. Id. at 335.
52. The facts did not indicate if the expert witness received his grief while working as a trial attorney in our court system.
53. *Holiday Inns*, 576 So. 2d at 336.
complicated patterns of grief. He explained both of these patterns to the jury and stated that certain factors affect a person's grief, and the ability of that person to recover from that grief.\(^5\)

The expert testified that he interviewed the plaintiffs before the trial and was able to explain to the jury the plaintiffs' ordeal in working their way through the grief process and where they were in the grief process. The expert testified regarding what factors adversely affected the plaintiffs' response to their son's death and what factors affected their ability or inability to recover from their grief. The expert also indicated the pattern the plaintiffs' grief would take in the future.\(^6\)

In examining the expert testimony in the case, the appellate court stated that the trial court had the discretion to determine whether a witness possessed the necessary expertise, and the range of subjects to which the expert may testify.\(^5\)\(^6\) The trial court's findings would not be disturbed, unless they were clearly erroneous.\(^5\)\(^7\) The appellate court found that the trial court did not err in designating the witness an expert in the field of grief and bereavement.

In examining the expert testimony, the Fourth District Court of Appeal determined that three statutory areas must be examined, sections 90.702, 90.704 and 90.403.\(^5\)\(^8\) The appellate court concluded that from these three statutes there are four requirements for determining the admissibility of expert testimony and stated:

(1) that the opinion evidence be helpful to the trier of fact;
(2) that the witness be qualified as an expert;
(3) that the opinion evidence can be applied to evidence offered at trial; and
(4) that evidence, although technically relevant, must not present a substantial danger of unfair prejudice that outweighs its probative value.\(^5\)\(^9\)

The appellate court stated that in addition to the requirement that the

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54. Id.
55. Id.
56. Id. at 335.
57. Id.; see Quinn v. Milard, 358 So. 2d 1378 (Fla. 3d Dist. Ct. App. 1978).
59. Holiday Inns, 576 So. 2d at 335 (citing Kruse v. State, 483 So. 2d 1383 (Fla. 4th Dist. Ct. App.), dismissed, 507 So. 2d 588 (Fla. 1987)).
evidence be helpful to the trier of fact, to be admissible the evidence
must also be beyond the ordinary understanding of the jury.\textsuperscript{60}

In examining the present case, the appellate court found that the
expert witness’s testimony clearly assisted the jury, since the subject
matter of the testimony was not within the normal, everyday compre-
prehension of the jurors. The appellate court stated that “the subject
of grief and bereavement is not an area within the normal every day com-
prehension of jurors, and the expert testimony was properly admitted to
aid the jury in its consideration of the effect of David’s death on his
parents.”\textsuperscript{61} The appellate court also rejected the defendant’s argument
that the expert’s testimony should have been excluded because its pro-
bative value was outweighed by the danger of unfair prejudice.\textsuperscript{62} The
appellate court found that the expert was cross-examined about his re-
liance on the plaintiffs’ statements and that he took the statements at
face value.\textsuperscript{63} The jury was free to reject the expert’s testimony based on
his reliance of what the plaintiffs told him.\textsuperscript{64} However, the appellate
court stated that the objections to this testimony should go solely to the
weight of the evidence and not to its admissibility.\textsuperscript{65}

In a short but enlightening case, the court in \textit{Brown v. Crane,
Phillips, Thomas & Metts, P.A.}\textsuperscript{66} reversed the trial court when oppos-
ing counsel cross examined the plaintiffs’ expert witness with unfamil-
iar portions of a book that were not recognized by the expert as being
authoritative nor were independently established as being authoritative.
In the \textit{Brown} case, the plaintiffs appealed a final judgment entered for
the defendants in a medical malpractice action. The plaintiffs’ alleged
that the doctors were negligent in the delivery of their twins, Matthew
and Linsey, which resulted in brain damage and central nervous system
damage to the twins.\textsuperscript{67}

During the cross-examination of one of the plaintiffs’ expert wit-
tesses, the trial court, over objection, permitted defense counsel to read
passages from a chapter in a medical textbook in the presence of the
jury. The expert indicated that he had not read that chapter, but had

\textsuperscript{60} Id. at 335-36.
\textsuperscript{61} Id. at 336.
\textsuperscript{62} Id.
\textsuperscript{63} Id. at 336-37.
\textsuperscript{64} \textit{Holiday Inns}, 576 So. 2d at 337.
\textsuperscript{65} \textit{Id.} See \textit{Botte v. Pomeroy}, 497 So. 2d 1275 (Fla. 4th Dist. Ct. App. 1986),
rev. denied, 508 So. 2d 15 (Fla. 1987).
\textsuperscript{66} 585 So. 2d 947 (Fla. 2d Dist. Ct. App. 1991).
\textsuperscript{67} Id. at 948.
authored another section in the book. The Doctor indicated that he did not recognize any entire book as being authoritative. 68

Section 90.706 of the Florida Statutes specifically states:

Statements of facts or opinions on a subject of science, art, or specialized knowledge contained in a published treatise, periodical, book, dissertation, pamphlet, or other writing may be used in cross-examination of an expert witness if the expert witness recognizes the author or the treatise, periodical, book, dissertation, pamphlet, or other writing to be authoritative, or, notwithstanding nonrecognition by the expert witness, if the trial court finds the author or the treatise, periodical, book dissertation, pamphlet, or other writing to be authoritative and relevant to the subject matter. 69

The expert witness did not recognize the book in question as being authoritative. In addition, the defense counsel did not attempt to independently establish the authoritativeness of the author or the text. Therefore, the trial court erred in allowing defense counsel to read portions of the medical text in the presence of the jury. 70

V. HEARSAY

A. Inconsistent Statements as Substantive Evidence

The improper use of inconsistent statements as substantive evidence during trial is one of the most abused sections of the evidence code. 71 The misuse generally takes one of two forms. In the first form, the trial attorney impeaches a witness with prior inconsistent statements. He then, improperly, argues the substance (truth) of these inconsistent statements to the jury in closing argument. 72 In the second

68. Id.
70. Brown, 585 So. 2d at 948.
71. Attorneys frequently misapprehend the difference in prior inconsistent statements that are used to impeach the credibility of the witness and are, therefore, simply not hearsay under Fla. Stat. § 90.801(1) (1989), and prior inconsistent statements that are used as substantive evidence under Fla. Stat. § 90.801(2)(a) (1989). A distinction between the two is essential to proper courtroom practice and procedure.
72. Prior inconsistent statements cannot be used as substantive evidence. Their use is merely to demonstrate that the witness gave a prior statement different from the one given in court. The issue is one of the witnesses credibility, therefore, the truth of the statement is not in issue. In other words, the prior inconsistent statements are offered to impeach the credibility of the witness and demonstrate to the jury that the
form, the trial attorney desires to use the prior inconsistent statements as substantive evidence—for the truth of the matter asserted—but does not fully comply with Rule 90.801(2)(a) and, consequently, commits error by arguing these statements as substantive evidence to the jury.

The trial attorney should discern the difference between prior inconsistent statements, which are nonhearsay, to impeach the credibility of the witness, and prior inconsistent statements that can be used for the truth of the matter asserted therein. The difference is crucial and an error in judgment can cause a reversal.

The improper use of prior inconsistent statements resulted in reversal in the first degree murder case of State v. Smith. In Smith, the defendant was being tried for the murder of John Cascio. The murder arose when the victim made sexual advances to the defendant's girlfriend, Josette Estes. During the investigation of the murder, Ms. Estes, who was seventeen at the time, was brought into a room where a deputy sheriff and a prosecutor took her statement before a court reporter.

During trial, the state had the trial court call Ms. Estes as a court witness, arguing that the State was unable to vouch for her credibility because she had given materially inconsistent statements under oath.

73. Fla. Stat. § 90.801(1)(c) (1989). Prior inconsistent statements which are used to impeach the credibility of a witness do not fall within the definition of hearsay because the statements are not for the truth of the matter asserted but are merely used to demonstrate that the witness made a statement different from the one being made in court and, therefore, should not be believed.

74. Fla. Stat. § 90.801(2)(a) (1989). Under prior evidentiary rules, the witness could not be impeached by the party who called him. However, this restriction was not, and is not, applicable to a statement offered under section 90.801(2)(a). The purpose for offering the evidence under this section is to prove the truth of the contents of the prior statement rather than to attack the credibility of the witness.

Two important factors must be considered when using prior inconsistent statements as substantive evidence under section 90.801(2)(a). First, unlike prior inconsistent statements used for impeaching the credibility of a witness, a prior inconsistent statement used as substantive evidence must be under oath. Second, in criminal cases it is unlikely that the prosecution can rely solely on a prior inconsistent statement as the only evidence available to prove an essential element of a criminal charge. See United States v. Orrico, 599 F.2d 113 (6th Cir. 1979).

75. 573 So. 2d 306 (Fla. 1991).

76. Id. at 308.

77. Id. at 312-13. The outdated argument of vouching for the credibility of your witness has been put to rest by last year's amendment to § 90.608. See 1990 Fla. Sess.
The trial court complied with the State's request and allowed the witness to be called as a court witness. The defendant argued on appeal that the trial court erred in allowing the State to impeach the witness with prior inconsistent statements and allowing the State to rely on those statements as substantive evidence. The supreme court agreed and reversed the defendant's conviction.

The supreme court stated that the purpose of admitting prior inconsistent statements is to test the credibility of the witness. This purpose is misused when the State is allowed to use these statements as substantive evidence of guilt. The Florida Supreme Court found that the State had attempted to enter these statements as impeachment and as substantive evidence under section 90.801(2)(a). The defendant relied on State v. Delgado-Santos, and argued that the interrogation of Ms. Estes did not satisfy the requirements of section 90.801(2)(a) since the interrogation was not an "other proceeding" as contemplated by the statute.

The supreme court examined the meaning of "other proceeding" in the Delgado-Santos case, affirming and adopting the opinion of the Third District Court of Appeals, and thus found that "an 'other pro-

Law Serv. 174 (West), amending Fla. Stat. § 90.608 (1989). This change allows a party to impeach his own witness and brings Florida in line with the Federal Evidence Code. See Fed. R. Evid. 607 ("The credibility of a witness may be attacked by any party, including the party calling the witness.").

Additionally, the supreme court found that Ms. Estes had cooperated with the authorities and that Ms. Estes prior statements were not materially inconsistent such as to render the State unable to vouch for her credibility. The supreme court found no adverse, material inconsistencies in the record that would allow calling Ms. Estes as a court witness.

78. At the time of the trial, a party calling a witness could not impeach the credibility of that witness. Compare Fla. Stat. § 90.608 (1987) with Fla. Stat. § 90.608 (Supp. 1990). The only way the state could impeach the witness was to have the witness called as a court witness or to have the witness declared adverse. See Fla. Stat. § 90.608(2) (1987).

79. Id. at 313.

80. Smith, 573 So. 2d at 313.


82. 497 So. 2d 1199 (Fla. 1986). The supreme court in Delgado-Santos held that a police interrogation was not an "other proceeding" as contemplated by section 90.801(2)(a). The analysis of this case laid the basis of the supreme court's determination of whether a prosecutor's investigative interrogation was an "other proceeding" within the rule.
ceeding’ must be no less formal than a deposition and no more so than a hearing.” The supreme court found that a proceeding implies a certain degree of formality, convention, structure and regularity and concluded that a police investigative interrogation is not an “other proceeding” as contemplated by section 90.801(2)(a).

The issue then became whether this analysis applies to a prosecutor’s investigative interrogation. The Florida Supreme Court concluded that it did and stated:

When Estes gave the statement at issue, she was brought into a room where a deputy sheriff and a prosecutor were waiting with a court reported to interrogate the seventeen-year-old about a homicide in which she had just been involved. No counsel was present to advise her or to protect Smith’s interests; no cross-examination was possible and no judge was present or made available to lend an air of fairness or objectivity. This prosecutorial interrogation was neither regulated nor regularized, it contained none of the safeguards involved in an appearance before a grand jury and did not even remotely resemble that process, nor did it have any quality of formality and convention which could arguably raise the interrogation to a dignity akin to that of a hearing or trial. Prosecutorial interrogations such as the one here provide no degree of formality, convention, structure, regularity and replicability of the process that must be provided pursuant to the statute to allow any resulting statements to be used as substantive evidence to prove the truth of the matter asserted.

The Florida Supreme Court then concluded that the trial court erred by allowing the jury to consider Ms. Estes’ prior statements to the prosecutor as substantive evidence and reversed the defendant’s conviction.

B. Prior Consistent Statements

One of the typical mistakes in using prior consistent statements

83. Smith, 573 So. 2d at 314-15 (citing Delgado-Santos, 497 So. 2d at 76-77).
84. Id.
85. Id.
86. Fla. Stat. § 90.801(2)(b) (1989) states in part:
(2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is . . .
(b) Consistent with his testimony and is offered to rebut an express or
is failing to determine if the prior consistent statement took place after an express or implied charge of improper influence, motive or recent fabrication. Because the out of court statement is consistent does not mean it is admissible under this hearsay exception. Illustrating this point is *McDonald v. State*, where the First District Court of Appeal examined the use of prior consistent statements. In *McDonald*, the victim testified that the defendant forced his way into her apartment and committed a sexual battery on her. Immediately after the attack, the victim ran to a next door neighbor's house where she relayed the incident. Approximately one hour later, the victim told the same story to the police. The next door neighbor and the police officer were allowed to testify at trial to the story told them by the victim, over defense objection.

The appellate court examined the witnesses' statements and determined that they clearly constituted prior consistent statements of the victim. However, the appellate court also found that there was no express or implied charge of improper influence, motive or recent fabrication that would justify admitting the statements under section 90.801(2)(b). While the cross-examination of the victim did point out inconsistencies in the pre-trial and trial versions of the events, there was no indication that the victim was changing her story at trial or of improper influence or a motive to falsify. The appellate court concluded that the prior consistent statements should not have been admitted under section 90.801(2)(b).

The appellate court stated that the statements were admissible under a common law exception to the hearsay rule in sexual battery cases known as the "first complaint" exception, and were admissible

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implied charge against him or improper influence, motive, or recent fabrication.

88. Id. at 372. The victim's child was asleep.
89. Id.
90. FLA. STAT. § 90.801(2)(b) (1989).
91. *McDonald*, 576 So. 2d at 373; *see* Monarca v. State, 412 So. 2d 443 (Fla. 5th Dist. Ct. App. 1982) (statements admissible to rebut the inference of consent which might be drawn from the silence of the victim); *see also* Ellis v. State, 6 So. 768 (1889) (where the exception was first recognized). The "first complaint" exception has been swallowed up under what was known as the *res gestae* exception to the hearsay rule. *See* Fitter v. State, 261 So. 2d 512 (Fla. 3d Dist. Ct. App. 1972); Gray v. State, 184 So. 2d 206 (Fla. 2d Dist. Ct. App. 1966).
as a spontaneous statement under section 90.803(1) or as an excited utterance under section 90.803(2). The appellate court, therefore, found the error in admitting the victim’s statements under 90.801(2)(b) to be harmless and sustained the defendant’s conviction.

C. Statements Made for the Purpose of Identification

The use of section 90.803(2)(c) invariably creates problems in trial which should not occur. Section 90.803 states that “a statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is: (c) One of identification of a person made after perceiving him.” This section is frequently abused when the proponent insists that every out of court identification falls under section 90.803(2)(c). Section 90.803(2)(c) is very specific and allows the use of out of court statements of identification when specific prerequisites are met. First, the declarant must testify at the trial or hearing. Second, the declarant must be subject to cross-examination regarding the statement. Third, the statement of identification must be made after the declarant perceives the assailant.

The typical tendency at trial is for the attorney to simply leave out one of the above-mentioned steps. This is keenly illustrated in Stanford v. State. In Stanford, the victim was attacked at his home by an indi-

93. Fla. Stat. § 90.803(2) (1989). The appellate court found that the statement to the police officer may not have been a spontaneous statement or an excited utterance, but that based on the admissibility of the other statements, this testimony was merely cumulative and harmless. McDonald, 578 So. 2d at 374.
95. Id.
96. Section 90.801(2)(c) makes the testimony of a witness who was present at the time of the identification admissible, if the person making the identification testifies at the trial and is subject to cross-examination concerning the identification (emphasis added in text).
97. The statement must come after the declarant perceives the identified person. It will be insufficient to merely identify the defendant to a third party without the initially perceiving the presence of the identified individual (emphasis added in text).
individual known to him. During trial, the court allowed, over objection, the testimony of the victim’s daughter and a neighbor named Ms. Hayes, identifying Stanford as the victim’s assailant. The daughter and Ms. Hayes testified to the identification made by the victim naming the person that he believed committed the crime. The daughter testified that on the day her father was attacked, her mother called her to come home immediately. Upon finding ambulance attendants treating her father, she asked her father who had beaten him and he responded with the defendant’s name. The next door neighbor, Susan Hayes, testified that when she asked the victim who had beaten him, he also responded with the defendant’s name.

The appellate court found that the testimony did not fit within the ambit of section 90.801(2)(c). Section 90.801(2)(c) specifically refers to a situation where the declarant sees the person after the criminal episode and identifies that person as the offender. The reasoning is simple. The out of court identification occurring shortly after the declarant perceives his assailant allows for a more reliable statement, one that is fresh in the declarant’s mind. To merely allow testimony regarding who the declarant believes committed the crime, without the need for perceiving the individual, would circumvent the rule and lead to unreliable and prejudicial statements being placed into evidence. In the present case, the appellate court found that although the evidence did not fit within the parameters of section 90.801(2)(c) it was harmless in light of other identification testimony and the overwhelming evidence of the defendant’s guilt.

99. Id. at 738. The victim lost consciousness after the attack and the next thing he remembered was waking up in a hospital a week later. The victim remembered what the defendant did to him because he opened his eyes during the attack. Id.

100. Id.

101. If numerous witnesses could be paraded before the court to testify that the declarant said this person did the crime (without complying with the prerequisites of section 90.801(2)(c)), it would lead to a situation where the jury could impossibly rely on a statement whose reliability is in doubt. The jury could arrive at an erroneous decision. What if the declarant did not get a good look at the individual, but was convinced of the person’s identity? Unnecessarily bolstering this unreliable testimony with other out of court statements of identification could lead the jury to improperly weigh the value of this testimony. The perceptions of individuals change dramatically when confronted with a stressful crisis. The jury should not be allowed to rely on inherently unreliable evidence as it probative value would be outweighed by the prejudicial effect this may have on the jury decision making process. This is especially true in close cases.

102. Stanford, 576 So.2d at 740-41. The reader should not misperceive the im-
D. **Statements for Purposes of Medical Diagnosis**

Hearsay statements made for the purposes of medical diagnosis are treated as an exception to the hearsay rule because of the strong motivation for declarants to be truthful when making statements to physicians for the purpose of diagnosis and treatment. Florida law recognizes the admissibility, as substantive evidence, of statements made to treating physicians but this exception only permits testimony relating to causation when it is reasonably pertinent to diagnosis or treatment. Additionally, the statements need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even family members can be included.

Problems in using section 90.803(4) generally arise when the statements being entered are not pertinent to diagnosis or treatment. Although statements which describe the inception or cause of an injury can fall within this hearsay exception, if they are reasonably pertinent to the treatment, pure statements of fault do not qualify.

103. FLA. STAT. § 90.803(4) (1989). This section states:

Statements made for purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment, or made by an individual who has knowledge of the facts and is legally responsible for the person who is unable to communicate the facts, which statements describe medical history, past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment.

Id.


105. See Saul v. MacArthur Found., 499 So. 2d 917 (Fla. 4th Dist. Ct. App. 1986) (statement that the patient fell by catching the heel of her toe on the carpet not admissible under section 90.803(4) since the statement was not relevant to treatment or diagnosis); Torres-Arboledo v. State, 524 So. 2d 403 (Fla. 1988) (statement by victim to emergency room doctor that he had been shot admissible under section 90.803(4) since it was pertinent to treatment and diagnosis of his wounds, but statement that black people tried to steal his medallion not admissible since it was a fact not pertinent to treatment or diagnosis).

106. In United States v. Iron Shell, 633 F.2d 77, 82-85 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981), the court stated that a statement regarding the inception or general cause of an injury should be admitted if: 1) the statement is reasonably pertinent to the decision that is affirmed even though an evidentiary error is made during the trial. If the evidence is overwhelming, the evidentiary error will usually be considered harmless. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) (regarding application of the harmless error standard in Florida). However, in the closer cases, or the cases fraught with numerous errors, harmless error will not be a safe harbor and evidentiary errors will cause reversals.
In *Visconti v. Hollywood Rental Service*, the plaintiff sustained personal injuries as a result of a 'slip and fall' while on the defendant's property. The plaintiff presented evidence that her fall was caused by the defendant's negligent maintenance of the floor surface. The defendant's response was that the cause of the plaintiff's injury was not the lack of proper maintenance on the floor but the defendant's own negligence. During trial the defense admitted, on cross-examination and over the plaintiff's objections, various hospital and emergency room medical reports which stated that the Plaintiff "fell coming out of the pool." These documents were entered during defendant's cross-examination of the plaintiff as impeachment of her testimony. The appellate court found that if a proper foundation had been laid for the admission of these records, statements which relate to the cause of the fall are generally not statements made for the purpose of medical diagnosis or treatment and are, therefore, not admissible under the hearsay exception as statements made for purposes of medical diagnosis or treatment.

The plaintiff denied making the statements reflected in the multitude of hospital records. The case is very puzzling from a logical standpoint. Though the court was generally correct in its assessment regarding the use of section 90.803(4), based on the limited fact pattern, the dicta in the case was internally inconsistent. If the material was being entered for impeachment purposes then it was not hearsay at all, but merely demonstrates that the plaintiff made a statement, at a different time, inconsistent with the one made in court. The statements of the plaintiff could also have been considered an admission of a party opponent under section 90.803(18). Therefore, if the material could have been properly entered into evidence, but was merely entered under the wrong section of the evidence code, then the error should have been no more than harmless. The court could have considered that all the medical reports, with other notations not pertinent for the impeachment or admission, were prejudicial to the plaintiff, however, the opinion is silent regarding this concern. The failure to authenticate this material could have concerned the court, the plaintiff denied having made any such statements, but, once again, the opinion is silent.

Based on the limited facts it is hard to discern how or why the defense chose to enter this impeaching material in opposing counsel's case-in-chief, as opposed to calling the person who heard the statement and then using that person to impeach the plaintiff.
A case illustrating the correct use of section 90.803(4) is State v. Ochoa. In Ochoa, the Third District Court of Appeal reversed the trial court's order dismissing the charges of sexual battery against the defendant, based on defense counsel's ore tenus motion to dismiss at the completion of an evidentiary hearing on the defendant's motion in limine. The appellate court, after omitting the statements of the victims that identified the defendant as the perpetrator of the sexual battery, stated that:

the victims' statements to the physician indicated that they each had been touched in the genitalia by an adult male. The physical examination revealed conditions consistent with digital penetration and inconsistent with an accidental occurrence.

The appellate court determined that the statements were made for the purposes of medical diagnosis or treatment, since the reason for the visit was for a physical examination. The medical history was, therefore, pertinent to his diagnosis and the statements were appropriate under section 90.803(4).

as suggested by Judge Garrett. Id. (Garrett, J., concurring). This would have been more effective than merely attempting to enter documentary evidence in the plaintiff's case-in-chief.

The court also alludes to the fact that the records could have been admissible under the business records exception, 90.803(6), had the proper foundation been laid. However, Judge Garrett, in his concurring opinion, correctly points out that the plaintiff had no business duty to transmit her statement. This would preclude it from being entered as a business record. Id. at 198 n.1 (Garrett, J., concurring).

112. Id. at 859. It is a matter of utter disbelief that a trial court would rule on an oral motion to dismiss charges on such a serious case, or in any case for that matter, when the case law and the Rules of Criminal Procedure clearly indicate that there must be a pending written motion, Fla. R. Crim. P. 3.190(a) and adequate notice to the opposing party. It is no less surprising that some of the poorer judicial decisions come from those judicial circuits that are overburdened with cases. However, this is no excuse for failure to know, understand, and implement basic fundamentals of the law, which is oftentimes just plain common sense. Clearly, the ideals of due process, fundamental fairness, fair play and common sense seem to be lost in the ever present rush to move cases. Though attorneys have been criticized for overzealous advocacy bordering on unethical conduct, poor and unethical lawyering can only be blamed on those judges who tolerate, and thus tacitly approve, poor preparation and unethical conduct to continue in the courtroom without severe sanctions being imposed.

113. Id.
114. Id.
E. Records of Regularly Conducted Business Activity

Business records\textsuperscript{118} are recognized as a hearsay exception because the reliability of these records are demonstrated by: 1) systematic checking, 2) habits of precision developed by the regular and continuous practices of businesses, 3) the actual experience of businesses in relying upon the accuracy of its records, and 4) the duty to make accurate records as part of a continuing job or occupation. Whenever the business records exception is used, there inevitably seems to be an argument regarding the proper custodian of the records. More and more attorneys continue to harbor the notion that only the records custodian, or the person who made the record, is qualified under section 90.803(6)(a) to introduce business records. This is simply incorrect. Section 90.803(6)(a) specifically states that a “custodian or otherwise qualified witness” who has the necessary knowledge to testify as to how a particular record was made can lay the necessary foundation for the introduction of the record. Any witness who can testify to the method by which a particular record was made is a “qualified witness.”

An excellent example demonstrating the role of the business records exception is illustrated in \textit{Stern v. Gad}.\textsuperscript{118} In \textit{Stern}, two Colombian emerald dealers, Juan Vargas and Jose Stern, transacted various business dealings over a period of years. In 1985, Mr. Vargas died. Mr. Gad, a resident of New York and also a gem dealer, was appointed as the personal representative of Mr. Vargas’ estate. The decedent’s widow found five undated checks among the decedent’s effects. The

\begin{footnotesize}
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\item[115] FLA. STAT. § 90.803(6) (1989). The business record exception states: A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness. The term “business as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
\item[116] No evidence in the form of an opinion or diagnosis is admissible under paragraph (a) unless such opinion or diagnosis would be admissible under ss. 90.701-90.705 if the person whose opinion is recorded were to testify to the opinion directly.
\end{footnotes}
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checks accumulated total was $805,000. The personal representative, acting on his attorney's advice, deposited the checks. The checks were returned for insufficient funds. Upon the checks being returned for insufficient funds, the personal representative brought suit for payment on the five checks. Stern, the defendant in the case, counterclaimed for return of the checks. Mr. Stern claimed that the balance due the estate was $60,000, not $805,000. The defense claimed that the checks had been given to the decedent as security for purchases of emeralds, with the specific understanding that the checks would not be dated and deposited without the consent of Mr. Stern. The defense claimed that the account had been paid down to $60,000 by other checks.

During trial, the court excluded a ledger sheet recording the dollar transactions of the emerald dealers. The ledger sheet was maintained by Haim, Mr. Stern's son-in-law, to record the purchases from, and payments to, the decedent. Haim was a gem dealer in Miami but did not participate in the transactions between Mr. Stern and Mr. Vargas. Because Haim resided in Miami, he was asked by Mr. Stern to keep track of the gem transactions. The personal representative objected to the introduction of the ledger sheet stating that it did not qualify as a business record.

The appellate court stated that the personal representative's conclusory allegations were insufficient and found that the ledger was maintained in the regular course of business. The appellate court based this finding on testimony by Haim that entries in the account were regularly made and were intended to accurately reflect the outstanding balance in that account at any particular time. Haim testified that the data in the ledger came from information provided by Stern and Vargas, and when Haim wrote checks on the account, those entries were from his own personal knowledge. Finally, Haim testified that he, Vargas, and Stern met in February of 1984 and agreed that the outstanding balance shown on the ledger at that time was accurate. Based on this testimony the Third District Court of Appeal found that the ledger sheet qualified as a business record and the trial court erred by excluding this evidence.
F. The Public Records Exception

Public records are a recognized exception to hearsay. This exception recognizes the inconvenience which would result in requiring a public official who made a public document to testify to information contained in the document. The public official's duty to accurately record matters, the public's scrutiny of the public records, the lack of motive to falsify such documents, and the force of habit and routine which goes into recording public documents, provides the necessary assurances of reliability. Consequently, the rule excludes matters observed by police officers and other law enforcement personnel for logical reasons which would impugn the trustworthiness and reliability of public documents. It is a common belief that observations by police officers at the scene of a crime, during investigation, or when a defendant is arrested, are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the alleged defendant. This exclusion has now been
modified.

The only legislative change in the rules of evidence came in section 90.803(8). The legislature amended section 90.803(8) to add a final sentence which provides that the criminal case exclusion for records and reports of matters observed by a law enforcement officer do not apply to an "affidavit otherwise admissible under s. 316.1934(5)." An affidavit which contains the results of an individual's breath or blood test, as authorized by section 316.1932 or section 316.1933, is admissible under the public records exception by section 316.1934(5), if the statutory requirements are demonstrated in the affidavit. The requirements the affidavit must disclose are:

(a) The type of test administered and the procedures followed;
(b) The time of the collection of the blood or breath sample analyzed;
(c) The numerical results of the test indicating the alcohol content of the blood or breath;
(d) The type and status of any permit issued by the Department of Health and Rehabilitative Services that was held by the person who performed the test; and
(e) If the test was administered by means of a breath testing instrument, the date of performance of the most recent required maintenance on such instrument.

This modification belies the logic and purpose behind the public records exception and cuts against the trustworthiness and reliability of this exception. The affidavit is prepared in anticipation of litigation, presumably in an adversarial atmosphere. The reliability of this exception is emasculated, since the lack of motive to falsify no longer applies in situations of an adversarial nature. The underlying basis for the public records exception, which makes this hearsay statement trustworthy

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duty imposed by law "as to matters there was a duty to report; excluding in criminal cases matters observed by police officers or other law enforcement personnel", was added by the Senate Judiciary-Criminal Committee to make certain that a defendant's right to confrontation could not be abridged in a criminal case. The committee adopted the view of the Federal Rules of Evidence.

**FLA. STAT. ANN. § 90.803(8) (West 1979) (committee notes).**


126. **FLA. STAT. § 90.803(8) (1989).**

127. **FLA. STAT. § 316.1934(5) (1989).**
and reliable, is weakened by the legislative grafting of the rule, which is, once again, a legislative overreaction to the problem of drunk driving.128

The fate of this amendment will ultimately be decided in our court system in the years to come. It will, in all likelihood, not resolve the evidentiary problems associated with the presentation of this type of proof but will ultimately only spin off more unnecessary litigation for our appellate courts to decide. There will be an obvious problem of whether an affidavit introduced in a criminal trial will violate the defendant's right of confrontation. An affidavit such as this is not firmly rooted in our jurisprudence and the reliability of these affidavits must meet the test set out by the United States Supreme Court in Idaho v. Wright.129

G. Statements of a Child Victim

Section 90.803(23)130 creates a limited exception for hearsay

128. Drunk driving is a serious problem plaguing our nation. However, legislative amendments which are enacted to lessen the state's burden in a criminal case, will not solve the problem, only add to it. Once again, the legislature's attempt to respond to the public outcry of drunk driving could backfire on the wrongly accused defendant by unfairly preventing him from properly confronting the witnesses against him and thoroughly cross-examining the witnesses and evidence before the jury.


130. FLA. STAT. § 90.803(23) (1991). This section states:
    (a)Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statements made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:
    1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and
    2. The child either:
    a. Testifies; or
    b. is unavailable as a witness, provided that there is other corroborative
statements of children eleven years of age or less, if the statement describes an act of child abuse, or sexual abuse, as described by the child victim. The use of section 90.803(23) is limited to children with a physical, mental, emotional, or developmental age of eleven or less. The exception should not apply to statements of children who are witnesses but not victims. The exception is applicable to both criminal and civil cases.

The trial court must hold a hearing outside of the presence of the jury before a statement may be admitted under section 90.803(23). This hearing is to determine whether the circumstances surrounding the making of the statement demonstrates that the statement is reliable. The child does not have to be testimonially competent for the child's out-of-court statement to be admitted in evidence.

During the survey period, the Fifth District Court of Appeal decided an important case concerning out of court statements of a child victim under section 90.803(23). In Kopko v. State, the district court of appeal examined the issue of repetitive hearsay testimony recounting the child victim's out-of-court statements describing the criminal sexual acts.

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131. The language of the statute clearly indicates it application is only for the child victim and not a witness. Contra Russell v. State, 572 So. 2d 940 (Fla. 5th Dist. Ct. App. 1990) (statements of a child witness, not victim, admissible under section 90.803(23)).


134. 577 So. 2d 956 (Fla. 5th Dist. Ct. App. 1991).
The child victim in this case was nine years old when she reported sexual abuse allegedly perpetrated by her stepfather, David Kopko. The defendant, David Kopko, had been married to the child's mother for approximately three years. Mrs. Kopko also had one son from a previous marriage and had one daughter with the defendant. Shortly after Mrs. Kopko told her oldest daughter, the victim, that she had decided to leave the defendant, the daughter described various sexual abuse by the defendant.138

Mrs. Kopko left the marital home taking all three children. A few days afterwards she met with a police officer and described the sexual abuse of her daughter. Afterwards the child victim made a videotaped statement concerning the incidents of sexual abuse by the defendant. The statement was taken in the form of an interview with a counselor for the Child Protection Team (CPT). The child victim was also examined by a CPT physician but no signs of abuse were discovered. The defendant eventually sued his wife for divorce and custody of his natural daughter. The defendant was later charged with sexual battery and lewd assault on the step-daughter.138

At trial, the state called: the child victim; Mrs. Kopko, the child's mother; the CPT counselor; and, the CPT physician who examined the child. The child victim's testimony was clear and concise and very similar to the statements she made to her mother, the CPT counselor, and the physician. The defense objected to the hearsay testimony of the CPT counselor and the physician, who related the child victim's statements.137 The trial court overruled these objections.

The defendant testified at trial and denied all the charges. The defendant described the family situation and testified that he and his wife fought regularly during their marriage regarding discipline, the children, and money. The defendant testified that his ex-wife would do anything to prevent him from obtaining custody of their youngest daughter.138 The jury found the defendant guilty of sexual battery and lewd assault on a child. The defendant, who had no prior record, was sentenced to life in prison, with a minimum mandatory sentence of

135. Id. at 957.
136. Id.
137. Id. at 958. The videotape of the child was originally excluded as evidence in the trial. However, on cross-examination the defense "opened the door" to this evidence and the trial court allowed the state to play portions of the videotaped interview for the jury.
138. Kopko, 577 So. 2d at 959.
twenty-five years.\textsuperscript{139}

The appellate court quickly dispatched the issues regarding the sufficiency of the notice and the trustworthiness of the hearsay statements. The district court found that the lack of notice did not create reversible error\textsuperscript{140} and found that the trial court did not abuse its discretion in admitting the hearsay statements.\textsuperscript{141} The appellate court then turned its attention to what it perceived as the "real problem in this case... why the CPT counselor or doctor should have testified at all about what the child had said out-of-court, or why the tape was played."\textsuperscript{142} The district court’s concern centered upon the unnecessary bolstering of the child victim’s statements through a parade of professional witnesses in a case with no physical evidence to corroborate these statements:

By having the child testify and then by routing the child’s words through respected adult witnesses, such as doctors, psychologists, CPT specialists, police and the like, with the attendant sophistication of vocabulary and description, there would seem to be a real risk that the testimony will take on an importance or appear to have an imprimatur of truth far beyond the content of the testimony. It is worrying to see, in a case such as this one, with virtually no evidence to corroborate the testimony of either the alleged victim or the alleged abuser, that only the victim’s version of events is allowed to be repeated through different (professional) witnesses.\textsuperscript{143}

The district court examined other cases where a "parade" of witnesses unnecessarily bolstered the child victim’s credibility\textsuperscript{144} and examined how these district courts analyzed the problem. The district court con-

\textsuperscript{139} \textit{Id.}

\textsuperscript{140} \textit{Id.} The State’s notice requirement was defective because the State did not set out what factors the State would argue to establish trustworthiness of the statements. The appellate court did not find reversible error due to the untimely notice because the arguments actually made by the state were discernible from viewing the tape and did not catch the defense by surprise. \textit{Id.}

\textsuperscript{141} \textit{Id.} The appellate court found that the admissibility of the statements was a judgment call for the trial court and stated that the trial court did not abuse its discretion in concluding that the hearsay statements were reliable enough to be admitted. \textit{Id.} at 960.

\textsuperscript{142} \textit{Kopko}, 577 So. 2d at 960.

\textsuperscript{143} \textit{Id.} at 960-61.

\textsuperscript{144} \textit{Id.} at 961; see \textit{Griffin v. State}, 526 So. 2d 752 (Fla. 1st Dist. Ct. App. 1988); \textit{Lazarowicz v. State}, 561 So. 2d 392 (Fla. 3d Dist Ct. App. 1990).
cluded that even though the trial court did not err in ruling that the hearsay statements of the child victim were admissible under section 90.803(23), "it was reversible error to utilize this hearsay exception as a device to admit prior consistent statements."\footnote{145} The district court stated that neither the statute nor the legislative history discuss the problem of prior consistent statements bolstering the victim's in-court testimony.\footnote{146} Additionally, the district court noted that if section 90.803(23) were meant to abrogate prior case law forbidding the repetitious use of prior statements to bolster in-court testimony, then such legislative intent should have been made clear. Absent a clear expression of such intent the district court held that:

where a child victim is able at trial to fully and accurately recount the crime perpetrated on him or her, it is error to allow the introduction of prior consistent statements made by the child. Where the child's out-of-court statements are needed to provide evidence of any aspect of the crime or related events which the testifying or unavailable child cannot adequately supply, such out-of-court statements are available pursuant to section 90.803(23).\footnote{147}

Applying this standard to the present case the district court found that the testimony of the CPT counselor and the CPT physician was merely an adult's reiteration of the child's prior statements consistent with her trial testimony and the admission of this evidence constituted reversible error.\footnote{148}

Though the district court may have reached the correct result, the analysis may be flawed. In many instances admitted hearsay statements will bolster the credibility of the hearsay declarant, in addition to being entirely consistent with prior testimony and evidence. Hearsay testimony is admissible when subject to a hearsay exception because the statement is considered reliable and trustworthy and, hopefully, relevant to some point in issue. Under the district court's analysis, even though the testimony is admissible pursuant to 90.803(23) and relevant, it must be excluded if any of the prior statements are consistent with the child's previous testimony. This decision will not give the

\begin{itemize}
\item \footnote{145} \textit{Id.} at 962.
\item \footnote{146} \textit{Id.; see} Glendening v. State, 536 So. 2d 212 (Fla. 1988) (where the court discusses the impropriety of having a witness vouch for the credibility of a hearsay declarant).
\item \footnote{147} \textit{Kopko}, 577 So. 2d at 962.
\item \footnote{148} \textit{Id.}
\end{itemize}
lower courts the guidance necessary to come to an appropriate evidentiary resolution when confronted with a child-victim's hearsay statements. Grafting an exception onto an evidentiary rule such as 90.803(23) is unnecessary and inappropriate.

The proper analysis should not lie with an exception grafted onto section 90.803(23), but instead should simply lie with the proper evidentiary analysis of relevant evidence. The court should simply determine if the hearsay statements of the child are logically relevant. In other words, do the statements prove or disprove a material fact? If the statements are logically relevant, then are the statements legally relevant? Does some statutory or evidentiary rule, such as section 90.403, exclude these logically relevant hearsay statements? By simply analyzing the hearsay statements pursuant to section 90.403, the proper analysis can be arrived at by determining if the probative value of the hearsay statements are substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. By applying this analysis, and determining whether the repetitious, cumulative testimony is substantially outweighed by one of the enumerated vices stated in section 90.403, the need to graft exceptions onto the hearsay rules will be needless.

H. Dying Declarations

Statements made by an unavailable declarant are admissible under section 90.804(2)(b) if they are made while the declarant believed that death was imminent and the statements concern the cause of what the declarant believed to be his or her impending death or the circumstances of the impending death. The exception is rooted in the belief that there is a powerful psychological pressure to be truthful when death is imminent which transcends all other motivations which a declarant may have to fabricate false statements.

149. Fla. Stat. § 90.804(2)(b) (1989). The section is commonly known as the hearsay exception for dying declarations:
(2) Hearsay Exceptions. The following are not excluded under s. 90.802, provided that the declarant is unavailable as a witness:
(b) Statement under belief of impending death. In a civil or criminal trial, a statement made by a declarant while reasonably believing that his death was imminent, concerning the physical cause or instrumentalities of what he believed to be his impending death or the circumstances surrounding his impending death.

Id.
An interesting case was decided by the Fourth District Court of Appeal during the survey period. In *State v. Weir*, the trial court declared section 90.804(2)(b) unconstitutional. In declaring the statute unconstitutional the trial court found that (1) the dying declaration statute contains an unconstitutional presumption that the dying declarant was speaking the truth; (2) the statute is based on religious beliefs that a declarant would not want to die with a lie on his lips, a *per se* judicial establishment of religion based on life after death; (3) the statute denies an accused the right to confront his accuser, a confrontation clause violation and; (4) the evidentiary section impermissibly shifts the burden of proof to the accused. The district court examined each section and reversed the trial court’s ruling.

Examining the claim that the dying declaration contains an unconstitutional presumption, the district court stated that the “admission of dying declarations is justified on the grounds of public necessity, manifest justice and the sense that impending death makes a false statement by the decedent improbable.” The district court disagreed that the dying declaration created an irrebuttable presumption of truth. The district court felt that the hearsay declarant, and the hearsay statement, can be impeached or discredited by other statements contrary to it. This would preserve the necessary requirement that the court determine if the proper predicate for the dying declaration has been laid and after the evidence is admitted it is for the jury to decide how much weight and credibility the evidence deserves. Additionally, evidence which demonstrates that the declarant did not accurately observe the

150. 569 So. 2d 897 (Fla. 4th Dist. Ct. App. 1990).
151. *Id.* at 899.
152. *Id.* at 900.
153. *Fla. Stat.* § 90.806 (1989) specifically allows for a hearsay declarant to be impeached as if he were a witness:

(1) When a hearsay statement has been admitted in evidence, credibility of the declarant may be attacked and, if attacked, may be supported by any evidence that would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time inconsistent with his hearsay statement is admissible, regardless of whether or not the declarant has been afforded an opportunity to deny or explain it.

(2) If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

*Id.*
facts recounted may be grounds for excluding the dying declaration. Therefore, since the dying declaration can be attacked and demonstrated to be untruthful as illustrated above, the district court felt it does not create an *irrebuttable* presumption of truth.

The district court next examined the claim that the dying declaration constitutes a judicial establishment of religion. The district court acknowledged that the underpinnings and early use of the dying declaration was premised in part on prevailing religious values in place centuries ago. However, the district court felt that there is a tremendous psychological pressure to be truthful when death is imminent which does not spring from purely religious motives.

The district court examined the confrontation clause issue and stated that "[t]his proposition has been soundly defeated by case law and authorities." If the statement falls within a firmly rooted hearsay exception the confrontation clause will not be violated.

Finally, the district court addressed the issue that the dying declaration shifts the burden of proof to the accused. The district court noted that the dying declaration does not impose any affirmative defense of innocence on the defendant but merely allows evidence to be admitted because of the public necessity and manifest injustice which would result in excluding evidence which meets the statutory prerequisites. Ultimately, the burden of proof remains with the State to prove the accused guilty beyond a reasonable doubt. The dying declaration does not shift the burden of proof to the accused to prove his innocence.

**VI. CONCLUSION**

Though few dramatic changes occurred during the survey period, the legislative change in the public records exception will probably begin to generate new case law in the coming year. The change will surely cause numerous dilemmas as the trial courts are left to deal with the various evidentiary problems brought on by the legislature's at-


155. *Id.* at 901. The court noted that many criminal statutes can be traced back to Biblical times. The prohibition against murder, or theft, can be traced directly to the ten commandments. Even so, the district court felt that such a challenge to these statutes on this ground would be absurd. *Id.*

156. *Id.*

157. *Id.* at 902.
tempt to devise needless short cuts to evidentiary proof. The long range burden of unraveling these problems will be thrust upon the appellate courts as more and more attorneys begin to utilize the new evidentiary changes. If any one thing is certain, it’s that the appellate courts will continue to be busy with more evidentiary issues as the legislature continues to attempt to fine tune the evidence code and the trial courts continue to contend with these changes.