Yontef v. Copelow

Court of Appeal of Florida, Fourth District

May 27, 2020, Decided

No. 4D19-2401

Reporter
294 So. 3d 953 *; 2020 Fla. App. LEXIS 7393 **; 45 Fla. L. Weekly D 1237

SHARON YONTEF, Individually and as Personal Representative of the Estate of Sanford Copelow, and as Trustee of the Sanford Copelow Revocable Inter Vivos Trust Under Agreement Dated October 23, 1995, as Amended and Restated on October 11, 2011, Appellant, v. JASON COPELOW, Appellee.

Prior History: **[**1]** Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Charles E. Burton, Judge; L.T. Case No. 502014CP005960XXXSB.

Core Terms

attorney's fees, trial court's order

Counsel: Seth B. Burack of Fox Rothschild LLP, West Palm Beach, for appellant.

Scott A Cole of Cole, Scott & Kissane, P.A., Miami, for appellee.

Judges: LEVENSON, JEFFREY R., Associate Judge. CIKLIN and KLINGENSMITH, JJ., concur.

Opinion by: LEVENSON, JEFFREY R

Opinion

[*953] LEVENSON, JEFFREY R., Associate Judge.

Appellant Sharon Yontef appeals the trial court's order directing her to pay Appellee Jason Copelow $30,124.89 in connection with breaches of the parties' Distribution Agreement. We affirm the trial court's order in all respects without comment, but reverse the trial court's award of $6,000.00 in attorney's fees to Appellee.

The client's affidavit was the only submission in support of the attorney's fee claim. An award of attorney's fees is improper where it is not supported by the testimony of the attorney who performed the services. *See Rodriguez v. Campbell, 720 So. 2d 266, 267 (Fla. 4th DCA 1998)*. Because the record does not contain this essential evidentiary support, we reverse and remand to the circuit court to conduct an additional hearing on this issue.

Affirmed in part, Reversed in part, and Remanded.

CIKLIN and KLINGENSMITH, JJ., concur. **[**2]**

End of Document

Fla. Stat. § 90.801

Current through all 2020 general legislation.

LexisNexis® Florida Annotated Statutes > Title VII. Evidence. (Chs. 90 — 92) > Chapter 90. Evidence Code. (§§ 90.101 — 90.958)

§ 90.801. Hearsay; definitions; exceptions.

(1) The following definitions apply under this chapter:

(a)A "statement" is:

1.An oral or written assertion; or

2.Nonverbal conduct of a person if it is intended by the person as an assertion.

(b)A "declarant" is a person who makes a statement.

(c)"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(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:

(a) Inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(b) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication; or

(c) One of identification of a person made after perceiving the person.

History

S. 1, ch. 76-237; s. 1, ch. 77-77; ss. 19, 22, ch. 78-361; ss. 1, 2, ch. 78-379; s. 2, ch. 81-93; s. 497, *ch. 95-147*.

Annotations

LexisNexis® Notes

Case Notes

Administrative Law: Agency Adjudication: Hearings: General Overview

Civil Procedure: Venue: Motions to Transfer: General Overview

Civil Procedure: Remedies: Costs & Attorney Fees: General Overview

Fla. Stat. § 90.802

Current through all 2020 general legislation.

LexisNexis® Florida Annotated Statutes > Title VII. Evidence. (Chs. 90 — 92) > Chapter 90. Evidence Code. (§§ 90.101 — 90.958)

§ 90.802. Hearsay rule.

Except as provided by statute, hearsay evidence is inadmissible.

History

S. 1, ch. 76-237; s. 1, ch. 77-77; s. 22, ch. 78-361; s. 1, ch. 78-379.

Annotations

LexisNexis® Notes

Case Notes

Criminal Law & Procedure: Criminal Offenses: Crimes Against Persons: Violation of Protective Orders: Application & Issuance

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Burglary & Criminal Trespass: Burglary: Elements

Criminal Law & Procedure: Trials: Defendant's Rights: Right to Confrontation

Criminal Law & Procedure: Sentencing: Imposition: Evidence

Criminal Law & Procedure: Sentencing: Restitution

Criminal Law & Procedure: Appeals: Reversible Errors: Evidence

Criminal Law & Procedure: Appeals: Standards of Review: Harmless & Invited Errors: Evidence

Evidence: Hearsay: General Overview

Evidence: Hearsay: Exceptions: General Overview

Evidence: Hearsay: Exceptions: Business Records

Evidence: Hearsay: Exceptions: Business Records: General Overview

Evidence: Hearsay: Exceptions: Former Testimony of Unavailable Declarants

Fla. Stat. § 90.803

Current through all 2020 general legislation.

LexisNexis® Florida Annotated Statutes > Title VII. Evidence. (Chs. 90 — 92) > Chapter 90. Evidence Code. (§§ 90.101 — 90.958)

§ 90.803. Hearsay exceptions; availability of declarant immaterial.

The provision of *s. 90.802* to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(1) Spontaneous statement. — A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness.

(2) Excited utterance. — A statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then-existing mental, emotional, or physical condition. —

(a)A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:

1.Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.

2.Prove or explain acts of subsequent conduct of the declarant.

(b) However, this subsection does not make admissible:

1.An after-the-fact statement of memory or belief to prove the fact remembered or believed, unless such statement relates to the execution, revocation, identification, or terms of the declarant's will.

2.A statement made under circumstances that indicate its lack of trustworthiness.

(4) Statements for purposes of medical diagnosis or treatment. — 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 inceptions or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. — A memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. A party may read into evidence a memorandum or record when it is admitted, but no such memorandum or record is admissible as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted business activity. —

(a)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, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), 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.

(b) Evidence in the form of an opinion or diagnosis is inadmissible 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.

(c)A party intending to offer evidence under paragraph (a) by means of a certification or declaration shall serve reasonable written notice of that intention upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer in evidence to provide to any other party a fair opportunity to challenge the admissibility of the evidence. If the evidence is maintained in a foreign country, the party intending to offer the evidence must provide written notice of that intention at the arraignment or as soon after the arraignment as is practicable or, in a civil case, 60 days before the trial. A motion opposing the admissibility of such evidence must be made by the opposing party and determined by the court before trial. A party's failure to file such a motion before trial constitutes a waiver of objection to the evidence, but the court for good cause shown may grant relief from the waiver.

(7) Absence of entry in records of regularly conducted activity. — Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, of a regularly conducted activity to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances show lack of trustworthiness.

(8) Public records and reports. — Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness. The criminal case exclusion shall not apply to an affidavit otherwise admissible under s. 316.1934 or s. 327.354.

(9) Records of vital statistics. — Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if a report was made to a public office pursuant to requirements of law. However, nothing in this section shall be construed to make admissible any other marriage of any party to any cause of action except for the purpose of impeachment as set forth in s. 90.610.

(10) Absence of public record or entry. — Evidence, in the form of a certification in accord with s. 90.902, or in the form of testimony, that diligent search failed to disclose a record, report, statement, or data compilation or entry, when offered to prove the absence of the record, report, statement, or data compilation or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation would regularly have been made and preserved by a public office and agency.

(11) Records of religious organizations. — Statements of births, marriages, divorces, deaths, parentage, ancestry, relationship by blood or marriage, or other similar facts of personal or family history contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. — Statements of facts contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, when such statement was certified by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and when such certificate purports to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. — Statements of fact concerning personal or family history in family Bibles, charts, engravings in rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. — The record of a document purporting to establish or affect an interest in property, as proof of the contents of the original recorded or filed document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording or filing of the document in the office.

(15) Statements in documents affecting an interest in property. — A statement contained in a document purporting to establish or affect an interest in property, if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. — Statements in a document in existence 20 years or more, the authenticity of which is established.

(17) Market reports, commercial publications. — Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations if, in the opinion of the court, the sources of information and method of preparation were such as to justify their admission.

(18) Admissions. — A statement that is offered against a party and is:

(a) The party's own statement in either an individual or a representative capacity;

(b)A statement of which the party has manifested an adoption or belief in its truth;

(c)A statement by a person specifically authorized by the party to make a statement concerning the subject;

(d)A statement by the party's agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship; or

(e)A statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph.

(19) Reputation concerning personal or family history. — Evidence of reputation:

(a) Among members of a person's family by blood, adoption, or marriage;

(b) Among a person's associates; or

(c) In the community,

concerning a person's birth, adoption, marriage, divorce, death, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history. — Evidence of reputation:

(a) In a community, arising before the controversy about the boundaries of, or customs affecting lands in, the community.

(b) About events of general history which are important to the community, state, or nation where located.

(21) Reputation as to character. — Evidence of reputation of a person's character among associates or in the community.

(22) Former testimony. — Former testimony given by the declarant which testimony was given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination; provided, however, the court finds that the testimony is not inadmissible pursuant to *s. 90.402* or *s. 90.403*.

(23) Hearsay exception; statement of child victim. —

(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 statement made by a child victim with a physical, mental, emotional, or developmental age of 16 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 evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to *s. 90.804(1)*.

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

(24) Hearsay exception; statement of elderly person or disabled adult. —

(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 statement made by an elderly person or disabled adult, as defined in *s. 825.101*, describing any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act on the declarant elderly person or disabled adult, 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 elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate; and

2.The elderly person or disabled adult is unavailable as a witness, provided that there is corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the elderly person's or disabled adult's participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before the trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the elderly person's or disabled adult's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

History

S. 1, ch. 76-237; s. 1, ch. 77-77; s. 1, ch. 77-174; ss. 20, 22, ch. 78-361; ss. 1, 2, ch. 78-379; s. 4, ch. 85-53; s. 11, ch. 87-224; s. 2, ch. 90-139; s. 3, ch. 90-174; s. 12, ch. 91-255; s. 498, ch. 95-147; s. 1, ch. 95-158; s. 2, ch. 96-330; s. 1, ch. 98-2; s. 2, ch. 2003-259; s. 1, ch. 2013-98, eff. Jan. 1, 2014; s. 1, ch. 2014-200, effective October 1, 2014.

Annotations

LexisNexis® Notes

Notes

Editor's notes.

Section 8, ch 2013-98, provides: "Except as otherwise expressly provided in this act, this act shall take effect January 1, 2014, except that, before March 1, 2014, the Department of Law Enforcement or any other criminal justice agency is not required to comply with an order to expunge a criminal history record as required by this act."

Amendments.

The 2003 amendment by s. 2, ch. 2003-259, effective July 1, 2003, in (6)(a) inserted "or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11)"; made a stylistic change in (6)(b); and added (6)(c).

The 2013 amendment substituted "age of 16" for "age of 11" in the introductory language of (23)(a).

The 2014 amendment deleted former (24)(a)2.a., which read: "Testifies; or"; deleted the (24)(a)2.b. designation; and made a stylistic change.

Fla. Stat. § 90.901

Current through all 2020 general legislation.

LexisNexis® Florida Annotated Statutes > Title VII. Evidence. (Chs. 90 — 92) > Chapter 90. Evidence Code. (§§ 90.101 — 90.958)

§ 90.901. Requirement of authentication or identification.

Authentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

History

S. 1, ch. 76-237; s. 1, ch. 77-77; s. 22, ch. 78-361; s. 1, ch. 78-379.

Annotations

LexisNexis® Notes

Case Notes

Commercial Law (UCC): Negotiable Instruments (Article 3): General Provisions & Definitions: Definitions: Negotiable & Nonnegotiable Instruments

Criminal Law & Procedure: Search & Seizure: Warrantless Searches: Consent to Search: General Overview

Criminal Law & Procedure: Trials: Motions for Acquittal

Criminal Law & Procedure: Sentencing: Appeals: General Overview

Criminal Law & Procedure: Sentencing: Capital Punishment: Bifurcated Trials

Criminal Law & Procedure: Sentencing: Imposition: General Overview

Evidence: Authentication

Evidence: Authentication: General Overview

Evidence: Authentication: Self-Authentication

Evidence: Authentication: Chain of Custody

Evidence: Demonstrative Evidence: Recordings

Fla. Stat. § 90.902

Current through all 2020 general legislation.

LexisNexis® Florida Annotated Statutes > Title VII. Evidence. (Chs. 90 — 92) > Chapter 90. Evidence Code. (§§ 90.101 — 90.958)

§ 90.902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required for:

(1)A document bearing:

(a)A seal purporting to be that of the United States or any state, district, commonwealth, territory, or insular possession thereof; the Panama Canal Zone; the Trust Territory of the Pacific Islands; or a court, political subdivision, department, officer, or agency of any of them; and

(b)A signature by the custodian of the document attesting to the authenticity of the seal.

(2)A document not bearing a seal but purporting to bear a signature of an officer or employee of any entity listed in subsection (1), affixed in the officer's or employee's official capacity.

(3) An official foreign document, record, or entry that is:

(a) Executed or attested to by a person in the person's official capacity authorized by the laws of a foreign country to make the execution or attestation; and

(b) Accompanied by a final certification, as provided herein, of the genuineness of the signature and official position of:

1.The executing person; or

2.Any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation.

The final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States or a diplomatic or consular official of the foreign country assigned or accredited to the United States. When the parties receive reasonable opportunity to investigate the authenticity and accuracy of official foreign documents, the court may order that they be treated as presumptively authentic without final certification or permit them in evidence by an attested summary with or without final certification.

(4)A copy of an official public record, report, or entry, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification by certificate complying with subsection (1), subsection (2), or subsection (3) or complying with any act of the Legislature or rule adopted by the Supreme Court.

(5) Books, pamphlets, or other publications purporting to be issued by a governmental authority.

(6) Printed materials purporting to be newspapers or periodicals.

(7) Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Commercial papers and signatures thereon and documents relating to them, to the extent provided in the Uniform Commercial Code.

(9) Any signature, document, or other matter declared by the Legislature to be presumptively or prima facie genuine or authentic.

(10) Any document properly certified under the law of the jurisdiction where the certification is made.

(11) An original or a duplicate of evidence that would be admissible under s. 90.803(6), which is maintained in a foreign country or domestic location and is accompanied by a certification or declaration from the custodian of the records or another qualified person certifying or declaring that the record:

(a) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters;

(b) Was kept in the course of the regularly conducted activity; and

(c) Was made as a regular practice in the course of the regularly conducted activity,

provided that falsely making such a certification or declaration would subject the maker to criminal penalty under the laws of the foreign or domestic location in which the certification or declaration was signed.

History

S. 1, ch. 76-237; s. 1, ch. 77-77; s. 1, ch. 77-174; s. 22, ch. 78-361; s. 1, ch. 78-379; s. 501, ch. 95-147; s. 3, ch. 2003-259.

Annotations

LexisNexis® Notes

Notes

Amendments.

The 2003 amendment by s. 3, ch. 2003-259, effective July 1, 2003, added (11).

Case Notes

Commercial Law (UCC): Negotiable Instruments (Article 3): General Provisions & Definitions: Definitions: Negotiable & Nonnegotiable Instruments

Constitutional Law: Bill of Rights: Fundamental Rights: Criminal Process: Right to Confrontation

Walker v. Harley-Anderson

Court of Appeal of Florida, Fourth District

September 9, 2020, Decided

No. 4D19-2216

Reporter
301 So. 3d 299 *; 2020 Fla. App. LEXIS 12716 **; 45 Fla. L. Weekly D 2116; 2020 WL 5372302

Reversed and remanded with directions.

KENDRIA WALKER, Appellant, v. TAYLA HARLEY-ANDERSON, Appellee.

Prior History: **[**1]** Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Michael G. Kaplan, Judge; L.T. Case No. DVCE 19-004177.

Core Terms

text message, authenticated, messages, texts, phone number, phone, trial court, nephew, circumstances, email, pages, injunction, match

Case Summary

Overview

HOLDINGS: [1]-The trial court abused its discretion by admitting text messages in appellee's action seeking an injunction for protection against stalking because the text messages, which showed threats made against appellee, were the sole evidence to support the entry of the injunction, but the messages were not sufficiently authenticated, § 90.901, Fla. Stat. (2019).

Outcome

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Authentication

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN1 **Standards of Review, Abuse of Discretion**

Review of a trial court's determination regarding the authentication of evidence is for an abuse of discretion. However, a trial court's discretion is limited by the rules of evidence.

Evidence > Authentication

Evidence > Admissibility > Statements as Evidence > Parol Evidence

HN2 **Evidence, Authentication**

In determining whether the evidence submitted is sufficient for the purpose of authentication, a trial judge must evaluate each instance on its own merits, there being no specific list of requirements for such a determination. Evidence may be authenticated by appearance, content, substance, internal patterns, or other distinctive characteristics taken in conjunction with

the circumstances. In addition, the evidence may be authenticated either by using extrinsic evidence, or by showing that it meets the requirements for self-authentication.

Evidence > Authentication

HN3 **Evidence, Authentication**

Testimony that a person received a text or email from another is not sufficient, by itself, to authenticate the identity of the sender. Other factors can circumstantially authenticate the text. Circumstances recognized as sufficient to meet the test of authenticity include when a letter is written disclosing information which is likely known only to the purported author.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN4 **Pleadings, Rule Application & Interpretation**

Evidence may be authenticated by examination of its appearance, contents, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances.

Evidence > Authentication

HN5 **Evidence, Authentication**

Authentication for the purpose of admission is a relatively low threshold that only requires a prima facie showing that the proffered evidence is authentic.

Counsel: Kendria Walker, Coral Springs, Pro se.

No appearance for appellee.

Judges: WARNER, J. GROSS and GERBER, JJ., concur.

Opinion by: WARNER

Opinion

[*300] WARNER, J.

In this appeal of a final judgment of injunction for protection against stalking, the appellant contends that the trial court erred by admitting text messages showing threats made against the appellee, the sole evidence to support the entry of the injunction. We hold that the messages were not sufficiently authenticated and should not have been considered by the trial court. Therefore, we reverse.

Appellee filed a petition for injunction for protection against stalking. In it she contended that appellant had sent her multiple text messages threatening her and her family. The court entered an ex parte temporary injunction. Appellant then filed a counterpetition against appellee, also alleging **[*301]** stalking through multiple text messages. The court proceeded to a final hearing on the petition and counter-petition.

At the final hearing, appellee testified that she did not personally know appellant, but she knew that appellant had a relationship **[**2]** with appellee's nephew, which apparently had fallen apart. As a result, appellee stated that she received twenty harassing messages over a period of about six months and then fifteen in one day, threatening violence against her and her family.

Appellee offered a series of ten pages of text messages into evidence. Appellant objected, contending that she did not recognize the telephone numbers from which the messages were sent. Over objection, the court admitted the messages. The trial court asked appellee how she knew that the messages were from appellant. After much back and forth, appellee said she knew the messages were from appellant because of the content of the messages, that they were intended to harass her, and appellant had stated that she would harass appellee's nephew's family.

The court then asked appellant if she sent the text messages. Appellant denied sending the text messages and testified that she did not know who sent them. She

did not recognize the phone numbers. Her phone records were entered as an exhibit. The phone numbers on the texts to appellee did not match the phone number in appellant's record. Appellant then presented the evidence of threatening text messages **[**3]** that she had received. Like appellee, she did not specifically know that the text messages were from appellee but concluded that, based on their content, they had to be from someone in the nephew's family.

After the presentation of evidence, the court acknowledged in its ruling that the texts sent to both appellant and appellee were threatening and would promote fear and anxiety in the receiver. As to appellant's counterpetition, the court found that appellant candidly acknowledged that she did not know specifically who sent the messages. Therefore, the court could not enter a final judgment against appellee on the counter petition. As to appellee's petition, the court found that the texts most likely came from appellant "because there's no alternative that's been provided. So, I don't know who else would have done that and that may be just in part given the nature of the relationships here." The court then entered a final judgment in favor of appellee, and appellant now appeals that judgment.

Appellant argues that the court erred in admitting the text messages, because they were not authenticated. ***HN1***[↑] Review of a trial court's determination regarding the authentication of evidence is for **[**4]** an abuse of discretion. *Mullens v. State, 197 So. 3d 16, 25 (Fla. 2016)*. However, a trial court's discretion is limited by the rules of evidence. *Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001)*.

Section 90.901, Florida Statutes (2019) provides: "[a]uthentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

HN2[↑] "In determining whether the evidence submitted is sufficient for this purpose [of authentication], the trial judge must evaluate each instance on its own merits, there being no specific list of requirements for such a determination." *Justus v. State, 438 So. 2d 358, 365 (Fla. 1983)*; *Symonette v. State, 100 So. 3d 180, 183 (Fla. 4th DCA 2012)*. "Evidence may be authenticated by appearance, content, substance, internal patterns, or other distinctive characteristics taken in conjunction **[*302]** with the circumstances. In addition, the evidence may be authenticated either by using extrinsic evidence, or by showing that it meets the requirements for self-authentication." *Jackson v. State, 979 So. 2d 1153, 1154 (Fla. 5th DCA 2008)*.

A few cases involve the authentication of text messages. In *Symonette*, for instance, we addressed the question of whether text messages from the defendant's phone were unauthentic hearsay. *100 So. 3d at 183*. In that case, a detective recovered the cell phone from the defendant and then **[**5]** a search warrant was executed on the defendant's phone which revealed the text messages. The co-defendant driver testified that she texted the defendant while they were sitting next to each other and then continued to text the defendant later after they were separated. The driver identified the text messages between her and the defendant and testified as to the context of the text messages. This court concluded that "[t]he extrinsic evidence offered by the State, as well as the circumstances surrounding the procurement of the phone and pictures, is sufficient to show that the matter in question is genuinely what the State claims — pictures of the defendant's text messages to the driver." *Id.* Thus, the photographs of the text messages were sufficiently authenticated to be admissible at the murder trial. In *State v. Lumarque, 44 So. 3d 171 (Fla. 3d DCA 2010)*, the court held that text messages and photos were authenticated, because those images were found on the defendant's phone which was seized pursuant to a search and extracted from it by a forensic expert who testified. Unlike the foregoing cases, appellant's cell phone was not examined, and the appellee did not even testify that she recognized appellant's phone number.

HN3[↑] "Testimony **[**6]** that a person received a text or email from another is not sufficient, by itself, to authenticate the identity of the sender." Charles W. Ehrhardt, 1 *West's Fla. Practice Series* section 901.1a (2020 ed.). Other factors can circumstantially authenticate the text. *Id. See, e.g., United States v. Siddiqui, 235 F. 3d 1318, 1322 (11th Cir. 2000)* (finding that a number of factors supported the authenticity of the email, that the address bore the defendant's address and when the witness replied to the email the "reply function" of the witness's email system automatically put the defendant's address as the sender; the context of the email showed details of the defendant's conduct and an apology that correlated to the defendant's conduct; and the email referred to the author by defendant's nickname and the witnesses confirmed that in phone conversations the defendant made the same requests as in the emails); *Pavlovich v. State, 6 N.E. 3d 969, 978-79 (Ind. Ct. App. 2014)* (finding text messages had

been properly authenticated by circumstantial evidence by a witness who confirmed that the 2662 number was used to arrange a meeting with the defendant; that the witness recognized the defendant's voice on the outgoing voicemail; and that the messages from the 2662 number indicated familiarity with the witness' escort business, the prior **[**7]** meeting between the witness and defendant and their prior discussion); *compare Commonwealth v. Koch, 2011 PA Super 201, 39 A. 3d 996, 1005 (Pa. Super. Ct. 2011)* (finding the trial court erred in admitting text messages into evidence; there was no testimony from the persons who sent or received the text messages and no contextual clues).

"Circumstances recognized as sufficient to meet the test of authenticity include when a letter is written disclosing information which is likely known only to the purported author." *State v. Love, 691 So. 2d 620, 621 (Fla. 5th DCA 1997)* (citing *ITT Real Estate Equities v. Chandler Ins. Agency, Inc., 617 So. 2d 750, 751 (Fla. 4th [*303] DCA 1993)*). In *Love*, the letter "contained specific details concerning the crime, the relationship between the co-defendants, incriminating evidence, and a proposed plan to fabricate testimony. This information was likely known only by the three co-defendants." *Id.* The court cited other details in the letter and concluded that the trial court erred by excluding the letter because there was prima facie evidence that the defendant or someone acting as his scribe wrote the letter.

In *Gosciminski v. State, 132 So. 3d 678 (Fla. 2013)*, the supreme court addressed a question of authentication of a receipt. In that case, the trial court found a Walgreens receipt admissible because it was printed on paper with a distinctive green Walgreens logo watermark, the Walgreens' return policy was printed on the back of **[**8]** the receipt; the front of the receipt showed no evidence of tampering; and the time and date stamp matched the account of the purchase. *Id. at 700*. "These distinctive characteristics of the receipt in conjunction with the other circumstances, i.e., the trail of documentary evidence that supported [the witness's] testimony . . . were adequate authentication." *Id.* Thus, the supreme court concluded the receipt was properly admitted. *HN4*[⬆] "[E]vidence may be authenticated by examination of its appearance, contents, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances." *Id.* (citing *Coday v. State, 946 So. 2d 988, 1000 (Fla. 2006)*).

In this case, there was no direct evidence that the messages were sent by appellant. No one saw or heard appellant send the messages. The messages appear to be from different phone numbers, and none of the origination numbers match the phone number of appellant, according to her phone bill placed into evidence. The trial court did not analyze the content of the messages but simply found no other explanation as to who sent them. This is insufficient, particularly after our review of the messages themselves.

Outside of a few references in the messages to the name of appellant's **[**9]** boyfriend, the nephew of the appellee, and a reference to "aunty" there are no clues as to who sent the messages or what they are about. The discord between the nephew and appellant appears to be well known between the two families. The first five pages of texts offered by appellee are dated January 1, and appellee testified that the year was 2019. These texts purportedly come from three different phone numbers. None of the phone numbers match the phone numbers on appellant's phone bill. Appellee did not testify that she recognized any of the numbers on the texts. Their substance generally refers to the nephew and threats to kill him but is populated with the pronoun "we" and not "I" indicating that multiple people are involved in these threats. One of the messages refers to appellant in the third person, indicating that it was sent from someone other than appellant.

As noted by the court, the last five pages of texts look different than the first five pages of texts. None of these texts are dated. Only the first two pages of the photographs of the text messages have origination phone numbers. Neither of the origination phone numbers match appellant's phone numbers on her bill. The **[**10]** remaining pages of text messages show only a day of the week and time, no origination phone number. In this group of texts, there is no mention of the nephew or of details known only to the appellant. In fact, one of the messages seems to convey that the sender has been wronged by a woman, not the nephew.

To summarize, the contextual clues in the texts are insufficient to provide authentication **[*304]** that these texts were sent by appellant. The messages do not contain any information which would have been known only to the appellant. The direct evidence is insufficient as well. The messages do not show appellant's telephone number as sender.

As the proponent of admission of the evidence, it was the appellee's burden to prove the authenticity of the text messages as being sent by appellant. Thus, the trial court's rationale that no other explanation for the

messages was offered placed on appellant the obligation of disproving their authenticity. This was error.

HN5[↑] "[A]uthentication for the purpose of admission is a relatively low threshold that only requires a prima facie showing that the proffered evidence is authentic[.]" *Mullens, 197 So. 3d at 25*. Even so, the instant case lacks the "distinctive characteristics" of **[**11]** *Gosciminski* or the contextual clues of *Love*. The text messages were not obtained pursuant to a search warrant from appellant's phone, and no circumstantial support shows appellant to be the author of the texts as in *Symonette* or *Lumarque*.

The appellee failed to make a prima facie showing of authenticity, i.e. that the text messages were what appellee claimed — messages authored by appellant. Accordingly, the trial court abused its discretion in admitting the text messages into evidence.

Because the text messages were the sole evidence to support the final judgment of injunction, and appellee has not contested this appeal, we conclude that we should reverse for vacation of the judgment and dismissal of the petition. Appellee should not get the proverbial "second bite at the apple" under the circumstances of this case. *See Morales v. Fifth Third Bank, 275 So. 3d 197 (Fla. 4th DCA 2019)*(adopting the analysis of *Tracey v. Wells Fargo, N.A., 264 So. 3d 1152 (Fla. 2d DCA 2019)* ("[W]hen fashioning remand for a civil appeal where the party with the burden of proof fails to sufficiently plead the claim it presents at trial or to establish a basis in admissible evidence for a claim at trial, an appellate panel may exercise some level of equitable discretion to consider the circumstances of the particular case. This discretion **[**12]** is bounded both by the substantive relief sought within the appeal and the strong preference for finality of trial proceedings.")

Reversed and remanded with directions to dismiss the petition.

GROSS and GERBER, JJ., concur.

End of Document

Lamb v. State

Court of Appeal of Florida, Fourth District

May 2, 2018, Decided

No. 4D17-545

Reporter
246 So. 3d 400 *; 2018 Fla. App. LEXIS 6086 **; 43 Fla. L. Weekly D 973; 2018 WL 2049640

ARKHEEM J. LAMB, Appellant, v. STATE OF FLORIDA, Appellee.

Prior History: **[**1]** Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Glenn D. Kelley, Judge; L.T. Case No. 502016CF004626A.

Core Terms

video, authentication, codefendants, carjacking, forensic, recording, digital, trial court, first victim, watch, downloaded, stolen, investigating, driving, posted, phone, judgment of acquittal, discovery violation, second victim, grand theft, witnesses, gun, best evidence rule, police detective, stolen property, identification, pulled, sufficient evidence, better position, trier of fact

Case Summary

Overview

HOLDINGS: [1]-The State did not commit a discovery violation by not identifying a police digital forensic examiner as an expert, as the examiner did not testify in the form of an opinion, but in the form of facts; [2]-The State sufficiently authenticated a social media video under § 90.901, Fla. Stat. when it presented the digital forensic examiner's testimony regarding how the video was obtained and its distinctive characteristics, along with the first victim's and a police detective's testimony regarding the video's distinctive content; [3]-The trial court properly denied defendant's motion for judgment of acquittal when defendant appeared in the video just a few hours after the first carjacking and less than an hour after the second, driving the first victim's car, wearing the first victim's watch, and stating "we live" while a codefendant counted the first victim's Cuban money.

Outcome

Convictions affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Discovery

HN1 **Abuse of Discretion, Discovery**

Where a trial court rules that no discovery violation occurred, the reviewing court must first determine whether the trial court abused its discretion.

Criminal Law & Procedure > ... > Discovery by Defendant > Expert Testimony > Scope of Disclosure

Evidence > Types of Evidence > Testimony > Expert Witnesses

HN2 **Expert Testimony, Scope of Disclosure**

Fla. R. Crim. P. 3.220(b)(1)(A)(i) requires the State, as part of its discovery obligation, to disclose expert witnesses. Who constitutes an expert witness may be derived from *§ 90.702, Fla. Stat. (2016)*.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > Authentication

HN3 **Abuse of Discretion, Evidence**

A trial court's conclusion regarding authentication is reviewed for an abuse of discretion.

Evidence > Authentication > Self-Authentication

HN4 **Authentication, Self-Authentication**

The mere fact that an item appears online does not make it self-authenticating. Predicate testimony to establish its authenticity or to prove the truth of its content may be required. Any argument that a copy of an online document can be admitted without any predicate testimony to establish its authenticity or to prove the truth of its content borders on the frivolous.

Evidence > Authentication

Evidence > Authentication > Self-Authentication

HN5 **Evidence, Authentication**

Authentication for the purpose of admission is a relatively low threshold that only requires a prima facie showing that the proffered evidence is authentic; the ultimate determination of the authenticity of the evidence is a question for the fact-finder. Evidence may be authenticated by appearance, content, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances. In addition, the evidence may be authenticated either by using extrinsic evidence, or by showing that it meets the requirements for self-authentication.

Evidence > Authentication

Evidence > Types of Evidence > Demonstrative Evidence > Recordings

HN6 **Evidence, Authentication**

The Court of Appeal of Florida, Fourth District, chooses to follow the Eleventh Circuit and other courts which have permitted the admission of social media videos in criminal cases based on sufficient evidence that the video depicts what the government claims, even though the government did not: (1) call the creator of the videos; (2) search the device which was used to create the videos; or (3) obtain information directly from the social media website. While a witness with knowledge of the video's creation could authenticate the video, *§ 90.901, Fla. Stat. (2016)* does not require it.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > Admissibility

Evidence > Rule Application & Interpretation

Criminal Law & Procedure > Trials > Judicial Discretion

HN7 **Abuse of Discretion, Evidence**

A trial court's decision on the admissibility of evidence is reviewed under an abuse of discretion standard. That discretion, however, is limited by the rules of evidence.

Evidence > Types of Evidence > Documentary Evidence > Best Evidence Rule

HN8 **Documentary Evidence, Best Evidence Rule**

The best evidence rule is predicated on the principle that if the original evidence is available, that evidence should be presented to ensure accurate transmittal of the critical facts contained within it.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Factual Issues

Evidence > Types of Evidence > Demonstrative Evidence > Recordings

HN9 **Province of Court & Jury, Factual Issues**

Even non-eyewitnesses may testify as to the identification of persons depicted or heard on a recording so long as it is clear the witness is in a better position than the jurors to make those determinations. However, when factual determinations are within the realm of an ordinary juror's knowledge and experience, such determinations and the conclusions to be drawn therefrom must be made by the jury.

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > Trials > Motions for Acquittal

HN10 **Standards of Review, De Novo Review**

In reviewing a motion for judgment of acquittal, a de novo standard of review applies. Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence. Nevertheless, the State is not required to rebut a hypothesis of innocence that is unreasonable.

Criminal Law & Procedure > Criminal Offenses > Theft & Related Offenses > Larceny & Theft

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > Stolen Property

HN11 **Theft & Related Offenses, Larceny & Theft**

Even where there is no direct physical evidence linking the defendant to the crimes, the finder of fact has the right to infer guilt of theft from the unexplained possession of recently stolen goods.

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > Mens Rea

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury

Criminal Law & Procedure > Trials > Motions for Acquittal

HN12 **Acts & Mental States, Mens Rea**

The intent to participate in a crime is a question for the jury and a trial court properly denies a motion for judgment of acquittal where an issue remains for the jury to decide.

Counsel: Carey Haughwout, Public Defender, and Siobhan Helene Shea, Special Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Jessenia J. Concepcion, Assistant Attorney General, West Palm Beach, for appellee.

Judges: GERBER, C.J. GROSS and KUNTZ, JJ., concur.

Opinion by: GERBER

Opinion

[*403] GERBER, C.J.

The defendant appeals from his convictions, arising from a carjacking, for grand theft of a vehicle and grand theft. The defendant primarily argues that the trial court erred in permitting the state to introduce into evidence a Facebook video showing the defendant sitting in the stolen car and wearing the victim's stolen watch just hours after the carjacking occurred. We find no error in

any of the trial court's decisions arising from the Facebook video's use at trial. Therefore, we affirm the convictions.

We present this opinion in the following sections:

A. The trial:
   1. The carjackings;
   2. The investigation;
   3. The Facebook video.

B. Our review of the defendant's arguments:
   1. The discovery objection;
   2. The authentication objection;
   3. The **[**2]** best evidence objection; and
   4. The motion for judgment of acquittal.

A. The Trial

The trial involved two separate carjackings, occurring just a few hours apart and about thirty miles apart. The jury convicted the defendant on the charges arising from the first carjacking, but acquitted him of the charges arising from the second carjacking. We will describe both carjackings because the evidence was intertwined.

1. The Carjackings

Around 10:00 p.m., the first victim was sitting in his car near a hotel in Jupiter. A man opened the first victim's door, put a gun to the first victim's head, and told the first victim to get out. A second man approached, and a pickup truck pulled up. The two men pushed the first victim to the ground and drove off in the first victim's car. The pickup truck followed. The men, besides taking the first victim's car, also took the first victim's phone, watch, wallet, and cash, including Cuban money.

Sometime after 1:00 a.m. that night in Greenacres, located about thirty miles south of the Jupiter hotel, the second victim pulled his car into an apartment complex. Two men then approached, one with a silver gun. The men took the second victim's phone and other items, **[**3]** and drove away in the second victim's car. Then a car matching the description of the first victim's car drove past the second victim, **[*404]** with the driver's side window partially rolled down. That car's driver said something to the second victim before driving away behind the second victim's car. The second victim could not see what that driver looked like or whether other people were in the car.

The following morning, both victims' cars were found in the same area in a city located between Jupiter and Greenacres. Both the first victim's phone and the second victim's phone were found in the first victim's car. The first victim's watch, wallet, and cash were missing.

2. The Investigation

A Jupiter police detective investigated the first carjacking at the Jupiter hotel. A Palm Beach County sheriff's detective investigated the second carjacking in Greenacres. The detectives came into contact with each other because the carjackings were similar.

The first victim identified two of the codefendants as the carjackers. However, the first victim did not identify the defendant as one of the carjackers or one of the persons inside the pick-up truck.

The second victim also identified one of the codefendants **[**4]** as the carjacker holding the gun. However, the second victim did not identify the defendant as the other carjacker or one of the persons inside the car matching the description of the first driver's car.

The detectives determined that the codefendants did not live in Jupiter, so the detectives pieced together the codefendants' connections to each other. During that investigation, the detectives found that the defendant and codefendants had connections to each other from being stopped by law enforcement on prior occasions. They all lived in the city where the cars were found.

The detectives obtained a search warrant for one of the codefendant's phones. On that phone, the detectives found pictures of that codefendant holding a silver gun matching the gun used in the carjackings. When one of the other codefendants was arrested, he possessed a silver gun matching the gun used in the carjackings.

3. The Facebook Video

The Jupiter police department also found on the codefendant's phone a Facebook video showing both stolen cars. The detectives showed the Facebook video to the first victim before trial.

At trial, the state, without having moved the Facebook video into evidence, asked the first **[**5]** victim if he recognized the defendant in the video he was shown. The defendant objected based on the best evidence

rule. The trial court overruled the defendant's objection. The first victim testified that the defendant could be seen on the Facebook video driving the first victim's car and wearing the first victim's watch, while one of the codefendants was sitting in the front passenger seat counting the first victim's Cuban money.

After both the first victim and second victim testified, the Palm Beach County Sheriff's detective testified. The state, without having moved the Facebook video into evidence, asked the detective if he recognized anyone in the Facebook video. The defendant objected based on the best evidence rule. The trial court overruled the defendant's objection. The detective testified he recognized the defendant in the Facebook video. The detective also testified that the Facebook video had been posted approximately twenty-one minutes after the second carjacking.

The state then moved to enter the Facebook video into evidence. The defendant **[*405]** objected, and the following exchange occurred at sidebar:

> THE COURT: I don't think it's been authenticated yet, has it?
>
> [DEFENSE COUNSEL]: **[**6]** That is our objection, Judge. We believe that this was extracted from the Jupiter Police Department, an agent from the Jupiter Police Department, and they have not yet testified. This witness [the Sheriff's detective] did not extract the video, just merely watched it.
> [STATE]: It was just pulled off Facebook. This is a copy of what was pulled off Facebook. This didn't come off anybody's cellphone.
> THE COURT: How are you going to authenticate it is the question.
> . . . .
> [STATE]: For one, it's self-authenticating. You have the Defendant himself saying that it's live, that he is doing it live. Number two, we know the cars were taken, the second car was taken after 1:30 in the morning, and we know the second car was found before 9:15 on the same day. So . . . we know it was taken between 1:30 and recovered between 9:15. This video is of both cars that were stolen --
> THE COURT: But how was it downloaded, how was it extracted? You still have an authentication —
> [STATE]: It's a copy of it off of Facebook.
> THE COURT: Did he [the Sheriff's detective] or did somebody else [download the video]?
>
> [STATE]: I don't think it matters who actually pulled it off. Anybody that viewed it can testify yes, that's **[**7]** the Facebook video I pulled off. And it authenticates itself that it occurred on that day and these are the individuals that are on the video.
> THE COURT: I don't think you can authenticate it that way. I don't think you can just say I viewed the video and therefore it is authentic. Somebody needs to testify that they took the video off of Facebook . . . .

After the sidebar, the trial court sustained the defendant's objection to the introduction of the Facebook video based on lack of authentication.

Shortly thereafter, outside of the jury's presence, the state proffered testimony from a Jupiter police digital forensic examiner to authenticate the Facebook video. The digital forensic examiner testified that he had been performing that type of work for approximately six years. He had multiple certifications in computer forensics, and over six hundred hours of training in computer and cellphone forensics, which included a course in online social network investigations from websites like Facebook.

As part of the digital forensic examiner's investigation, he visited one codefendant's public Facebook page. He looked for videos posted within the carjackings' time frame. He found multiple videos **[**8]** on the codefendant's Facebook page, including a Facebook Live video showing people driving a car. He downloaded the video, and verified that the original and the downloaded videos were the same. He testified that at the time of trial, the video remained posted on the codefendant's Facebook page. He confirmed that the video which the state sought to introduce into evidence was the same video which he downloaded. He conceded that he was not sure whether the video's time stamp reflected the time it was recorded, or the time when it was posted on Facebook. He further testified that, aside from the video's time stamp indicating a time shortly after the second carjacking, he had no way of knowing when the video was created.

[*406] The defendant objected that a discovery violation occurred. The defendant argued that the digital forensic examiner was listed as a fact witness but should have been listed as an expert witness because he would be opining on the date and time that the video was created, and would be instructing the jury on how Facebook works, with which a layperson is not familiar. The defendant moved for a *Richardson* hearing.

The trial court found that the digital forensic examiner's testimony **[**9]** was not a discovery violation because

"he is simply testifying as to [his] familiar[ity] with Facebook, what he did in downloading it and the features of Facebook."

The defendant then argued that the Facebook video was not authenticated because no witness present during the recording had testified, and no witness had testified as to the reliability of the process which produced the recording.

The state responded that the video was authenticated by its content's distinctive characteristics. According to the state, evidence that the defendant and the codefendants could be seen in the video driving the stolen cars and possessing the stolen property was sufficient to authenticate the video.

The trial court overruled the defendant's authentication objection. The court found that the state had made a prima facie showing of the video's genuineness. The court further reasoned that the video's content established its connection to the case, and the digital forensic examiner testified as to the manner in which the video was produced. The court recognized that its finding of genuineness was merely a threshold finding, and the parties still could argue to the jury about the weight and credibility **[**10]** to be given to the video.

The digital forensic examiner then testified before the jury consistent with his proffered testimony. During his testimony before the jury, the trial court admitted the Facebook video into evidence over the defendant's objections. The trial court also admitted into evidence, over the defendant's objections, a screenshot of the codefendant's Facebook page with the video post as it appeared on the day when the digital forensic examiner downloaded the video. The digital forensic examiner testified that the video's time stamp showed the video was posted at 1:51 a.m.

The state next recalled the Jupiter police detective to testify about the Facebook video's contents. At the beginning of the detective's testimony, the state played the Facebook video for the jury. The state then had the detective testify about his observations from the video based on his knowledge of the defendant's and codefendant's identities. The detective testified that the defendant was driving the first victim's car with one of the codefendants sitting in the passenger seat. The detective testified that the other two other codefendants were driving the second victim's car. The detective identified **[**11]** the defendant's voice as stating "we live" on the video.

After the state rested, the defendant moved for a judgment of acquittal. The defendant argued that the state's proof of grand theft of a vehicle was circumstantial because the first victim had not identified the defendant as one of the carjackers, and the only proof was that the defendant was in the first victim's vehicle on the Facebook video posted after the carjacking. Additionally, the defendant argued that his mere possession of the first victim's car without any proof that he knew the car was stolen was insufficient to show guilty knowledge. The defendant also argued that his mere presence as an after-acquired passenger in the first victim's car was **[*407]** insufficient to prove him guilty of grand theft of that car. As to the charge for grand theft of the first victim's watch, the defendant argued that his mere possession of the watch was insufficient to show guilty knowledge.

The trial court denied the defendant's motion for judgment of acquittal, and found sufficient circumstantial evidence existed for the jury to find the defendant guilty of the charges.

The jury ultimately found the defendant guilty of grand theft of a vehicle **[**12]** and grand theft of the watch in the first carjacking, but acquitted him of charges arising from the second carjacking.

B. Our Review of the Defendant's Arguments

This appeal followed. The defendant's arguments primarily relate to the evidence revealed by the Facebook video. According to the defendant, the trial court erred in four material respects:

> 1. ruling that the state had not committed a discovery violation by not identifying the Jupiter police digital forensic examiner as an expert and, as a result of that ruling, not holding a *Richardson* inquiry;
> 2. admitting the Facebook video into evidence over the defendant's objection that such evidence was not properly authenticated, because the Jupiter police digital forensic examiner and the Jupiter police detective did not record the video and were not shown in the recording of the video;
> 3. overruling the defendant's best evidence rule objections to allowing the first victim, the Sheriff's detective, and the Jupiter police detective to identify the defendant and the first victim's stolen property in the Facebook video when those witnesses were in the same position as the jury in reviewing the video; and

4. denying the defendant's motion **[**13]** for judgment of acquittal because the state did not prove the defendant intended to participate in the theft of the first victim's car and watch.

We address each argument in turn.

1. The Discovery Objection

HN1[↑] "[W]here a trial court rules that no discovery violation occurred, the reviewing court must first determine whether the trial court abused its discretion." *Pender v. State, 700 So. 2d 664, 667 (Fla. 1997)*.

HN2[↑] *Florida Rule of Criminal Procedure 3.220(b)(1)(A)(i)* requires the state, as part of its discovery obligation, to disclose expert witnesses. Who constitutes an expert witness may be derived from *section 90.702, Florida Statutes* (2016):

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

Here, we agree with the trial court that the state had not committed a discovery violation by not identifying the Jupiter police digital forensic examiner as an expert. **[**14]** Although the digital forensic examiner testified based on his knowledge, skill, experience, training, and education, he did not testify in the form of an opinion. The **[*408]** digital forensic examiner testified in the form of facts — the actions which he took to access one of the codefendant's public Facebook page, find on that Facebook page the live video featuring the defendant and the codefendants, and download that video for use as evidence at trial.

The fact that the digital forensic examiner, while describing his actions, also explained for the jury how Facebook videos are broadcast and then saved to a Facebook profile timeline, did not convert his factual testimony into expert testimony. As the trial court found, the digital forensic examiner "simply testif[ied] as to [his] familiar[ity] with Facebook, what he did in downloading it and the features of Facebook." Like the trial court, we do not consider the digital forensic examiner's familiarity with Facebook to have been sufficiently specialized to fall within the scope of *section 90.702*. *See L.L. v. State, 189 So. 3d 252, 256-57 (Fla. 3d DCA 2016)* ("Of course, all lay witnesses have some specialized knowledge — knowledge relevant to the case that is not common to everyone. . . . Indeed, that is why all **[**15]** witnesses — lay or expert — are called: to get what they know about the case that other people do not.") (alteration, quotation marks, and citation omitted).

Based on the foregoing, we conclude that the trial court did not abuse its discretion in finding the state had not committed a discovery violation by not identifying the digital forensic examiner as an expert and, as a result of that ruling, not holding a *Richardson* inquiry.

2. The Authentication Objection

HN3[↑] A trial court's conclusion regarding authentication is reviewed for an abuse of discretion. *Mullens v. State, 197 So. 3d 16, 25 (Fla. 2016)*.

"Authentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *§ 90.901, Fla. Stat.* (2016).

HN4[↑] The mere fact that an item appears online does not make it self-authenticating. Predicate testimony to establish its authenticity or to prove the truth of its content may be required. *See Dolan v. State, 187 So. 3d 262, 266 (Fla. 2d DCA 2016)* ("Any argument that a copy of an online document . . . can be admitted . . . without any predicate testimony to establish its authenticity or to prove the truth of its content . . . borders on **[**16]** the frivolous.").

However, *HN5*[↑] "authentication for the purpose of admission is a relatively low threshold that only requires a prima facie showing that the proffered evidence is authentic; the ultimate determination of the authenticity of the evidence is a question for the fact-finder." *Mullens, 197 So. 3d at 25*. "Evidence may be authenticated by appearance, content, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances. In addition, the evidence may be authenticated either by using

extrinsic evidence, or by showing that it meets the requirements for self-authentication." *Symonette v. State, 100 So. 3d 180, 183 (Fla. 4th DCA 2012)* (quotation marks and citation omitted).

Here, the state met the relatively low threshold required to authenticate the Facebook video. The digital forensic examiner visited one of the codefendants' public Facebook page. He looked for videos posted within the carjackings' time frame. He found a Facebook Live video showing the stolen vehicles being driven by the defendant and the codefendants. He downloaded the video, verified that the original and the downloaded videos were the same, confirmed **[*409]** that the video which the state sought to introduce into evidence was the same video which he downloaded, **[**17]** and testified that the video remained posted on the codefendant's Facebook page at the time of trial. The first victim testified that the defendant could be seen on the Facebook video driving the first victim's car while wearing the first victim's watch while a codefendant counted the first victim's Cuban money. The Jupiter police detective also testified that the defendant could be seen on the Facebook video driving the first victim's car while stating "we live" on the video. Based on this evidence, we conclude the state made a prima facie showing of the video's authenticity for the purpose of admission into evidence, thus allowing the jury to make the ultimate determination of the weight to be given to the video's contents.

The defendant cites *Santana v. State, 191 So. 3d 946 (Fla. 4th DCA 2016)*, for the proposition that "authentication should be made by the technician who operated the recording device or a person with knowledge of the conversation that was recorded." *Id. at 948*. However, *Santana* is distinguishable from the instant case. In *Santana*, the state entered into evidence an alleged *audio* recording of phone conversations between the defendant and a confidential informant. *Id. at 947*. At trial, the confidential informant did not testify, and the **[**18]** investigating agent could not testify that the recordings were true representations of the conversations because he did not monitor the conversations. *Id. at 948*. We found that although the state had introduced testimony supporting the speakers' identities on the recording, the state did not introduce evidence showing that the recording accurately represented the conversations. *Id.*

Santana is distinguishable because there, the issue was an audio recording which potentially could have been altered without detection. Here, however, the Facebook video provides an unbroken visual recording of the defendant for an extended period of time.

The defendant's argument that we should require the state to provide testimony from the defendant, codefendants, or other witnesses who appear in the video, or from someone who recorded the video, sets the authentication burden too high. *See U.S. v. Broomfield, 591 Fed. Appx 847, 852 (11th Cir. 2014)* (*Biggins* factors usually applied to admitting government surveillance, such as how recording occurred, the recording equipment's condition, and how relevant speakers were identified, were unnecessary to authenticate a YouTube video, because "the prosecution could seldom, if ever, authenticate a video that it did not create."). **[**19]** Instead, as in *Broomfield*, if the video's distinctive characteristics and content, in conjunction with circumstantial evidence, are sufficient to authenticate the video, then the government has met its authentication burden. *Id.*

HN6[↑] We choose to follow the Eleventh Circuit and other courts which have permitted the admission of social media videos in criminal cases based on sufficient evidence that the video depicts what the government claims, even though the government did not: (1) call the creator of the videos; (2) search the device which was used to create the videos; or (3) obtain information directly from the social media website. *See, e.g., U.S. v. Washington, 2017 U.S. Dist. LEXIS 136220, 2017 WL 3642112 at *2 (N.D. Ill. Aug. 24, 2017)* (YouTube video which the government contended showed the defendant and several other men pointing firearms at the camera was sufficiently authenticated where law enforcement witness would testify that he watched this video on YouTube, recognized the defendant, and downloaded the video); **[*410]** *State v. Gray, 2017 La. App. LEXIS 1182, 2017 WL 3426021 at *16 (La. Ct. App. June 28, 2017)* (YouTube videos were sufficiently authenticated where the investigating officer's testimony provided sufficient support that the videos were what the state claimed them to be, that is, videos depicting the defendant and other gang members in a park and surrounding **[**20]** area). As the *Washington* court stated, "[w]hile a witness with [knowledge of the video's creation] *could* authenticate [the] video, *Rule 901* does not *require* it." *2017 U.S. Dist. LEXIS 136220, 2017 WL 3642112 at *2*.[1]

[1] *But see, e.g., U.S. v. Hassan, 742 F.3d 104 (4th Cir. 2014)* (trial court did not abuse its discretion in admissions of

Here, as in the foregoing cases, the state met its authentication burden. The state presented the Jupiter Police digital forensic examiner's testimony regarding how the Facebook video was obtained and its distinctive characteristics, and the first victim's and the Jupiter police detective's testimony regarding the Facebook video's distinctive content. Therefore, the trial court did not abuse its discretion in admitting the Facebook video into evidence over the defendant's objection that such evidence was not properly authenticated.

3. The Best Evidence Objection

HN7[↑] "A trial court's decision on the admissibility of evidence is reviewed under an abuse of discretion standard. That discretion, however, is limited by the rules of evidence." *Ayalavillamizar v. State, 134 So. 3d 492, 496 (Fla. 4th DCA 2014)* (citation omitted).

The best evidence rule is codified in *section 90.952, Florida Statutes* (2016): "Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph." *HN8*[↑] "This rule is predicated on the principle that if **[**21]** the original evidence is available, that evidence should be presented to ensure accurate transmittal of the critical facts contained within it." *T.D.W. v. State, 137 So. 3d 574, 576 (Fla. 4th DCA 2014)* (citation omitted).

Here, the original evidence was available and presented. Thus, the best evidence rule was satisfied.

What the defendant appears to be arguing, instead of the best evidence rule, is an unpreserved "lay opinion" objection that the first victim, the Sheriff's detective, and the Jupiter police detective were permitted to identify the defendant and the first victim's stolen property in the Facebook video when those witnesses were in the same position as the jury in reviewing the video. Even though this apparent "lay opinion" objection was not specified as such, we will address it on the merits.

Section 90.701, Florida Statutes (2016), states:

> If a witness is not testifying as an expert, the witness's testimony about what he or she perceived may be in the form of inference and opinion when:
>
> **[*411]** (1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the **[**22]** prejudice of the objecting party; and
>
> (2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

We recently examined *section 90.701* to determine the circumstances when a court may allow a lay person to identify persons in recordings. As we stated in *Alvarez v. State, 147 So. 3d 537 (Fla. 4th DCA 2014)*:

> *HN9*[↑] Even non-eyewitnesses may testify as to the identification of persons depicted or heard on a recording so long as it is clear the witness is in a better position than the jurors to make those determinations. *See Johnson v. State, 93 So. 3d 1066, 1069 (Fla. 4th DCA 2012)* (holding no error in admission of detective's identification of defendant as individual in surveillance video where defendant changed his appearance after the event recorded in the video, and the detective had a personal encounter with the defendant shortly after the event and before he changed his appearance); *State v. Cordia, 564 So. 2d 601, 601-02 (Fla. 2d DCA 1990)* (finding that officers' identification of defendant's voice on a recording was admissible where officers had worked with defendant in the past and were familiar with his voice).
>
> However, "[w]hen factual determinations are within the realm of an ordinary juror's knowledge and experience, such determinations and the conclusions to be drawn therefrom must be made by the jury." *Ruffin v. State, 549 So. 2d 250, 251 (Fla. 5th DCA 1989)* (finding the court **[**23]** erred in allowing three officers to identify defendant as the man in the videotape, where the officers were not eyewitnesses to the crime, did not have familiarity with Ruffin, and were not qualified as

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Facebook pages and YouTube videos where the government presented the certifications of records custodians of Facebook and Google, verifying that the Facebook pages and YouTube videos had been maintained as business records in the course of regularly conducted business activities, and by tracking the Facebook pages and Facebook accounts to the defendant's mailing and e-mail addresses via internet protocol addresses); *People v. Franzese, 154 A.D.3d 706, 61 N.Y.S.3d 661 (N.Y. Sup. Ct. App. Div. 2d 2017)* (YouTube video was properly authenticated by a YouTube certification, which indicated when the video was posted online, by a police officer who viewed the video at or about the time that it was posted online, by the defendant's own admissions about the video made in a jail phone call, and by the video's distinctive characteristics).

> experts in identification); *see also* Proctor v. State, 97 So. 3d 313, 315 (Fla. 5th DCA 2012) (finding court erred in allowing officer to identify defendant as the perpetrator in a surveillance video where the officer was in no better position than the jury to make that determination); Charles v. State, 79 So. 3d 233, 235 (Fla. 4th DCA 2012) (finding court erred in allowing detective to testify that he could not identify the defendant as the person on the surveillance video the first time he watched it, but "he was later able to piece things together and identify the person in the video" as the defendant).

Alvarez, 147 So. 3d at 542-43.

Here, the two investigating detectives were in a better position than the jury to identify the defendant and codefendants in the Facebook video, because the detectives were familiar with the defendant and codefendants through their investigation and interviews, and because the codefendants were not jointly tried with the defendant and did not testify before the jury.

Additionally, the first victim was in a better position than the jury to identify his stolen car, stolen watch, and stolen Cuban **[**24]** money in the Facebook video because he was familiar with those items. Although the first victim identified the defendant in the Facebook video in the context of identifying the stolen property, we consider the first victim's identification of the defendant to be harmless given that the two investigating detectives identified the defendant in the Facebook video, and the state played the Facebook video for the jury.

[*412] In sum, because the two investigating detectives and the first victim were in a better position than the jury to identify the persons and stolen property in the Facebook video, the trial court did not abuse its discretion in overruling the defendant's best evidence/lay opinion objection to the investigating detectives and the first victim describing the Facebook video's contents.

4. The Motion for Judgment of Acquittal

The standard of review for denial of a motion for judgment of acquittal was stated in Pagan v. State, 830 So. 2d 792 (Fla. 2002):

> ***HN10***[↑] In reviewing a motion for judgment of acquittal, a de novo standard of review applies. Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. If, after viewing the evidence in the light most favorable to the State, **[**25]** a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence.

Id. at 803 (internal citations omitted). Nevertheless, "[t]he State is not required to rebut a hypothesis of innocence that is unreasonable." Westbrooks v. State, 145 So. 3d 874, 878 (Fla. 2d DCA 2014).

In the instant case, the defendant's hypothesis of innocence was that he was not present when the carjackings occurred and was not involved in the carjackings. Rather, he argued, he made a poor decision by being in the first victim's car and hanging out with the codefendants after the carjackings occurred. Thus, the defendant argued, he lacked the intent to participate in the crimes.

The state's evidence rebutted the defendant's hypothesis of innocence. The defendant appeared in the Facebook video just a few hours after the first carjacking, and less than an hour after the second carjacking, driving the first victim's car, wearing the first victim's watch, and stating "we **[**26]** live" when the video was recording, while a codefendant counted the first victim's Cuban money. Both victims identified from the crime scenes two codefendants who appeared in the video with the defendant. Viewing this evidence in the light most favorable to the state, a rational trier of fact could find beyond a reasonable doubt that the defendant was part of the scheme to steal the first victim's property, and not merely in the wrong place at the wrong time with the wrong crowd after the fact. *See* § 812.022(2), Fla. Stat. (2016) ("[P]roof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property knew or should have known that the property had been stolen."); T.S.R. v. State, 596 So. 2d 766, 767 (Fla. 5th DCA 1992) (***HN11***[↑] "Although there is no direct physical evidence linking the defendant to the crimes[,] the finder of fact has the right to infer guilt of theft from the unexplained possession of recently stolen goods.").

To the extent the defendant's intent was in question, the

evidence presented was sufficient to send that question to the jury. *See Salter v. State, 77 So. 3d 760, 763 (Fla. 4th DCA 2011)* (***HN12***[↑] the "intent to participate in a crime is a question for the jury and a trial court properly denies a motion for judgment of acquittal **[**27]** where an issue remains for the jury to decide.").

[*413] Based on the foregoing, the trial court did not err in denying the defendant's motion for judgment of acquittal.

Conclusion

But for the defendant's participation in the Facebook video showing off the bounty from that night's criminal escapade, the state may not have had sufficient evidence to convict the defendant as a participant in these crimes. However, the Facebook video existed, and made the state's case. The trial court: (1) properly ruled that the state had not committed a discovery violation in its disclosure of the digital forensic examiner who obtained the Facebook video; (2) properly overruled the defendant's authentication objection to the Facebook video's admission based on the state's witnesses' testimony; (3) properly overruled the defendant's best evidence/lay opinion objection to allowing the state's witnesses to identify the defendant and the first victim's stolen property in the Facebook video; and (4) properly denied the defendant's motion for judgment of acquittal. We find no merit in the defendant's other arguments not discussed in this opinion. We affirm the defendant's convictions.

Affirmed.

GROSS and KUNTZ, JJ., **[**28]** concur.

End of Document

Fla. Stat. § 90.108

Current through all 2020 general legislation.

LexisNexis® Florida Annotated Statutes > Title VII. Evidence. (Chs. 90 — 92) > Chapter 90. Evidence Code. (§§ 90.101 — 90.958)

§ 90.108. Introduction of related writings or recorded statements.

(1) When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously. An adverse party is not bound by evidence introduced under this section.

(2) The report of a court reporter, when certified to by the court reporter as being a correct transcript of the testimony and proceedings in the case, is prima facie a correct statement of such testimony and proceedings.

History

S. 1, ch. 76-237; s. 1, ch. 77-77; ss. 2, 22, ch. 78-361; ss. 1, 2, ch. 78-379; s. 472, *ch. 95-147*; s. 5, *ch. 95-286*.

Annotations

LexisNexis® Notes

Case Notes

Criminal Law & Procedure: Criminal Offenses: Sex Crimes: Sexual Assault: General Overview

Criminal Law & Procedure: Criminal Offenses: Sex Crimes: Sexual Assault: Abuse of Adults

Criminal Law & Procedure: Interrogation: Noncustodial Confessions & Statements

Criminal Law & Procedure: Trials: Defendant's Rights: Right to Confrontation

Criminal Law & Procedure: Trials: Examination of Witnesses: Admission of Codefendant Statements

Criminal Law & Procedure: Trials: Examination of Witnesses: Cross-Examination

Criminal Law & Procedure: Sentencing: Imposition: Factors

Criminal Law & Procedure: Sentencing: Imposition: Victim Statements

Criminal Law & Procedure: Appeals: Reversible Errors: General Overview

Criminal Law & Procedure: Appeals: Reversible Errors: Evidence

Robinson v. CSX Transp., Inc.

Court of Appeal of Florida, Fifth District

December 21, 2012, Opinion Filed

Case No. 5D11-2815

Reporter
103 So. 3d 1006 *; 2012 Fla. App. LEXIS 21953 **; 38 Fla. L. Weekly D 48

JAMES ROBINSON, Appellant, v. CSX TRANSPORTATION, INC., Appellee.

Prior History: **[**1]** Appeal from the Circuit Court for Putnam County, Terril J. LaRue, Judge.

Core Terms

shoving, accident report, trial court, redacted, exclude evidence, proffered, platform, tools, safe, backup, train, hose

Case Summary

Procedural Posture

Appellant conductor sued appellee railroad under the Federal Employers' Liability Act, *45 U.S.C.S. §§ 51-60*, after the train on which he was working was involved in a collision. A jury in the Circuit Court for Putnam County, Florida, returned a defense verdict. Appellant sought review.

Overview

Appellant was injured when a truck failed to stop for warning signals at a crossing and collided with the train on which he was working. Appellee introduced an accident report appellant completed in which he stated the truck driver was at fault. The report also asked whether he had a safe workplace, which he answered "no," and wrote, "shoving platform." Pursuant to its order excluding evidence of alternative safety equipment, the trial court ordered redaction of the words "shoving platform" from the report. The appellate court held that the trial court abused its discretion by excluding evidence of appellee's failure to provide appellant with certain safety equipment, as the evidence was relevant to determine whether appellee exercised reasonable care for his safety. The trial court also erred by allowing impeachment of appellant with the redacted report. Under *§ 90.108(1), Fla. Stat.* (2010), and the rule of completeness, once appellee opened the door by introducing that part of the report related to the truck driver, in the interest of fairness, appellant was entitled to bring in the redacted portion of the report in which he faulted appellee for not providing a shoving platform.

Outcome

The appellate court reversed the judgment and remanded the case for a new trial.

LexisNexis® Headnotes

Workers' Compensation & SSDI > Remedies Under Other Laws > Federal Employers' Liability Act

HN1[] Remedies Under Other Laws, Federal Employers' Liability Act

Under the Federal Employers' Liability Act, 45 U.S.C.S. §§ 51-60, a railroad is liable for injuries suffered by its employee resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. § 51.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Maintenance & Safety

Workers' Compensation & SSDI > Remedies Under Other Laws > Federal Employers' Liability Act

HN2[] Railroads & Rail Transportation, Maintenance & Safety

The Federal Employers' Liability Act, 45 U.S.C.S. §§ 51-60, imposes a duty upon a railroad to furnish its employees with a safe workplace and to provide both safe and sufficient tools with which to perform that work.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN3[] Standards of Review, Abuse of Discretion

An appellate court reviews the trial court's admission or exclusion of evidence for an abuse of discretion.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Governments > Legislation > Types of Statutes

Workers' Compensation & SSDI > Remedies Under Other Laws > Federal Employers' Liability Act

HN4[] Jury Trials, Province of Court & Jury

The jury's right to pass upon the question of an employer's liability in an action under the Federal Employers' Liability Act (FELA), 45 U.S.C.S. §§ 51-60, must be most liberally viewed. The role of the jury is significantly greater in FELA cases than in common law negligence actions because Congress intended FELA to be remedial in nature.

Civil Procedure > Trials > Jury Trials > General Overview

Workers' Compensation & SSDI > Remedies Under Other Laws > Federal Employers' Liability Act

HN5[] Trials, Jury Trials

Claims under the Federal Employers' Liability Act, 45 U.S.C.S. §§ 51-60, are to be submitted to jury when the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that the jury may also attribute the result to other causes.

Evidence > Types of Evidence > Documentary Evidence > Completeness

HN6[] Documentary Evidence, Completeness

See § 90.108(1), Fla. Stat. (2010).

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

HN7[] Harmless & Invited Errors, Harmless Error Rule

The test for harmless error in a civil case is whether, but for such error, a different result may have been reached.

Counsel: John S. Mills and Andrew D. Manko of The Mills Firm, P.A., Tallahassee, for Appellant.

Daniel J. Fleming and Payong V. Puksahome of Melkus, Fleming & Gutierrez, P.L., Tampa, for Appellee.

Judges: COHEN, J. LAWSON and EVANDER, JJ., concur.

Opinion by: COHEN

Opinion

[*1007] COHEN, J.

James Robinson appeals from the final judgment entered in favor of CSX Transportation, Inc. ("CSX"), in his action brought under the Federal Employers' Liability Act ("FELA")[1] after the train on which he was working was involved in a collision. On appeal, he argues the trial court erred by excluding evidence of CSX's failure to provide him with certain safety tools with which to perform his work and by allowing CSX to impeach him with a redacted accident report. We agree and reverse.

On the evening of March 17, 2008, Robinson was the lead conductor on a work train performing a shoving movement of sixteen train cars through a public railroad crossing.[2] Before the train reached the **[*1008]** crossing, Robinson noticed that a tractor-trailer was not stopping ahead of the activated warning signals at the crossing. Robinson used his flashlight to try to alert the **[**2]** tractor-trailer to stop, but was unsuccessful. The tractor-trailer collided with the train, causing injury to Robinson.

Robinson brought suit against CSX under FELA,[3] alleging CSX breached its duty to provide a safe workplace. In his complaint, Robinson alleged CSX did not supply sufficient safety tools with which to perform the shoving movement, specifically citing CSX's failure to make available either a backup hose or a shoving platform on the day of the accident.[4] Prior to trial, however, the lower court granted CSX's motion in limine **[**3]** seeking to preclude Robinson from introducing evidence regarding such equipment.

At trial, Robinson proffered that CSX failed to provide him with a backup hose on the day of the accident although he requested one that day. Other CSX employees proffered that backup hoses and shoving platforms were regularly used in performing shoving movements. Despite the proffers, the trial court excluded the evidence regarding the safety equipment because none of Robinson's witnesses proffered that either tool was routinely used and available for use at that railroad yard on the day of the accident.

Later during the trial, CSX introduced an accident report Robinson completed two days after the accident. To the question of whom Robinson believed was at fault for the accident, he wrote, "Truck driver." The report also asked whether Robinson had a safe workplace, which he answered by checking a box marked, "no," and writing, "shoving platform." Pursuant to its order granting CSX's motion in limine to exclude evidence of the alternative safety equipment, the trial court ordered redaction of the

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[1] 45 U.S.C. §§ 51-60 (2010).

[2] In performing a shoving movement, the train's engine pushes the cars backwards through the crossing from the rear of the train. The engineer controls the train from the rear, while the lead conductor is positioned at the opposite end of the train. Because the engineer cannot see hazards in the crossing, the conductor directs the engineer by radio. As is customary for the conductor performing a shoving movement, on the day of the accident Robinson was standing on a side ladder attached to the edge of the car that was leading the train. Robinson was equipped with only a flashlight to alert traffic and a portable radio to communicate with the engineer.

[3] *HN1*[↑] Under FELA, a railroad is liable for injuries suffered by its employee "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U.S.C. § 51; *see also* Foerman v. Seaboard Coast Line R.R. Co., 279 So. 2d 825, 827 (Fla. 1973) (noting that *HN2*[↑] FELA imposes duty upon railroad to furnish its employees with safe workplace and to provide both safe and sufficient tools with which to perform that work).

[4] Both the backup hose and the shoving platform give the lead conductor the ability to apply the brakes and sound the horn. These tools are important in performing a shoving movement because they give the conductor control of the train in the event that the engineer becomes incapacitated or if communication between the conductor and engineer is blocked. A shoving platform also provides a steel cage in which the conductor stands. Even if a collision could not be avoided, the shoving platform's **[**4]** steel cage may protect the conductor from injury.

words "shoving platform" from that portion of the report.

While cross-examining Robinson, CSX used the redacted accident report as impeachment. **[**5]** Specifically, CSX noted that Robinson faulted only the driver of the tractor-trailer on the accident report. Robinson's counsel moved to admit the redacted portion of the accident report to rehabilitate Robinson, but the trial court denied that motion. During its closing argument, defense counsel suggested that Robinson waited until filing the lawsuit to place any blame on CSX. The jury ultimately returned a verdict in favor of CSX.

HN3[↑] This Court reviews the trial court's admission or exclusion of evidence **[*1009]** for an abuse of discretion. *See Health First, Inc. v. Cataldo, 92 So. 3d 859, 866 (Fla. 5th DCA 2012)*. However, ***HN4***[↑] the jury's right to pass upon the question of an employer's liability in a FELA action "must be most liberally viewed." *Johannessen v. Gulf Trading && Transp. Co., 633 F.2d 653, 656 (2d Cir. 1980)*; *Eggert v. Norfolk & W. Ry. Co., 538 F.2d 509, 511 (2d Cir. 1976)* (noting that role of jury is significantly greater in FELA cases than in common law negligence actions because Congress intended the Act to be remedial in nature); *see also Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500, 506, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957)* (explaining that ***HN5***[↑] FELA claims are to be submitted to jury when "the proofs justify with **[**6]** reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that . . . the jury may also . . . attribute the result to other causes . . . ." (footnote omitted)).

We hold the trial court abused its discretion by excluding the evidence regarding CSX's failure to provide a backup hose or shoving platform. Evidence concerning the backup hose and shoving platform was relevant to whether CSX exercised reasonable care for Robinson's safety. *See Cook v. CSX Transp., Inc., No. 6:06-CV-1193, 2008 U.S. Dist. LEXIS 43487, 2008 WL 2275544, at *2 (M.D. Fla. June 1, 2008)* (denying railroad's motion in limine seeking to exclude evidence of safer alternative methods for performing work and noting that "[t]he standard for relevance . . . sets a very low bar . . ."); *see also Gorman v. Grand Trunk W. R.R., Inc., No. 2:07-CV-12911, 2009 U.S. Dist. LEXIS 69562, 2009 WL 2448604, at *6 (E.D. Mich. Aug. 10, 2009)* (noting that "whether any given arrangement is reasonably safe cannot be determined . . . without any consideration of possible alternative arrangements. Instead, whether the conditions of a workplace are reasonably safe depends on a comparison of **[**7]** the marginal benefits and costs of an available safer alternative."); *Edsall v. CSX Transp., Inc., No. 1:06-CV-389, 2007 U.S. Dist. LEXIS 94900, 2007 WL 4608788, at *4 (N.D. Ind. Dec. 28, 2007)* ("[T]he issue of what is reasonably safe cannot be viewed in a factual vacuum. . . . [E]vidence of alternative methods can be helpful in determining whether a reasonable and prudent railroad would have required use of the method that injured its employee."). By requiring Robinson to proffer that the tools were available at that yard on that day, the trial court took too narrow a view of the relevance of the safety tools. The evidence was relevant—regardless of whether the tools were immediately available on the day of the accident—because it tended to prove that CSX breached its duty to provide a safe workplace by failing to make the tools available, despite their general use in the industry.

The trial court also abused its discretion by allowing impeachment of Robinson with the redacted accident report. Although Robinson had faulted both the truck driver and CSX in the accident report, the trial court's redaction left the jury with a distorted impression of the report's contents. Under the rule of completeness, once CSX **[**8]** opened the door by introducing that part of the report related to the truck driver, Robinson was entitled to bring in the redacted portion of the report in the interest of fairness. *See § 90.108(1), Fla. Stat.* (2010) (*HN6*[↑] "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously."); *see also Larzelere v. State, 676 So. 2d 394, 401 (Fla. 1996)* (explaining **[*1010]** that purpose of rule of completeness is "to avoid the potential for creating misleading impressions by taking statements out of context.").

Had the trial court admitted the proffered testimony and allowed reference to the redacted portions of the accident report, the jury may well have reached a different result. Thus, these errors cannot be deemed harmless. *See Witham v. Sheehan Pipeline Constr. Co., 45 So. 3d 105, 109 (Fla. 1st DCA 2010)* (noting that *HN7*[↑] the test for harmless error in a civil case is whether, but for such error, a different result may have been reached). Accordingly, we reverse the judgment entered in favor of CSX and remand **[**9]** for a new trial.[5]

[5] In light of the remand for a new trial, the trial court should

REVERSED AND REMANDED FOR NEW TRIAL.

LAWSON and EVANDER, JJ., concur.

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revisit both the admissibility of the prior accident and the limitation on the background of the plaintiff's expert, Byrnes.

Harden v. State

Court of Appeal of Florida, Fourth District

May 23, 2012, Decided

No. 4D10-2615

Reporter
87 So. 3d 1243 *; 2012 Fla. App. LEXIS 8258 **; 37 Fla. L. Weekly D 1227; 2012 WL 1859267

LARRY HARDEN, Appellant, v. STATE OF FLORIDA, Appellee.

Prior History: **[**1]** Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Amy L. Smith, Judge; L.T. Case No. 2008CF003096AWB.

Core Terms

messages, motive, trial court, sexual battery, propensity, defense counsel, outweighed, portions, beating, domestic violence, prior incident, bad act

Case Summary

Procedural Posture

Defendant challenged a judgment the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County (Florida), which convicted him of sexual battery, false imprisonment, and domestic battery. He argued that the trial court abused its discretion in admitting evidence of a prior act of physical violence towards the victim pursuant to § 90.404(2)(a), Fla. Stat. (2009).

Overview

The State notified the trial court that it intended to ask the victim about her relationship with defendant, including a prior domestic violence incident. Defense counsel objected on grounds of relevance, prejudice, and lack of notice. The trial court found that the evidence was admissible as probative of defendant's motive and intent, The court of appeal held that the trial court abused its discretion in admitting evidence of the prior incident. Motive and intent were not particularly pertinent issues in the trial. The earlier incident of domestic violence did nothing more than demonstrate defendant's propensity for violence against the victim. The primary contested fact was whether the victim consented to the sex. Defendant's motive or intent was not significant to any contested fact. Even if the prior domestic violence incident had some marginal relevance in showing why the victim delayed reporting the alleged sexual battery, that relevance was substantially outweighed by the danger of unfair prejudice. Under § 90.403, Fla. Stat. (2009), the prior bad act was unfairly prejudicial because it was propensity evidence that showed defendant's bad character.

Outcome

The court of appeal reversed defendant's convictions and remanded the case for a new trial.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Requirements

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Objections

HN1[] Preservation for Review, Requirements

No magic words are required when making an objection, and an issue is preserved for appeal if the attorney's articulated concern is sufficiently specific to inform the court of the alleged error.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Requirements

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Objections

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Offers of Proof

HN2[] Preservation for Review, Requirements

See § 90.104(1), Fla. Stat. (2009).

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

HN3[] Abuse of Discretion, Evidence

A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. The trial court's discretion, however, is limited by the rules of evidence.

Evidence > Relevance > Exclusion of Relevant Evidence
Evidence > Confusion, Prejudice & Waste of Time

Evidence > Relevance > Relevant Evidence

HN4[] Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time

Relevant evidence is evidence tending to prove or disprove a material fact. § 90.401, Fla. Stat. (2009). Generally, any evidence relevant to prove a fact at issue is admissible unless precluded by a specific rule of exclusion. § 90.402, Fla. Stat. (2008). However, even if evidence is relevant, it is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. § 90.403, Fla. Stat. (2009).

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN5[] Conduct Evidence, Prior Acts, Crimes & Wrongs

Similar fact evidence of collateral crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity. § 90.404(2)(a), Fla. Stat. (2009). Thus, evidence of other crimes is admissible where such evidence tends to disprove a defendant's theory of defense or attempt to explain his or her intent.

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN6[] Conduct Evidence, Prior Acts, Crimes & Wrongs

Evidence of other crimes is not limited to other crimes with similar facts. Evidence of bad acts or crimes is admissible without regard to whether it is similar fact evidence if it is relevant to establish a material issue. So-called similar fact crimes are merely a special application of the general rule that all relevant evidence is admissible unless specifically excluded by a rule of evidence. The requirement that similar fact crimes contain similar facts to the charged crime is based on the requirement to show relevancy. This does not bar the introduction of evidence of other crimes which are factually dissimilar to the charged crime if the evidence of other crimes is relevant.

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN7[] Conduct Evidence, Prior Acts, Crimes &

Wrongs

Even if prior bad acts do not bear a striking similarity to the charged offenses, the prior acts are admissible if they are relevant to show motive and intent.

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN8 **Conduct Evidence, Prior Acts, Crimes & Wrongs**

Where intent or motive is not a material fact at issue, the collateral crime evidence cannot be admitted for the purpose of showing intent or motive.

Criminal Law & Procedure > ... > Sexual Assault > Abuse of Adults > Elements

HN9 **Abuse of Adults, Elements**

State of mind is not a material fact in a sexual battery charge, nor is intent an issue.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

HN10 **Harmless & Invited Error, Evidence**

The erroneous admission of collateral crimes is presumptively harmful error.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Definition of Harmless & Invited Error

HN11 **Harmless & Invited Error, Definition of Harmless & Invited Error**

The harmless error test places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

Evidence > ... > Hearsay > Rule Components > General Overview

HN12 **Hearsay, Rule Components**

Section 90.801(1)(c), Fla. Stat. (2009), defines "hearsay" as a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Evidence > ... > Hearsay > Rule Components > Statements

HN13 **Rule Components, Statements**

A statement may be offered to prove a variety of things besides its truth. When a statement is not offered for the truth of its contents, but to prove a material issue in a case, it is not hearsay.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

HN14 **Criminal Process, Right to Confrontation**

While a trial court's evidentiary rulings are reviewed for an abuse of discretion, a defendant in a criminal case has a constitutional right to a full and fair cross-examination of his or her accuser.

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

Evidence > ... > Credibility of Witnesses > Impeachment > Bias, Motive & Prejudice

HN15 **Examination of Witnesses, Cross-Examination**

A party may attack the credibility of a witness by

showing that he or she is biased. A defendant has the right to fully cross-examine a State's witness to reveal bias and any improper motive the witness may have had in testifying against the defendant. However, evidence of bias may be inadmissible if it unfairly prejudices the trier of fact against the witness or misleads the trier of fact.

Evidence > Types of Evidence > Documentary Evidence > Completeness

HN16 **Documentary Evidence, Completeness**

See *§ 90.108(1), Fla. Stat.* (2009).

Evidence > Types of Evidence > Documentary Evidence > Completeness

HN17 **Documentary Evidence, Completeness**

The purpose of the completeness rule is to avoid the potential for creating misleading impressions by taking statements out of context. However, the rule of completeness has not been interpreted to require exclusion of evidence where only portions of a written or recorded statement are available.

Evidence > ... > Hearsay > Rule Components > Statements

HN18 **Rule Components, Statements**

Statements offered as evidence of commands or threats directed to the witness, rather than for the truth of the matter asserted, are not hearsay.

Evidence > ... > Hearsay > Rule Components > General Overview

HN19 **Hearsay, Rule Components**

Verbal acts are not hearsay because they are admitted to show they were actually made and not to prove the truth of what was asserted therein.

Counsel: Carey Haughwout, Public Defender, and John M. Conway, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Richard Valuntas, Assistant Attorney General, West Palm Beach, for appellee.

Judges: TAYLOR, J. Ciklin and Gerber, JJ., concur.

Opinion by: TAYLOR

Opinion

[*1245] TAYLOR, J.

Appellant, Larry Harden, appeals his convictions for sexual battery, false imprisonment, and domestic battery. Because the trial court abused its discretion in admitting evidence of a prior incident of domestic violence that served only to show propensity, we reverse for a new trial. We also write to address an evidentiary issue likely to arise again on retrial.

Appellant was accused of beating and raping his then-girlfriend, K.W., in a motel room following an argument in which appellant accused K.W. of sleeping with someone else. Before trial, the prosecutor notified the trial court that he intended to ask K.W. about her relationship with appellant, including a prior domestic violence incident that occurred about six months before the alleged rape. Defense **[**2]** counsel objected to evidence of the prior incident on grounds of relevance, prejudice, and lack of notice. Defense counsel further argued that the standard was not merely whether there was relevancy, but whether the prejudice outweighed the probative value. The trial court found that the evidence was admissible as probative of appellant's motive and intent, relying on *Nicholson v. State, 10 So. 3d 142 (Fla. 4th DCA 2009)*. Evidence of the prior act was admitted at trial. The jury convicted appellant of sexual battery, false imprisonment, and domestic battery.

On appeal, appellant argues that the trial court abused

its discretion in admitting evidence of the prior act of physical violence towards K.W. The state suggests that this issue was not preserved because appellant raised only a "leading" objection at trial when the prosecutor asked about the prior incident and because appellant did not specifically argue that the victim's testimony was "evidence of other bad acts which served only to show propensity to commit crime." On the merits, the state argues that the evidence of the prior incident was relevant to establish appellant's intent and motive.

As a preliminary matter, we find that **[**3]** this issue was preserved. Notwithstanding the fact that defense counsel did not use the magic word "propensity," it is apparent that defense counsel's articulated concern was sufficiently specific to inform the trial court of the alleged error. *See* Conner v. State, 987 So. 2d 130, 133 (Fla. 2d DCA 2008) (explaining that ***HN1***[↑] "no magic words" are required when making an objection and that an issue is preserved for appeal if the attorney's articulated concern is sufficiently specific to inform the court of the alleged error). Moreover, defense counsel's pretrial arguments were sufficient to preserve this issue for appellate review where the trial court made a definitive ruling on the record. *See* McWatters v. State, 36 So. 3d 613, 627 (Fla. 2010) ("Moreover, McWatters preserved his objection for review by obtaining a pretrial ruling on the admissibility of the evidence."); § 90.104(1), Fla. Stat. (2009) (***HN2***[↑] "If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party **[*1246]** need not renew an objection or offer of proof to preserve a claim of error for appeal.").

Turning to the merits, we first note that ***HN3***[↑] a trial court's ruling on the admissibility **[**4]** of evidence is reviewed for an abuse of discretion. McCall v. State, 941 So. 2d 1280, 1283 (Fla. 4th DCA 2006). The trial court's discretion, however, is limited by the rules of evidence. *Id.*

HN4[↑] Relevant evidence is evidence tending to prove or disprove a material fact. § 90.401, Fla. Stat. (2009). Generally, any evidence relevant to prove a fact at issue is admissible unless precluded by a specific rule of exclusion. *See* State v. Williams, 992 So. 2d 330, 333 (Fla. 3d DCA 2008); *see also* § 90.402, Fla. Stat. (2008). However, even if evidence is relevant, it is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat. (2009).

HN5[↑] Similar fact evidence of collateral crimes, wrongs, or acts "is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity." § 90.404(2)(a), Fla. Stat. (2009). Thus, evidence **[**5]** of other crimes is admissible where such evidence "tends to disprove a defendant's theory of defense or attempt to explain his intent." *Gould v. State, 942 So. 2d 465, 467 (Fla. 4th DCA 2006).*

HN6[↑] Evidence of other crimes is not, however, limited to other crimes with similar facts. *See* Sexton v. State, 697 So. 2d 833, 836-37 (Fla. 1997). "[E]vidence of bad acts or crimes is admissible without regard to whether it is similar fact evidence if it is relevant to establish a material issue." Pittman v. State, 646 So. 2d 167, 170 (Fla. 1994). As our supreme court explained:

> So-called similar fact crimes are merely a special application of the general rule that all relevant evidence is admissible unless specifically excluded by a rule of evidence. The requirement that similar fact crimes contain similar facts to the charged crime is based on the requirement to show relevancy. This does not bar the introduction of evidence of other crimes which are factually dissimilar to the charged crime if the evidence of other crimes is relevant.

Bryan v. State, 533 So. 2d 744, 746 (Fla. 1988).

In Dennis v. State, 817 So. 2d 741 (Fla. 2002), the Florida Supreme Court held that the trial court properly admitted **[**6]** evidence that the defendant previously stalked, threatened, and assaulted the woman whom he was charged with murdering. In affirming the admission of the evidence, the court cited *Sexton* and held that "the nature of Dennis's relationship with the victim was relevant to establish Dennis's motive." *Id. at 762*.

Accordingly, ***HN7***[↑] even if prior bad acts do not bear a striking similarity to the charged offenses, the prior acts are admissible if they are relevant to show motive and intent. *See* Nicholson, 10 So. 3d at 145-46 (holding that, in the defendant's trial for the murder of his ex-wife, evidence of the defendant's prior bad acts committed against victim were admissible to show the defendant's motive and intent even though they were not sufficiently similar to the charged offense to warrant introduction for purposes of identity); *State v. Wright, 74 So. 3d 503, 505-06 (Fla. 2d DCA 2011)* (holding that, in the

prosecution of the defendant for armed kidnapping of the victim, evidence of the defendant's **[*1247]** prior acts of domestic violence against the victim was relevant to the issues of motive and intent, and that the probative value of the evidence outweighed the prejudicial effect).

However, ***HN8***[↑] where **[**7]** intent or motive is not a material fact at issue, the collateral crime evidence cannot be admitted for the purpose of showing intent or motive. *See* *Pratt v. State, 1 So. 3d 1169 (Fla. 4th DCA 2009)*. In *Pratt*, this court held that in a prosecution for aggravated battery of the defendant's wife and daughter, it was error to admit evidence of three prior beatings of the wife by defendant during the preceding eighteen months. We explained:

> In the circumstances of this case, these earlier incidents of violence do nothing more than demonstrate his propensity for violence with his family members. Neither party did anything to make motive or intent significant to any contested fact. No one suggested any factual issue as to a specific reason for battering the two women. Nor did he claim that his actions were by mistake. Motive, intent and mistake were simply not made pertinent issues in the trial.

Id. at 1170 (emphasis added); *accord* *Herbert v. State, 526 So. 2d 709 (Fla. 4th DCA 1988)* (in prosecution for aggravated child abuse, error to admit evidence of an earlier beating of the same child; there was no dispute at trial as to the identity, motive, or knowledge of the defendant in beating her **[**8]** son with a belt, and the only issue in dispute was whether or not the beating constituted a crime).

Here, unlike in a murder case such as *Nicholson*, motive and intent were not particularly pertinent issues in the trial. As our supreme court has explained: ***HN9***[↑] "State of mind is not a material fact in a sexual battery charge, nor is intent an issue." *Coler v. State, 418 So. 2d 238, 239 (Fla. 1982)*. Likewise, the Second District has held that, in a prosecution against the defendant for sexual battery of his then spouse, it was error to admit a prior incident in which the defendant slapped his spouse, "because the perpetrator's state of mind is not an issue in a sexual battery case." *Hebel v. State, 765 So. 2d 143, 145 (Fla. 2d DCA 2000)*.

In the case at bar, the earlier incident of domestic violence did nothing more than demonstrate appellant's propensity for violence against his girlfriend. The primary contested fact in this case was whether appellant's girlfriend consented to the sex; appellant's motive or intent was not significant to any contested fact. *See* *id. at 145*. Even if the prior domestic violence incident had some marginal relevance in showing why K.M. delayed reporting the alleged **[**9]** sexual battery, this relevance was substantially outweighed by the danger of unfair prejudice. The prior bad act was unfairly prejudicial because it was classic propensity evidence that showed appellant's bad character. Furthermore, on this record, we cannot say that the error was harmless. *See* *Goodwin v. State, 751 So. 2d 537, 547 (Fla. 1999)* (***HN10***[↑] erroneous admission of collateral crimes is presumptively harmful error); *State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986)* (***HN11***[↑] "The harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.").

Appellant also argues that the trial court reversibly erred in refusing to allow him to question K.M. regarding MySpace messages she sent to appellant's new girlfriend **[*1248]** after the alleged sexual battery occurred, thereby denying him a full and fair opportunity to cross-examine the witness about her bias or motive to be untruthful. We address this issue for the benefit of the trial court upon retrial.

Before trial, appellant **[**10]** filed a notice to admit business records regarding messages sent—after the alleged rape—from the MySpace account of the alleged victim, K.W., to appellant's new girlfriend, Kayla. The state moved in limine to preclude the admission of the MySpace messages, and the trial court held a hearing on the matter. At the hearing, K.W. admitted in her testimony that she sent the messages over MySpace to Kayla. In the messages, K.W. told Kayla, among other things, that she was "ugly" and that her "vagina was like a swimming pool." K.W. also wrote that "I'm too beautiful for you to compete, you look like a F'g gorilla, for real dog, you should try something about that shit, Larry is . . . a F-boy." K.W. also admitted that one of the messages stated that, "Larry's ladies, you hoes don't stand a chance." K.W. claimed that she sent the messages in response to messages from Kayla. K.W. explained that Kayla had threatened to beat her up and even followed her home after appellant's first court appearance. K.M. testified that she wrote the messages to let Kayla know she would not be intimidated.

Defense counsel argued that the messages were

relevant to K.W.'s credibility because they were sent within **[**11]** weeks of the alleged sexual assault and supported the defense theory that the alleged victim was a jealous ex-girlfriend. Defense counsel claimed that "we asked MySpace for everything, and they sent us what they said they had." Defense counsel admitted the defense had received the messages in 2008 from MySpace, and that the messages were not turned over to the prosecution until the Tuesday or Wednesday before trial.

At the end of the pretrial hearing, the trial court ruled that K.W.'s MySpace messages were inadmissible because 1) the prejudice of the messages outweighed their probative value, 2) the messages, which the defense had subpoenaed, were not turned over to the prosecution in a timely manner, and 3) the rule of completeness precluded the admission of the messages because "some of these emails are clearly responsive to other emails, and without having those other emails, they are out of context."[1]

HN14[↑] While a trial court's evidentiary rulings are reviewed for an abuse of discretion, it is also "clear that a defendant in a criminal case has a constitutional right to a full and fair cross-examination of his accuser." *Taylor v. State, 623 So. 2d 832, 833 (Fla. 4th DCA 1993)*. ***HN15***[↑] A party may **[*1249]** attack the credibility of a witness by showing that he or she is biased. *Id.*; *Chatman v. State, 687 So. 2d 860, 862 (Fla. 1st DCA 1997)*. **[**13]** "The courts have repeatedly held that a defendant has the right to fully cross-examine a State's witness to reveal bias and any improper motive the witness may have had in testifying against the defendant." *Powe v. State, 413 So. 2d 1272, 1273 (Fla. 1st DCA 1982)*. However, "[e]vidence of bias may be inadmissible if it unfairly prejudices the trier of fact against the witness or misleads the trier of fact." *Breedlove v. State, 580 So. 2d 605, 609 (Fla. 1991)*.

Here, we find that the MySpace messages were relevant because they demonstrated bias and supported the defense theory that K.M. was a jealous ex-girlfriend with a motive to lie. Moreover, we cannot agree with the trial court's conclusion that the probative value of the messages was substantially outweighed by the danger of unfair prejudice. Here, while K.M. may be embarrassed that she sent the messages, we fail to see how the messages were unfairly prejudicial to the state.

Furthermore, because we are ordering a new trial, the prosecution will not be unfairly surprised by the messages. Thus, the issue as to whether the defense failed to timely turn the messages over to the prosecution is now moot. We do, however, address the "rule **[**14]** of completeness," which was the trial court's final basis for excluding the messages.

The rule of completeness is codified in *section 90.108(1), Florida Statutes* (2009), which provides that ***HN16***[↑] "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously." ***HN17***[↑] The purpose of the rule is to avoid the potential for creating misleading impressions by taking statements out of context. *Larzelere v. State, 676 So. 2d 394, 401 (Fla. 1996)*. However, the rule of completeness has not been interpreted to require exclusion of evidence where only portions of a written or recorded statement are available. *See, e.g.*, *State v. Hall, 194 N.C.App. 42, 50-51, 669 S.E.2d 30, 36-37 (2008)* (explaining that even where portions of a statement are inaudible or inadvertently destroyed, the rule of completeness has not been interpreted to require exclusion of the remaining portions of the statement; the court may in its discretion admit the other portions of the statement); *United States v. Thompson, 2009 U.S. Dist. LEXIS 9669, 2009 WL 331482 (E.D. Ky. 2009)* **[**15]** (finding the rule of completeness inapplicable where the government introduced a thirty-second news clip featuring portions of a reporter's interview of the defendant that lasted almost thirty minutes; the government was not in possession of the entire interview, the other portions of the interview were

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[1] To the extent that the trial court may have believed the messages should also be excluded as hearsay, the trial court was incorrect. ***HN12***[↑] *Subsection 90.801(1)(c), Florida Statutes* (2009), defines "hearsay" as a "statement other than one made by the declarant while testifying at the trial **[**12]** or hearing, offered in evidence to prove the truth of the matter asserted." The Florida Supreme Court has recognized that ***HN13***[↑] a statement may "be offered to prove a variety of things besides its truth." *Foster v. State, 778 So. 2d 906, 914-15 (Fla. 2000)*. When a statement is not offered for the truth of its contents, but to prove a material issue in a case, it is not hearsay. *Id. at 915*. One recognized non-hearsay use of an out of court statement is to "show motive." *Eugene v. State, 53 So. 3d 1104, 1109 (Fla. 4th DCA 2011)*. Here, appellant is correct that the messages were non-hearsay because they were not being offered for the truth of the matter asserted—e.g., that appellant's new girlfriend was ugly—but rather were being offered for the non-hearsay purpose to establish that the victim was a jealous ex-girlfriend.

unavailable, and the fact that the defendant may have said something else during the interview did not implicate the rule of completeness).

Here, if the parties are able to produce the MySpace messages that Kayla sent to K.W., then those messages should be admitted—alongside K.W.'s MySpace messages—under the rule of completeness. However, if Kayla's MySpace messages to K.W. are unavailable, the rule of completeness does not mandate the exclusion of the messages that K.W. sent to Kayla. Rather, the state may elicit testimony that K.W.'s MySpace messages were sent in response to threatening messages from Kayla. *See* United States v. Bellomo, 176 F.3d 580, 586 (2d Cir. 1999) (***HN18***[↑] statements offered as evidence of commands or threats directed to the witness, rather than **[*1250]** for the truth of the matter asserted, are not hearsay); ***see also*** State v. Holland, 76 So. 3d 1032, 1034 (Fla. 4th DCA 2011) **[**16]** (***HN19***[↑] "Verbal acts are not hearsay because they are admitted to show they were actually made and not to prove the truth of what was asserted therein."). This solution will avoid the potential for creating a misleading impression and will allow the jury to accurately perceive the entire context surrounding K.W.'s MySpace messages.

In summary, we reverse appellant's convictions and remand for a new trial consistent with this opinion.

Reversed for a new trial.

CIKLIN and GERBER, JJ., concur.

End of Document

Fla. Stat. § 90.201

Current through all 2020 general legislation.

LexisNexis® Florida Annotated Statutes > Title VII. Evidence. (Chs. 90 — 92) > Chapter 90. Evidence Code. (§§ 90.101 — 90.958)

§ 90.201. Matters which must be judicially noticed.

A court shall take judicial notice of:

(1) Decisional, constitutional, and public statutory law and resolutions of the Florida Legislature and the Congress of the United States.

(2) Florida rules of court that have statewide application, its own rules, and the rules of United States courts adopted by the United States Supreme Court.

(3) Rules of court of the United States Supreme Court and of the United States Courts of Appeal.

History

S. 1, ch. 76-237; s. 1, ch. 77-77; ss. 21, 22, ch. 78-361; ss. 1, 2, ch. 78-379.

Annotations

LexisNexis® Notes

Case Notes

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Burglary & Criminal Trespass: Criminal Trespass: Elements

Evidence: Judicial Notice: General Overview

Evidence: Judicial Notice: Adjudicative Facts: Proceedings in Other Courts

Evidence: Judicial Notice: Domestic Laws

Family Law: Child Support: Obligations: Computation: Guidelines

Legal Ethics: Sanctions: Disciplinary Proceedings: General Overview

Pensions & Benefits Law: Governmental Employees: State Pensions

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Burglary & Criminal Trespass: Criminal Trespass: Elements

Adjudication of petitioner as juvenile delinquent under Fla. Stat. § 810.097(2) was improper because the State failed to present sufficient evidence to support a finding that either of two school district police officers who warned petitioner to leave the school premises were designees of the school's principal for purposes of § 810.097(2); further, the trial court failed to take judicial notice of any specific decision of any court when declaring that the officers were the principal's designees, and, thus, the ruling did not satisfy the conditions for taking proper judicial notice pursuant to Fla. Stat. § 90.201(1). None of the decisions cited by the State concerned § 810.097(2) or otherwise established that school police officers were designees of the principal. J.R. v. State, 99 So. 3d 427, 2012 Fla. LEXIS 1662 (Fla. 2012).

Evidence: Judicial Notice: General Overview

Adjudication of petitioner as juvenile delinquent under Fla. Stat. § 810.097(2) was improper because the State failed to present sufficient evidence to support a finding that either of two school district police officers who warned petitioner to leave the school premises were designees of the school's principal for purposes of § 810.097(2); further, the trial court failed to take judicial notice of any specific decision of any court when declaring that the officers were the principal's designees, and, thus, the ruling did not satisfy the conditions for taking proper judicial notice pursuant to Fla. Stat. § 90.201(1). None of the decisions cited by the State concerned § 810.097(2) or otherwise established that school police officers were designees of the principal. J.R. v. State, 99 So. 3d 427, 2012 Fla. LEXIS 1662 (Fla. 2012).

Because publicly recorded documents such as deeds and mortgages are not included in the list of matters which must or may be judicially noticed under Fla. Stat. §§ 90.201 and 90.202, the trial court erred in appointing a receiver without requiring the applicants to introduce the subject mortgages into evidence and to establish their authenticity. Bull v. Jacksonville Federal Sav. & Loan Ass'n, 576 So. 2d 755, 1991 Fla. App. LEXIS 1751 (Fla. 1st DCA 1991).

Hospital failed to prove that it was a governmental entity because the only documents it submitted pertaining to mandatory notice under Fla. Stat. § 90.201 were insufficient to show such status, were not proferred to the trial court, or were not printed or certified copies as required by Fla. Stat. § 90.202(10). Doctors Memorial Hospital, Inc. v. Evans, 543 So. 2d 809, 1989 Fla. App. LEXIS 2497 (Fla. 1st DCA 1989).

Evidence: Judicial Notice: Adjudicative Facts: Proceedings in Other Courts

Trial court's bifurcated proceeding to prevent the presentation of evidence of the prior record to the jury during the initial stage of the trial was entirely appropriate procedure, but the odd procedure used by the court to introduce the prior judgment was improper; the court effectively introduced its own evidence against defendant, thereby departing from its required position of neutrality. Dolan v. State, 187 So. 3d 262, 2016 Fla. App. LEXIS 2183 (Fla. 2nd DCA 2016).

Trial court reversibly erred in an automobile accident case by taking judicial notice of a portion of an appellate opinion in the divorce case of the motorist's expert witness, which was admitted for impeachment purposes, because the statements made in the divorce case were inadmissible hearsay. Rubrecht v. Cone Distrib., 95 So. 3d 950, 2012 Fla. App. LEXIS 13354 (Fla. 5th DCA 2012).

Evidence: Judicial Notice: Domestic Laws

As appellee did not proffer a statute laying out a mathematical formula for calculation of his claimed retirement benefit, the trial court was not authorized under Fla. Stat § 90.201(1) to take judicial notice of government website printouts to establish the value of appellee's future pension benefits. Nationwide Mut. Fire Ins. Co. v. Darragh, 95 So. 3d 897, 2012 Fla. App. LEXIS 9201 (Fla. 5th DCA 2012).

Fla. Stat. § 90.202

Current through all 2020 general legislation.

LexisNexis® Florida Annotated Statutes > Title VII. Evidence. (Chs. 90 — 92) > Chapter 90. Evidence Code. (§§ 90.101 — 90.958)

§ 90.202. Matters which may be judicially noticed.

A court may take judicial notice of the following matters, to the extent that they are not embraced within *s. 90.201*:

(1) Special, local, and private acts and resolutions of the Congress of the United States and of the Florida Legislature.

(2) Decisional, constitutional, and public statutory law of every other state, territory, and jurisdiction of the United States.

(3) Contents of the Federal Register.

(4) Laws of foreign nations and of an organization of nations.

(5) Official actions of the legislative, executive, and judicial departments of the United States and of any state, territory, or jurisdiction of the United States.

(6) Records of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States.

(7) Rules of court of any court of this state or of any court of record of the United States or of any other state, territory, or jurisdiction of the United States.

(8) Provisions of all municipal and county charters and charter amendments of this state, provided they are available in printed copies or as certified copies.

(9) Rules promulgated by governmental agencies of this state which are published in the Florida Administrative Code or in bound written copies.

(10) Duly enacted ordinances and resolutions of municipalities and counties located in Florida, provided such ordinances and resolutions are available in printed copies or as certified copies.

(11) Facts that are not subject to dispute because they are generally known within the territorial jurisdiction of the court.

(12) Facts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned.

(13) Official seals of governmental agencies and departments of the United States and of any state, territory, or jurisdiction of the United States.

History

S. 1, ch. 76-237; s. 1, ch. 77-77; s. 1, ch. 77-174; ss. 3, 22, ch. 78-361; ss. 1, 2, ch. 78-379.

Annotations

LexisNexis® Notes

Case Notes

Administrative Law: Judicial Review: Reviewability: General Overview

Civil Procedure: Justiciability: Standing: Burdens of Proof

Civil Procedure: Pleading & Practice: Defenses, Demurrers & Objections: Affirmative Defenses: General Overview

Civil Procedure: Pleading & Practice: Defenses, Demurrers & Objections: Motions to Dismiss

Contracts Law: Negotiable Instruments: Enforcement: Duties & Liabilities of Parties: Types of Parties: Assignees & Assignors

Criminal Law & Procedure: Criminal Offenses: Crimes Against Persons: Violation of Protective Orders: Application & Issuance

Criminal Law & Procedure: Discovery & Inspection: Discovery by Defendant: Prior Record of Defendant

Criminal Law & Procedure: Witnesses: Unavailability

Criminal Law & Procedure: Sentencing: Capital Punishment: Mental Retardation

Criminal Law & Procedure: Sentencing: Corrections, Modifications & Reductions: General Overview

Criminal Law & Procedure: Sentencing: Guidelines: Adjustments & Enhancements: General Overview

Criminal Law & Procedure: Sentencing: Restitution

Criminal Law & Procedure: Postconviction Proceedings: Motions to Vacate Judgment

Evidence: Hearsay: Exceptions: Public Records: General Overview

Evidence: Judicial Notice

Evidence: Judicial Notice: General Overview

Evidence: Judicial Notice: Adjudicative Facts

Evidence: Judicial Notice: Adjudicative Facts: General Overview

Evidence: Judicial Notice: Adjudicative Facts: Facts Generally Known

Evidence: Judicial Notice: Adjudicative Facts: Proceedings in Other Courts

Evidence: Judicial Notice: Adjudicative Facts: Public Records

Evidence: Judicial Notice: Adjudicative Facts: Verifiable Facts

Evidence: Testimony: Lay Witnesses: Opinion Testimony: Rational Basis

Family Law: Guardians: General Overview

Family Law: Parental Duties & Rights: Termination of Rights: Involuntary Termination: General Overview

Legal Ethics: Sanctions: Disciplinary Proceedings: Hearings

Torts: Procedure: Conflicts of Laws: General Overview

Administrative Law: Judicial Review: Reviewability: General Overview

In an action by Department of Health and Rehabilitative Services (HRS) to recover from parents support paid for children adjudicated dependent, trial court improperly denied a request to take judicial notice of the guidelines and procedure by which HRS determined maintenance fees based upon ability to pay, claiming that trial court could not take judicial notice of an administrative rule; pursuant to Fla. Stat. § *90.202(9)*, a court could take judicial notice of rules promulgated by governmental agencies of the state which were published in the Florida Administrative Code or in bound written copies. *Department of Health & Rehabilitative Services v. Spencer, 430 So. 2d 509, 1983 Fla. App. LEXIS 19048 (Fla. 1st DCA 1983)*.

Civil Procedure: Justiciability: Standing: Burdens of Proof

In a suit on a guarantee, summary judgment for the lender's assignee was improper because standing was not established by the substitution of parties, the assignee failed to produce summary judgment evidence of the assignment more than 20 days prior to the hearing as required by *Fla. R. Civ. P. 1.510(c)*, and the trial court could not take judicial notice of the assignment. *Sandefur v. RVS Capital, LLC, 183 So. 3d 1258, 2016 Fla. App. LEXIS 1038 (Fla. 4th DCA 2016)*.

Civil Procedure: Pleading & Practice: Defenses, Demurrers & Objections: Affirmative Defenses: General Overview

There was no specific requirement that defendant asserting statute of limitations affirmative defense submit date of filing suit to jury, and, even if there were, trial court could have taken judicial notice of date; therefore, directed verdict was improper. *Elmore v. Fla. Power & Light Co., 895 So. 2d 475, 2005 Fla. App. LEXIS 1320 (Fla. 4th DCA 2005)*.

Civil Procedure: Pleading & Practice: Defenses, Demurrers & Objections: Motions to Dismiss

Order dismissing the mortgagor's counterclaim to quiet title was reversed because the trial court improperly considered matters that were outside the four corners of the mortgagor's counterclaim as it was not permitted to consider or take judicial notice of matters outside the counterclaim to which the motion to dismiss was directed. *Migliazzo v. Wells Fargo Bank, N.A., 290 So. 3d 577, 2020 Fla. App. LEXIS 748 (Fla. 2nd DCA 2020)*.

Contracts Law: Negotiable Instruments: Enforcement: Duties & Liabilities of Parties: Types of Parties: Assignees & Assignors

In a suit on a guarantee, summary judgment for the lender's assignee was improper because standing was not established by the substitution of parties, the assignee failed to produce summary judgment evidence of the

assignment more than 20 days prior to the hearing as required by *Fla. R. Civ. P. 1.510(c)*, and the trial court could not take judicial notice of the assignment. *Sandefur v. RVS Capital, LLC, 183 So. 3d 1258, 2016 Fla. App. LEXIS 1038 (Fla. 4th DCA 2016)*.

Criminal Law & Procedure: Criminal Offenses: Crimes Against Persons: Violation of Protective Orders: Application & Issuance

Final judgment of injunction against a husband to protect a wife and the parties' children from domestic violence pursuant to Fla. Stat. § *741.30* was reversed because the wife presented no evidence at the petition hearing, and the trial court never received and considered a copy of the transcript of the proceedings of which it agreed to take judicial notice. *Achurra v. Achurra, 80 So. 3d 1080, 2012 Fla. App. LEXIS 2467 (Fla. 1st DCA 2012)*.

Criminal Law & Procedure: Discovery & Inspection: Discovery by Defendant: Prior Record of Defendant

Although Fla. Stat. § *90.202(6)* permits judicial notice of any court record, the prosecutor's use of information pertaining to defendant's date of birth, place of address, and description through judicial notice of a previous court file was an inappropriate surprise and a discovery violation under *Fla. R. Crim. P. 3.220(b)(1)(F)* because the court file in the previous case had not been listed in discovery. *Milton v. State, 429 So. 2d 804, 1983 Fla. App. LEXIS 19523 (Fla. 4th DCA 1983)*.

Criminal Law & Procedure: Witnesses: Unavailability

Trial court did not abuse its discretion in allowing the State to present the prior trial testimony of an unavailable witness, as the judge's reliance on his own family experience with the medical results of childbirth in determining that she was unavailable was reasonable, based on judicial notice on common knowledge of women's typical medical conditions shortly after childbirth. *Richardson v. State, 182 So. 3d 918, 2016 Fla. App. LEXIS 584 (Fla. 1st DCA 2016)*.

Criminal Law & Procedure: Sentencing: Capital Punishment: Mental Retardation

Even if a circuit court bused its discretion in allowing a number of documents to be admitted into evidence via an overbroad application of judicial notice under Fla. Stat. § *90.202(6)*, any error was harmless because the language of the order demonstrated beyond a reasonable doubt that the challenged evidence did not contribute to the postconviction court's conclusion that defendant failed to establish mental retardation. *Dufour v. State, 69 So. 3d 235, 2011 Fla. LEXIS 289 (Fla. 2011)*, cert. denied, *565 U.S. 1185, 132 S. Ct. 1150, 181 L. Ed. 2d 1031, 2012 U.S. LEXIS 936 (U.S. 2012)*.

Criminal Law & Procedure: Sentencing: Corrections, Modifications & Reductions: General Overview

Trial court should have taken judicial notice of a parole commission's order in determining defendant's *Fla. R. Crim. P. 3.800(a)* motion; the trial court was not limited strictly to the record before the court "at sentencing" when addressing the claim, and the parole commission order was sufficient record evidence to support the motion to correct illegal sentence. *Wencel v. State, 915 So. 2d 1270, 2005 Fla. App. LEXIS 20072 (Fla. 4th DCA 2005)*.

Criminal Law & Procedure: Sentencing: Guidelines: Adjustments & Enhancements: General Overview

Where the trial court did not offer the State an opportunity to present information relevant to the propriety of taking judicial notice, but instead offered the State an opportunity only to prove that defendant required treatment that was not included in the two programs discussed by a Florida Department of Corrections (DOC) representative off the record, the court improperly shifted the burden to the State to prove that the DOC could provide specialized treatment for defendant; thus, the court erred in granting a downward departure based on judicial notice. *State v. Green, 890 So. 2d 1283, 2005 Fla. App. LEXIS 351 (Fla. 2nd DCA 2005)*, overruled, *State v. Chubbuck, 141 So. 3d 1163, 2014 Fla. LEXIS 1982 (Fla. 2014)*.

Criminal Law & Procedure: Sentencing: Restitution

Because the value of a pick-up truck could vary substantially, and because the trial court's order did not indicate the assumptions that were made in selecting a value for the truck, the trial court erred in taking judicial notice under Fla. Stat. § *90.202(12)* of a used car guide to determine the amount of restitution owed by defendant. *Walentukonis v. State, 932 So. 2d 1136, 2006 Fla. App. LEXIS 9766 (Fla. 2nd DCA 2006)*.

Criminal Law & Procedure: Postconviction Proceedings: Motions to Vacate Judgment

Circuit court did not abuse its discretion in declining the inmate's request for judicial notice because the documents were not relevant to either of the claims that were granted an evidentiary hearing. The inmate, therefore, was not entitled to postconviction relief on that claim. *Dailey v. State, 279 So. 3d 1208, 2019 Fla. LEXIS 1742 (Fla. 2019)*, cert. denied, *2020 U.S. LEXIS 5225 (U.S. Nov. 2, 2020)*.

Evidence: Hearsay: Exceptions: Public Records: General Overview

In a medical malpractice case, the trial court erred in admitting shelter orders pertaining to the patient from the Department of Children and Families by taking judicial notice of them pursuant to §§ *90.202(6)* and *90.203, Fla. Stat.*, because judicial notice was not an exception to the rule prohibiting admission of hearsay evidence, § *90.801(1)(c), Fla. Stat.*, and the hearsay within hearsay, § *90.805, Fla. Stat.*, that was within the shelter orders. *Hartong v. Bernhart, 128 So. 3d 858, 2013 Fla. App. LEXIS 19439 (Fla. 5th DCA 2013)*.

Evidence: Judicial Notice

Even if the entire court file was judicially noticed under Fla. Stat. § *90.202(6)*, a sworn arrest report in a court file could not be relied upon to show that the defendant's offenses arose from one criminal episode, as matters within the court file were subject to the same rules of evidence as other evidence. *Burgess v. State, 831 So. 2d 137, 2002 Fla. LEXIS 2178 (Fla. 2002)*.

Trial court properly took judicial notice, under Fla. Stat. § *90.202(11)* and (12), and Fla. Stat. § *90.203*, of a map used by the State only to demonstrate the location of a school in relation to the alleged drug transaction; the map clearly did not establish an element of the crime. *Graves v. State, 587 So. 2d 633, 1991 Fla. App. LEXIS 10140 (Fla. 3rd DCA 1991)*.

Although Fla. Stat. § *90.202(6)* permits judicial notice of any court record, the prosecutor's use of information pertaining to defendant's date of birth, place of address, and description through judicial notice of a previous court file was an inappropriate surprise and a discovery violation under *Fla. R. Crim. P. 3.220(b)(1)(F)* because the court file in the previous case had not been listed in discovery. *Milton v. State, 429 So. 2d 804, 1983 Fla. App. LEXIS 19523 (Fla. 4th DCA 1983)*.

Evidence: Judicial Notice: General Overview

November 2009 compensation order was not made part of the record on appeal, and the appellate court entered a separate order requiring the claimant to show cause why it should not have taken judicial notice of the November 2009 order under the authority of Fla. Stat. §§ 90.202, 90.204; the claimant did not respond or otherwise show cause why the appellate court should not have taken judicial notice of the November 2009 order that denied a claim for a change in authorized medical providers. Accordingly, the appellate court took judicial notice of this order. *Miranda v. Bridge, 112 So. 3d 500, 2012 Fla. App. LEXIS 16704 (Fla. 1st DCA 2012)*.

Appellate court declined to take judicial notice of purported reassignments by transferees of all rights, responsibilities, and obligations associated with each condominium unit back to the borrower in a foreclosure action because they were not part of the record and did not qualify for notice under Fla. Stat. § 90.202. *Beggi v. Ocean Bank, 91 So. 3d 193, 2012 Fla. App. LEXIS 9470 (Fla. 3rd DCA 2012)*.

Final judgment of injunction against a husband to protect a wife and the parties' children from domestic violence pursuant to Fla. Stat. § 741.30 was reversed because the wife presented no evidence at the petition hearing, and the trial court never received and considered a copy of the transcript of the proceedings of which it agreed to take judicial notice. *Achurra v. Achurra, 80 So. 3d 1080, 2012 Fla. App. LEXIS 2467 (Fla. 1st DCA 2012)*.

Termination order pursuant to Fla. Stat. § 39.806(1)(e)1 was proper because, inter alia, witnesses testified that mother failed to complete assigned psychotherapy sessions, medication management program, dyadic therapy, substance abuse therapy, and refused to follow a court order that directed her to go into an inpatient substance abuse program; the court explicitly stated that it took appropriate judicial notice of the underlying dependency orders and findings, found that there was clear and convincing evidence that the mother did not substantially comply with the case plans, and that it was in the manifest best interests of the child to terminate the mother's parental rights. The trial court made it clear it did not rely solely on the judicially noticed prior orders or on any hearsay contained therein to reach its conclusion to terminate the mother's parental rights, and the facts on which the dependency orders were rendered were re-established and added to with clear and convincing evidence provided by the testimony of the case managers, the guardian ad litem, and the therapists involved with the mother and her child over the past months. *C.G. v. Dep't of Children & Families, 67 So. 3d 1141, 2011 Fla. App. LEXIS 11957 (Fla. 3rd DCA 2011)*.

Even if a circuit court bused its discretion in allowing a number of documents to be admitted into evidence via an overbroad application of judicial notice under Fla. Stat. § 90.202(6), any error was harmless because the language of the order demonstrated beyond a reasonable doubt that the challenged evidence did not contribute to the postconviction court's conclusion that defendant failed to establish mental retardation. *Dufour v. State, 69 So. 3d 235, 2011 Fla. LEXIS 289 (Fla. 2011)*, cert. denied, *565 U.S. 1185, 132 S. Ct. 1150, 181 L. Ed. 2d 1031, 2012 U.S. LEXIS 936 (U.S. 2012)*.

Referee properly considered a federal district court's order and magistrate's report in an attorney disciplinary proceeding. *Fla. Bar v. Shankman, 41 So. 3d 166, 2010 Fla. LEXIS 1112 (Fla. 2010)*.

There was no specific requirement that defendant asserting statute of limitations affirmative defense submit date of filing suit to jury, and, even if there were, trial court could have taken judicial notice of date; therefore, directed verdict was improper. *Elmore v. Fla. Power & Light Co., 895 So. 2d 475, 2005 Fla. App. LEXIS 1320 (Fla. 4th DCA 2005)*.

Where the trial court did not offer the State an opportunity to present information relevant to the propriety of taking judicial notice, but instead offered the State an opportunity only to prove that defendant required treatment that was not included in the two programs discussed by a Florida Department of Corrections (DOC) representative off the record, the court improperly shifted the burden to the State to prove that the DOC could provide specialized treatment for defendant; thus, the court erred in granting a downward departure based on judicial notice. *State v.*

Green, 890 So. 2d 1283, 2005 Fla. App. LEXIS 351 (Fla. 2nd DCA 2005), overruled, *State v. Chubbuck, 141 So. 3d 1163, 2014 Fla. LEXIS 1982 (Fla. 2014)*.

Any error in applying Florida law to an award of prejudgment interest post-trial was an invited error as the issue was raised at trial, the brokers' counsel did not object, claiming the matter was premature, and the brokers' counsel stipulated to having the trial court determine interest post-trial; while Fla. Stat. § *90.202(2)* permitted the trial court to take judicial notice of the laws of another state, the record was insufficient to show that the brokers met the requirements of Fla. Stat. § *90.203*, which governed the mandatory application of the laws of a sister state. *Bennett v. Morales, 845 So. 2d 1002, 2003 Fla. App. LEXIS 7973 (Fla. 5th DCA 2003)*.

An otherwise inadmissible handwritten statement from a prior domestic violence case that the victim caused to be filed against defendant was not admissible in defendant's murder trial under Fla. Stat. § *90.202(6)* merely because it was included in a judicially noticed court file. *Stoll v. State, 762 So. 2d 870, 2000 Fla. LEXIS 1457 (Fla. 2000)*.

Taking judicial notice of the fact that a homosexual environment adversely affects a child was an inappropriate subject for judicial notice under ch. 90.202(11), because it was not a "fact" that was "generally known" within the meaning of the statute as was made clear from the testimony of the court-appointed psychologist, who presented the only evidence in the record on this point. *Maradie v. Maradie, 680 So. 2d 538, 1996 Fla. App. LEXIS 7574 (Fla. 1st DCA 1996)*.

To fulfill the requirements of Fla. Stat. § *90.202(12)*, the facts sought to be noticed must not be subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned, rather accurate records or other sources must exist which establish the judicially-noticed fact; no records or sources were before the trial court which established the fact that a homosexual environment adversely affected a child, of which the trial court took judicial notice. *Maradie v. Maradie, 680 So. 2d 538, 1996 Fla. App. LEXIS 7574 (Fla. 1st DCA 1996)*.

Neither Fla. Stat. § *90.202(11)* nor (12) permit the court to take judicial notice in a child custody dispute that a homosexual environment can adversely affect a child; judicial notice applied to self-evident truths that no reasonable person could question, truisms that approached platitudes or banalities. *Maradie v. Maradie, 680 So. 2d 538, 1996 Fla. App. LEXIS 7574 (Fla. 1st DCA 1996)*.

Under Fla. Stat. § *90.202(4)*, a court may take judicial notice of foreign law in a manner similar to that under the federal rules; a court's determination of foreign law is treated as a ruling on a question of law. *Transportes Aereos Nacionales, S.A. v. De Brenes, 625 So. 2d 4, 1993 Fla. App. LEXIS 2469 (Fla. 3rd DCA 1993)*, cert. denied, *512 U.S. 1222, 114 S. Ct. 2711, 129 L. Ed. 2d 838, 1994 U.S. LEXIS 4721 (U.S. 1994)*.

Because publicly recorded documents such as deeds and mortgages are not included in the list of matters which must or may be judicially noticed under Fla. Stat. § *90.201* and *90.202*, the trial court erred in appointing a receiver without requiring the applicants to introduce the subject mortgages into evidence and to establish their authenticity. *Bull v. Jacksonville Federal Sav. & Loan Ass'n, 576 So. 2d 755, 1991 Fla. App. LEXIS 1751 (Fla. 1st DCA 1991)*.

Hospital failed to prove that it was a governmental entity because the only documents it submitted pertaining to mandatory notice under Fla. Stat. § *90.201* were insufficient to show such status, were not proferred to the trial court, or were not printed or certified copies as required by Fla. Stat. § *90.202(10)*. *Doctors Memorial Hospital, Inc. v. Evans, 543 So. 2d 809, 1989 Fla. App. LEXIS 2497 (Fla. 1st DCA 1989)*.

In a claim arising out of a lease agreement concerning commercial property in Nicaragua and governed by Nicaraguan law, the lessor was not entitled to summary judgment, where there was no indication in the record that the trial court either applied Nicaraguan law or took judicial notice of Nicaraguan law under Fla. Stat. § *90.202(4)* pursuant to the procedures in Fla. Stat. §§ *90.203* or *90.204*. *Sanders v. Inversiones Varias, S.A., (INVASA), 436 So. 2d 1089, 1983 Fla. App. LEXIS 22800 (Fla. 3rd DCA 1983)*.

In an action by Department of Health and Rehabilitative Services (HRS) to recover from parents support paid for children adjudicated dependent, trial court improperly denied a request to take judicial notice of the guidelines and procedure by which HRS determined maintenance fees based upon ability to pay, claiming that trial court could not take judicial notice of an administrative rule; pursuant to Fla. Stat. § 90.202(9), a court could take judicial notice of rules promulgated by governmental agencies of the state which were published in the Florida Administrative Code or in bound written copies. *Department of Health & Rehabilitative Services v. Spencer, 430 So. 2d 509, 1983 Fla. App. LEXIS 19048 (Fla. 1st DCA 1983)*.

Mandate of Fla. Stat. § 90.203 that a court take judicial notice of any matter in Fla. Stat. § 90.202 does not apply to appellate courts. *Hillsborough County Bd. of County Comm'rs v. Public Employees Relations Com., 424 So. 2d 132, 1982 Fla. App. LEXIS 22055 (Fla. 1st DCA 1982)*.

Because the trial court took judicial notice under Fla. Stat. § 90.202(5), (11) of the fact that contemnor was no longer secretary of appellant department, the issue concerning contemnor's failure to pay a guardian ad litem was moot. *In Interest of E., 409 So. 2d 1071, 1981 Fla. App. LEXIS 21913 (Fla. 2nd DCA 1981)*.

Evidence: Judicial Notice: Adjudicative Facts

Circuit court did not abuse its discretion in declining the inmate's request for judicial notice because the documents were not relevant to either of the claims that were granted an evidentiary hearing. The inmate, therefore, was not entitled to postconviction relief on that claim. *Dailey v. State, 279 So. 3d 1208, 2019 Fla. LEXIS 1742 (Fla. 2019)*, cert. denied, *2020 U.S. LEXIS 5225 (U.S. Nov. 2, 2020)*.

Order dismissing the mortgagor's counterclaim to quiet title was reversed because the trial court improperly considered matters that were outside the four corners of the mortgagor's counterclaim as it was not permitted to consider or take judicial notice of matters outside the counterclaim to which the motion to dismiss was directed. *Migliazzo v. Wells Fargo Bank, N.A., 290 So. 3d 577, 2020 Fla. App. LEXIS 748 (Fla. 2nd DCA 2020)*.

Evidence: Judicial Notice: Adjudicative Facts: General Overview

While the State of Florida did not present the predicate information needed to take judicial notice of the valuation of a used car at an online website, in the context of a restitution award arising from a vehicular theft, the owner of the vehicle properly expressed an opinion as to the value of the owner's car based, in part, upon information obtained from the website. *S.M. v. State, 159 So. 3d 966, 2015 Fla. App. LEXIS 3605 (Fla. 2nd DCA 2015)*.

Pursuant to § 90.202, Fla. Stat., the referee could take judicial notice of the Illinois disciplinary rule and any related case law in the attorney disciplinary hearing. *Fla. Bar v. D'Ambrosio, 25 So. 3d 1209, 2009 Fla. LEXIS 1920 (Fla. 2009)*.

Pursuant to Fla. Stat. §§ 90.202(6) and 90.204(1), a trial court may take judicial notice of its own records after affording the parties reasonable opportunity to present information relevant to the propriety of taking judicial notice and to the nature of the matter noticed. *Ward v. State, 984 So. 2d 650, 2008 Fla. App. LEXIS 9371 (Fla. 1st DCA 2008)*.

Evidence: Judicial Notice: Adjudicative Facts: Facts Generally Known

Trial court did not abuse its discretion in allowing the State to present the prior trial testimony of an unavailable witness, as the judge's reliance on his own family experience with the medical results of childbirth in determining that she was unavailable was reasonable, based on judicial notice on common knowledge of women's typical

medical conditions shortly after childbirth. *Richardson v. State, 182 So. 3d 918, 2016 Fla. App. LEXIS 584 (Fla. 1st DCA 2016)*.

Evidence: Judicial Notice: Adjudicative Facts: Proceedings in Other Courts

Appellee's summary judgment evidence was proper in a foreclosure action, as the trial court could take judicial notice of bankruptcy court records while the recorded deed was admissible as a public record and also established appellee's superior interest. *Black Point Assets, Inc. v. Fannie Mae, 220 So. 3d 566, 2017 Fla. App. LEXIS 8844 (Fla. 5th DCA 2017)*.

Trial court's bifurcated proceeding to prevent the presentation of evidence of the prior record to the jury during the initial stage of the trial was entirely appropriate procedure, but the odd procedure used by the court to introduce the prior judgment was improper; the court effectively introduced its own evidence against defendant, thereby departing from its required position of neutrality. *Dolan v. State, 187 So. 3d 262, 2016 Fla. App. LEXIS 2183 (Fla. 2nd DCA 2016)*.

In a medical malpractice case, the trial court erred in admitting shelter orders pertaining to the patient from the Department of Children and Families by taking judicial notice of them pursuant to §§ *90.202(6)* and *90.203, Fla. Stat.*, because judicial notice was not an exception to the rule prohibiting admission of hearsay evidence, § *90.801(1)(c), Fla. Stat.*, and the hearsay within hearsay, § *90.805, Fla. Stat.*, that was within the shelter orders. *Hartong v. Bernhart, 128 So. 3d 858, 2013 Fla. App. LEXIS 19439 (Fla. 5th DCA 2013)*.

Trial court reversibly erred in an automobile accident case by taking judicial notice of a portion of an appellate opinion in the divorce case of the motorist's expert witness, which was admitted for impeachment purposes, because the statements made in the divorce case were inadmissible hearsay. *Rubrecht v. Cone Distrib., 95 So. 3d 950, 2012 Fla. App. LEXIS 13354 (Fla. 5th DCA 2012)*.

Proponent of a motion to suppress carried the initial burden of establishing a violation of the Fourth Amendment, and that was reflected in the provisions of *Fla. R. Crim. P. 3.190(g)(3)*, which required the defense to present evidence in support of the motion, after which time the State may offer rebuttal evidence; the initial burden required the defense to make some showing that a search occurred and was invalid, and the defendant's mere presence in the courtroom was not sufficient to meet the initial burden. While it appeared the trial court sua sponte took judicial notice of the absence of a search warrant in the court file, and §§ *90.203* and *90.204, Fla. Stat.* provided the procedure to be followed in taking judicial notice pursuant to § *90.202, Fla. Stat*, neither the parties nor the court complied with those procedures. *State v. Mobley, 98 So. 3d 124, 2012 Fla. App. LEXIS 11765 (Fla. 5th DCA 2012)*.

Although Fla. Stat. § *90.202(c)* gave a trial court the authority to rely on the records and proceedings of an earlier custody hearing when ruling on a petition for a domestic violence injunction, the injunction entered by the trial court could not stand because, while the trial court gave notice of its intent to rely on the testimony of the witnesses at the custody hearing, the trial court failed to formally take judicial notice of the records from the custody hearing and to make them a part of the record in the instant proceeding as required under Fla. Stat. § *90.204*. *Coe v. Coe, 39 So. 3d 542, 2010 Fla. App. LEXIS 10679 (Fla. 2nd DCA 2010)*.

In a disciplinary proceeding, a referee did not abuse his discretion in accepting bankruptcy court documents and orders into the record and then relying on them because the referee was entitled to take judicial notice thereof under Fla. Stat. § *90.202(6)* and the attorney acknowledged that the records were true and correct copies. *Fla. Bar v. Head, 27 So. 3d 1, 2010 Fla. LEXIS 1 (Fla. 2010)*.

Trial court was able, under Fla. Stat. § *90.202(6)* to take judicial notice of the final order dismissing a prior lawsuit between the parties. *Miller v. Preefer, 1 So. 3d 1278, 2009 Fla. App. LEXIS 1281 (Fla. 4th DCA 2009)*.

Evidence: Judicial Notice: Adjudicative Facts: Public Records

Appellee's summary judgment evidence was proper in a foreclosure action, as the trial court could take judicial notice of bankruptcy court records while the recorded deed was admissible as a public record and also established appellee's superior interest. *Black Point Assets, Inc. v. Fannie Mae, 220 So. 3d 566, 2017 Fla. App. LEXIS 8844 (Fla. 5th DCA 2017)*.

Evidence: Judicial Notice: Adjudicative Facts: Verifiable Facts

Trial court erred in admitting government website printouts to establish the value of appellee's future pension benefits, because it was not entitled to take judicial notice of them under Fla. Stat. § *90.202(12)* as facts that were not subject to dispute. *Nationwide Mut. Fire Ins. Co. v. Darragh, 95 So. 3d 897, 2012 Fla. App. LEXIS 9201 (Fla. 5th DCA 2012)*.

Evidence: Testimony: Lay Witnesses: Opinion Testimony: Rational Basis

While the State of Florida did not present the predicate information needed to take judicial notice of the valuation of a used car at an online website, in the context of a restitution award arising from a vehicular theft, the owner of the vehicle properly expressed an opinion as to the value of the owner's car based, in part, upon information obtained from the website. *S.M. v. State, 159 So. 3d 966, 2015 Fla. App. LEXIS 3605 (Fla. 2nd DCA 2015)*.

Family Law: Guardians: General Overview

Because the trial court took judicial notice under Fla. Stat. § *90.202(5)*,(11) of the fact that contemnor was no longer secretary of appellant department, the issue concerning contemnor's failure to pay a guardian ad litem was moot. *In Interest of E., 409 So. 2d 1071, 1981 Fla. App. LEXIS 21913 (Fla. 2nd DCA 1981)*.

Family Law: Parental Duties & Rights: Termination of Rights: Involuntary Termination: General Overview

Termination order pursuant to Fla. Stat. § *39.806(1)(e)*1 was proper because, inter alia, witnesses testified that mother failed to complete assigned psychotherapy sessions, medication management program, dyadic therapy, substance abuse therapy, and refused to follow a court order that directed her to go into an inpatient substance abuse program; the court explicitly stated that it took appropriate judicial notice of the underlying dependency orders and findings, found that there was clear and convincing evidence that the mother did not substantially comply with the case plans, and that it was in the manifest best interests of the child to terminate the mother's parental rights. The trial court made it clear it did not rely solely on the judicially noticed prior orders or on any hearsay contained therein to reach its conclusion to terminate the mother's parental rights, and the facts on which the dependency orders were rendered were re-established and added to with clear and convincing evidence provided by the testimony of the case managers, the guardian ad litem, and the therapists involved with the mother and her child over the past months. *C.G. v. Dep't of Children & Families, 67 So. 3d 1141, 2011 Fla. App. LEXIS 11957 (Fla. 3rd DCA 2011)*.

Legal Ethics: Sanctions: Disciplinary Proceedings: Hearings

Referee properly considered a federal district court's order and magistrate's report in an attorney disciplinary proceeding. *Fla. Bar v. Shankman, 41 So. 3d 166, 2010 Fla. LEXIS 1112 (Fla. 2010)*.

Pursuant to § *90.202, Fla. Stat.*, the referee could take judicial notice of the Illinois disciplinary rule and any related case law in the attorney disciplinary hearing. *Fla. Bar v. D'Ambrosio, 25 So. 3d 1209, 2009 Fla. LEXIS 1920 (Fla. 2009)*.

Torts: Procedure: Conflicts of Laws: General Overview

Under Fla. Stat. § *90.202(4)*, a court may take judicial notice of foreign law in a manner similar to that under the federal rules; a court's determination of foreign law is treated as a ruling on a question of law. *Transportes Aereos Nacionales, S.A. v. De Brenes, 625 So. 2d 4, 1993 Fla. App. LEXIS 2469 (Fla. 3rd DCA 1993)*, cert. denied, *512 U.S. 1222, 114 S. Ct. 2711, 129 L. Ed. 2d 838, 1994 U.S. LEXIS 4721 (U.S. 1994)*.

Research References & Practice Aids

RESEARCH REFERENCES & PRACTICE AIDS

Florida Statutes references.

Chapter 90. Evidence Code, F.S. § *90.203*. Compulsory judicial notice upon request.

Law Reviews & Journals

2009 Survey of Juvenile Law, Michael J. Dale, Fall 2009, *34 Nova L. Rev. 199*.

Casenote: Foreign Law, Politics & Litigants In U.S. Courts: A Discussion of Issues Raised by Transportes Aereos Nacionales, S.A. v. De Brenes, William H. White, Jr., Fall 1995, *27 U. Miami Inter-Am. L. Rev. 161*.

Evidence: 1996 Survey of Florida Law, Dale Alan Bruschi, Fall 1996, *21 Nova L. Rev. 149*.

Treatises

Florida Evidence Manual, Chapter 2 Judicial Notice, § *90.201.01 Text of the Rule*.

Florida Evidence Manual, Chapter 2 Judicial Notice, § *90.202.01 Text of the Rule and Analysis*.

Florida Evidence Manual, Chapter 2 Judicial Notice, § *90.203.01 Text of the Rule*.

Florida Evidence Manual, Chapter 2 Judicial Notice, § *90.204.01 Text of the Rule*.

Florida Evidence Manual, Chapter 2 Judicial Notice, § *90.207.01 Text of the Rule and Analysis*.

Florida Evidence Manual, Chapter 9 Authentication and Identification, § *90.901.01 Text of the Rule and Analysis*.

Florida Evidence Manual, Chapter 9 Authentication and Identification, § *90.902.01 Text of the Rule*.

Florida Family Law, Division IV Dissolution of Marriage, Chapter 82 Modification of Child Support, Part I. Legal Background, § *82.02 Grounds for Modification*.

Florida Torts, I. Actions Based on Negligent Conduct, Chapter 3 Proof of Negligence, A. Proof of Case, § *3.04 Province of Court and Jury*.

Jury Instructions

Florida Forms of Jury Instruction, I. Instructions Used in All Civil Actions, Part A. Procedure and General Instructions, Chapter 1 Drafting and Use of Instructions, and Instructions Before and During Trial, Part C. General Instructions, 2. Instructions During Trial, § *1.46 Judicial Notice*.

FLORIDA BAR PUBLICATIONS

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, B. Compulsory Judicial Notice, 1. [§ *2.2] In General*.

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, B. Compulsory Judicial Notice, 3. Court Rules, a. [§ 2.4] Local, State, and Federal.

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, C. Discretionary Judicial Notice, 1. [§ 2.6] In General.

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, C. Discretionary Judicial Notice, 2. [§ 2.7] Special, Local, and Private Acts and Resolutions.

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, C. Discretionary Judicial Notice, 3. [§ 2.8] Decisional, Constitutional, and Statutory Law of Other States.

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, C. Discretionary Judicial Notice, 4. [§ 2.9] Contents of Federal Register.

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, C. Discretionary Judicial Notice, 5. [§ 2.10] Laws of Foreign Nations and Organizations of Nations.

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, C. Discretionary Judicial Notice, 6. [§ 2.11] Official Actions of Legislative, Executive, and Judicial Departments of United States or State.

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, C. Discretionary Judicial Notice, 7. [§ 2.12] Court Records.

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, C. Discretionary Judicial Notice, 8. [§ 2.13] Court Rules.

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, C. Discretionary Judicial Notice, 9. [§ 2.14] Municipal and County Charters.

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, C. Discretionary Judicial Notice, 10. [§ 2.15] Administrative Rules.

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, C. Discretionary Judicial Notice, 11. [§ 2.16] Ordinances and Resolutions of Florida Municipalities and Counties.

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, C. Discretionary Judicial Notice, 12. [§ 2.17] Facts of Common Knowledge.

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, C. Discretionary Judicial Notice, 13. [§ 2.18] Facts Capable of Accurate and Ready Determination.

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, C. Discretionary Judicial Notice, 14. [§ 2.19] Governmental Seals.

Judicial Notice on Appeal: A History Lesson in Recent Trends, by Dorothy F. Easley, December, 2010, *84 Fla. Bar J. 45.*

Proceed with Caution: The Effect of Disciplinary Determinations on Civil Suits Involving Engineers, by Jonathan Yi, December, 2007, *81 Fla. Bar J. 10.*

Appellate Practice: Judicial Notice on Appeal: Why All the Fuss?, by Dorothy F. Easley, May, 2006, *80 Fla. Bar J. 40.*

Florida Proceedings After Dissolution of Marriage, 5 Modification of Parental Responsibility, II. Guidelines for Modification, C. Issues Considered by Court, b. [§ 5.10] Sexual Conduct.

Florida Proceedings After Dissolution of Marriage, 7 Modification of Child Support, III. Grounds, C. Change in Circumstances, 6. [§ 7.28] Effect Of Inflation.

Florida Proceedings After Dissolution of Marriage, 9 Foreign Judgments, VI. Other Issues, B. [§ 9.26] Application Of Foreign Law.

Business Litigation in Florida, 11 Pretrial Preparation and Trial Procedures; Direct Examination, Cross-Examination, Redirect, and Rebuttal, I. Pretrial Preparation, C. Simplifying Proof, 5. [§ 11.10] Judicial Notice On Request Of Party.

Business Litigation in Florida, 12 Selected Problems in Evidence, V. Pretrial Discovery as Evidence, B. [§ 12.26] Testimony From Another Case.

Business Litigation in Florida, 12 Selected Problems in Evidence, VI. [§ 12.29] Authoritative Texts.

Florida Civil Trial Practice, 13 Documentary Evidence, III. Admissibility of Documents and Use At Trial, D. [§ 13.20] Judicial Notice Of Documents.

End of Document

Fla. Stat. § 90.203

Current through all 2020 general legislation.

LexisNexis® Florida Annotated Statutes > Title VII. Evidence. (Chs. 90 — 92) > Chapter 90. Evidence Code. (§§ 90.101 — 90.958)

§ 90.203. Compulsory judicial notice upon request.

A court shall take judicial notice of any matter in *s. 90.202* when a party requests it and:

(1) Gives each adverse party timely written notice of the request, proof of which is filed with the court, to enable the adverse party to prepare to meet the request.

(2) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

History

S. 1, ch. 76-237; s. 1, ch. 77-77; s. 22, ch. 78-361; s. 1, ch. 78-379.

Annotations

LexisNexis® Notes

Case Notes

Civil Procedure: Pleading & Practice: Defenses, Demurrers & Objections: Motions to Dismiss

Criminal Law & Procedure: Criminal Offenses: Crimes Against Persons: Violation of Protective Orders: Application & Issuance

Evidence: Hearsay: Exceptions: Public Records: General Overview

Evidence: Judicial Notice

Evidence: Judicial Notice: General Overview

Evidence: Judicial Notice: Adjudicative Facts

Evidence: Judicial Notice: Adjudicative Facts: Proceedings in Other Courts

Civil Procedure: Pleading & Practice: Defenses, Demurrers & Objections: Motions to Dismiss

Order dismissing the mortgagor's counterclaim to quiet title was reversed because the trial court improperly considered matters that were outside the four corners of the mortgagor's counterclaim as it was not permitted to

consider or take judicial notice of matters outside the counterclaim to which the motion to dismiss was directed. *Migliazzo v. Wells Fargo Bank, N.A., 290 So. 3d 577, 2020 Fla. App. LEXIS 748 (Fla. 2nd DCA 2020)*.

Criminal Law & Procedure: Criminal Offenses: Crimes Against Persons: Violation of Protective Orders: Application & Issuance

Final judgment of injunction against a husband to protect a wife and the parties' children from domestic violence pursuant to Fla. Stat. § *741.30* was reversed because the wife presented no evidence at the petition hearing, and the trial court never received and considered a copy of the transcript of the proceedings of which it agreed to take judicial notice. *Achurra v. Achurra, 80 So. 3d 1080, 2012 Fla. App. LEXIS 2467 (Fla. 1st DCA 2012)*.

Evidence: Hearsay: Exceptions: Public Records: General Overview

In a medical malpractice case, the trial court erred in admitting shelter orders pertaining to the patient from the Department of Children and Families by taking judicial notice of them pursuant to §§ *90.202(6)* and *90.203, Fla. Stat.*, because judicial notice was not an exception to the rule prohibiting admission of hearsay evidence, § *90.801(1)(c), Fla. Stat.* and the hearsay within hearsay, § *90.805, Fla. Stat.*, that was within the shelter orders. *Hartong v. Bernhart, 128 So. 3d 858, 2013 Fla. App. LEXIS 19439 (Fla. 5th DCA 2013)*.

Evidence: Judicial Notice

Trial court improperly took judicial notice of the only evidence supporting the California corporation's motion for summary judgment since the Florida corporation was given neither fair warning that the trial court intended to take judicial notice on its own motion nor a reasonable opportunity to present information. *Scripps Research Inst., Inc. v. Scripps Research Inst., 916 So. 2d 988, 2005 Fla. App. LEXIS 20275 (Fla. 4th DCA 2005)*.

Trial court properly took judicial notice under Fla. Stat. § *90.202(11)* and (12), and Fla. Stat. § *90.203*, of a map used by the State only to demonstrate the location of a school in relation to the alleged drug transaction; and the map clearly did not establish an element of the crime. *Graves v. State, 587 So. 2d 633, 1991 Fla. App. LEXIS 10140 (Fla. 3rd DCA 1991)*.

Defendant was not prejudiced by the State's request that the court take judicial notice of a Department of Corrections rule, which was made the day before jury selection, because defendant had been furnished the text of the rule by the information approximately three months prior to trial. *Rogers v. State, 413 So. 2d 1270, 1982 Fla. App. LEXIS 20050 (Fla. 1st DCA 1982)*.

Trial court was furnished with sufficient information, pursuant to Fla. Stat. § *90.203*, to take judicial notice of a Department of Corrections rule where the rule was set forth in the information and court file and published in the Florida Administrative Code. *Rogers v. State, 413 So. 2d 1270, 1982 Fla. App. LEXIS 20050 (Fla. 1st DCA 1982)*.

Request for judicial notice must be made pursuant to this statute, which requires timely written notice so that the opposing party has sufficient time to meet the request. An untimely request made on the day before trial should not have been granted. *Digiovanni v. Deutsche Bank Nat'l Trust Co., 2020 Fla. App. LEXIS 16825 (Fla. 2nd DCA Nov. 25, 2020)*.

Evidence: Judicial Notice: General Overview

Proponent of a motion to suppress carried the initial burden of establishing a violation of the Fourth Amendment, and that was reflected in the provisions of *Fla. R. Crim. P. 3.190(g)(3)*, which required the defense to present

evidence in support of the motion, after which time the State may offer rebuttal evidence; the initial burden required the defense to make some showing that a search occurred and was invalid, and the defendant's mere presence in the courtroom was not sufficient to meet the initial burden. While it appeared the trial court sua sponte took judicial notice of the absence of a search warrant in the court file, and §§ 90.203 and 90.204, Fla. Stat. provided the procedure to be followed in taking judicial notice pursuant to § 90.202, Fla. Stat, neither the parties nor the court complied with those procedures. *State v. Mobley, 98 So. 3d 124, 2012 Fla. App. LEXIS 11765 (Fla. 5th DCA 2012).*

Final judgment of injunction against a husband to protect a wife and the parties' children from domestic violence pursuant to Fla. Stat. § 741.30 was reversed because the wife presented no evidence at the petition hearing, and the trial court never received and considered a copy of the transcript of the proceedings of which it agreed to take judicial notice. *Achurra v. Achurra, 80 So. 3d 1080, 2012 Fla. App. LEXIS 2467 (Fla. 1st DCA 2012).*

Any error in applying Florida law to an award of prejudgment interest post-trial was an invited error as the issue was raised at trial, the brokers' counsel did not object, claiming the matter was premature, and the brokers' counsel stipulated to having the trial court determine interest post-trial; while Fla. Stat. § 90.202(2) permitted the trial court to take judicial notice of the laws of another state, the record was insufficient to show that the brokers met the requirements of Fla. Stat. § 90.203, which governed the mandatory application of the laws of a sister state. *Bennett v. Morales, 845 So. 2d 1002, 2003 Fla. App. LEXIS 7973 (Fla. 5th DCA 2003).*

The requirements of Fla. Stat. §§ 90.203 and 90.204 were not met by stipulating to judicial notice; a stipulation alone does not provide the evidentiary basis for judicial notice of evidence not otherwise properly before the court. *Carson v. Gibson, 595 So. 2d 175, 1992 Fla. App. LEXIS 1507 (Fla. 2nd DCA 1992).*

In a claim arising out of a lease agreement concerning commercial property in Nicaragua and governed by Nicaraguan law, the lessor was not entitled to summary judgment, where there was no indication in the record that the trial court either applied Nicaraguan law or took judicial notice of Nicaraguan law under Fla. Stat. § 90.202(4) pursuant to the procedures in Fla. Stat. §§ 90.203 or 90.204. *Sanders v. Inversiones Varias, S.A., (INVASA), 436 So. 2d 1089, 1983 Fla. App. LEXIS 22800 (Fla. 3rd DCA 1983).*

Mandate of Fla. Stat. § 90.203 that a court take judicial notice of any matter in Fla. Stat. § 90.202 does not apply to appellate courts. *Hillsborough County Bd. of County Comm'rs v. Public Employees Relations Com., 424 So. 2d 132, 1982 Fla. App. LEXIS 22055 (Fla. 1st DCA 1982).*

Evidence: Judicial Notice: Adjudicative Facts

Order dismissing the mortgagor's counterclaim to quiet title was reversed because the trial court improperly considered matters that were outside the four corners of the mortgagor's counterclaim as it was not permitted to consider or take judicial notice of matters outside the counterclaim to which the motion to dismiss was directed. *Migliazzo v. Wells Fargo Bank, N.A., 290 So. 3d 577, 2020 Fla. App. LEXIS 748 (Fla. 2nd DCA 2020).*

Evidence: Judicial Notice: Adjudicative Facts: Proceedings in Other Courts

In a medical malpractice case, the trial court erred in admitting shelter orders pertaining to the patient from the Department of Children and Families by taking judicial notice of them pursuant to §§ 90.202(6) and 90.203, Fla. Stat., because judicial notice was not an exception to the rule prohibiting admission of hearsay evidence, § 90.801(1)(c), Fla. Stat. and the hearsay within hearsay, § 90.805, Fla. Stat., that was within the shelter orders. *Hartong v. Bernhart, 128 So. 3d 858, 2013 Fla. App. LEXIS 19439 (Fla. 5th DCA 2013).*

Trial court's bifurcated proceeding to prevent the presentation of evidence of the prior record to the jury during the initial stage of the trial was entirely appropriate procedure, but the odd procedure used by the court to introduce the prior judgment was improper; the court effectively introduced its own evidence against defendant, thereby departing

from its required position of neutrality. *Dolan v. State, 187 So. 3d 262, 2016 Fla. App. LEXIS 2183 (Fla. 2nd DCA 2016)*.

Research References & Practice Aids

RESEARCH REFERENCES & PRACTICE AIDS

Florida Statutes references.

Chapter 90. Evidence Code, F.S. § *90.204*. Determination of propriety of judicial notice and nature of matter noticed.

Law Reviews & Journals

Casenote: Foreign Law, Politics & Litigants In U.S. Courts: A Discussion of Issues Raised by Transportes Aereos Nacionales, S.A. v. De Brenes, William H. White, Jr., Fall 1995, *27 U. Miami Inter-Am. L. Rev. 161*.

Treatises

Florida Evidence Manual, Chapter 2 Judicial Notice, § *90.202.01 Text of the Rule and Analysis*.

Florida Evidence Manual, Chapter 2 Judicial Notice, § *90.203.01 Text of the Rule*.

Florida Evidence Manual, Chapter 2 Judicial Notice, § *90.207.01 Text of the Rule and Analysis*.

Florida Evidence Manual, Chapter 9 Authentication and Identification, § *90.901.01 Text of the Rule and Analysis*.

Florida Torts, I. Actions Based on Negligent Conduct, Chapter 3 Proof of Negligence, A. Proof of Case, § *3.04 Province of Court and Jury*.

FLORIDA BAR PUBLICATIONS

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, C. Discretionary Judicial Notice, 1. [§ 2.6] In General.

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, C. Discretionary Judicial Notice, 5. [§ 2.10] Laws of Foreign Nations and Organizations of Nations.

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, C. Discretionary Judicial Notice, 6. [§ 2.11] Official Actions of Legislative, Executive, and Judicial Departments of United States or State.

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, D. [§ 2.20] Effect of Judicial Notice.

Florida Proceedings After Dissolution of Marriage, 9 Foreign Judgments, VI. Other Issues, B. [§ 9.26] Application Of Foreign Law.

Business Litigation in Florida, 11 Pretrial Preparation and Trial Procedures; Direct Examination, Cross-Examination, Redirect, and Rebuttal, I. Pretrial Preparation, C. Simplifying Proof, 5. [§ 11.10] Judicial Notice On Request Of Party.

Business Litigation in Florida, 11 Pretrial Preparation and Trial Procedures; Direct Examination, Cross-Examination, Redirect, and Rebuttal, I. Pretrial Preparation, C. Simplifying Proof, 6. [§ 11.11] Judicial Notice On Court Motion.

Florida Civil Trial Practice, 13 Documentary Evidence, III. Admissibility of Documents and Use At Trial, D. [§ 13.20] Judicial Notice Of Documents.

Florida Civil Trial Practice, 13 Documentary Evidence, III. Admissibility of Documents and Use At Trial, F. [§ 13.22] Checklist of Objections To Admissibility.

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Fla. Stat. § 90.204

Current through all 2020 general legislation.

LexisNexis® Florida Annotated Statutes > Title VII. Evidence. (Chs. 90 — 92) > Chapter 90. Evidence Code. (§§ 90.101 — 90.958)

§ 90.204. Determination of propriety of judicial notice and nature of matter noticed.

(1) When a court determines upon its own motion that judicial notice of a matter should be taken or when a party requests such notice and shows good cause for not complying with *s. 90.203(1)*, the court shall afford each party reasonable opportunity to present information relevant to the propriety of taking judicial notice and to the nature of the matter noticed.

(2) In determining the propriety of taking judicial notice of a matter or the nature thereof, a court may use any source of pertinent and reliable information, whether or not furnished by a party, without regard to any exclusionary rule except a valid claim of privilege and except for the exclusions provided in *s. 90.403*.

(3) If a court resorts to any documentary source of information not received in open court, the court shall make the information and its source a part of the record in the action and shall afford each party reasonable opportunity to challenge such information, and to offer additional information, before judicial notice of the matter is taken.

(4) In family cases, the court may take judicial notice of any matter described in *s. 90.202(6)* when imminent danger to persons or property has been alleged and it is impractical to give prior notice to the parties of the intent to take judicial notice. Opportunity to present evidence relevant to the propriety of taking judicial notice under subsection (1) may be deferred until after judicial action has been taken. If judicial notice is taken under this subsection, the court shall, within 2 business days, file a notice in the pending case of the matters judicially noticed. For purposes of this subsection, the term "family cases" has the same meaning as provided in the Rules of Judicial Administration.

History

S. 1, ch. 76-237; s. 1, ch. 77-77; s. 22, ch. 78-361; s. 1, ch. 78-379; s. 2, *ch. 2014-35*, eff. May 12, 2014.

Annotations

LexisNexis® Notes

Notes

Amendments.

The 2014 amendment added (4).

Case Notes

Civil Procedure: Judgments: Entry of Judgments: Enforcement & Execution: Fraudulent Transfers

Criminal Law & Procedure: Criminal Offenses: Crimes Against Persons: Violation of Protective Orders: Application & Issuance

Criminal Law & Procedure: Pretrial Motions & Procedures: Motions in Limine

Criminal Law & Procedure: Sentencing: Guidelines: Adjustments & Enhancements: General Overview

Evidence: Judicial Notice

Evidence: Judicial Notice: General Overview

Evidence: Judicial Notice: Adjudicative Facts: General Overview

Evidence: Judicial Notice: Adjudicative Facts: Proceedings in Other Courts

Evidence: Testimony: Lay Witnesses: Opinion Testimony: Rational Basis

Family Law: Child Support: Obligations: Computation: Imputed Income: General Overview

Family Law: Marital Termination & Spousal Support: Dissolution & Divorce: Property Distribution: Equitable Distribution: Factors: General Overview

Workers' Compensation & SSDI: Administrative Proceedings: Evidence: General Overview

Civil Procedure: Judgments: Entry of Judgments: Enforcement & Execution: Fraudulent Transfers

Trial court's taking judicial notice of a former husband's financial affidavits in a fraudulent transfer case brought by a former wife against the former husband's son was proper because the affidavits were relevant on the issue of whether the former husband was insolvent at time of the transfer, and the affidavits were the type of material that may have been judicially noticed. *Manchec v. Manchec, 951 So. 2d 1026, 2007 Fla. App. LEXIS 4585 (Fla. 4th DCA 2007)*.

Criminal Law & Procedure: Criminal Offenses: Crimes Against Persons: Violation of Protective Orders: Application & Issuance

Final judgment of injunction against a husband to protect a wife and the parties' children from domestic violence pursuant to Fla. Stat. § *741.30* was reversed because the wife presented no evidence at the petition hearing, and the trial court never received and considered a copy of the transcript of the proceedings of which it agreed to take judicial notice. *Achurra v. Achurra, 80 So. 3d 1080, 2012 Fla. App. LEXIS 2467 (Fla. 1st DCA 2012)*.

Criminal Law & Procedure: Pretrial Motions & Procedures: Motions in Limine

New hearing was ordered where it was not clear whether the trial court considered newspaper articles and other information that questioned an officer's credibility in contravention of Fla. Stat. § 90.204(3), when the trial court granted appellee's motion to suppress his confession. State v. Brown, 577 So. 2d 704, 1991 Fla. App. LEXIS 3199 (Fla. 4th DCA 1991).

Criminal Law & Procedure: Sentencing: Guidelines: Adjustments & Enhancements: General Overview

Where the trial court did not offer the State an opportunity to present information relevant to the propriety of taking judicial notice, but instead offered the State an opportunity only to prove that defendant required treatment that was not included in the Tier 1 or Tier 2 programs discussed by a Florida Department of Corrections (DOC) representative off the record, the court improperly shifted the burden to the State to prove that the DOC could provide specialized treatment for defendant; thus, the court erred in granting a downward departure based on judicial notice. State v. Green, 890 So. 2d 1283, 2005 Fla. App. LEXIS 351 (Fla. 2nd DCA 2005), overruled, State v. Chubbuck, 141 So. 3d 1163, 2014 Fla. LEXIS 1982 (Fla. 2014).

Evidence: Judicial Notice

Trial court improperly took judicial notice of the only evidence supporting the California corporation's motion for summary judgment since the Florida corporation was given neither fair warning that the trial court intended to take judicial notice on its own motion nor a reasonable opportunity to present information. Scripps Research Inst., Inc. v. Scripps Research Inst., 916 So. 2d 988, 2005 Fla. App. LEXIS 20275 (Fla. 4th DCA 2005).

Evidence: Judicial Notice: General Overview

Magistrate erred when she sua sponte took judicial notice of two sources she used to impute income to the former wife, including an IRS tax guide Glaister v. Glaister, 137 So. 3d 513, 2014 Fla. App. LEXIS 4781 (Fla. 4th DCA 2014).

November 2009 compensation order was not made part of the record on appeal, and the appellate court entered a separate order requiring the claimant to show cause why it should not have taken judicial notice of the November 2009 order under the authority of Fla. Stat. §§ 90.202, 90.204; the claimant did not respond or otherwise show cause why the appellate court should not have taken judicial notice of the November 2009 order that denied a claim for a change in authorized medical providers. Accordingly, the appellate court took judicial notice of this order. Miranda v. Bridge, 112 So. 3d 500, 2012 Fla. App. LEXIS 16704 (Fla. 1st DCA 2012).

Final judgment of injunction against a husband to protect a wife and the parties' children from domestic violence pursuant to Fla. Stat. § 741.30 was reversed because the wife presented no evidence at the petition hearing, and the trial court never received and considered a copy of the transcript of the proceedings of which it agreed to take judicial notice. Achurra v. Achurra, 80 So. 3d 1080, 2012 Fla. App. LEXIS 2467 (Fla. 1st DCA 2012).

In entering an order equitably dividing the parties' property, the trial court violated Fla. Stat. § 90.204 by "judicially noticing" facts in the former husband's proposed final judgment, as it was submitted over a month after the close of the evidence, and the former wife was not afforded a reasonable opportunity to present information relevant to the propriety of taking judicial notice and to the nature of the matter noticed. Craig v. Craig, 982 So. 2d 724, 2008 Fla. App. LEXIS 6284 (Fla. 1st DCA 2008).

Where the trial court did not offer the State an opportunity to present information relevant to the propriety of taking judicial notice, but instead offered the State an opportunity only to prove that defendant required treatment that was not included in the Tier 1 or Tier 2 programs discussed by a Florida Department of Corrections (DOC) representative off the record, the court improperly shifted the burden to the State to prove that the DOC could

provide specialized treatment for defendant; thus, the court erred in granting a downward departure based on judicial notice. State v. Green, 890 So. 2d 1283, 2005 Fla. App. LEXIS 351 (Fla. 2nd DCA 2005), overruled, State v. Chubbuck, 141 So. 3d 1163, 2014 Fla. LEXIS 1982 (Fla. 2014).

Trial court's attempt to take judicial notice of prior case did not comply with the notice provisions of Fla. Stat. § 90.204(1), even if those matters were proper matters for judicial notice, because agency lacked warning that the record of a prior case would be considered. Forfeiture of Forty-Four Thousand, Six Hundred & Forty Five Dollars v. De La Puente, 634 So. 2d 710, 1994 Fla. App. LEXIS 2560 (Fla. 1st DCA 1994).

The requirements of Fla. Stat. §§ 90.203 and 90.204 were not met by stipulating to judicial notice; a stipulation alone does not provide the evidentiary bases for judicial notice of evidence not otherwise properly before the court. *Carson v. Gibson, 595 So. 2d 175, 1992 Fla. App. LEXIS 1507 (Fla. 2nd DCA 1992).*

Where plaintiff moved trial court to take judicial notice of pleadings of a prior case before the court, but did not include the pleadings in the record, trial court's judicial notice was improper under Fla. Stat. § 90.204(3). National Union Fire Ins. Co. v. Underwood, 502 So. 2d 1325, 1987 Fla. App. LEXIS 6873 (Fla. 4th DCA 1987).

In adverse possession suit, trial court erred in, on its own initiative, seeking out and relying on maps that were not a part of the record and in denying the parties an opportunity to challenge this evidence. Bonifay v. Garner, 503 So. 2d 389, 1987 Fla. App. LEXIS 11963 (Fla. 1st DCA 1987).

In a claim arising out of a lease agreement concerning commercial property in Nicaragua and governed by Nicaraguan law, the lessor was not entitled to summary judgment, where there was no indication in the record that the trial court either applied Nicaraguan law or took judicial notice of Nicaraguan law under Fla. Stat. § 90.202(4) pursuant to the procedures in Fla. Stat. §§ 90.203 or 90.204. *Sanders v. Inversiones Varias, S.A., (INVASA), 436 So. 2d 1089, 1983 Fla. App. LEXIS 22800 (Fla. 3rd DCA 1983).*

Even though the fact that burglaries of structures tented for fumigation were so common in the community as to make an intervening criminal act reasonably foreseeable by the landlord, making the fact susceptible of being judicially noticed, before such fact was admissible, each party had to be afforded a reasonable opportunity to present information relevant to the propriety of taking judicial notice and to the nature of the matter noticed per Fla. Stat. § 90.204. Rodriguez v. Philip, 413 So. 2d 441, 1982 Fla. App. LEXIS 20005 (Fla. 3rd DCA 1982).

In taking judicial notice of labor market conditions without affording claimant an opportunity to present information relevant to the propriety of taking judicial notice and the nature of the noticed matters, worker's compensation hearing officer failed to follow requirement of Fla. Stat. § 90.204. Leffler v. Grand Union Co., 409 So. 2d 1145, 1982 Fla. App. LEXIS 19141 (Fla. 1st DCA 1982).

Deputy commissioner erred in taking judicial notice of economic conditions in claimant's community to determine claimant's wage loss earnings without giving employer the opportunity to present information regarding the propriety of taking judicial notice and other facts relative to the economic conditions considered. United States Sugar Corp. v. Hayes, 407 So. 2d 1079, 1982 Fla. App. LEXIS 18861 (Fla. 1st DCA 1982).

Evidence: Judicial Notice: Adjudicative Facts: General Overview

While the State of Florida did not present the predicate information needed to take judicial notice of the valuation of a used car at an online website, in the context of a restitution award arising from a vehicular theft, the owner of the vehicle properly expressed an opinion as to the value of the owner's car based, in part, upon information obtained from the website. S.M. v. State, 159 So. 3d 966, 2015 Fla. App. LEXIS 3605 (Fla. 2nd DCA 2015).

Pursuant to Fla. Stat. §§ 90.202(6) and 90.204(1), a trial court may take judicial notice of its own records after affording the parties reasonable opportunity to present information relevant to the propriety of taking judicial notice

and to the nature of the matter noticed. *Ward v. State, 984 So. 2d 650, 2008 Fla. App. LEXIS 9371 (Fla. 1st DCA 2008)*.

Evidence: Judicial Notice: Adjudicative Facts: Proceedings in Other Courts

Proponent of a motion to suppress carried the initial burden of establishing a violation of the Fourth Amendment, and that was reflected in the provisions of *Fla. R. Crim. P. 3.190(g)(3)*, which required the defense to present evidence in support of the motion, after which time the State may offer rebuttal evidence; the initial burden required the defense to make some showing that a search occurred and was invalid, and the defendant's mere presence in the courtroom was not sufficient to meet the initial burden. While it appeared the trial court sua sponte took judicial notice of the absence of a search warrant in the court file, and §§ *90.203* and *90.204, Fla. Stat.* provided the procedure to be followed in taking judicial notice pursuant to § *90.202, Fla. Stat*, neither the parties nor the court complied with those procedures. *State v. Mobley, 98 So. 3d 124, 2012 Fla. App. LEXIS 11765 (Fla. 5th DCA 2012)*.

Although Fla. Stat. § *90.202(c)* gave a trial court the authority to rely on the records and proceedings of an earlier custody hearing when ruling on a petition for a domestic violence injunction, the injunction entered by the trial court could not stand because, while the trial court gave notice of its intent to rely on the testimony of the witnesses at the custody hearing, the trial court failed to formally take judicial notice of the records from the custody hearing and to make them a part of the record in the instant proceeding as required under Fla. Stat. § *90.204*. *Coe v. Coe, 39 So. 3d 542, 2010 Fla. App. LEXIS 10679 (Fla. 2nd DCA 2010)*.

Evidence: Testimony: Lay Witnesses: Opinion Testimony: Rational Basis

While the State of Florida did not present the predicate information needed to take judicial notice of the valuation of a used car at an online website, in the context of a restitution award arising from a vehicular theft, the owner of the vehicle properly expressed an opinion as to the value of the owner's car based, in part, upon information obtained from the website. *S.M. v. State, 159 So. 3d 966, 2015 Fla. App. LEXIS 3605 (Fla. 2nd DCA 2015)*.

Family Law: Child Support: Obligations: Computation: Imputed Income: General Overview

Magistrate erred when she sua sponte took judicial notice of two sources she used to impute income to the former wife, including an IRS tax guide *Glaister v. Glaister, 137 So. 3d 513, 2014 Fla. App. LEXIS 4781 (Fla. 4th DCA 2014)*.

Family Law: Marital Termination & Spousal Support: Dissolution & Divorce: Property Distribution: Equitable Distribution: Factors: General Overview

In entering an order equitably dividing the parties' property, the trial court violated Fla. Stat. § *90.204* by "judicially noticing" facts in the former husband's proposed final judgment, as it was submitted over a month after the close of the evidence, and the former wife was not afforded a reasonable opportunity to present information relevant to the propriety of taking judicial notice and to the nature of the matter noticed. *Craig v. Craig, 982 So. 2d 724, 2008 Fla. App. LEXIS 6284 (Fla. 1st DCA 2008)*.

Workers' Compensation & SSDI: Administrative Proceedings: Evidence: General Overview

In taking judicial notice of labor market conditions without affording claimant an opportunity to present information relevant to the propriety of taking judicial notice and the nature of the noticed matters, worker's compensation

hearing officer failed to follow requirement of Fla. Stat. § 90.204. Leffler v. Grand Union Co., 409 So. 2d 1145, 1982 Fla. App. LEXIS 19141 (Fla. 1st DCA 1982).

Research References & Practice Aids

RESEARCH REFERENCES & PRACTICE AIDS

Law Reviews & Journals

Casenote: Foreign Law, Politics & Litigants In U.S. Courts: A Discussion of Issues Raised by Transportes Aereos Nacionales, S.A. v. De Brenes, William H. White, Jr., Fall 1995, 27 U. Miami Inter-Am. L. Rev. 161.

Treatises

Florida Civil Procedure, Chapter 13. Privileges, § 13-10. Husband and Wife.

Florida Evidence Manual, Chapter 2 Judicial Notice, § 90.202.01 Text of the Rule and Analysis.

Florida Evidence Manual, Chapter 2 Judicial Notice, § 90.203.01 Text of the Rule.

Florida Evidence Manual, Chapter 2 Judicial Notice, § 90.204.01 Text of the Rule.

Florida Evidence Manual, Chapter 2 Judicial Notice, § 90.207.01 Text of the Rule and Analysis.

Florida Family Law, Division V Parent-Child Relationships, Chapter 90 Paternity, Part I. Legal Background, B. Establishing Paternity in Paternity Proceeding, § 90.24 Evidence to Prove Paternity.

Florida Torts, I. Actions Based on Negligent Conduct, Chapter 3 Proof of Negligence, A. Proof of Case, § 3.04 Province of Court and Jury.

FLORIDA BAR PUBLICATIONS

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, C. Discretionary Judicial Notice, 1. [§ 2.6] In General.

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, C. Discretionary Judicial Notice, 6. [§ 2.11] Official Actions of Legislative, Executive, and Judicial Departments of United States or State.

Evidence in Florida, Chapter 2. Judicial Notice; Presumptions; Burden of Proof, I. Judicial Notice, D. [§ 2.20] Effect of Judicial Notice.

Judicial Notice on Appeal: A History Lesson in Recent Trends, by Dorothy F. Easley, December, 2010, *84 Fla. Bar J. 45.*

Appellate Practice: Judicial Notice on Appeal: Why All the Fuss?, by Dorothy F. Easley, May, 2006, *80 Fla. Bar J. 40.*

Florida Proceedings After Dissolution of Marriage, 9 Foreign Judgments, VI. Other Issues, B. [§ 9.26] Application Of Foreign Law.

Florida Bar Civil Trial Preparation, Part Four: Evidence, I. Overview, C. Judicial Notice, 5 Court' s Ruling.

Business Litigation in Florida, 11 Pretrial Preparation and Trial Procedures; Direct Examination, Cross-Examination, Redirect, and Rebuttal, I. Pretrial Preparation, C. Simplifying Proof, 5. [§ 11.10] Judicial Notice On Request Of Party.

Business Litigation in Florida, 11 Pretrial Preparation and Trial Procedures; Direct Examination, Cross-Examination, Redirect, and Rebuttal, I. Pretrial Preparation, C. Simplifying Proof, 6. [§ 11.11] Judicial Notice On Court Motion.

Florida Civil Trial Practice, 13 Documentary Evidence, III. Admissibility of Documents and Use At Trial, D. [§ 13.20] Judicial Notice Of Documents.

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BDO Seidman, LLP v. Banco Espirito Santo Int'l

Court of Appeal of Florida, Third District

June 23, 2010, Opinion Filed

Nos. 3D09-324, 09-197, 07-2746, 07-2472

Reporter
38 So. 3d 874 *; 2010 Fla. App. LEXIS 9119 **; 35 Fla. L. Weekly D 1408

BDO SEIDMAN, LLP., Appellant, vs. BANCO ESPIRITO SANTO INTERNATIONAL, etc., et al., Appellees.

Subsequent History: Released for Publication July 9, 2010.

Prior History: [**1] An Appeal from the Circuit Court for Miami-Dade County, Jose M. Rodriguez, Judge. Lower Tribunal No. 04-14009.

BDO Seidman, LLP v. Banco Espirito Santo Int'l. Ltd., 26 So. 3d 1, 2009 Fla. App. LEXIS 11242 (Fla. Dist. Ct. App. 3d Dist., 2009)

Core Terms

phase, punitive damages, gross negligence, comparative fault, noteholder, bifurcation, causation, trial court, damages, audit, audit report, reckless, hearsay, financial statement, judicial notice, compensatory, indifference, purchaser, clear and convincing evidence, private placement, trifurcation, persuasive, predicate, exposed, parties, argues, rights, cases

Case Summary

Procedural Posture
Appellant accounting firm sought review of a judgment of the Circuit Court for Miami-Dade County (Florida) entered on a jury verdict in favor of appellee banks in a gross negligence action.

Overview
The trial court divided the trial into phases, which essentially amounted to a trifurcation of the issues. In the first phase, the jury determined the questions of the accounting firm's negligence and gross negligence. In the second phase, it addressed compensatory damages, which included a determination of comparative fault and causation. In the third phase, the jury addressed punitive damages. As a result, the first phase jury deliberations regarding negligence and gross negligence did not include specific evaluations of fault, including failures to report or act on the part of the banks or third parties. A gross negligence finding should have been based upon a thorough consideration of all of the evidence bearing on causation, reliance, and comparative fault. The appellate court's conclusion on trifurcation obviated the need for extended analysis of the other issues raised by the parties.

Outcome
The court reversed the judgment and remanded the matter for further proceedings.

LexisNexis® Headnotes

Civil Procedure > Trials > Separate Trials

HN1[] Trials, Separate Trials

Bifurcation of liability and damages is ordinarily within the sound discretion of the trial court. *Fla. R. Civ. P. 1.270(b)*.

Torts > ... > Types of Damages > Punitive Damages > Aggravating Circumstances

HN2[] Punitive Damages, Aggravating Circumstances

Under Florida law, the purpose of punitive damages is not to further compensate the plaintiff, but to punish the defendant for its wrongful conduct and to deter similar misconduct by it and other actors in the future. The character of negligence necessary to sustain an award of punitive damages must be of a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them. Hence, punitive damages are appropriate when a defendant engages in conduct which is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights and safety of others.

Torts > ... > Types of Damages > Punitive Damages > Aggravating Circumstances

HN3[] Punitive Damages, Aggravating Circumstances

See *§ 768.72(2)(b), Fla. Stat.* (2007).

Evidence > Burdens of Proof > Clear & Convincing Proof

HN4[] Burdens of Proof, Clear & Convincing Proof

Clear and convincing evidence differs from the greater weight of the evidence in that it is more compelling and persuasive. Greater weight of the evidence means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, clear and convincing evidence is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

Bankruptcy Law > ... > Examiners, Officers & Trustees > Duties & Functions > Capacities & Roles

Evidence > ... > Statements as Evidence > Hearsay > Hearsay Within Hearsay

Evidence > ... > Exceptions > Business Records > Normal Course of Business

HN5[] Duties & Functions, Capacities & Roles

A court-appointed receiver or trustee is ordinarily a successor records custodian and may establish the necessary foundation for the admission of the defunct entity's records of regularly conducted business activity for purposes of § 90.803(6), (7), Fla. Stat. (2009). Similarly, the receiver or trustee may testify from personal knowledge regarding relevant aspects of his or her own personal investigation of the business failure and liquidation or reorganization of the entity. There is, however, no broad exemption from the rules of evidence that would allow a receiver or trustee to introduce hearsay, or hearsay within hearsay, regarding statements by out of court declarants.

Evidence > Judicial Notice > Adjudicative Facts > Judicial Records

HN6[] Adjudicative Facts, Judicial Records

Inadmissible evidence does not become admissible because it is included in a judicially noticed court file. Although a trial court may take judicial notice of court records, it does not follow that this provision permits the wholesale admission of all hearsay statements contained within those court records.

Evidence > ... > Exceptions > Judgments > General Overview

HN7 **Exceptions, Judgments**

A court judgment is hearsay to the extent that it is offered to prove the truth of the matters asserted in the judgment. As to those matters, there must be an applicable hearsay exception.

Evidence > Judicial Notice > General Overview

HN8 **Evidence, Judicial Notice**

Under the Evidence Code, a request for judicial notice is subject to analysis under *§ 90.403, Fla. Stat.* *§ 90.204, Fla. Stat.* Judicial findings of fact present a rare case where, by virtue of their having been made by a judge, they would likely be given undue weight by the jury, thus creating a serious danger of unfair prejudice.

Contracts Law > ... > Damages > Measurement of Damages > Reliance Damages

HN9 **Measurement of Damages, Reliance Damages**

Under the noteholder reliance test, an accounting firm has potential liability only if it knows, at the time it is hired for a particular audit, that the audit will be used as part of a private placement memorandum which is to be given to prospective purchasers of the notes. Alternatively, it is liable if the firm subsequently affirmatively consents to the audit report's inclusion in the private placement memoranda.

Contracts Law > ... > Damages > Measurement of Damages > Reliance Damages

HN10 **Measurement of Damages, Reliance Damages**

What one purchaser may rely upon in entering into a contract may not be material to another purchaser. Each plaintiff must prove his own reliance.

Counsel: Greenberg Traurig, and Elliot H. Scherker, Elliot B. Kula, Julissa Rodriguez, and Brigid F. Cech Samole; Greenberg, Traurig and Karen Y. Bitar and Adam D. Cole (New York); Alvarez Armas & Borron, and Arturo Alvarez, for appellant/cross-appellee.

Holland & Knight, and Rodolfo Sorondo, Jr. and Christopher N. Bellows; Gamba & Lombana, and Hector J. Lombana; Thomas Alexander & Forrester and Steven W. Thomas, Emily Alexander and Mark Forrester; Billbrough & Marks and Geoffrey B. Marks; Gonzalo Dorta, for appellees/cross-appellants.

Judges: Before COPE, WELLS, and SALTER, JJ.

Opinion by: SALTER

Opinion

[*875] SALTER, J.

The accounting firm of BDO Seidman, LLP appeals a jury verdict and final judgment awarding the appellees over $ 159 million in compensatory damages and over $ 351 million in punitive damages. The appellees--Banco Espirito Santo and two of its affiliates (collectively, "Banco")--cross-appeal the denial of prejudgment interest on the compensatory award from the date the losses allegedly occurred through the date of the jury verdict. We reverse the final judgment and remand the case for a new trial, finding **[**2]** that the "trifurcation" of the trial into three distinct phases impermissibly allowed the jury to render a verdict on BDO's liability for gross negligence (a determination pertinent in this case as a predicate for the later consideration of punitive damages) [1] two months *before* the jury's consideration of, and verdict deciding, the intertwined issues of causation, reliance, and comparative fault.

[1] As the jury was instructed at the close of that first phase, "gross negligence means you find by clear and convincing evidence that the conduct of BDO Seidman was so reckless or wanting in care that it constituted a conscious disregard or indifference to the rights of persons exposed to its conduct."

Because of the prejudice inherent in the premature, first-phase gross negligence finding, we do not address in detail other aspects of the trial. Our conclusion regarding the "trifurcation" issue renders moot or pretermits our consideration of most of the other parts of the jury's verdicts and the remaining points on appeal and cross-appeal.

I. *The Bifurcation Rulings*

The trial court's good intentions are apparent from this record, and the ***HN1***[☎] bifurcation of liability and damages is ordinarily within **[**3]** the sound discretion of the trial court. *Florida Rule of Civil Procedure 1.270(b)*; *Roseman v. Town Square Ass'n, 810 So. 2d 516 (Fla. 4th DCA 2001)*. The salutary objectives of judicial economy (no phase II damages trial is required if the jury returns a defense verdict in phase I), and the reduction of a longer case into more digestible "phases," often support bifurcation and the exercise of that discretion. These objectives are much harder to achieve, however, in a complex case brought by plaintiffs not in privity with the accounting firm/defendant. In such a case, liability ultimately turns on specific demonstrations of knowledge, intent, and reliance. [2] The evidence pertaining to those issues is inextricably intertwined with the claims and affirmative defenses on issues of comparative fault, causation, and gross negligence.

In this case, the parties did not move for bifurcation. The trial court notified the parties that the case would be tried in phases. First, the jury would hear evidence on whether BDO breached its professional duties to its former client, the bankrupt non-party E. S. Bankest **[**4]** L.L.C. ("Bankest"), whether BDO's duties extended to the appellees and, if so, whether the appellees relied on BDO's audit reports. Second, if the first phase culminated in a verdict finding duty and breach of duty, a trial on damages would proceed. This plan was later modified, however.

The trial court ultimately determined that comparative fault and causation issues **[*876]** would be tried and determined in the second, compensatory damages phase rather than in the first phase. The question of whether BDO was "personally guilty of gross negligence" [3] would be determined in the first phase. The jury would then be asked at the close of phase II whether Banco was entitled to punitive damages against BDO (and if so, the amount of those punitive damages would be determined in phase III). This meant that the phase I jury deliberation regarding negligence *and gross negligence* did not include specific evaluations of the alleged negligence and fault, including failures to report or act, on the part of the Banco parties and ten third-party or *Fabre* [4] actors. Those determinations occurred instead at the close of phase II, when all of the evidence in that phase was viewed against the backdrop that BDO **[**5]** had already been found not merely negligent, but so negligent (or "guilty") as to arise to the level of intentional disregard for the rights of others. The jury's phase I finding of gross negligence required them to find that "guilt" by clear and convincing evidence as well, and they were reminded of this in the phase II instruction on "entitlement" to punitive damages:

> You already have found Defendant BDO Seidman grossly negligent by clear and convincing evidence. If you now find for Plaintiff ESB Finance or Plaintiff Banco Espirito Santo, S.A. (Nassau Branch) and against Defendant BDO Seidman, you should consider whether in addition to compensatory damages, Plaintiffs are entitled to punitive damages in the circumstances of this case as punishment and as a deterrent to others.

As noted, the jury returned a phase II verdict finding no comparative fault by Banco or others, finding compensatory damages totaling $ 170 million, and finding an entitlement to punitive damages. The next **[**6]** day, the jury returned its phase III verdict for $ 351,689,343.

II. *Analysis*

A. *The Impact of the Phase I Gross Negligence Verdict*

Punitive damages are a form of extraordinary relief for acts and omissions so egregious as to jeopardize not only the particular plaintiff in the lawsuit, but the public as a whole, such that a punishment--not merely compensation--must be imposed to prevent similar conduct in the future:

> ***HN2***[☎] Under Florida law, the purpose of punitive damages is not to further compensate the plaintiff, but to punish the defendant for its wrongful conduct

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[2] *First Fla. Bank, N.A. v. Max Mitchell & Co., 558 So. 2d 9, 15 (Fla. 1990)* ("*Max Mitchell*").

[3] "Guilty of gross negligence" is part of the standard jury instruction on punitive damages and is the precise wording given to the jury in phase I of the trial here.

[4] *Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993)*.

and to deter similar misconduct by it and other actors in the future. *See* W.R. Grace & Co.-Conn. V. Waters, 638 So. 2d 502, 504 (Fla. 1994); see also White Constr. Co. v. Dupont, 455 So. 2d 1026, 1028 (Fla. 1984); St. Regis Paper Co. v. Watson, 428 So. 2d 243, 247 (Fla. 1983). In *White Construction Co.*, we reaffirmed the standard necessary to justify the imposition of punitive damages:

> The character of negligence necessary to sustain an award of punitive damages must be of a "gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire **[**7]** want of care which raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of **[*877]** the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them."

455 So. 2d at 1029 (quoting Carraway v. Revell, 116 So. 2d 16, 20 n. 12 (Fla. 1959)). Hence punitive damages are appropriate when a defendant engages in conduct which is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights and safety of others.

Owens-Corning Fiberglas Corp. v. Ballard, 749 So. 2d 483, 486 (Fla. 1999) (footnote omitted).

The Legislature codified the definition of "gross negligence" (as a predicate for a punitive damages claim) in section 768.72(2)(b), Florida Statutes (2007):

> ***HN3***[↑] "Gross negligence" means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

This definition is also found in the standard jury instruction on punitive damages [5] **[**8]** as adapted and given in this case. The phase I jury instructions at issue here did not use the specific term "punitive damages," but they did include the definition of "gross negligence" in the standard instruction and the further requirement that the standard of proof for such a finding is "by clear and convincing evidence":

> ***HN4***[↑] "Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, "clear and convincing evidence" is **evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue**" (emphasis added).

Thus, two months before the jury retired in phase II to deliberate whether comparative fault on the part of Banco or ten other specific persons and entities was a legal cause of any damages suffered by Banco, the jurors had already rendered a verdict of "guilt" reflecting their "firm belief or conviction, **[**9]** without hesitation" that BDO was so reckless or wanting in care that its acts and omissions "constituted a conscious disregard or indifference to the rights of persons exposed to its conduct." And in phase II argument, counsel for Banco reminded the jury in no uncertain terms that they had already reached such a conclusion. [6]

B. *Mullen and Engle*

In defense of this unusual order of proof and factfinding, Banco relies upon Mullen v. Treasure Chest Casino, LLC, 186 F. 3d 620 (5th Cir. 1999), a case cited favorably by our Supreme Court in Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1270 (Fla. 2006). We do not find Banco's argument persuasive, however, as *Mullen* and *Engle* involved bifurcation issues in class actions, [7] another level of complexity that is not pertinent here. Those cases considered a division of fact-finding between mass tort issues that are appropriate for class adjudication (liability, affirmative defenses applicable **[*878]** to all class members, and

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[5] *Standard Jury Instructions--Civil Cases (No. 00-2)*, 797 So. 2d 1199 (Fla. 2001).

[6] Indeed, counsel argued to both the jury and the trial court that BDO's evidence and argument on causation in phase II were in defiance of the jury's phase I verdict.

[7] *Mullen* involved a class action brought by former employees of a floating casino alleging that the vessel's ventilation system caused respiratory illnesses, while *Engle* considered Florida-based claims for damages allegedly caused by addiction to cigarettes containing nicotine.

predicate requirements for consideration of an award of punitive **[**10]** damages) and those issues only appropriate for individual determinations (causation, actual damages, and comparative fault).

In those cases, bifurcation was permitted so long as the same issue would not be reexamined by different juries. *Mullen, 186 F.3d at 628*. The underlying rationale for permitting the class-phase/individual-phase bifurcation is the avoidance of hundreds of trials on the same (common, class-phase) issues of fact. In this case, in contrast, only two related Banco claimants actually sought recovery against a single defendant based on a single set of operative facts. No class claim was asserted. There was no class-type rationale for allowing the jury to determine the pivotally-important gross negligence/punitive damage finding before it deliberated and determined the interwoven causation and comparative fault issues.

Mullen did not involve a claim for punitive damages, much less any consideration **[**11]** of whether the predicate findings on entitlement to such damages could be rendered before the individual issues of causation, damages, and comparative fault were to be heard by the same jury. That opinion does, however, cite several other federal bifurcated class actions in which punitive damages were to be resolved commonly and other issues would be tried individually. *Mullen, 186 F. 3d at 628*. The Supreme Court of Florida found *Mullen* persuasive on the constitutionality [8] of bifurcation in class actions involving two jury trials (phase one on common class issues, phase two on issues unique to each individual claimant). *Engle, 945 So. 2d at 1270-71*.

But on the point involved here--whether evidence regarding causation and comparative fault can be considered in a separate phase after the same jury has found the factual predicate for punitive damages--the majority decision in *Engle* held that the trial court erred in allowing the **[**12]** jury to find entitlement to punitive damages during phase I. *Engle* holds that such a determination was "premature." *Id. at 1269*. Two Justices dissented from that holding. Their analysis is essentially the argument advanced by Banco here: a jury verdict in phase I holding that BDO was "grossly negligent" was not a finding of "entitlement to punitive damages," or "liability for punitive damages," which was properly determined in phase II.

The *Engle* majority's holding is controlling. The phase I finding of breach of duty "did not constitute 'a finding of liability,'" because in phase II the jury might conceivably have found for BDO on legal causation and comparative fault. If the jury had done so, that "would have precluded the jury from awarding compensatory or punitive damages." *Id. at 1263*. This is also a practical rule to follow, because here phase II seems akin to shooting fish in a barrel. The jurors should have been allowed to consider *all* of the evidence on causation and other allegedly-responsible actors as they decided whether "the conduct of [BDO] was so reckless or wanting in care that it constituted a conscious disregard or indifference to the rights of persons exposed to **[**13]** its conduct." For example, it seems impossible for the jury in phase II to weigh objectively (and under a "mere preponderance" standard) the alleged effect of the acts and omissions of Banco's Victor Balestra [9] against BDO's **[*879]** conduct two months *after* finding (under a "clear and convincing" standard) that BDO was reckless and consciously indifferent to the rights of anyone (appellees or otherwise) exposed to BDO's conduct.

C. *Banco's "Same Evidence" Argument*

Banco also argues that the "fine line" between simple and gross negligence made it appropriate for the jury to determine duty and breach for both simple and gross negligence in phase I. In further support of this proposition, Banco cites numerous cases in which a jury decided whether a defendant's **[**14]** conduct in a particular case constituted simple negligence *or* gross negligence. In those cases, however, there was no bifurcation. There were no comparative fault issues. Each of the cases involved a trial in which the distinction between simple and gross negligence was a critical element of liability (by virtue of Florida's guest automotive passenger statute, former section 320.59,

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[8] In federal cases, the *Seventh Amendment to the United States Constitution*, and in state court cases in Florida, *article I, section 22, of the Florida Constitution*, prohibit the reconsideration of a jury's findings on a defendant's conduct by a different jury.

[9] Balestra was simultaneously vice chairman of BDO's client (Bankest, the fraudulent Miami factoring company), president of the Espirito Santo Bank (one-half owner of Bankest) in Miami, and a director of ESB Finance Ltd. (the special-purpose entity formed to purchase $ 140 million in notes (as a result of the fraud, notes ultimately worth about 10 cents on the dollar)) originally issued to worldwide customers of Espirito Santo International, S.A.

Florida Statutes, repealed in 1972, [10] or because of the gross negligence exception to worker's compensation exclusivity and immunity [11] in earlier versions of chapter 440).

In one case cited by Banco, this Court relied upon and quoted the Supreme Court of Florida's holding in *Faircloth v. Hill, 85 So. 2d 870, 872 (Fla. 1956)*:

> While each separate act involved in the drama might not in and of itself establish gross negligence, nevertheless, the **entire course of conduct of the automobile driver under all of the circumstances and in the light of all the related factors taken collectively** might well establish the **[**15]** existence of gross negligence?. (emphasis added).

Madden v. Killinger, 97 So. 2d 205, 206 (Fla. 3d DCA 1957). Similarly, in *Hellweg v. Holmquist, 203 So. 2d 209, 211 (Fla. 4th DCA 1967)*, also cited by Banco, a driver's gross negligence in an automobile accident was said to depend upon "the time, location, amount of traffic, physical conditions, and all other elements that affect travel."

While an accounting firm's conduct of an audit is quite different than the operation of an automobile, a "gross negligence" finding in either case should be based upon a thorough consideration of all of the evidence bearing on causation, reliance, and comparative fault. In this case, some of that evidence was not admitted until well after a verdict of gross negligence already had been rendered. Banco's "same evidence for simple and gross negligence" argument might prove persuasive in a case in which only the defendant's conduct mattered. But in this case, the jury did not consider the same evidence for anything but the "breach of duty" element of simple negligence. Causation, reliance, and comparative fault evidence, bearing directly on damages as an element of liability for simple negligence, was presented **[**16]** after gross negligence had already been determined.

III. *Other Issues*

As noted at the outset of this opinion, our conclusion on "trifurcation" obviates the need for extended analysis of the other issues raised by the parties. We briefly address three points to assist the parties and the trial court in a re-trial:

[*880] A. *Hearsay*

HN5[↑] A court-appointed receiver or trustee is ordinarily a successor records custodian and may establish the necessary foundation for the admission of the defunct entity's records of regularly conducted business activity for purposes of *section 90.803(6)* and *(7)*, Florida Statutes (2009). Similarly, the receiver or trustee may testify from personal knowledge regarding relevant aspects of his or her own personal investigation of the business failure and liquidation or reorganization of the entity. There is, however, no broad exemption from the rules of evidence that would allow a receiver or trustee to introduce hearsay, or hearsay within hearsay, regarding statements by out of court declarants.

BDO argues that the trial court erred by taking judicial notice of a bankruptcy court order, and allowing that order to be shown to the jury. [12] The trial court took the view that the **[**17]** facts determined by the bankruptcy court were properly admissible in this case. BDO's objection should have been sustained.

HN6[↑] "Inadmissible evidence does not become admissible because it is included in a judicially noticed court file." The Florida Bar, *Evidence in Florida* § 2.12, at 2-7 (7th ed. 2008). "Although a trial court may take judicial notice of court records, it does not follow that this provision permits the wholesale admission of all hearsay statements contained within those court records." *Stoll v. State, 762 So. 2d 870, 876 (Fla. 2000)* (citation omitted). "[T]here has been a 'seemingly widespread but mistaken notion that an item is judicially noticeable merely because it is part of the "court file."'" *Id. at 877* (citation omitted).

HN7[↑] "A **[**18]** court judgment is hearsay 'to the extent that it is offered to prove the truth of the matters asserted in the judgment.'" *United States v. Sine, 493 F.3d 1021, 1036 (9th Cir. 2007)* (citation omitted). As to

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[10] *See, e.g., Madden v. Killinger, 97 So. 2d 205 (Fla. 3d DCA 1957); Foy v. Fleming, 168 So. 2d 177 (Fla. 1st DCA 1964).*

[11] *See Courtney v. Florida Transformer, Inc., 549 So. 2d 1061 (Fla. 1st DCA 1989).*

[12] *In re: E.S. Bankest, L.C.*, Case No. 04-17602 - BKC - AJC (Bankr. S.D. Fla. Sept. 14, 2005) (Opinion (1) granting Joint Motion of Lewis B. Freeman and Banco Espirito Santo International, LTD. for Final Summary Judgment Disallowing Claims filed by BDO Seidman, LLP, and (2) Denying BDO Seidman, LLP's Motion for Summary Judgment).

those matters, there must be an applicable hearsay exception. Stoll, 762 So. 2d at 876; § 90.805 (2009); *see also* Charles W. Ehrhardt, *Ehrhardt's Florida Evidence* § 204.2, at 85 & n. 5 (2009).

HN8[↑] Under the Evidence Code, a request for judicial notice is also subject to analysis under section 90.403, Florida Statutes. *See* § 90.204, Fla. Stat. "[J]udicial findings of fact 'present a rare case where, by virtue of their having been made by a judge, they would likely be given undue weight by the jury, thus creating a serious danger of unfair prejudice.'" Nipper v. Snipes, 7 F.3d 415, 418 (4th Cir. 1993); *see also* Secada v. Weinstein, 563 So. 2d 172, 173-74 (Fla. 3d DCA 1990). For these reasons, the subject bankruptcy order was not a proper subject of judicial notice, nor properly admissible in evidence.

Another bankruptcy order was also introduced into evidence (rather than being judicially noticed). [13] For the reasons explained above, BDO's objection to its introduction also should have **[**19]** been sustained.

B. *Reliance By Noteholders*

The case went to the jury on two theories of reliance. One was the alleged reliance **[*881]** in 2002 by ESB Finance, Ltd., a special purpose entity formed by Espirito Santo International, S.A., when ESB Finance acquired the "several hundred" promissory notes issued earlier by Bankest. An officer of ESB Finance and an officer of Bankest testified that the BDO audit partner assented to ESB Finance's reliance on the BDO audit reports on Bankest's financial statements, though this was denied by the BDO partner, thus creating a jury question under Max Mitchell.

But Banco also argued a second theory in the trial court and here--that the noteholders themselves were intended by BDO to rely on the BDO audit reports on Bankest. Banco argues **[**20]** that the noteholders relied, and were understood by BDO to be relying, on the BDO-audited statements because those statements were part of the private placement memoranda provided to each such noteholder. Banco later purchased the notes from the noteholders, who assigned their rights to ESB Finance. By reason of the assignments, ESB Finance stood in the shoes of the noteholders.

To show noteholder reliance, Banco had to comply with the test outlined in Restatement (Second) of Torts section 552, which was adopted in Max Mitchell, 558 So. 2d at 15-16. ***HN9***[↑] Under that test, BDO would have potential liability only if BDO knew, at the time it was hired for a particular audit, that the audit would be used as part of a private placement memorandum which was to be given to prospective purchasers of the notes. Max Mitchell, 558 So. 2d at 15-16. Alternatively, BDO would also be covered by *Max Mitchell* if BDO subsequently affirmatively consented to the audit report's inclusion in the private placement memoranda.

With regard to Bankest's 1998 and 1999 private placement memoranda, it is undisputed that the BDO audit reports were not attached. Banco argues, however, that reliance was proven because two **[**21]** witnesses testified that some of the prospective purchasers of the 1998 and 1999 notes received the BDO audit reports for other reasons. The fact that a prospective purchaser obtained an audit report for another reason is insufficient to impose liability under *Max Mitchell*. The *Max Mitchell* decision cites with approval illustration 10 of Restatement section 552, as follows:

> 10. **A, an independent public accountant**, is retained by B Company to conduct an annual audit of the customary scope for the corporation and to furnish his opinion on the corporation's financial statements. **A is not informed of any intended use** of the financial statements; but A knows that the financial statements, accompanied by an auditor's opinion, are customarily used in a wide variety of financial transactions by the corporation and that they may be relied upon by lenders, investors, shareholders, creditors, purchasers and the like, in numerous possible kinds of transactions. In fact B Company uses the financial statements and accompanying auditor's opinion to obtain a loan from X Bank. Because of A's negligence, he issues an unqualifiedly favorable opinion upon a balance sheet that materially misstates the financial **[**22]** position of B Company, and through reliance upon it X Bank suffers pecuniary loss. **A is not liable to X Bank**.

558 So. 2d at 15 (emphasis added). The proof of

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[13] *In re: E.S. Bankest, L.C.*, Case No. 04-17602 - BKC - AJC (Bankr. S.D. Fla. March 24, 2005) (Order Granting Judgment on Partial Findings in Favor of Respondents on the Motion by Gunster, Yoakley & Stewart, P.A. for an Order (I) Converting Chapter 11 Case to Case under Chapter 7 of the Bankruptcy Code, or (II) Appointing chapter 11 Trustee, or (III) Appointing an Examiner, Pursuant to 11 U.S.C. § 1112(b) and Bankruptcy Rule 9014).

reliance in this case was inadequate with regard to the holders of the 1998 and 1999 notes. [14]

[*882] We next consider any private placement memoranda which actually included BDO audit reports, and where BDO knew that this was an intended use at the time BDO was hired, or BDO affirmatively consented to such use. Banco must then prove individualized reliance by each noteholder. *Lance v. Wade, 457 So. 2d 1008, 1011 (Fla. 1984)*.

Banco maintains that it can prove individual reliance by calling just one noteholder to testify that he or she relied on the BDO audits. Banco contends that because the private placement memoranda and audit for any particular note series were identical, it can be inferred that every nontestifying noteholder had the same reliance as the testifying noteholder. We disagree. As stated in *Lance*, HN10[↑] "What one purchaser may rely upon in entering into a contract may not be material to another purchaser." *457 So. 2d at 1011*. **[**23]** The case cited by Banco, *Klay v. Humana, Inc., 382 F.3d 1241 (11th Cir. 2004)*, involves a different issue. The *Klay* decision acknowledges that "each plaintiff must prove his own reliance in this case . . . ." *Id. at 1259*. The *Klay* court was considering whether, for purpose of class certification, the common issues of fact regarding reliance outweighed the individual issues, and concluded that under the facts of that case, the common issues predominated. *Id.*

Banco also argues that it may prove reliance by indirect means. Banco maintains that the noteholders relied on Banco, which in turn relied on BDO's financial statements. For this proposition Banco relies on *Joseph v. Norman LaPorte Realty, Inc., 508 So. 2d 496, 497 (Fla. 3d DCA 1987)*, which involved construction of a swimming pool. The present case involves accountant liability, on which *Max Mitchell* is controlling. This part of Banco's argument runs counter to *Max Mitchell* and *illustration 10 of section 552*, quoted above.

C. *Punitive Damages*

The amount of punitive damages assessed against BDO exceeded several-fold DO's net worth according to the phase III record. While it is true that BDO, like most professional service firms, distributed **[**24]** substantially all of its annual net income to its partners (leaving a year-end net worth much lower than annual net income), the $ 351 million punitive damages award would plainly "lead to [the defendant's] financial demise." *Lipsig v. Ramlawi, 760 So. 2d 170, 189 (Fla. 3d DCA 2000)*. An accounting firm that must distribute its net income and net worth to judgment creditors rather than the partners who produced that income will not have partners (or clients) for long. But for our decision to remand for a new trial on the "trifurcation" issue, we would have been compelled to find an abuse of discretion in the denial of BDO's post-trial motion for a remittitur regarding the punitive damages.

IV. *Conclusion*

The trial of this case consumed four months of attentive service by a jury and a dedicated trial judge. [15] We have carefully considered every substantive and procedural authority that might be applied to preserve at least some of the jury's findings.

In **[**25]** this case, however, no such balm is to be found. The fact issues are, to use that word that frustrates bifurcation, "intertwined." The cart cannot lead the horse. But if nothing else, the trifurcated trial has identified those evidentiary disputes (publication of excerpts from a plan of reorganization and statements by an out-of-court **[*883]** prosecutor, for example) that may be resolved in a pretrial conference on remand and in a streamlined, [16] two-phase trial. We have also provided guidance on other issues in an effort to assist the trial court on remand. All issues except the quantum of punitive damages can be determined in phase I. If entitlement to punitive damages is found in phase I, quantum of punitive damages can be determined in phase II.

Reversed and remanded for further proceedings in accordance with this opinion.

End of Document

[14] If private placement memoranda were issued for other years without BDO audits, the same principles would apply.

[15] Because of a prior mistrial correctly granted by the trial court, the trial judge actually expended over seven months of trial time on the case, in addition to the pretrial motions and hearings considered over the preceding three years.

[16] "Streamlined" would hardly seem to apply to a trial that previously took four months. It does appear, from a complete review of the transcript, that phases I and II overlapped in part as to various witnesses and the related cross-examination. Telescoping these phases and witnesses into a single phase may actually reduce the cumulative number of trial days on remand.

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1. *Dufour v. State, 69 So. 3d 235*
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Cases	Court: State Courts > Florida

Dufour v. State

Supreme Court of Florida

February 3, 2011, Decided

No. SC09-262

Reporter
69 So. 3d 235 *; 2011 Fla. LEXIS 289 **; 36 Fla. L. Weekly S 57

DONALD WILLIAM DUFOUR, Appellant, vs. STATE OF FLORIDA, Appellee.

Subsequent History: Released for Publication August 25, 2011.

Rehearing denied by *Dufour v. State, 2011 Fla. LEXIS 1971 (Fla., Aug. 25, 2011)*

US Supreme Court certiorari denied by, Motion granted by *Dufour v. Fla., 2012 U.S. LEXIS 936 (U.S., Jan. 23, 2012)*

Prior History: **[**1]** An Appeal from the Circuit Court in and for Orange County, Lawrence Kirkwood, Judge — Case No. 82-5467.

Dufour v. State, 495 So. 2d 154, 1986 Fla. LEXIS 2617 (Fla., 1986)

Core Terms

mentally retarded, adaptive behavior, deficits, GED, functioning, trial court, score, circuit court, adaptive, limitations, documents, skills, grade, prong, postconviction, subaverage, possessed, testing, murder, judicial notice, measurement, sexual, court file, repair, present evidence, intelligence, evidentiary, rebutted, alcohol, AAIDD

Case Summary

Procedural Posture

Appellant inmate sought review of the order of the Circuit Court in and for Orange County (Florida), which, in ruling on the inmate's petition for postconviction relief from a capital conviction, concluded that the inmate was not mentally retarded pursuant to *Fla. R. Crim. P. 3.203* and *3.851*.

Overview

The inmate contended that the circuit court erred in determining that he was not mentally retarded in accordance with the definition set forth in *Fla. R. Crim. P. 3.203* and *§ 921.137(1), Fla. Stat.* (2005). The court concluded that the circuit court incorrectly applied the standard error of measurement to the IQ score reached by one of the three experts in the case. There was some reasonable possibility that the error affected the circuit court's determination of the inmate's intellectual functioning. However, the inmate could not establish all three prongs of the applicable test to be excluded from the death penalty based on mental retardation as he failed to establish that he demonstrated deficient adaptive functioning. The inmate's handling of the leasing of his apartment, his administration of household chores, his daily maintenance of personal hygiene, his work to secure a GED diploma, and his serving as an aide in an engine repair class in addition to organizing and developing lesson plans for a motorcycle repair shop showed that he had the ability to live independently in society. Finally, the circuit court did not commit prejudicial error in its admission of evidence.

Outcome
The court affirmed the order of the circuit court.

LexisNexis® Headnotes

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

HN1 **Capital Punishment, Intellectual Disabilities**

See *Fla. R. Crim. P. 3.203.*

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

Evidence > Burdens of Proof > Clear & Convincing Proof

HN2 **Capital Punishment, Intellectual Disabilities**

A defendant must establish a three-prong standard to be categorically excluded from the death penalty based on mental retardation. Specifically, the defendant must present evidence of the following: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before the age of eighteen. *Fla. R. Crim. P. 3.203(b)*; *§ 921.137(1), Fla. Stat.* (2005). Clear and convincing evidence means evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief, without hesitation, about the matter in issue. Moreover, a defendant must establish all three elements, and the failure to prove any one prong would result in the determination that the defendant is not mentally retarded.

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

HN3 **Appeals, Standards of Review**

When reviewing determinations of mental retardation, the reviewing court examines the record for whether competent, substantial evidence supports the determination of the trial court. The reviewing court cannot reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses. However, to the extent that the circuit court decision concerns any questions of law, the reviewing court applies a de novo standard of review.

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

HN4 **Capital Punishment, Intellectual Disabilities**

Under Florida law, the first element of a mental retardation determination requires that the person exhibit significantly subaverage general intellectual functioning, which is defined as performance that is two or more standard deviations from the mean score on a standardized intelligence test specified by the Department of Children and Family Services. *§ 921.137(1), Fla. Stat.* (2005). "Significantly subaverage general intellectual functioning" correlates with an IQ of 70 or below.

Governments > Legislation > Interpretation

HN5 **Legislation, Interpretation**

Courts defer to the plain meaning of statutes.

Criminal Law & Procedure > ... > Standards of Review > Deferential Review > Credibility & Demeanor Determinations

HN6 **Deferential Review, Credibility & Demeanor Determinations**

A reviewing court cannot reweigh the evidence or second-guess the circuit court's findings as to the

credibility of witnesses.

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

HN7 **Capital Punishment, Intellectual Disabilities**

As described in § 921.137(1), Fla. Stat. (2005) and *Fla. R. Crim. P. 3.203(b)*, the term adaptive behavior means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The definition in § 921.137 and *Rule 3.203* states that the subaverage intellectual functioning must exist "concurrently" with adaptive deficits to satisfy the second prong of the definition, which has been interpreted to mean that subaverage intellectual functioning must exist at the same time as the adaptive deficits, and that there must be current adaptive deficits.

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

HN8 **Capital Punishment, Intellectual Disabilities**

Fla. R. Crim. P. 3.203 states that a trial court, as the fact-finder in deciding a motion to determine mental retardation, shall conduct an evidentiary hearing on the motion for a determination of mental retardation. During that hearing, the trial court does not weigh a defendant's strengths against his limitations in determining whether a deficit in adaptive behavior exists. Rather, after it considers the findings of experts and all other evidence, *Rule 3.203(e)*, it determines whether a defendant has a deficit in adaptive behavior by examining evidence of a defendant's limitations, as well as evidence that may rebut those limitations. If evidence of a strength rebuts evidence of a perceived limitation, that limitation may not serve as justification for finding a deficit in adaptive behavior.

Evidence > Burdens of Proof > Preponderance of Evidence

HN9 **Burdens of Proof, Preponderance of Evidence**

Preponderance of evidence is defined as evidence which as a whole shows that the fact sought to be proved is more probable than not.

Governments > Courts > General Overview

Governments > Legislation > General Overview

HN10 **Governments, Courts**

Courts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN11 **Abuse of Discretion, Evidence**

A circuit court's admission of evidence will not be reversed absent an abuse of discretion.

Evidence > Judicial Notice > Legislative Facts > Domestic Laws

HN12 **Legislative Facts, Domestic Laws**

In Florida, a court may take judicial notice of various matters including records of any Florida court or of any court of record of the United States or of any state, territory, or jurisdiction of the United States. § 90.202(6), Fla. Stat. (2007). However, the fact that a record may be judicially noticed does not render all that is in the record admissible. Documents contained in a court file, even if that entire court file is judicially noticed, are still subject to the same rules of evidence to which all evidence must adhere.

Evidence > Admissibility > Expert Witnesses

HN13 **Admissibility, Expert Witnesses**

See § 90.704, Fla. Stat. (2004).

Evidence > Admissibility > Expert Witnesses

HN14 **Admissibility, Expert Witnesses**

Although experts may testify as to the things on which they rely, experts cannot bolster or corroborate their opinions with the opinions of other experts who do not testify because such testimony improperly permits one expert to become a conduit for the opinion of another expert who is not subject to cross-examination. To allow an expert to do so would cause any probative value of the testimony to be substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. *§ 90.403, Fla. Stat.* (1995). Further, an expert's testimony may not be used as a basis to introduce otherwise inadmissible evidence.

Counsel: Bill Jennings, Capital Collateral Regional Counsel, Maria D. Chamberlin and Marie-Louise Samuels Parmer, Assistant CCR Counsel, Middle Region, Tampa, Florida, for Appellant.

Pamela Joe Bondi, Attorney General, Tallahassee, Florida and Scott A. Browne, Assistant Attorney General, Tampa, Florida, for Appellee.

Gretchen S. Sween, of Dechert, LLP, Austin, Texas, and George G. Gordon of Dechert, LLP, Philadelphia, PA., on behalf of The American Association on Intellectual and Developmental Disabilities (AAIDD), for Amicus Curiae.

Judges: LEWIS, POLSTON, and LABARGA, JJ., concur. CANADY, C.J., concurs in result. PARIENTE, J., concurs in part and dissents in part with an opinion, in which QUINCE and PERRY, JJ., concurs.

Opinion

[*238] ***REVISED OPINION***

PER CURIAM.

This case is before the Court on appeal from an order concluding that Donald William Dufour is not mentally retarded pursuant to *Florida Rules of Criminal Procedure 3.203* **[*239]** and *3.851*. The final order concerns postconviction relief from a capital conviction for which a sentence of death was imposed, and we therefore have jurisdiction of the appeal under *article V, section 3(b)(1), of the Florida Constitution.* **[**2]** We affirm the order of the postconviction court.

FACTS AND PROCEDURAL HISTORY

Background and the Direct Appeal Proceedings

Several homicides produced Dufour's incarceration. In early September of 1982, the body of Zack Miller was found in an orange grove in Orlando. As the investigation of Miller's death was proceeding, Dufour was involved in the robberies and murders of Daniel King and Earl Wayne Peeples in Jackson, Mississippi, in October of 1982. *See Dufour v. State, 453 So. 2d 337, 338 (Miss. 1984)*. After being detained in Mississippi on the charges related to the King and Peeples murders, Dufour was arrested by Florida law enforcement officers for the first-degree murder of Miller. While the capital proceedings related to the Miller death progressed, Dufour pled no contest to the murder of Edward Wise, which had occurred in Orlando on July 4, 1982, and was sentenced to life imprisonment.

A capital jury unanimously found Dufour guilty of the murder of Zack Miller and recommended the death penalty, which the trial court imposed in 1984. *See Dufour v. State, 495 So. 2d 154, 157 (Fla. 1986) (Dufour I)*.[1] On direct appeal, this Court affirmed the conviction and sentence. *See 495 So. 2d at 156*. **[**3]** The Court detailed the circumstances surrounding the Miller murder as follows:

State witness Stacey Sigler, [Dufour's] former

[1] In sentencing Dufour to death, the trial court found no mitigating circumstances and four aggravating circumstances: (1) Dufour was previously convicted of another capital felony; (2) the murder was committed while Dufour was engaged in the commission of an armed robbery; **[**5]** (3) the murder was committed for the purpose of avoiding or preventing a lawful arrest; and (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. *See Dufour v. State, 905 So. 2d 42, 49 (Fla. 2005)*.

girlfriend, testified that on the evening of September 4, 1982, the date of the murder, [Dufour] announced his intention to find a homosexual, rob and kill him. He then requested that she drop him off at a nearby bar and await his call. About one hour later, [Dufour] called Sigler and asked her to meet him at his brother's home. Upon her arrival, [Dufour] was going through the trunk of a car she did not recognize, and wearing new jewelry. Both the car and the jewelry belonged to the victim.
[Dufour] had met the victim in the bar and driven with him to a nearby orange grove. There, [Dufour] robbed the victim and shot him in the head and, from very close range, through the back. Telling Sigler that he had killed a man and left him in an orange grove, he abandoned the victim's car with her help.

According to witness Robert Taylor, a close associate of [Dufour], [Dufour] said that he had shot a homosexual from Tennessee in an orange grove with a .25 automatic and taken his car. Taylor, who testified that he had purchased from [Dufour] a piece of the stolen jewelry, **[**4]** helped [Dufour] disassemble a .25 automatic pistol and discard the pieces in a junkyard.

State witness Raymond Ryan, another associate of [Dufour], also testified that **[*240]** [Dufour] had told him of the killing, and that [Dufour] had said "anybody hears my voice or sees my face has got to die." Noting [Dufour's] possession of the jewelry, Ryan asked him what he had paid for it. [Dufour] responded[,] "You couldn't afford it. It cost somebody a life." Ryan further testified that he had seen [Dufour] and Taylor dismantle a .25 caliber pistol.
Henry Miller, the final key state's witness, testified as to information acquired from [Dufour] while an inmate in an isolation cell next to [Dufour]. In return for immunity from several armed robbery charges, Miller testified that [Dufour] had told him of the murder in some detail, and that [Dufour] had attempted to procure through him witness Stacey Sigler's death for $5,000.

Id. at 156-57.

On direct appeal, Dufour raised sixteen issues. *See id. at 157-64*.[2] This Court denied fifteen of the claims, but held that the trial court erroneously found that the murder had been committed for the purpose of avoiding a lawful arrest because the evidence failed to establish the requisite proof of intent. *See id. at 163*. Nevertheless, this Court upheld the sentence of death based on the three remaining aggravating factors and the complete lack of mitigation. *See id.*

Postconviction Proceedings

In 1992, Dufour filed an initial motion pursuant to *Florida Rule of Criminal Procedure 3.850*, and he amended the motion in 2001. *See Dufour v. State, 905 So. 2d 42, 50 (Fla. 2005) (Dufour III)*. Dufour raised multiple claims, but only one is tangentially relevant to the present appeal—whether the failure of the court-appointed psychiatrist to conduct appropriate tests for organic brain damage and mental illness violated due process. *See id.* In 2003, the circuit court denied Dufour's motion, and Dufour appealed the order to this Court, asserting ten issues. *See id.*[3] In addition, **[*241]** Dufour filed a

[2] Dufour advanced that (1) the trial court erred in denying his motion to suppress evidence seized during a search of his residence; (2) the testimony of Henry Miller should have been suppressed; (3) the trial court erred in denying several motions for mistrial; (4) the trial court abused its discretion in limiting the cross-examination of state witness Robert Taylor; (5) the trial court erred in allowing a detective to read into evidence portions of a **[**6]** statement made by Robert Taylor in 1982; (6) a mistrial was required after certain comments in the prosecutor's closing argument impermissibly directed the attention of the jurors to Dufour's decision to not testify; (7) the trial court committed reversible error in finding Dufour's absence during a pretrial motions hearing voluntary and conducting the hearing in his absence; (8) the trial court erred in denying his motions for a continuance; (9) the trial court erred in declining to impose sanctions for an alleged violation by the prosecution of the provisions of ***Florida Rule of Criminal Procedure 3.220(b)(3)***; (10) the trial court erred in forcing Dufour to wear leg shackles during the trial; (11) the trial court erred in denying Dufour's motion for mistrial; (12) the trial court erred in denying Dufour's proposed special instructions on the jury's sentencing recommendation; (13) the trial court erred during the penalty phase by admitting into evidence extensive details of the Mississippi murders committed by Dufour; (14) the trial court erred in denying Dufour's motion to strike death as a possible penalty because the charging indictment had failed to allege the aggravating factors **[**7]** possibly subjecting him to the death penalty; (15) the trial court erred in finding that the avoid arrest aggravating factor was established; and (16) the trial court erred in finding that the cold, calculated, and premeditated aggravating circumstance was established. *See Dufour I, 495 So. 2d at 157-64*.

petition for a writ of habeas corpus that presented four issues. *See id.*[4]

While the initial postconviction appeal was pending, Dufour filed a motion for postconviction relief that sought a determination of mental retardation pursuant to *Florida Rule of Criminal Procedure 3.203*. Correspondingly, Dufour filed a motion requesting this Court to relinquish jurisdiction to the circuit court. We denied the motion to relinquish jurisdiction without prejudice to Dufour filing a motion seeking relief under *rule 3.203* within sixty days after his pending postconviction and habeas proceedings became final. *See Dufour v. State, 905 So. 2d 42 (Fla. 2005)* (unpublished order). On the same day, we issued a decision that affirmed the circuit court's denial of Dufour's motion for postconviction relief and denied his habeas petition. *See Dufour III, 905 So. 2d at 48*.

In accord with this Court's order, Dufour filed a timely motion pursuant to *Florida Rules of Criminal Procedure 3.203* and *3.851* that asserted his conviction and sentence of death are contrary to the reasoning and holding in *Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)*, which **[**10]** established that the *Eighth Amendment* prohibits the execution of the mentally retarded. Moreover, Dufour contended that *section 921.137, Florida Statutes* (2004), violates both the United States Constitution and the Florida Constitution. The circuit court appointed two expert psychologists to evaluate Dufour: Dr. Harry McClaren on behalf of the State and Dr. Valerie McClain on behalf of the defense. Dufour retained Dr. Denis Keyes as an expert, and the State presented the expert testimony of Dr. Sidney Merin, who had previously testified on behalf of the State during the 2002 postconviction hearing.

The circuit court conducted an evidentiary hearing during which the evidence presented established Dufour's deplorable and difficult childhood. When Dufour was two years old, his family moved from New York to Orlando, Florida. Before moving to Florida, Dufour's father was afflicted by polio and was also injured in an accident that required a steel plate to be placed in his head. The resulting physical disability impacted his demeanor, and Dufour's father developed depression. Thereafter, Dufour's father became an alcoholic, spending most of his days drunk and releasing the anger he felt for **[**11]** his life on his family through physical abuse. As a result, Dufour witnessed domestic violence throughout his childhood and was the victim of physical abuse by his father.

Dufour's father died while Dufour was a teenager, and his mother remarried. In maintaining the new household, Dufour's **[*242]** mother assigned the children chores, such as doing their own laundry, cleaning their room, cooking lunch, and washing the dishes. Dufour and his older brothers would also perform yard work and mow the grass. Dufour was able to accomplish each of these tasks. Dufour also possessed a license to drive and was able to drive without limitation. He appeared to understand the various traffic signals, although his friends sometimes characterized him as a poor driver. Additional evidence indicated that Dufour had participated in legal proceedings concerning a forfeiture of a vehicle purportedly owned by Dufour.

With regard to the ability of Dufour to maintain a home and provide self-care, throughout his life, Dufour has primarily resided with his parents, brothers, and friends. For example, Dufour and his former girlfriend, Stacy Sigler, decided to reside in an apartment together. Although in conflict with **[**12]** other evidence, Sigler testified that Dufour leased the apartment and handled the rent. Sigler testified that while she was at work, Dufour decorated the apartment for her. She further

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[3] Dufour contended that (1) his counsel rendered ineffective assistance by failing to investigate and present a defense of voluntary intoxication and in failing to strike jurors during the guilt phase; **[**8]** (2) his penalty phase counsel rendered ineffective assistance; (3) he received an inadequate mental health evaluation; (4) he was prejudiced by the cumulative impact of improper evidence; (5) his trial counsel was ineffective in failing to object when the sentencing jury was misled by comments, questions, and instructions that inaccurately diluted the jury's sense of responsibility for their role in the sentencing process; (6) the State committed fundamental error by destroying exculpatory physical evidence; (7) Florida's death penalty statute was unconstitutional; (8) *section 921.141(5), Florida Statutes* (1981), was facially vague and overbroad; (9) the rule prohibiting Dufour's lawyers from interviewing jurors was unconstitutional; and (10) the combination of procedural and substantive errors cumulatively deprived him of a fair trial. *See id. at 50 n.1*.

[4] Dufour asserted that (1) his appellate counsel rendered ineffective assistance during his direct appeal; (2) the cold, calculated, and premeditated jury instruction was unconstitutionally vague and overbroad; (3) his death sentence was unconstitutional because the jury did not render a verdict on each element of the capital offense; **[**9]** and (4) the combination of procedural and substantive errors cumulatively deprived Dufour of a fair trial. *See id. at 50 n.2*.

stated that Dufour possessed the ability to maintain a clean kitchen, but that their kitchen would not pass a "white glove" test. She testified that Dufour was able to select his own apparel and dress appropriately. In addition, Dufour was able to independently accomplish proper hygiene activities daily, such as brushing his teeth and showering.

The evidence also established that Dufour possessed the ability to be self-sufficient and live independently of his friends and family. After committing the capital offenses in Mississippi, Dufour obtained food and secured boarding and lodging unaided by others. *See Dufour v. State, 453 So. 2d 337, 339 (Miss. 1984)*. Specifically, Dufour negotiated with management at a boarding house that he would care for an elderly invalid who resided there in exchange for board and lodging. *See id.* When Dufour learned that he had been implicated in the Mississippi homicides, he arranged to change his identity by having his dark hair cut and dyed blond. *See id.* Thereafter, he **[**13]** remained in seclusion at the boarding house to avoid detection by law enforcement for approximately two weeks until he eventually left the premises and was ultimately arrested. *See id.*

In the view of Dufour's stepsister, Dufour was not mentally retarded and possessed intelligence equal to her own. During Dufour's teenage years, his stepsister observed him reading and believed that he could interpret the material. This was in contrast to Dufour's older brother John, who was described by family members as intellectually slow and who attended a school that assisted profoundly mentally retarded students who engaged in aggressive, violent behavior, or physically acted out in class.

Despite his stepsister's observations of his reading ability, other evidence demonstrated that Dufour had an "abysmal" academic performance in school. Initially established by his performance in first grade, this fact was further proven by his many failing grades throughout his education. For instance, he had to repeat the second grade due to his academic performance, and he still did not accomplish passing grades during his second attempt. In light of his poor grades, he was "socially promoted," or "placed" for **[**14]** the rest of elementary school. The term "placed" indicated that although the student advanced to the next grade level, the student had not successfully achieved the curricular requirements to be promoted. In addition, Dufour was enrolled in basic classes, which were the lowest level of coursework in his school. However, other evidence suggested **[*243]** that this poor performance in school could be related to other factors, such as Dufour's deplorable conditions at home, sexual abuse, and frequent abuse of alcohol and other narcotics. For example, Dufour informed a mental health expert that he spent the majority of his time in high school selling and consuming drugs instead of focusing on academics.

The evidence demonstrated that Dufour still struggles with proper spelling and grammar. As an adult, Dufour would read children's books to his friend's children, but struggled with some of the words. In addition, various materials purported to be authored by Dufour contained misspellings and grammatical errors. Despite these difficulties, Dufour successfully completed medical requests in prison for a special diet and medicine to treat Hepatitis C, with which he was diagnosed. However, there was conflicting **[**15]** evidence as to whether Dufour engaged the assistance of others in completing these requests.

The evidence further indicated that Dufour possesses proficiency in mechanical projects. In junior high, Dufour earned his highest grades in physical education and shop. After two years in junior high school, Dufour transferred to a vocational school. Subsequently, while incarcerated during the 1970s for a burglary conviction, Dufour obtained his General Educational Development (GED) diploma and completed a small engine repair course. In addition to successfully completing the course, Dufour served as an aide to the instructor of the course. Dufour also assisted in organizing and teaching a motorcycle repair course at the correctional institution. Dufour displayed other mechanical skills as a youth by refurbishing a motorcycle.

In addition to his mechanical skills, testimony established that Dufour possessed "street smarts," which is a shrewd awareness of how to survive as a result of living or working in a difficult environment. Dufour was also described as possessing the ability to easily persuade and interact with people.

With regard to Dufour's health, he began to abuse drugs and alcohol from **[**16]** a very young age. According to his older brother, if Dufour was awake, he was using alcohol or drugs. When bringing his father alcohol, Dufour would sip from the beer. He would also take beer from the refrigerator while his parents slept. By the third grade, Dufour would consume a six-pack of beer. By the fourth grade, he began abusing marijuana daily. Starting in the fifth grade, he experimented with inhalants such as toluene and glue on a daily basis. In junior high, his

drug use escalated to include many psychedelic and sedative drugs. Dufour's brother recalled that Dufour's arm would be covered in scars or infected from injecting various types of narcotics into his veins with a needle.

In addition to the drug and alcohol abuse, Dufour unsuccessfully attempted to establish that he suffered from organic and traumatic brain damage. Although there was some testimony with regard to incidents in which Dufour was injured, such as vehicular and physical accidents, none of this testimony established or substantiated that the accidents resulted in injury to his brain. Moreover, Dufour failed to present any evidence or medical records documenting any injuries to his brain.

The evidence also **[**17]** developed Dufour's employment history. He secured employment at roofing and painting companies but would only hold the position for a few months at a time. Further, Dufour's former lover employed him as a chauffeur. At one point, a neighbor's husband attempted to secure employment for Dufour working with drywall. However, when Dufour arrived at the construction site, it **[*244]** became apparent that he had no experience with drywall and he was terminated. Dufour's brother also attempted to secure employment for Dufour as a yard assistant, but Dufour would often stop attending work. Other evidence established that Dufour's difficulty in maintaining employment was a result of his dissatisfaction with the type of positions he obtained. In sum, Dufour failed to maintain stable employment.

With regard to Dufour's ability to maintain healthy relationships, as a child, Dufour was sexually abused by an adult man in his twenties. In seventh grade, Dufour began to engage in sexual relations with women. During junior high school, he engaged in alcohol-related sexual activities simultaneously with multiple, older sexual partners. When Dufour was in his late teenage years, his stepsister accused him of rape. **[**18]** When he was approximately sixteen years old, Dufour's mother sent him to live with his older brother in Gainesville. Dufour became heavily involved in a predominantly homosexual "party" scene. During this period, one of his brother's friends raped him. Dufour spent much of this time intoxicated and would exchange sexual favors for special favors from older men. For example, the older men would use Dufour to solicit younger boys.

Later in life, he shared a romantic relationship with Stacy Sigler, which included Sigler working as a prostitute and sharing her proceeds with Dufour. Sigler and Dufour would have sex with multiple partners, including Dufour's brothers. While with Sigler, Dufour planned and executed a trip for the couple to Houston, Texas. Sigler did not know who had booked the plane tickets, reservations, or other arrangements, and there was no evidence presented as to how the tickets were purchased. However, Dufour was in possession of the tickets and navigated the airport, such as finding the correct gate and flight for the duo. He also made all ground transportation arrangements, including paying for the transportation. Further, Dufour ushered Sigler to the locations that **[**19]** he wanted to visit without consulting others.

Dufour presented testimony to establish that no property receipts or library records existed from Florida's death row to indicate that Dufour utilized the library resources or engaged in intellectual and strategic games. In addition, a death row inmate testified that Dufour required assistance in writing inmate requests for canteen supplies and appeared to have very poor hygiene. For instance, the inmate testified that Dufour did not understand that he had to wash his clothes. Instead, Dufour assumed that the sweat from his workouts cleaned his clothing. However, the State presented testimony with regard to contrasting property receipts which established that while incarcerated, Dufour possessed items such as paperback books, playing cards, a traditional dictionary, and a bible dictionary.

Both defense experts, Dr. Keyes and Dr. McClain, concluded that Dufour was mentally retarded. Both state experts, Dr. Merin and Dr. McClaren, concluded that Dufour was *not* mentally retarded. The experts tested the intellectual functioning of Dufour and obtained the following scores: Dr. McClain—(a) Verbal IQ - 68; (b) Performance IQ - 72 (c) Full Scale **[**20]** IQ - 67; Dr. McClaren—(a) Verbal IQ - 65; (b) Performance IQ - 65; (c) Full Scale IQ - 62; Dr. Merin's original test scores—(a) Verbal IQ - 85; (b) Performance IQ - 64; (c) Full Scale IQ - 74. Each of the experts reviewed and commented on the testing conducted by the other experts. With regard to Dr. Merin's intelligence testing for the 2002 proceeding, all of the **[*245]** experts noted that there were administration and scoring errors.

Following the evidentiary hearing, the circuit court concluded that Dufour did not establish by either clear and convincing evidence or a preponderance of evidence that he was mentally retarded. Dufour now appeals that decision.

ANALYSIS

The Mental Retardation Determination

Dufour challenges the circuit court's determination that he is not mentally retarded in accordance with the definition set forth in *Florida Rule of Criminal Procedure 3.203* and section 921.137(1), Florida Statutes (2005). In 2001, the Legislature enacted section 921.137, which barred the imposition of death sentences on the mentally retarded and established a method for determining which capital defendants are mentally retarded. *See* § 921.137, Fla. Stat. (2001). The following year, the United **[**21]** States Supreme Court held that execution of mentally retarded offenders constitutes "excessive" punishment under the Eighth Amendment, but left "the task of developing appropriate ways to enforce the constitutional restriction" to the states. Atkins v. Virginia, 536 U.S. 304, 317, 321, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

In response to this authority, this Court promulgated *Florida Rule of Criminal Procedure 3.203*, which specifies the procedure for presenting claims of mental retardation as a bar to a death sentence. The statute and rule are substantially similar with regard to the definition of mental retardation. *Rule 3.203(b)* provides:

> HN1[↑] As used in this rule, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in rule *65G-4.011 of the Florida Administrative Code*. The term "adaptive behavior," **[**22]** for the purpose of this rule, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

Accord § 921.137(1), Fla. Stat. (2005).[5] From this authority, we derived a three-prong standard that the HN2[↑] defendant must establish to be categorically excluded from the death penalty based on mental retardation. Specifically, Dufour must have presented evidence of the following: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before the age of eighteen. *See Fla. R. Crim. P. 3.203(b)*; § 921.137(1), Fla. Stat. Clear and convincing evidence means evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief, without hesitation, about the matter in issue. *See* In re Standard Jury Instructions In Civil Cases-Report No. 09-01, 35 So. 3d 666, 668 (Fla. 2010). Moreover, a defendant must **[*246]** establish all three elements, and the failure to prove any one prong would result in the determination that the defendant is not mentally retarded. *See* **[**23]** Nixon v. State, 2 So. 3d 137, 142 (Fla. 2009).

HN3[↑] When reviewing determinations of mental retardation, we examine the record for whether competent, substantial evidence supports the determination of the trial court. *See* Nixon, 2 So. 3d at 140 (citing Cherry v. State, 959 So. 2d 702, 712 (Fla. 2007); Johnston v. State, 960 So. 2d 757, 761 (Fla. 2006)). This Court cannot "reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses." Brown v. State, 959 So. 2d 146, 149 (Fla. 2007) (citing Trotter v. State, 932 So. 2d 1045, 1049 (Fla. 2006)). However, to the extent that the circuit court decision concerns any questions of law, we apply a de novo standard of review. *See* Cherry, 959 So. 2d at 712.

*Intellectual [**24] Functioning*

HN4[↑] Under Florida law, the first element of a mental retardation determination requires that the person exhibit "significantly subaverage general intellectual functioning," which is defined as "performance that is two or more standard deviations from the mean score on a standardized intelligence test" specified by the

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[5] Both the rule and the statute have been amended since 2005, but those amendments did not alter the relevant substance of the prior rule and statute. *See* In re Amendments to the Florida Rules of Criminal Procedure, 26 So. 3d 534, 536 (Fla. 2009) (correcting citation and references to time periods); ch. 2006-195, § 23, Laws of Fla. (effective June 12, 2006) (amending title and substituting "Agency for Persons with Disabilities" for "Department of Children and Family Services").

Department of Children and Family Services. *See § 921.137(1)*. The Department has designated the Stanford-Binet Intelligence Scale and the Wechsler Intelligence Scale (WAIS) as the approved tests. *See Fla. Admin. Code R. 65B-4.032*. On the WAIS, a score of 70 is two standard deviations from the mean. Accordingly, "significantly subaverage general intellectual functioning" correlates with an IQ of 70 or below.

Dufour's scores on the WAIS-III were as follows: Dr. McClain—(a) Verbal IQ - 68; (b) Performance IQ - 72 (c) Full Scale IQ - 67; Dr. McClaren—(a) Verbal IQ - 65; (b) Performance IQ - 65; (c) Full Scale IQ - 62; Dr. Merin's original test scores—(a) Verbal IQ - 85; (b) Performance IQ - 64; (c) Full Scale IQ - 74. The circuit court determined that Dufour had not proven by clear and convincing evidence that he possesses significantly subaverage general intellectual **[**25]** functioning. The court noted that the results of the scores indicated that Dufour is at, or near, the mildly mentally retarded range. However, the court considered the scores in conjunction: "Taking Dr. McClain's score of 67, which is approximately halfway between the scores of Dr. McClaren and Dr. Merin, the band of confidence still ranges from 62 to 72, with the upper range being above the *Cherry* cut-off score of 70." Further, the court noted that some test results suggested the possibility of malingering and that Dufour had reasonable motivation to perform poorly to avoid execution.

As to the weight of the expert testimony, the circuit court found that some testing irregularities had occurred with Dr. Merin. The court also found that the diagnoses of mental retardation by Drs. McClain and Keyes were not persuasive, and that Dr. McClain had discounted her own test results. The court considered that Dr. McClaren did not believe the validity of his own scoring results because the scores were contrary to the expected practice effect and Dufour did not appear to be making his best effort, due to either malingering or illness.

On appeal, Dufour advances somewhat inconsistent positions with **[**26]** regard to the application of *Cherry*. On one hand, he asserts that the circuit court's application of the standard error of measurement to Dr. McClain's score violates *Cherry*. On the other, Dufour maintains that this Court should reconsider and recede from *Cherry* because it violates *Atkins*. **[*247]** We reject Dufour's request that this Court reconsider *Cherry*. Although all of the experts testified that a standard error of measurement must be applied to intelligence scores, this Court has consistently interpreted the plain language of *section 921.137(1)* to require the defendant to establish that he or she has an IQ of 70 or below.

> Both *section 921.137* and *rule 3.203* provide that significantly subaverage general intellectual functioning means "performance that is two or more standard deviations from the mean score on a standardized intelligence test." One standard deviation on the WAIS-III, the IQ test administered in the instant case, is fifteen points, so two standard deviations away from the mean of 100 is an IQ score of 70. As pointed out by the circuit court, the statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding **[**27]** rule are clear. We ***HN5***[↑] defer to the plain meaning of statutes.

Cherry, 959 So. 2d at 712-13; *see also Nixon, 2 So. 3d at 142*; *Phillips v. State, 984 So. 2d 503, 510 (Fla. 2008)*; *Jones v. State, 966 So. 2d 319, 329 (Fla. 2007)*; *Brown, 959 So. 2d at 148-49*; *Johnston, 960 So. 2d at 761*; *Burns v. State, 944 So. 2d 234, 245 (Fla. 2006)*; *Rodgers v. State, 948 So. 2d 655, 666-67 (Fla. 2006)*; *Trotter, 932 So. 2d at 1049*; *Zack v. State, 911 So. 2d 1190, 1201 (Fla. 2005)*. Most recently, in *Nixon*, this Court considered and rejected a similar request to reconsider and recede from *Cherry*. *See Nixon, 2 So. 3d at 142-43*. Despite advancing reasonable arguments with regard to standard psychological practices for testing and measuring intellectual functioning, Dufour has not demonstrated a reason to overturn this Court's interpretation of the plain language of *section 921.137*.

However, we find merit to Dufour's first argument on this issue because the circuit court incorrectly applied the standard error of measurement to the IQ score that resulted from Dr. McClain's evaluation of Dufour. Nothing in our prior precedent suggests that the plain language of the statute applies solely to capital defendants. As **[**28]** Dufour asserts, it would be unduly prejudicial for the statute to be interpreted to allow the State or the circuit court to benefit from the standard error of measurement but to prohibit the defendant from doing so.

In this posture, it is important to note that this ***HN6***[↑] Court cannot "reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses." *Brown v. State, 959 So. 2d 146, 149 (Fla. 2007)* (citing *Trotter v. State, 932 So. 2d 1045, 1049*

(Fla. 2006)). Here, the circuit court did not completely discredit the reliability of the IQ scores. Although the circuit court noted the concerns with malingering and set forth specific issues with each expert's evaluation, the court ultimately stated that it found *some* credibility to the testimony supporting each score. Consequently, the postconviction court concluded that it had to consider all the scores together but incorrectly applied the standard error of measurement to the middle score. In light of the legal error, this Court cannot parse from the record the amount of credibility to apportion to each score based on the postconviction court's vague statement that it found *some* credibility to the testimony **[**29]** supporting each score. Consequently, there is a reasonable possibility that the error affected the circuit court's determination of Dufour's intellectual functioning. Specifically, the language of the order does not demonstrate beyond a reasonable doubt that the error did not contribute to the circuit court's conclusion that Dufour failed to establish subaverage intellectual functioning. **[*248]** *See* State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). Accordingly, the circuit court's legal error with regard to the standard error of measurement cannot be deemed harmless as to the intellectual functioning element.

Adaptive Behavior

Despite our conclusion as to the intellectual functioning element, we affirm the circuit court's determination that Dufour failed to establish that he demonstrates deficient adaptive functioning. ***HN7***[☎] As described in section 921.137(1) and *rule 3.203(b)*, the term adaptive behavior "means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." The definition in section 921.137 and *Florida Rule of Criminal Procedure 3.203* states that the subaverage **[**30]** intellectual functioning must exist "concurrently" with adaptive deficits to satisfy the second prong of the definition, which this Court has interpreted to mean that subaverage intellectual functioning must exist at the same time as the adaptive deficits, and that there must be current adaptive deficits. *See* Jones v. State, 966 So. 2d 319, 326 (Fla. 2007).

After considering the testimony of all the witnesses, the postconviction court found that Dufour failed to present by either clear and convincing evidence or a preponderance of the evidence that Dufour has deficits in adaptive behavior to a level necessary to support a finding of mental retardation. The circuit court accepted much of the factual evidence presented by Dufour, but determined that the evidence established that the reason for his behavior was the consequence of intense drug use and deplorable home conditions which included sexual and physical abuse. The circuit court's consideration of an alternative explanation for Dufour's adaptive behavior demonstrates that Dufour failed to meet his burden of proof.

In addition, competent, substantial evidence supports this conclusion. Virtually all of the witnesses testified with **[**31]** regard to Dufour's extensive drug use. Dufour's self-reporting in earlier psychological evaluations and the deposition testimony of Dufour's family established that Dufour suffered from sexual abuse as a child and engaged in atypical sexual relationships from a young age. Dufour's brothers testified as to the physical abuse Dufour suffered at the hands of his father. Moreover, testimony established that Dufour only attended high school to sell drugs, which provides an alternative explanation for his low grades. His father's abuse, his family's poverty, and his early substance abuse provided an explanation for Dufour's poor performance in school. In sum, the circuit court determined that the teacher's testimony with regard to Dufour's grades did not outweigh or refute the alternative explanations for Dufour's poor academic performance, nor did it sufficiently establish that this performance was attributable to mental retardation.

The postconviction court also considered that this Court upheld the circuit court's finding of the aggravating circumstance that the murder was committed in a cold, calculated, and premeditated manner. In Phillips v. State, 984 So. 2d 503, 512 (Fla. 2008), this **[**32]** Court held that "[t]he actions required to satisfy the CCP aggravator are not indicative of mental retardation." Accordingly, the circuit court correctly applied this Court's precedent in consideration of one of the aggravating circumstances of the Miller murder.

Additionally, there is significant conflict in the evidence with regard to Dufour's adaptive behavior. For instance, Dufour advanced that he did not meet the standard of personal independence expected of **[*249]** his age, cultural group, and community because he had always been cared for by others and had never possessed the responsibility of handling bills. Conversely, the evidence with regard to Dufour's independent actions in Mississippi demonstrated his proficiency to care for himself and his ability to engage in well-thought-out actions to avoid arrest. *See* Dufour, 453 So. 2d at 339.

Moreover, Stacy Sigler testified that Dufour handled the leasing of their apartment and paid the rent. Dufour also accomplished the chores assigned by his mother, such as laundry, cleaning his room, cooking lunch, washing dishes, and maintaining the yard. Whereas Dufour presented testimony demonstrating that he lacked proper hygiene skills, the State **[**33]** established that Dufour was able to select his own apparel, dress appropriately, and independently accomplish proper hygiene activities such as brushing his teeth and showering.

Further, Dufour asserted that his poor grades in elementary school established deficient adaptive functioning. However, prison records demonstrate that Dufour successfully achieved a GED diploma and assisted as an aide in a small engine repair course in addition to virtually organizing and developing the curriculum for a motorcycle repair course. With regard to his employment history, Dufour contended that he had never maintained meaningful employment for more than a few months. On the other hand, the State presented testimony which established that Dufour's difficulty in maintaining employment was a result of his dissatisfaction with the type of positions he obtained. Furthermore, Dufour advanced that the absence of a chessboard in his prison property records indicated that he lacked the ability to engage in intellectual and strategic games. In contrast, the State presented evidence that while incarcerated, Dufour possessed items such as paperback books, playing cards, a traditional dictionary, and a bible **[**34]** dictionary. Accordingly, the conflicts in the evidence substantiate the determination of the circuit court that Dufour failed to satisfy his burden with regard to the adaptive behavior element.

In disagreeing with the circuit court's determination that Dufour lacks a deficit in adaptive behavior, the dissent misdirects attention as to the manner in which a trial court should evaluate whether an individual has a deficit in adaptive behavior. The dissent ignores the direct evidence and places the focus in evaluating adaptive behavior exclusively on the individual's alleged limitations, rather than evaluating the evidence fairly and impartially. In evaluating whether Dufour has a deficit in adaptive behavior, the dissent would not permit the circuit court to even consider the clear evidence that a deficit does not exist. If this Court adopted the dissent's methodology and required trial courts to only consider a defendant's limitations in determining a deficit, according to the dissent, the mere assertion of a limitation would be sufficient to produce a deficit. This would render the second prong of section 921.137's definition of mental retardation automatically satisfied and, as a consequence, **[**35]** superfluous. By attempting to shift the focus to only Dufour's alleged limitations in defining a deficit, the dissent also fails to recognize that the circuit court acted within its province as a fact-finder in determining that Dufour did not have a deficit in adaptive behavior. Specifically, in making its determination, the circuit court utilized the proper methodology of examining *all evidence* pertaining to a possible deficit in adaptive behavior for Dufour, including evidence of Dufour's strengths that clearly rebutted allegations of his limitations. It did not, as the dissent contends, improperly weigh Dufour's strengths against his limitations.

[*250] *Rule 3.203* mandates the circuit court's methodology. That ***HN8***[↑] rule states that a trial court, as the fact-finder in deciding a motion to determine mental retardation, "shall conduct an evidentiary hearing on the motion for a determination of mental retardation." During that hearing, the trial court does not weigh a defendant's strengths against his limitations in determining whether a deficit in adaptive behavior exists. Rather, after it considers "the findings of experts and *all other evidence*," *Fla. R. Crim. P. 3.203(e)*, it determines whether **[**36]** a defendant has a deficit in adaptive behavior by examining evidence of a defendant's limitations, as well as evidence that may rebut those limitations, *see, e.g.*, Phillips, 984 So. 2d at 511-12 (holding that a trial court's order finding a lack of a deficit in adaptive behavior was supported by competent, substantial evidence of the defendant's strengths that refuted the defendant's purported limitations). If evidence of a strength rebuts evidence of a perceived limitation, that limitation may not serve as justification for finding a deficit in adaptive behavior. *See, e.g., id.*

For example, here, the dissent points to witness testimony and the assessment of medical doctors in contending that Dufour has a deficit in adaptive behavior because of a profound inability to live independently in society. Specifically, the dissent points to allegations and opinions of Dufour's limitations with regard to personal financial accounting, academic failures and menial jobs, and his failure to maintain personal-adult relationships. The dissent suggests further that Dufour has asserted limitations in communication, self-care, home living, social skills, community use, self-direction, health and safety, **[**37]** functional academics, leisure, and work. The dissent also highlights allegations of Dufour's limitations with regard to reading and

inadequacies in spelling and grammar as significant evidence of Dufour's deficit in adaptive behavior.

The circuit court, however, in properly examining whether the evidence supported or rebutted Dufour's alleged limitations, determined that a deficit in adaptive behavior did not exist. A deficit in adaptive behavior did not exist based on the evidence, and that evidence rebutted Dufour's alleged limitations and the notion that Dufour has a deficit in adaptive behavior. Specifically, Dufour's handling of the leasing of his apartment, payment of rent, administration of household chores, and daily maintenance of personal hygiene refuted the contention that he has an inability to live independently in society. Dufour's ability to live independently in society was also exemplified by the evidence showing his serving as an aide in an engine repair class in addition to virtually organizing and developing the curriculum for a motorcycle repair shop. Dufour's preparing and executing lesson plans alone were reflective of his cogitative ability as a fully-functioning, contributing member of society.

Further rebutting Dufour's alleged limitations was his work to secure a GED diploma. This refutes the notion that he has a deficit in literacy and an inability to communicate efficaciously in society. The specifications of the GED have changed slightly throughout the years as different versions of the test have been issued. *Compare Archived Information, Educational and Labor Market Performance of GED Recipients*, http://www2.ed.gov/pubs/GED/backgrd.html, *with Florida Literacy Coalition—Get your G.E.D., Frequently Asked Questions*, http://www.floridaliteracy.org/ged_information_faq.html. Nevertheless, to obtain a GED diploma, an individual has always been required to successfully master an intensive examination. *See Archived Information*; *Florida Literacy* ***[*251]*** *Coalition, supra.* The test sections of the GED exam involve a battery of questions that generally emphasize the ability to read, write, think, and solve mathematical problems. *See Archived Information, supra*. According to the American Council on Education, the GED Tests attempt to assess academic skills and knowledge *typically developed in a four-year program of high school education. See American Council on Education—History of the GED Tests*, http://www.acenet.edu/Content/NavigationMenu/ged/about/history_GED_Tests.htm. Successfully passing a GED exam has traditionally been no simple matter.

By successfully mastering this rigorous test, Dufour exhibited individual cognitive strengths that rebutted his asserted limitations of poor academic performance, difficulty reading, struggles with spelling and grammar, and inability to communicate **[**38]** and live independently in society. Dufour's GED diploma is therefore clear evidence of how evidence of a personal strength rebuts an alleged limitation and is direct proof that a deficit in adaptive behavior does not exist in fact.

The dissent is incorrect with regard to the record concerning the GED evidence. Contrary to the dissent's assertion that the State did not present evidence with regard to the significance of Dufour obtaining a GED, the GED evidence was presented by the State directly in support of its argument that Dufour lacked a deficit in adaptive behavior. Both Dr. Merin and Dr. McClaren, whose testimony the State relied upon to establish that Dufour did not have a deficit in adaptive behavior, discussed the relevance of Dufour obtaining a GED. Dr. Merin testified that in his mental health evaluation of Dufour, he examined prison progress reports which stated that Dufour had excelled while in prison, where he participated as an instructor in small engine and motorcycle repair classes, and where he obtained his GED. *See* Transcript of Record at 2804-05. For Dr. Merin, this demonstrated that Dufour was a "very capable type of individual" who could function well and "solve problems whether they be social problems or maybe mechanical problems," and that Dufour was "definitely capable of college work." Transcript of Record at 2805-06. The dissent has ignored this part of the record.

Dr. McClaren testified that the GED obtained by Dufour signified the absence of a deficit in adaptive behavior and demonstrated an aptitude for college work. *See* Transcript of Record at 3047-48, 3094. Dr. McClaren also specifically opined during cross-examination by Dufour's counsel that obtaining a GED was "suggestive of Mr. Dufour's ability to function at a higher level." Transcript of Record at 3094. Dr. McClaren further attested during cross-examination that Dufour admitted to him that he cheated on the GED, *see* Transcript of Record at 3094-95, which displays a mental aptitude by Dufour that negates his assertion that he has a deficit in adaptive behavior.

The State advanced the "GED" argument from its first pleading. Dufour's GED information was in the attachments to the State's response to Dufour's rule 3.851 postconviction motion. *See* State's Answer to Rule 3.851 Motion at 75, 78; State's Amended Answer to Rule 3.851 Motion at 250, 253. It was addressed

during the evidentiary proceeding below when the State entered a copy of Dufour's GED certificate into evidence to corroborate the testimony of Dr. McClaren. *See* Transcript of Record at 3047-48. Moreover, in the State's answer brief on appeal the GED was advanced in support of its argument that this Court should affirm the trial court's finding that Dufour did not **[*252]** have a deficit in adaptive behavior. *See* State Answer Brief at 60. In fact, in Dufour's initial brief on appeal, he acknowledged that Dr. McClaren relied on Dufour's successful completion of the GED exam in partial support of his conclusion that Dufour did not have a deficit in adaptive behavior. *See* Dufour's Initial Brief at 35.

Furthermore, Dufour presented evidence of his GED during his initial rule 3.850 postconviction proceeding in *Dufour v. State, 905 So. 2d 42 (Fla. 2005)*. There, he offered the testimony of a mental health expert, Dr. Robert Berland. *See id. at 61*. Dr. Berland testified with regard to Dufour's good prison record. *See id.* Dufour attempted to use that testimony to establish that trial counsel was ineffective for failure to present Dufour's good prison record as mitigation evidence during the penalty phase. *See id.* During Dr. Berland's testimony, he testified that Dufour had received his GED certificate and, at the time he obtained it, he demonstrated an ability to conform his conduct to the requirements of law, but that a subsequent head trauma, suffered after that incarceration and before Dufour committed murder, had stymied Dufour's ability to conform his conduct. *See* Transcript of Record at 494-95, 509-10.

The presentation of evidence with regard to Dufour obtaining a GED certificate commenced in Dufour's initial postconviction proceeding, and persisted during this postconviction proceeding in the form of both evidence and argument by the State, negating the assertion of the dissent that the significance of Dufour's GED was not presented or was not properly argued by the State. The dissent fallaciously attempts to bolster its argument by contending that the State failed to present evidence with regard to the specific version of the GED that Dufour earned. This argument is misleading at best. During the evidentiary proceeding, the State entered into evidence an exact copy of the *specific* GED earned by Dufour. *See* Transcript of Record at 3047-48; Record of Exhibit K1 at 5240. That GED therefore logically served as the specific basis for the testimony the State introduced regarding the rigors Dufour had to specifically overcome, and the individual aptitude he had to show, to earn a GED.

In addition, the circuit court concluded that Dufour failed to establish that he is mentally retarded by a preponderance of the evidence. *HN9*[↑] Preponderance of evidence is defined as evidence "which as a whole shows that the fact sought to be proved is more probable than not." *State v. Edwards, 536 So. 2d 288, 292 n.3 (Fla. 1st DCA 1988)*. The extensiveness of the evidence concerning Dufour's drug use and abusive childhood and the conflicting evidence with regard to his adaptive behavior provides competent, substantial evidence in support of the circuit court's conclusion under the lesser standard. The fact that the circuit court attributed Dufour's behavior to an alternative explanation demonstrates that there is another, equally likely reason for his behavior other than mental retardation. Therefore, Dufour did not present evidence that demonstrates the existence of mental retardation as required. *See id.*

Accordingly, we affirm the postconviction court's order **[**39]** because competent, substantial evidence supports the circuit court's determination that Dufour has failed to establish the adaptive behavior deficiency element of *section 921.137* and *rule 3.203*. A defendant must establish all three of the elements and the failure to prove any single element results in a determination that the defendant is not mentally **[*253]** retarded. *See Nixon, 2 So. 3d at 142*. In light of our holding that competent, substantial evidence supports the circuit court's determination that Dufour's behavior is attributable to factors other than mental retardation along with the conflicting evidence on whether deficiency exists, we do not address the last prong of the test, which is whether the subaverage intellectual functioning and deficient adaptive behavior manifested prior to the age of eighteen. *See id. at 145*; *Phillips, 984 So. 2d at 509 n.11*, *Jones, 966 So. 2d at 329-30*; *Trotter, 932 So. 2d at 1049 n.5*.

Constitutionality of Section 921.137(4)

Dufour asserts that the circuit court unconstitutionally applied the clear and convincing evidence standard in evaluating whether Dufour is mentally retarded. He advances that the decisions in *Atkins* and *Cooper v. Oklahoma, 517 U.S. 348, 363, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996)*, **[**40]** demonstrate that this burden violates his due process rights under the Florida and United States Constitutions. Here, the circuit court found that Dufour failed to demonstrate deficient adaptive behavior under either the clear and convincing *or* the preponderance of the evidence standard. Because we

hold that competent, substantial evidence supports the circuit court's determination with regard to adaptive behavior deficiency under the lower standard, we decline to reach the constitutional challenge raised by Dufour. *See* Singletary v. State, 322 So. 2d 551, 552 (Fla. 1975) (**HN10**[↑] "[C]ourts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds."); *see also* Nixon, 2 So. 3d at 145; Phillips, 984 So. 2d at 509 n.11; Jones, 966 So. 2d at 329-30; Trotter, 932 So. 2d at 1049 n.5.

Evidentiary Issues

Dufour next contends that the circuit court improperly allowed a number of documents to be admitted into evidence and improperly allowed a former defense expert to testify for the State. In reviewing this issue, **HN11**[↑] a circuit court's admission of evidence will not be reversed absent an abuse of discretion. *See* Medina v. State, 466 So. 2d 1046, 1050 (Fla. 1985). **[**41]** We hold that even if the circuit court abused its discretion, any error is harmless because the language of the order demonstrates beyond a reasonable doubt that the challenged evidence did not contribute to the postconviction court's conclusion that Dufour failed to establish mental retardation. *See* State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). Thus, there is no reasonable possibility that the asserted errors affected the court's determination.

However, we note two things. First, the postconviction court afforded judicial notice to the 2002 postconviction proceeding and certain letters within the court file. **HN12**[↑] In Florida, a court may take judicial notice of various matters including "[r]ecords of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States." § 90.202(6), Fla. Stat. (2007). However, the fact that a record may be judicially noticed does not render all that is in the record admissible. *See* Allstate Ins. Co. v. Greyhound Rent-A-Car, Inc., 586 So. 2d 482, 483 (Fla. 4th DCA 1991). For instance, the court's authority to take judicial notice of records cannot be used to justify the wholesale admission **[**42]** of hearsay statements within those court files, such as through police reports or letters. *See* Stoll v. State, 762 So. 2d 870, 876 (Fla. 2000) ("We have never held that such otherwise inadmissible documents are automatically admissible just because they were included in a judicially noticed court file."). In *Stoll*, we held that "documents contained in a court file, even if that entire **[*254]** court file is judicially noticed, are still subject to the same rules of evidence to which all evidence must adhere." *Id. at 877*. In so holding, we noted the observations of another appellate court that there has been a

> seemingly widespread but mistaken notion that an item is judicially noticeable merely because it is part of the "court file." Court files are often replete with letters, affidavits, legal briefs, privileged or confidential data, *in camera* materials, fingerprint records, probation reports, as well as depositions that may contain unredacted gossip and all manner of hearsay and opinion.

Ptasznik v. Schultz, 247 A.D.2d 197, 679 N.Y.S. 2d 665, 666-67 (N.Y. App. Div. 1998) (citations omitted). "[N]one of these [items] are rendered admissible merely because they are part of the court file." Stoll, 762 So. 2d at 877 **[**43]** (citing *Ptasznik, 679 N.Y.S. 2d at 667*). Thus, while the court may take judicial notice of documents in a court file that were properly placed there, this notice would not make the contents of the documents admissible if they were subject to challenge, such as when a document is protected by privilege or constituted hearsay. In addition, taking judicial notice of an entire prior proceeding may be expeditious for the current proceedings, but it does not allow the substance of the underlying materials to be entered into evidence without compliance with the rules of evidence.

Furthermore, the manner in which documents were introduced through the expert testimony was problematic. The State introduced copious documents that the experts relied upon during their evaluation of Dufour and, during the expert testimony, projected these documents on a screen in the courtroom where the trier of fact (i.e., the judge in this bench proceeding) could view the entirety of the substance of the document. The documents came from many unidentified sources and included prior psychological evaluations, inmate grievance requests, multiple police reports, and evidence from the 2002 proceeding. Dufour challenged **[**44]** the use of these documents, asserting that the State was utilizing the expert witness as a conduit to introduce otherwise inadmissible evidence and that the State had not established a foundation for the documents' admissibility outside the fact that the documents were possibly consulted by the expert witness as a basis for an opinion. In addition, Dufour advanced that publishing the documents through the projector screen amounted to the documents' admission in open court for everyone to read without the proper predicate being established, and that the projection of

the documents with altered highlighted portions constituted improper bolstering and leading.

In general, the challenged documents fell into the following categories: (1) those that had been admitted into evidence in the 2002 proceedings; (2) those that had been admitted during the course of the 2008 hearing; and (3) those that were introduced solely for identification and were not admitted into evidence. For the documents of which the court took judicial notice, the court expressly noted in its order that the documents from the 2002 hearing were not considered in its determination. Accordingly, the error, if any, in the **[**45]** admission of such evidence was harmless. *See* Capitoli v. State, 175 So. 2d 210, 212 (Fla. 2d DCA 1965) ("Since the trial judge, sitting without a jury, stated that he based his findings exclusively upon such evidence and that he disregarded the challenged evidence, the error, if any, in the admission of such evidence was harmless."). For the documents that were admitted into evidence during the evidentiary hearing, but were not part of the prior **[*255]** judicially noticed proceeding, the court's order does not indicate that any of these documents were considered in its determination. Thus, there is not a reasonable possibility that any error in admitting these documents affected the circuit court's determination.

For the last set of documents, the postconviction court allowed the State to project the documents relied upon by Dr. McClaren onto a screen in the courtroom. In forming opinions, experts can rely on information which is not itself admissible, under section 90.704, Florida Statutes (2004), which provides:

> ***HN13***[↑] The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type **[**46]** reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.

HN14[↑] Although experts may testify as to the things on which they rely, experts cannot bolster or corroborate their opinions with the opinions of other experts who do not testify because "[s]uch testimony improperly permits one expert to become a conduit for the opinion of another expert who is not subject to cross-examination." Schwarz v. State, 695 So. 2d 452, 455 (Fla. 4th DCA 1997). To allow an expert to do so would cause any probative value of the testimony to be "substantially outweighed by the danger of unfair prejudice, confusion of issues, [or] misleading the jury." Id. at 455 (quoting § 90.403, Fla. Stat. (1995)). Further, an expert's testimony may not be used as a basis to introduce otherwise inadmissible evidence. *See* Linn v. Fossum, 946 So. 2d 1032, 1037 (Fla. 2006). Under these circumstances, the circuit court did not abuse its discretion by allowing the challenged documents to be published on the screen. However, we hasten to remind attorneys and judges that the rules of evidence must be applied before the substance of any document may be **[**47]** admitted for consideration by the trier of fact.

Second, the continuous failure to state on the record the identification and exhibit numbers for evidence, along with the references to evidence from prior proceedings without any indication of its identifying information, created unnecessary hardship for this Court in conducting our review. Without an attorney's diligence in creating a clear and comprehensible record, an appellate court is left to piece together the evidentiary record to properly review the proceeding. Thus, it is important for attorneys to ensure that the record reflects identifying information as to which piece of evidence is being referenced and addressed during the proceeding because an appellate court's perspective of a proceeding is limited by the contents of the record.

CONCLUSION

Accordingly, we affirm the circuit court's determination that Dufour has not established that he is mentally retarded.

It is so ordered.

LEWIS, POLSTON, and LABARGA, JJ., concur.

CANADY, C.J., concurs in result.

PARIENTE, J., concurs in part and dissents in part with an opinion, in which QUINCE and PERRY, JJ., concurs.

Concur by: PARIENTE (In Part)

Dissent by: PARIENTE (In Part)

Dissent

PARIENTE, J., concurring in part and dissenting **[**48]** in part.

The sole issue in this appeal concerns the propriety of the trial court's determination that Dufour was not mentally retarded. Because of significant errors in **[*256]** the trial court's evaluation of Dufour's IQ and adaptive functioning, we should remand to the trial court for a reevaluation of the evidence regarding the IQ and adaptive functioning prongs using the correct legal standards. In our emerging jurisprudence on the evaluation of mental retardation in connection with the death penalty, we must be certain that we are utilizing objective and scientifically acceptable measures for evaluation of both IQ and deficits in adaptive behavior.

I therefore agree with the majority that the trial court erred in its evaluation of Dufour's IQ and that this error is not harmless beyond a reasonable doubt. I disagree, however, that we should affirm based on the failure of Dufour to prove deficits in adaptive behavior because, as discussed below, the trial court made three significant errors when analyzing this prong. I also dissent from the portions of the majority opinion that utilize non-record evidence of the specific requirements and difficulty of the GED given to Dufour in order to refute the existence of Dufour's adaptive functioning deficits. This evidence concerning how rigorous the specific version of the GED that Dufour took was neither presented nor argued by the State and accordingly I am concerned that Dufour was deprived of the opportunity to refute the majority's conclusions regarding the significance and difficulty of the specific version of the GED that Dufour took. This potential problem with the record evidence regarding the rigors of a specific version of the GED could be avoided by remanding for a reevaulation by the trial court of all the evidence, thereby providing the parties an opportunity to be heard.[6]

As to the trial court's error in evaluating the IQ, the trial court accepted Dr. McClain's score of 67 as the most reliable but then applied the standard error of measure to the **[**49]** score, *adding* five points. In this case, it would therefore appear that a likelihood exists that Dufour's IQ is significantly subaverage. Thus, the two other prongs of the three-part test for mental retardation become important to evaluate: concurrent deficits in adaptive behavior in at least two areas and onset before age 18.

Although I agree that there may be cases where we could affirm the trial court based on findings on adaptive functioning alone, I do not agree that this is one of those cases. In this case, there is reason to question the trial court's evaluation of adaptive functioning because the trial court failed to focus on "deficits" in adaptive behavior, failed to properly evaluate Dr. Keyes' objective testimony of deficits in adaptive behavior, and rejected the evidence relating to deficits in adaptive behavior based on an "alternative explanation" for the deficits. I will explain each of my concerns in turn.

In my view, the trial court first erred by failing to focus on Dufour's established "deficits in adaptive behavior." In other words, the focus in evaluating adaptive behavior should be on the individual's *limitations*, rather than his or her demonstrated adaptive skills. **[**50]** This proposition is supported both by the American Association on Intellectual and Developmental Disabilities' (AAIDD) definition of mental **[*257]** retardation, as well as the language of section 921.137, Florida Statutes (2006), and *Florida Rule of Criminal Procedure 3.203*. *See* § 921.137(1), Fla. Stat. (2006) ("[T]he term 'mental retardation' means significantly subaverage general intellectual functioning existing concurrently with *deficits in adaptive behavior* and manifested during the period from conception to age 18." (emphasis added)); *Fla. R. Crim. P. 3.203(b)* ("[T]he term 'mental retardation' means significantly subaverage general intellectual functioning existing concurrently with *deficits in adaptive behavior* and manifested during the period from conception to age 18." (emphasis added)).

In stating that the focus is on an individual's limitations, I do not mean that a court is precluded from reviewing the full picture or considering whether a deficit does or does not exist. In fact, courts must review *all available evidence* in order to determine this prong. But a court cannot reject a determination that deficits exist simply because a defendant has strengths in certain other areas. **[**51]** In other words, possessing certain adaptive skills in one area does not eliminate the possibility that the defendant has deficits in other areas.

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[6] Contrary to the majority's characterization, I do not dispute that the State presented evidence that Dufour obtained his GED or that the experts used this information in evaluating whether Dufour is mentally retarded. However, the majority relies on non-record sources in discussing the rigors and specific requirements of the version of the GED that Dufour took in 1978—information which was not presented by Dr. Merin or Dr. McClaren. I take issue only with the non-record evidence that is utilized in the majority opinion. *See* majority op. at 28-29.

Section 921.137(1) defines adaptive behavior as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." § 921.137(1), Fla. Stat. (2006). For the purpose of implementing the adaptive behavior prong, since the enactment of the statute, Florida courts have adopted the analytic framework set forth in Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). See Nixon v. State, 2 So. 3d 137, 143 (Fla. 2009); Phillips v. State, 984 So. 2d 503, 511 (Fla. 2008); Jones v. State, 966 So. 2d 319, 326-27 (Fla. 2007). Specifically, when defining mental retardation, the United States Supreme Court explained deficits in adaptive behavior as "limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." Atkins, 536 U.S. at 308 n.3 (quoting Am. Ass'n on Mental Retardation, *Mental Retardation: **[**52]** Definition, Classification, and Systems of Supports* 5 (9th ed. 1992)).[7]

In finding that Dufour is not mentally retarded based on his failure to establish deficits in adaptive behavior, the trial court relies significantly on the adaptive skills Dufour *does possess*, rather than his deficits. For example, the trial court stated in its findings on adaptive behavior:

> **[*258]** Mr. Dufour does not read or write much, if at all. He does not play chess in the Department of Corrections. He does not have good hygiene habits. In the past, he drove a car and possessed a driver's license. He participated in teaching a small engine repair class while in prison in the 1970's. He could be good with children. He was capable of interacting in social situations, and could be friendly and engaging. He appeared to understand discussions with his trial counsel.

This approach to assessing adaptive behavior is at odds not only with the statutory definition itself but also with the current consensus within the scientific community as to the proper method **[**54]** for assessing adaptive behavior in the criminal justice context. Specifically, the AAIDD and the DSM-IV stress that the focal point of adaptive behavior should be on the individual's limitations rather than demonstrated adaptive skills. An important reason for this policy is that "[t]he skills possessed by individuals with mental retardation vary considerably, and the fact that an individual possesses one or more that might be thought by some laypersons as inconsistent with the diagnosis (such as holding a menial job, or using public transportation) cannot be taken as disqualifying." James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental & Physical Disability L. Rep. 11, 21 n.29 (2003).

The AAIDD, in its amicus brief to this Court, explains that the significant limitations in adaptive behavior must be based on objective measurements and not weighed against adaptive strengths. The purpose of the adaptive functioning prong is to ascertain whether the measured intellectual score reflects a real-world disability, as opposed to a testing anomaly. Thus for this prong, the diagnostician's focus must remain on the presence of confirming deficits. **[**55]** Accordingly, the AAIDD has specifically noted that "assessments must . . . assume that limitations in individuals often coexist with strengths, and that a person's level of life functioning will improve if appropriate personalized supports are provided over a sustained period." Am. Ass'n on Intellectual & Developmental Disabilities, *Definition of Intellectual Disability*, http://www.aaidd.org/content_100.cfm?navID=21 (last visited Jan. 14, 2011).[8] Further, as the AAIDD correctly

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[7] *Atkins* adopted this framework from the AAIDD's 1992 definition of mental retardation, which was substantially similar to the definition of mental retardation set forth by the American Psychiatric Association (APA) in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (2000) (DSM-IV): (1) significantly subaverage general intellectual functioning that is accompanied by (2) significant limitations in adaptive functioning in at least two skill areas (communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety); and (3) the onset must occur before age 18. Atkins, 536 U.S. at 308 n.3 (quoting *Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed. 2000)). However, unlike the AAIDD definition, the DSM-IV definition still distinguished between degrees of mental retardation (i.e., mild, moderate, severe, and profound). *See* Atkins, 536 U.S. at 308 n.3; J. Gregory Olley & **[**53]** Ann W. Cox, Assessment of Adaptive Behavior in Adult Forensic Cases: The Use of the Adaptive Behavior System—II, *in Adaptive Behavior Assessment System-II, Clinical Use & Interpretation* 383 (Thomas Oakland & Patti L. Harrison ed., 2008).

[8] The AAIDD has explicitly stated that "[m]ental retardation and intellectual disability are two names for the same thing. But intellectual disability is gaining currency as the preferred term." Am. Ass'n on Intellectual & Developmental Disabilities, *FAQ*

explains, much of the clinical definition of adaptive behavior is much less relevant in prisons, and in fact, a person with mental retardation is likely to appear to have stronger adaptive behavior in a structured environment such as a prison than in society. The amicus brief of the AAIDD further points out that "[s]tereotypes and lay assumptions about people with mental retardation can cloud or distort individual assessment."

The failure to take an objective approach to deficits in adaptive behavior can result in the perpetuation of misunderstanding mental retardation. In *State v. White, 118 Ohio St. 3d 12, 2008 Ohio 1623, 885 N.E.2d 905 (Ohio 2008)*, the Supreme Court of Ohio reversed the trial court's finding that White failed to prove significant deficiencies in adaptive behavior. In its opinion, the court focused on concerns similar to those **[*259]** advanced by the AAIDD as to improperly focusing on an individual's demonstrated adaptive skills and placing too much importance on lay testimony regarding White's demonstrated adaptive skills:

> *The mentally retarded are not necessarily devoid of all adaptive skills. Indeed, "they may look relatively normal in some areas and have certain significant limitations in other areas."* Mildly retarded persons can play sports, write, hold jobs, and drive. Dr. Hammer testified that in determining whether a person is mentally retarded, one must focus on those adaptive skills the person lacks, not on those he possesses.
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> The trial court's analysis appears to disregard this **[**57]** testimony. For example, the trial court's opinion mentions twice that White was a licensed driver. However, Dr. Hammer testified that a mildly retarded individual can qualify for a driver's license and that licensed-driver status is not a good criterion for distinguishing between people who are and are not retarded.
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> . . . .
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> The trial court's analysis was also misdirected in stressing that White's family and peers did not perceive White to be lacking in adaptive behavior skills. Both experts testified that laymen cannot easily recognize mild mental retardation. . . .
>
> . . . In light of [Dr. Hammer's] unrebutted testimony, the impressions of White's peers . . . lend no support to the findings of the trial court.

White, 885 N.E.2d at 914-15 (emphasis added). While the Ohio Supreme Court recognized that a trial court is the trier of fact, the court concluded that the trial court abused its discretion in making this determination by disregarding "credible and uncontradicted expert testimony in favor of . . . the court's own expectations of how a mentally retarded person would behave." *Id. at 915*.

In this case, the trial court likewise erred in failing to properly evaluate Dr. Keyes' objective **[**58]** testimony in regard to deficits in adaptive functioning. Although the trial court stated that Dr. Keyes provided a "great deal of substantive information about mental retardation" and found that his opinion was entitled to moderate weight and was "very useful in arriving at a legal conclusion," these findings are in seeming contradiction to the trial court's ultimate findings that the defendant failed to produce sufficient evidence that his adaptive behavior is impaired to the degree necessary to support a finding of mental retardation, either under the clear and convincing standard or under the preponderance of the evidence standard. The trial court does not explain whether it found the State's expert witnesses to be more credible on the topic of adaptive behavior. Further, the trial court does not appear to provide an underlying reason for discounting any of Dufour's lay and expert witness testimony regarding adaptive behavior.

In this regard, there was significant evidence supporting a claim of deficits in adaptive functioning. Dr. Keyes conducted adaptive functioning testing on Dufour and as part of the assessment, interviewed Dufour, two inmates on death row whose cells were adjacent **[**59]** to Dufour's, and two individuals who knew Dufour prior to the age of 18. On the tests administered by Dr. Keyes, Dufour ultimately scored more than two standard deviations below the mean on the General Adaptive Composite, which is consistent with mental retardation. Further, various witnesses established that Dufour never lived alone, always relied on others for help and support, was not in charge of paying bills, never held a job for more than a few months, and **[*260]** never had a checking account, and that the jobs he did hold were menial, he was easily led around and influenced by others, and he was always more comfortable playing with children. Even State witness Dr. McClaren agreed that Dufour's history of academic failure and menial jobs, along with his history of poor relationships, could be consistent with a diagnosis of mental retardation.

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on Intellectual Disability, **[**56]** http://www.aaidd.org/content_104.cfm (last visited Jan. 14, 2011). However, the term "mental retardation" is the term that is generally contained in current federal and state laws.

The evidence demonstrates that Dufour has significant adaptive functioning limitations in communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.

The testimony also established that Dufour demonstrated "abysmal" academic performance in school. He failed kindergarten **[**60]** and had to repeat second grade. He never passed second grade, but instead was "placed" for the remainder of elementary school. Dufour was also in the lowest level of classes, i.e., basic. Dufour's basic English teacher in seventh grade, Joyce Jones, described Dufour's mental abilities as below average and thought he was "very possibly" mentally retarded. She also described him as immature, "like a little kid." She did not remember Dufour having any friends. Dufour did not graduate from vocational technical school. Further, evidence demonstrated that Dufour has difficulty with spelling, punctuation, and grammar and reads at a basic level.

While there is evidence that Dufour learned to perform small-engine repair while incarcerated, even the State's expert witness Dr. Merin acknowledged that people with mental retardation can also be taught carpentry skills, how to fix complex items, work in a stockroom, and drive an automobile. While I acknowledge evidence that the defendant obtained his GED is relevant to the court's inquiry, this fact alone does not eliminate a finding that Dufour was mentally retarded, especially in light of his overall academic performance and his uncontroverted **[**61]** significantly subaverage IQ of under 70. Additionally, the majority opinion discusses the significance and difficulty as to the specific version of the GED that Dufour was given based on non-record evidence, which neither the State nor its witnesses presented or discussed. Attributing significance to the GED that was not specifically argued, based on non-record evidence, deprives Dufour of the opportunity to explain or counter these conclusions.

Finally, and importantly, the trial court committed a significant error in its analysis of this prong by rejecting the deficits in adaptive behavior based on an "alternative explanation" for the deficits. Specifically, the trial court found any deficits in Dufour's adaptive behavior were not caused by mental retardation, but were the consequence of intense drug use and his "deplorable home environment." The majority perpetuates the error by accepting these findings. Contrary to the trial court and the majority, nothing within the plain language of section 921.137 or *rule 3.203* requires proof as to the causation of deficits in adaptive functioning—only that the defendant has such deficits. In determining whether a defendant has shown mental retardation, this Court is confined to the statutory definition of "mental retardation" and is not at liberty to add additional requirements or exceptions to the definition.

Nothing within the statutory requirements or within the clinical definition of mental retardation supports the theory that determining the cause of the deficits is a part of the inquiry in determining mental retardation. Moreover, the trial **[**62]** court does not rely on any expert opinion to support its conclusion that alternative explanations can disqualify a person who otherwise would be considered mentally **[*261]** retarded based on meeting each prong in the statutory definition of the term.

The statute and rule define mental retardation as a condition that meets the above three prongs, without specifying the origin of the disability.[9] In this case, Dr. Keyes, a very qualified expert in mental retardation, explained that Dufour has numerous risk factors for mental retardation: traumatic brain injury before the age of 18, malnutrition, an impaired childcare giver (his alcoholic abusive father), lack of adequate stimulation, domestic violence, and child abuse.

Specifically, there was evidence that after he was born, Dufour suffered from traumatic brain damage from an unidentified source, lacked adequate stimulation, was abused as a child, and suffered multiple head injuries, **[**63]** both before and after the age of 18. Further, Dufour started using alcohol and drugs at a very young age, including inhaling toluene or glue at the age of ten. In other words, his "deplorable home environment" and intense drug use may have been contributing factors to his mental retardation, but those risk factors are not a basis to reject a finding of mental retardation.

The *Eighth Amendment's* protection against execution afforded to mentally retarded individuals does not depend on the cause of the mental retardation. Further, a trial court's approach relating to alternative explanations has the potential to place a significant and unnecessary roadblock in front of a defendant who is

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[9] In fact, approximately forty to fifty percent of the causes of mental retardation have no identifiable origin. *See* Am. Ass'n on Intellectual & Developmental Disabilities, *FAQ on Intellectual Disability*, http://www.aaidd.org/content_104.cfm (last visited Jan. 14, 2011).

attempting to establish mental retardation. A capital defendant who attempts to establish that he is mentally retarded may have multiple risk factors for mental retardation in his or her background such as abusive childhood (with physical and sexual abuse), lack of childhood stimulation (including abandonment and neglect by parents), and substance abuse. The linchpin for the deficits in adaptive behavior and significantly subaverage IQ is that both of these prongs must have been manifested before the age **[**64]** of 18. The cause of the deficits in adaptive behavior is not part of the inquiry as long as the defendant can prove he meets all three prongs.

In conclusion, I believe that this Court would be well-served in remanding this case for a reevaluation of the evidence presented so that we can be assured that findings regarding mental retardation are based on solid, scientifically acceptable explanations. While it may very well be that the totality of the circumstances supports a finding that Dufour is not mentally retarded, this review should occur after the trial court reevaluates the IQ and adaptive behavior prongs. Therefore, for the reasons expressed above, I would remand for a reevaluation of the evidence by the trial court.

QUINCE and PERRY, JJ., concurs.

End of Document

In re Adoption of Freeman

Supreme Court of Florida, Division B.

Oct. 24, 1956.

No Number in Original

Reporter
90 So. 2d 109 *; 1956 Fla. LEXIS 3439 **

In the Matter of Adoption of Joseph Lee FREEMAN, a minor. John William FREEMAN, Appellant, v. John W. ADKINSON and Bessie Mae Adkinson, Appellees.

Core Terms

interlocutory decree, proceedings, records, final hearing, final decree, judicial notice

Case Summary

Procedural Posture
Appellant father sought review of an order of the Circuit Court of Walton County (Florida) that granted appellees' petition for the adoption of appellant's son.

Overview
Appellees petitioned for the adoption of appellant's son. Appellant requested the petition be dismissed. The state Welfare Board recommended the petition be dismissed and the child returned to the custody of his father. The lower court entered an interlocutory order of adoption in favor of appellees, and entered a final order of adoption in favor of appellees. Appellant sought review. The court found that the lower court could not take judicial notice of what was contained in the record of another distinct case unless it was brought to the attention of the court or made part of the record. The court affirmed because there was no transcript of the testimony from the first hearing, and the court could not find that the lower court judge improperly took notice of other proceedings. The presumption was that the lower court judge did not commit an error, and if he took notice of the records of other proceedings it was in compliance with the necessary procedures. Because appellant failed to rebut that presumption, there was no abuse of discretion in taking judicial notice, and the court affirmed.

Outcome
Judgment of the lower court that granted appellees' petition for the adoption of appellant's son was affirmed because appellant failed to rebut the presumption that the lower court judge properly took judicial notice of records of other proceedings before the decision of adoption was granted.

LexisNexis® Headnotes

Evidence > Judicial Notice > Adjudicative Facts > Judicial Records

Evidence > Judicial Notice

Evidence > Judicial Notice > General Overview

HN1 **Adjudicative Facts, Judicial Records**

A court shall not take judicial notice of what may be contained in the record of another distinct case unless it be brought to the attention of the court by being made a

part of the record.

Evidence > Judicial Notice > Adjudicative Facts > Judicial Records

Evidence > Judicial Notice

Evidence > Judicial Notice > General Overview

Evidence > Judicial Notice > Adjudicative Facts > General Overview

HN2 **Adjudicative Facts, Judicial Records**

The court in which a cause is pending will take judicial notice of all its own records in such cause and of the proceedings relating thereto. But orders and other proceedings which do not properly belong to the record of a case being considered by a court must be proved or in some way directly brought into the record of the pending case by some order of the court referring to and adopting the outside records or proceedings as part of its own record, in order that an appellate court may, in the event of an appeal, know the exact nature, character, scope, and extent of the matters upon which the court below arrived at the decision appealed from and carried on the record to the appellate court.

Evidence > Authentication > General Overview

Evidence > Judicial Notice

HN3 **Evidence, Authentication**

When necessary for the administration of justice in a given case, the court will take judicial notice of all previous and undisputed proceedings therein as appear of record, certified or authenticated as required by law, and required by law to be on file or of record in the cause.

Evidence > Judicial Notice > General Overview

Evidence > Judicial Notice

HN4 **Evidence, Judicial Notice**

Judicial knowledge cannot be resorted to so as to raise controversies not presented by the record. The right of a court to act upon than which is in point of fact known to it must be subordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court and of stating and conducting them.

Evidence > Judicial Notice > General Overview

Evidence > Judicial Notice

HN5 **Evidence, Judicial Notice**

In the event a party relies on the judicial knowledge of the trial judge as to local conditions, he must in some form procure that knowledge to be brought into the record, so that an appellate court may rely thereupon.

Counsel: **[**1]** D. W. Berry, Pensacola and Ervin & Buford, Tallahassee, for appellant.

Thos. D. Beasley, De Funiak Springs, for appellees.

Opinion by: O'CONNELL

Opinion

[*109] O'CONNELL, Justice.

On March 30, 1953 John W. Adkinson and Bessie Mae Adkinson, appellees, petitioned in the Circuit Court of Walton County for the adoption of Joseph Lee Freeman, a minor. John William Freeman, natural father **[*110]** of the child, the appellant here, asked in his answer that the petition be dismissed. In August of that year the State Welfare Board filed its recommendation that the petition be dismissed and the child returned to the custody of his natural father. Thereafter a hearing was held and on November 9, 1953 the court below entered an interlocutory order of adoption in favor of the petitioners. This order was contrary to the previous recommendation of the State Welfare Board. Subsequent to the interlocutory order the Board filed its

recommendations in regard to a final decree of adoption in which it said: "that in view of the fact that the Court, at the time of the interlocutory hearing in this cause, rendered a decision in favor of the adoption and have awarded temporary custody of said **[**2]** child to the petitioners, the State Welfare Board is of the opinion that it is to the best interest of said child to have legal protection of final adoption". The testimony at the hearing which resulted in the interlocutory decree was not reported and is not before this Court in the record on appeal. On February 9, 1955 a final hearing was begun on the matter and on March 16, 1955 a final decree awarding the adoption to petitioners was entered, whereupon the father instituted this appeal.

In its interlocutory decree the lower court said "after hearing and considering the testimony and in the light of past events touching the custody of the child involved and his support and maintenance as disclosed by the records of this Court on the civil and criminal side of the docket, of which the Court takes knowledge, the Court is of the opinion that in the best interests of the child and his welfare the petition for change of custody prayed for should be denied and that an interlocutory decree in the adoption proceedings should be granted". At the hearing beginning February 9, 1955 no testimony was permitted relating to events prior to the first hearing which resulted in the interlocutory **[**3]** decree. This Court, therefore, is ignorant as to the past events referred to in the interlocutory decree. Nor does this Court have before it any information concerning the records of the lower court, civil and criminal, involving the support and maintenance of the child; such records were referred to in the decree. In the final decree the judge said that although the testimony in the original hearing was not reported and, therefore, not available for review, there were recitals in the interlocutory decree which indicated that he had considered the testimony taken at the original hearing. He then recalled certain facts and reached his conclusion, as he stated it, after considering the unhappy and somewhat sordid history, fully and in detail covered by the testimony upon which the interlocutory decree was based.

Although the judge in his final decree commented on the fact that in the final hearing testimony was confined to the change in circumstances alleged to have taken place since the entry of the interlocutory decree and that at the final hearing much testimony was also adduced reflecting upon the character of the home of the petitioners, it is possible that his decision was **[**4]** affected by the testimony brought out in the first hearing prior to the interlocutory decree. It is also possible that his final decree was also predicated somewhat upon his knowledge of certain records of his court on the civil and criminal side bearing upon support and maintenance of the subject child.

It is the rule in this State that ***HN1***[↑] a court shall not take judicial notice of what may be contained in the record of another distinct case unless it be brought to the attention of the court by being made a part of the record. *Atlas Land Corporation v. Norman, 116 Fla. 800, 156 So. 885, 886*. In the same case we find the Court making this statement:

"***HN2***[↑] The court in which a cause is pending will take judicial notice of all its own records in such cause and of the proceedings relating thereto. But orders **[*111]** and other proceedings which do not properly belong to the record of a case being considered by a court must be proved or in some way directly brought into the record of the pending case by some order of the court referring to and adopting the outside records or proceedings as part of its own record, in order that an appellate court may, in the event of an appeal, know the **[**5]** exact nature, character, scope, and extent of the matters upon which the court below arrived at the decision appealed from and carried on the record to the appellate court. See 1 Jones Commentaries on Evidence (2d Ed.) pages 762-770, and cases cited."

The reasoning of this Court in the Atlas case was reaffirmed twenty years later in *Kelley v. Kelley, Fla., 75 So.2d 191*, *31* C.J.S., Evidence, § 50(b) provides that "***HN3***[↑] when necessary for the administration of justice in a given case, the court will take such notice of all previous and undisputed proceedings therein as appear of record, certified or authenticated as required by law, and required by law to be on file or of record in the cause * * *." In 20 Am.Jur. Sec. 17 it is said "***HN4***[↑] Judicial knowledge cannot be resorted to so as to raise controversies not presented by the record. The right of a court to act upon than which is in point of fact known to it must be subordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court and of stating and conducting them." Section 27 says "***HN5***[↑] in the event a party relies on the judicial knowledge of the trial judge as to local conditions, **[**6]** he must in some form procure that knowledge to be brought into the record, so that an appellate court may rely thereupon * * *."

Since we have before us no transcript of the testimony on the first hearing, we cannot say that the lower court judge improperly took notice of other proceedings both

civil and criminal. The record is silent on the matter. The presumption is, of course, that he committed no error and that therefore if he did take notice of such records he did so in compliance with the necessary procedure. Appellant has not brought before us evidence to rebut the presumption. Even if error was committed, we feel it was not prejudicial, as other evidence exists to support the findings. In *Baggesi v. Baggesi, 100 Cal.App.2d 828, 224 P.2d 894* the court took judicial notice of certain alleged customs of Italian farmers in certain counties of California. The court held that although the lower court should not have done so, on prejudicial error resulted, as the findings were supported by other evidence. The lower court judge in the instant case did expressly refer to the fact that much testimony was also adduced at the final hearing reflecting upon the character of the **[**7]** home of the petitioners. Also, from an examination of the transcript of the testimony it is seen that much information concerning the character and status of the appellant father was adduced. We think there was substantial evidence to support the final decree of the lower court even should we determine, which we cannot do, that he abused his discretion in taking judicial notice of facts which were not the proper subject matter for such judicial notice. On the basis of facts adduced at the final hearing alone the judge could have reached his decision and we can find no valid reason to overthrow his judgment.

Although such is not required by law, we believe that because of the seriousness of the effect of adoption proceedings, both on the child involved and the parents, natural and adoptive, that it would be desirable for the trial judge to require that final hearings in all adoption proceedings be reported. If needed, as in this case, they can then be transcribed.

The decree appealed from is accordingly affirmed for the reasons expressed herein.

DREW, C.J., and THOMAS and ROBERTS, JJ., concur.

End of Document

Fla. Stat. § 90.503

Current through all 2020 general legislation.

LexisNexis® Florida Annotated Statutes > Title VII. Evidence. (Chs. 90 — 92) > Chapter 90. Evidence Code. (§§ 90.101 — 90.958)

§ 90.503. Psychotherapist-patient privilege.

(1) For purposes of this section:

(a)A "psychotherapist" is:

1.A person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, who is engaged in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction;

2.A person licensed or certified as a psychologist under the laws of any state or nation, who is engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction;

3.A person licensed or certified as a clinical social worker, marriage and family therapist, or mental health counselor under the laws of this state, who is engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction;

4.Treatment personnel of facilities licensed by the state pursuant to chapter 394, chapter 395, or chapter 397, of facilities designated by the Department of Children and Families pursuant to chapter 394 as treatment facilities, or of facilities defined as community mental health centers pursuant to *s. 394.907(1)*, who are engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction; or

5.An advanced practice registered nurse licensed under *s. 464.012*, whose primary scope of practice is the diagnosis or treatment of mental or emotional conditions, including chemical abuse, and limited only to actions performed in accordance with part I of chapter 464.

(b)A "patient" is a person who consults, or is interviewed by, a psychotherapist for purposes of diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction.

(c)A communication between psychotherapist and patient is "confidential" if it is not intended to be disclosed to third persons other than:

1.Those persons present to further the interest of the patient in the consultation, examination, or interview.

2.Those persons necessary for the transmission of the communication.

3.Those persons who are participating in the diagnosis and treatment under the direction of the psychotherapist.

(2)A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.

(3) The privilege may be claimed by:

(a) The patient or the patient's attorney on the patient's behalf.

(b)A guardian or conservator of the patient.

(c) The personal representative of a deceased patient.

(d) The psychotherapist, but only on behalf of the patient. The authority of a psychotherapist to claim the privilege is presumed in the absence of evidence to the contrary.

(4) There is no privilege under this section:

(a) For communications relevant to an issue in proceedings to compel hospitalization of a patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has reasonable cause to believe the patient is in need of hospitalization.

(b) For communications made in the course of a court-ordered examination of the mental or emotional condition of the patient.

(c) For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

History

S. 1, ch. 76-237; s. 1, ch. 77-77; s. 22, ch. 78-361; s. 1, ch. 78-379; s. 40, *ch. 90-347*; s. 1, *ch. 92-57*; s. 19, *ch. 93-39*; s. 475, *ch. 95-147*; s. 28, *ch. 99-2*; s. 5, *ch. 99-8*; s. 1, *ch. 2006-204*, eff. July 1, 2006; s. 30, *ch. 2014-19*, eff. July 1, 2014; s. 7, *ch. 2018-106*, eff. Oct. 1, 2018.

Annotations

LexisNexis® Notes

Notes

Amendments.

The 2006 amendment by s. 1, ch. 2006-204, effective July 1, 2006, added (1)(a)5. and made a related change.

The 2014 amendment substituted "Department of Children and Families" for "Department of Children and Family Services" in (1)(a)4.

The 2018 amendment by s. 7, ch. 2018-106 substituted "advanced practice registered nurse licensed" for "advanced registered nurse practitioner certified" in (1)(a)5.

Leonard v. Leonard

Court of Appeal of Florida, First District

May 7, 1996, Filed

CASE No. 95-3632

Reporter
673 So. 2d 97 *; 1996 Fla. App. LEXIS 4593 **; 21 Fla. L. Weekly D 1117

DEBRA A. LEONARD, Appellant, v. JOSEPH H. LEONARD, Appellee.

Subsequent History: [1]** Released for Publication May 23, 1996.

Prior History: Petition for Writ of Certiorari - Original Jurisdiction.

Disposition: Cause remanded with directions to grant the wife's motion for protective order.

Core Terms

custody, parties, child custody, mental health, trial court, psychological, depositions, marriage

Case Summary

Procedural Posture
In a child custody dispute, petitioner wife requested a writ of certiorari for review of the denial of her motion for a protective order with respect to her psychiatric records.

Overview
In a child custody dispute, respondent husband sought petitioner wife's psychiatric records. Petitioner's motion for a protective order with respect to such records was denied and petitioner sought certiorari review. The court held that petitioner did not waive her psychotherapist-patient privilege by seeking custody of the parties' children. Respondent's allegations and petitioner's denial of mental health issues did not place petitioner's mental health at issue or constitute a waiver of the privilege. By ordering the parties to submit to an independent psychological examination, the trial court ensured it would obtain information essential to its determination of the best interests of the children without invading privileged information. The court therefore granted the writ of certiorari and quashed the order denying petitioner's request for a protective order. The case was remanded with directions that the protective order be issued.

Outcome
Petitioner wife's request for a writ of certiorari was granted and the order denying her motion for a protective order was quashed because petitioner did not waive the psychotherapist-patient privilege by denying respondent husband's allegations of mental instability and because the information could be obtained from independent psychological evaluations. The case was remanded so the protective order could be issued.

LexisNexis® Headnotes

Evidence > Privileges > Psychotherapist-Patient Privilege > Elements

Family Law > Child Custody > Child Custody Procedures

Evidence > Privileges > Psychotherapist-Patient Privilege > General Overview

Evidence > Privileges > Psychotherapist-Patient Privilege > Waiver

Family Law > Child Custody > Custody Awards > General Overview

HN1[⬇] **Psychotherapist-Patient Privilege, Elements**

In a child custody dispute, the mental and physical health of both parents is a factor that must be considered by the trial judge in determining the best interests of the child (or children). This does not mean that a spouse places his or her mental health in issue allowing a resulting waiver of psychotherapist-patient privilege, merely by seeking child custody. Further, mere allegations of mental or emotional instability are insufficient to place the custodial parent's mental health at issue so as to overcome the privilege. By the same token, the custodial parent's denial of allegations of mental instability does not act as a waiver of the psychotherapist-patient privilege.

Evidence > Privileges > Psychotherapist-Patient Privilege > General Overview

Family Law > Child Custody > Child Custody Procedures

Family Law > Child Custody > Custody Awards > General Overview

HN2[⬇] **Privileges, Psychotherapist-Patient Privilege**

A parent's implicit waiver of confidentiality as to his or her mental health becomes relevant with respect to a custody dispute, in circumstances where, after being awarded custody of the children, and during the pendency of a request for rehearing, the mother attempted suicide. This event makes the wife's mental health vital to the proper determination of the custody issue.

Civil Procedure > Judicial Officers > Judges > General Overview

Evidence > Privileges > Psychotherapist-Patient Privilege > General Overview

Healthcare Law > Medical Treatment > Patient Confidentiality > General Overview

Family Law > Child Custody > Custody Awards > General Overview

Family Law > Child Custody > Child Custody Procedures

HN3[⬇] **Judicial Officers, Judges**

A trial judge may balance competing interests with respect to best interests of the child, by directing both parties to submit to an independent psychiatric or psychological examination. Such an approach provides the trial judge with information relevant to the child custody decision, while preserving psychiatrist-patient confidentiality.

Counsel: Louis K. Rosenbloum and David H. Levin of Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., Pensacola, for Petitioner.

Cynthia L. Heir of Anderson & Sellers, Pensacola, for Respondent.

Judges: JOANOS, J., VAN NORTWICK, J., CONCURS. BENTON, J., CONCURS IN RESULT.

Opinion by: JOANOS

Opinion

[*97] JOANOS, J.

By petition for writ of certiorari, we are asked to review an order denying the petitioner-wife's motion for a protective order and overruling her objections to depositions of mental health professionals and production of their records. Petitioner contends the trial court departed from the essential requirements of law by compelling discovery in violation of petitioner's psychotherapist-patient privilege. We agree, and grant the petition.

This cause arises in the context of a child custody dispute in a dissolution of marriage proceeding. The parties were married May 26, 1989, and lived together as husband and wife until 1994 when the wife filed a **[**2]** petition for dissolution of marriage. The parties have two children, who were three and four years of age when the trial court issued the order here under review. The wife's petition **[*98]** sought primary residential custody of the children; the husband's answer and counterpetition also sought primary residential custody of the children, placing the custody matter at issue. In an interim order dated November 4, 1994, the trial court granted primary residential custody of the children to the wife.

On April 11, 1995, the husband served notice that he would take the deposition of Dr. Terry Ptacek, a psychologist who counseled the wife in 1987, in connection with injuries sustained by the wife in an automobile accident. On May 1, 1995, the husband served notice of his intent to seek production of Dr. Ptacek's "entire file for Debra Leonard," then in the possession of Dr. Whibbs. On April 26, 1995, the husband served an unsworn motion for a psychological evaluation and social investigation of the wife, pursuant to *section 61.20, Florida Statutes* (1993), requesting that the trial court order the wife to submit to a psychological examination. The husband's motion listed eight behaviors of the **[**3]** wife which allegedly indicated a need for a psychological evaluation. [1] On May 17 and 18, 1995, the husband served notices of depositions duces tecum of Lynn McCreary, the wife's psychologist, and of Steve Gantman and Carol Allen, counselors at a local mental health clinic who counseled the wife's son by her previous marriage.

The wife filed an objection **[**4]** to the requested discovery on grounds that the subpoenas sought privileged information of a confidential nature between doctor and patient. The wife also filed a motion for a protective order, asserting as grounds therefor that the three individuals are mental health counselors, subject to the "psychiatrist/psychologist-patient privilege."

On August 17, 1995, the trial court conducted an evidentiary hearing on the parties' motions. With regard to the wife's alleged suicide attempt, the husband testified that in 1987 before the parties were married, he looked through the window of the wife's home and saw her slumped over a chair. The husband said he broke a window to enter the house, and called for an ambulance and the police. The husband further stated the wife was revived by emergency medical technicians, but he offered no other testimony or evidence about the incident or the cause of the wife's alleged unconscious state. The wife said she did not recall the incident. The husband also referred to the wife's 1987 treatment with Dr. McCreary and Dr. Ptacek, as the source of his use of the term "obsessive-compulsive behavior" to describe the wife's behavior. The husband's allegations **[**5]** that the wife forged various instruments related to instances when the wife allegedly signed the husband's name on credit card applications and furniture store applications, and withdrew funds from the husband's bank account. The wife acknowledged making cash withdrawals from the husband's account, but testified she had done so throughout the marriage with the husband's knowledge and consent. The husband did not dispute the wife's statement that the withdrawn funds were deposited in a

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[1] The wife's alleged behaviors as set forth in the motion for psychological examination were:

a. Attempt to commit suicide.

b. Prior mental evaluations.

c. Utterance of forged instruments on various occasions.

d. Placement of locks on the outside of each child's bedroom, which prevents the child from exiting his room.

e. Manic-compulsive behavior regarding her attention to excessive cleanliness of the children, the Husband's hair, the bathroom, and her car.

f. Manic behavior regarding spending.

g. Sleep disorders.

h. Irrational need to control every aspect of everyone's daily routine.

joint account for payment of household bills.

The parties offered conflicting testimony with respect to locks on the children's bedroom doors. The husband testified that, as a disciplinary measure, the wife reversed the locks on the children's bedroom doors, preventing them from leaving their rooms. The wife testified that the husband installed hook-and-eye locks on the children's bedroom doors. In a similar vein, the husband provided several examples of the wife's behavior which he viewed as an obsession with cleanliness. The wife countered with allegations of slovenly behavior by the husband.

[*99] The wife seeks relief from the trial court's order overruling her objections to discovery pertaining to mental **[**6]** health care provided to the wife and her son from a previous marriage, and authorizing the depositions and production of records of all mental health professionals who treated the wife and her son. The wife does not challenge the trial court's order directing both parties and their children to undergo independent psychological evaluations.

HN1[↑] In a child custody dispute, the mental and physical health of both parents is a factor that must be considered by the trial judge in determining the best interests of the child (or children). This does not mean that a spouse places his or her mental health in issue allowing a resulting waiver of psychotherapist-patient privilege, merely by seeking child custody. Further, "mere allegations of mental or emotional instability are insufficient to place the custodial parent's mental health at issue so as to overcome the privilege." *Oswald v. Diamond, 576 So. 2d 909, 910 (Fla. 1st DCA 1991)*. *See also Mohammad v. Mohammad, 358 So. 2d 610, 613 (Fla. 1st DCA 1978)*; *Schouw v. Schouw, 593 So. 2d 1200, 1201 (Fla. 2d DCA 1992)*; *Peisach v. Antuna, 539 So. 2d 544, 546 (Fla. 3d DCA 1989)*; *Roper v. Roper, 336 So. 2d 654, 656 (Fla. 4th DCA 1976)*, **[**7]** *cert. denied, 345 So. 2d 426 (Fla. 1977)*. By the same token, the custodial parent's denial of allegations of mental instability does not act as a waiver of the psychotherapist-patient privilege. "To hold otherwise would eviscerate the privilege; a party seeking privileged information would obtain it simply by alleging mental infirmity." *Peisach v. Antuna, 539 So. 2d at 546*.

HN2[↑] A parent's implicit waiver of confidentiality as to his or her mental health becomes relevant with respect to a custody dispute, in circumstances such as those described in *Miraglia v. Miraglia, 462 So. 2d 507 (Fla. 4th DCA 1984)*, and *Critchlow v. Critchlow, 347 So. 2d 453 (Fla. 3d DCA 1977)*. In *Miraglia*, after being awarded custody of the children, and during the pendency of a request for rehearing, the mother attempted suicide. The court held this event made the wife's mental health vital to the proper determination of the custody issue. *462 So. 2d at 508*. Similarly, in *Critchlow*, during the pendency of the dissolution proceeding in which the wife requested custody of the party's young child, the wife voluntarily entered a hospital for mental treatment. The husband then filed an amended **[**8]** petition, seeking custody of the child. The court held the wife's voluntary commitment made her mental health vital to a proper determination of permanent custody, and the psychiatrist-patient privilege cannot be invoked in such circumstances.

HN3[↑] A trial judge may balance competing interests with respect to best interests of the child, by directing both parties to submit to an independent psychiatric or psychological examination. Such an approach provides the trial judge with information relevant to the child custody decision, while preserving psychiatrist-patient confidentiality. *Schouw, 593 So. 2d at 1201*.

The trial court in this case appropriately directed both parties and their children to submit to independent psychological evaluations. These court-ordered evaluations will provide information essential to the trial court's determination of the best interests of the children, without invading the wife's psychotherapist-patient privilege. In this regard, we reject the husband's meritless assertion that both he and the independent examiner are entitled to take depositions and examine the records of mental health professionals who treated the wife and her son. *See Roper, 336 [**9] So. 2d at 656*. No evidence was presented that the wife was involved in a calamitous event during the pendency of these proceedings, which arguably could bring the child custody dispute in this case within the *Miraglia/Critchlow* principle. Therefore, the court-ordered independent psychiatric examinations of the parties and their children will accomplish the proper balance of providing the trial court with information relevant to the child custody decision, while maintaining the confidentiality required by the privilege. *Roper, 336 So. 2d at 657*.

Accordingly, because the appealed order departs from the essential requirements of law, we grant the wife's petition for writ of certiorari and quash the order under review. **[*100]** This cause is remanded with directions to grant the wife's motion for protective order.

VAN NORTWICK, J., CONCURS. BENTON, J.,

CONCURS IN RESULT.

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O'Neill v. O'Neill

Court of Appeal of Florida, Fifth District

August 16, 2002, Opinion Filed

Case No. 5D01-3727

Reporter
823 So. 2d 837 *; 2002 Fla. App. LEXIS 11659 **; 27 Fla. L. Weekly D 1870

AMY W. O'NEILL, Petitioner, v. GEORGE C. O'NEILL, Respondent.

Subsequent History: [1]** Released for Publication September 10, 2002.

Prior History: Petition for Writ of Certiorari to the Circuit Court for Orange County, Jay Paul Cohen, Judge.

Disposition: Writ of certiorari denied.

Core Terms

custody, trial court, essential requirement, records, mental health, psychiatric, emotional, patient

Case Summary

Procedural Posture
Pursuant to *Fla. R. App. P. 9.100(c)*, petitioner mother petitioned for a writ of certiorari to quash the order of the Circuit Court for Orange County (Florida), which denied her motion for a protective order.

Overview

Respondent father filed a verified emergency ex parte petition for temporary modification of child custody. He also requested that the mother produce all records pertaining to her stay at a treatment center and a hospital's psychiatric ward. The mother contended that the trial court's order departed from the essential requirements of law by violating the statutory psychotherapist-patient privilege set out in *Fla. Stat. ch. 90.503* (1998). The appellate court concluded that the trial court's order did not depart from the essential requirements of law. Specifically, the appellate court concluded that the mother's statements threatening to take her own life, as well as the lives of her children, when joined with appropriate supporting behavior, constituted a calamitous event and supported an implicit waiver of the statutory privilege. Moreover, there was additional testimony demonstrating that the mother was unable to function as a properly nurturing parent. Her residence was in a deplorable condition, despite the fact that she and the children were financially well supported.

Outcome
The petition for a writ of certiorari was denied.

LexisNexis® Headnotes

Civil Procedure > Discovery & Disclosure > Discovery > Protective Orders

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN1 **Discovery, Protective Orders**

A petition for certiorari to review a discovery order is appropriate when a discovery order departs from the essential requirements of law, causing material injury to a petitioner throughout the remainder of the proceedings below and effectively leaving no adequate remedy on appeal. The reviewing court must first determine whether the petitioner has made a prima facie showing that the order complained of creates irreparable harm. Where the petitioner has met this threshold, the reviewing court must determine whether there has been a departure from the essential requirements of law.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Evidence > Privileges > Psychotherapist-Patient Privilege > General Overview

Healthcare Law > Medical Treatment > Patient Confidentiality > General Overview

HN2 **Discovery, Privileged Communications**

Fla. Stat. ch. 90.503(2) (1998) sets forth the initial parameters of the psychotherapist-patient privilege, stating that a patient has a privilege to refuse to disclose confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.

Evidence > Privileges > Psychotherapist-Patient Privilege > Elements

Healthcare Law > Medical Treatment > Patient Confidentiality > General Overview

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Evidence > Privileges > Psychotherapist-Patient Privilege > General Overview

Evidence > Privileges > Psychotherapist-Patient Privilege > Exceptions

HN3 **Psychotherapist-Patient Privilege, Elements**

Fla. Stat. ch. 90.503(4) (1998) carves an exception to the psychotherapist-patient privilege: there is no privilege for a communication relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense.

Evidence > Privileges > Psychotherapist-Patient Privilege > General Overview

Family Law > ... > Custody Awards > Standards > Best Interests of Child

Evidence > Privileges > General Overview

Family Law > Child Custody > Custody Awards > General Overview

HN4 **Privileges, Psychotherapist-Patient Privilege**

Fla. Stat. ch. 61.13(2)(a) (1999) requires a trial court to decide the custody of minor children by ascertaining what is in the child's best interest. In so determining, one factor that must be weighed is the mental health of each parent, although a parent may assert the evidentiary privilege of *Fla. Stat. ch. 90.503* (1998). An exception to the privilege has been recognized in situations where a "calamitous event," such as an attempted suicide, occurs during a pending custody dispute, so that the mental health of the parent is sufficiently at issue to warrant finding no statutory privilege exists. What is relevant to the trial court's determination regarding child custody is the parties' present ability and condition.

Criminal Law & Procedure > Defenses > Insanity > Insanity Defense

Family Law > Child Custody > Custody Awards > General Overview

Healthcare Law > Medical Treatment > Incompetent, Mentally Disabled & Minors > Institutionalization

Criminal Law & Procedure > Defenses > General Overview

Criminal Law & Procedure > Defenses > Insanity > General Overview

Healthcare Law > Medical Treatment > Incompetent, Mentally Disabled & Minors > General Overview

HN5 **Insanity, Insanity Defense**

By seeking custody or by seeking to retain custody, a parent does not make his or her mental condition an element of the claim or defense. Moreover, one party does not create a calamitous event by merely claiming that the opposing party has an unfit mental or emotional state to have custody of the minor children.

Counsel: Mark P. Rabinowitz, Seymour Benson, and Michael P. Sampson of Holland & Knight, LLP, Orlando, for Petitioner.

John W. Frost and Robert S. Swaine of Frost Tamayo Sessums & Aranda, P.A., Bartow, for Respondent.

Judges: CASANUEVA, DARRYL C., Associate Judge. GREEN, OLIVER L., and STRINGER, THOMAS E., ASSOCIATE JUDGES, Concur.

Opinion by: DARRYL C. CASANUEVA

Opinion

[*838] CASANUEVA, DARRYL C., Associate Judge.

In this original proceeding pursuant to *Florida Rule of Appellate Procedure 9.100(c)*, Amy W. O'Neill petitions for a writ of certiorari to quash the trial court's order denying her motion for a protective order. Because the trial court's order does not depart from the essential requirements of law, see *Parkway Bank v. Fort Myers Armature Works, Inc., 658 So. 2d 646 (Fla. 2d DCA 1995)*, we deny the petition.

The parties were married on September 23, 1989, and have five children, **[**2]** all still minors. The O'Neills were divorced on May 15, 2000. During the dissolution proceedings, **[*839]** George C. O'Neill sought his wife's psychological and psychiatric records. Finding that Ms. O'Neill's privacy interest outweighed the need for the records, the trial court at that time denied Mr. O'Neill's request. In the final judgment of dissolution, entered after the parties reached a settlement agreement at mediation, the trial court designated Ms. O'Neill as the primary residential parent for all five children.

Mr. O'Neill began the present action on October 22, 2001, when he filed a verified emergency ex parte petition for temporary modification of child custody. He alleged, *inter alia*, that his former wife suffered from alcoholism and an addiction to controlled substances, that she had been admitted in early 2001 to a residential treatment center, that she had used a number of illegal substances in the presence of the children, and that on October 18, 2001, she was admitted to the psychiatric ward of a local hospital after making suicidal threats to a friend and saying that she would "take the children with me." Mr. O'Neill also alleged that her alcohol and substance abuse **[**3]** constituted a substantial and material change in circumstances that put the children's safety at risk. In conjunction with the emergency petition, Mr. O'Neill served a notice on his former wife to produce at a hearing all records pertaining to her stay at the treatment center and the hospital's psychiatric ward. In response, Ms. O'Neill moved for a protective order.

Ms. O'Neill's motion for a protective order asserted that Mr. O'Neill's request to produce invaded her privacy rights, violated her psychotherapist-patient privilege, and, furthermore, that neither her mental nor her emotional condition was placed in issue. The trial court

denied her the protective order on the ground that it could not properly determine custody of the minor children without vital information about her mental health and substance abuse. The court, therefore, required her to produce treatment center and hospital records that were made for the purpose of diagnosis or treatment of her mental or emotional condition, including alcoholism and other drug addiction.

HN1[↑] A petition for certiorari to review a discovery order is appropriate "when a discovery order departs from the essential requirements of law, causing **[**4]** material injury to a petitioner throughout the remainder of the proceedings below and effectively leaving no adequate remedy on appeal." *Allstate Ins. Co. v. Langston, 655 So. 2d 91, 94 (Fla. 1995)*. The reviewing court must first determine whether the petitioner has made a prima facie showing that the order complained of creates irreparable harm. *Morgan, Colling & Gilbert, P.A. v. Pope, 798 So. 2d 1, 3 (Fla. 2d DCA 2001)*. Because the petitioner here, Ms. O'Neill, has met this threshold, we must determine whether there has been a departure from the essential requirements of law. *City of Oldsmar v. Kimmins Contracting Corp., 805 So. 2d 1091, 1092 (Fla. 2d DCA 2002)*.

Ms. O'Neill contends that the trial court's order departs from the essential requirements of law by violating the statutory psychotherapist-patient privilege set out in *section 90.503, Florida Statutes* (1998). We reject her contention. As this court has recently noted, the common law did not recognize a psychotherapist-patient privilege. *Guerrier v. State, 811 So. 2d 852, 854 (Fla. 5th DCA 2002)*. Because evidentiary privileges were **[**5]** unknown at common law, they are generally looked upon with disfavor. *Nat'l Union Fire Ins. Co. of Pittsburgh v. KPMG Peat Marwick, 742 So. 2d 328, 331 (Fla. 3d DCA 1999)*, approved, *765 So. 2d 36 (Fla. 2000)*. Accordingly, the statute must be strictly construed. *Guerrier, 811 So. 2d at 854 n.2* **[*840]** (citing *Ady v. Am. Honda Fin. Corp., 675 So. 2d 577, 581 (Fla. 1996)*).

HN2[↑] Subsection (2) of *section 90.503* sets forth the initial parameters of the privilege, stating that a

> patient has a privilege to refuse to disclose ... confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.

HN3[↑] Subsection (4) then carves an exception to this privilege: there is no privilege for a communication "relevant to an issue of the mental or emotional condition **[**6]** of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense." *Section 90.503* reflects an awareness that "confidentiality is essential to the conduct of successful psychiatric care." Attorney ad Litem for D.K. v. Parents of D.K., *780 So. 2d 301, 306 (Fla. 4th DCA 2001)*.

HN4[↑] *Section 61.13(2)(a), Florida Statutes* (1999), requires a trial court to decide the custody of minor children by ascertaining what is in the child's best interest. In so determining, one factor that must be weighed is the mental health of each parent, although a parent may assert the evidentiary privilege of *section 90.503*. An exception to the privilege has been recognized in situations where a "calamitous event," such as an attempted suicide, occurs during a pending custody dispute, so that "the mental health of the parent is sufficiently at issue to warrant finding no statutory privilege exists." [1] *D.K., 780 So. 2d at 309*. "What is relevant to the trial court's determination regarding child custody is the parties' present ability and condition." *Schouw v. Schouw, 593 So. 2d 1200, 1201 (Fla. 2d DCA 1992)*. **[**7]**

HN5[↑] By seeking custody or by seeking to retain custody, a parent does not make his or her mental condition an element of the claim or defense. *McIntyre v. McIntyre, 404 So. 2d 208, 209 (Fla. 2d DCA 1981)*. Moreover, one party does not create a calamitous event by merely claiming that the opposing party has an unfit mental or emotional state to have custody of the minor children. In *Critchlow v. Critchlow, 347 So. 2d 453, 455 (Fla. 3d DCA 1977)*, however, where the **[**8]** mother

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[1] We recognize that, alternatively, the trial court could have required each party to submit to an independent psychological or psychiatric examination, which, in Ms. O'Neill's instance, might have avoided the instant order on appeal. *D.K., 780 So. 2d at 309*. Although that alternative was clearly available to the trial court, our certiorari jurisdiction does not encompass directing the trial court to order this alternative. See *Broward County v. G.B.V. Int'l., 787 So. 2d 838 (Fla. 2001)*.

was voluntarily committed for treatment of her mental condition, her "mental health [was] vital to a proper determination of permanent custody." Therefore, the court concluded that the then existing statutory patient-psychiatrist privilege could not be invoked under the facts of that child custody case. Id. Similarly, in *Miraglia v. Miraglia, 462 So. 2d 507, 508 (Fla. 4th DCA 1984)*, one parent's suicide attempt was found sufficient to vitiate the privilege. These cases have been found to create an implicit waiver of confidentiality because the parent's mental health became relevant to a custody dispute. *Leonard v. Leonard, 673 So. 2d 97, 99 (Fla. 1st DCA 1996)*.

In this case, Ms. O'Neill has not actually attempted suicide but has threatened to take her own life as well as her children's. Her threatening remarks were serious enough to alarm her friend, who was immediately prompted to drive Ms. O'Neill to the hospital where she was voluntarily committed. We conclude that such statements, when joined with appropriate supporting behavior, as here, constitute a calamitous event and support an implicit waiver of the statutory privilege. A trial **[**9]** court is not required to wait until a calamitous event becomes a tragedy. Moreover, there was additional testimony demonstrating that Ms. O'Neill was unable to function as a properly nurturing parent. Her residence was in a deplorable condition, despite the fact that she and the children were financially well supported, and she had driven a motor vehicle when she was apparently intoxicated with one of her children as a passenger. These facts and others support the trial court's decision to temporarily change primary residential custody to Mr. O'Neill. Thus, we find that the trial court has not departed from the essential requirements of the law.

Although we deny Ms. O'Neill's petition for certiorari, under the circumstances of this case we are confident that the trial court will take the necessary steps to insure that dissemination of Ms. O'Neill's psychological and psychiatric records is limited and that any violator will be severely sanctioned.

Ms. O'Neill's other grounds for her petition demonstrate no departure from the essential requirements of law and merit no further comment.

We deny the petition for writ of certiorari.

GREEN, OLIVER L., and STRINGER, THOMAS E., ASSOCIATE **[**10]** JUDGES, Concur.

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Attorney Ad Litem for D.K. v. Parents of D.K.

Court of Appeal of Florida, Fourth District

March 21, 2001, Opinion Filed

CASE NO. 4D00-3634

Reporter
780 So. 2d 301 *; 2001 Fla. App. LEXIS 3473 **; 26 Fla. L. Weekly D 783

ATTORNEY AD LITEM FOR D.K., a minor, Petitioner, v. THE PARENTS OF D.K., Respondents.

Subsequent History: [1]** Released for Publication April 6, 2001.

Prior History: Petition for writ of certiorari to the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Sandra K. McSorley, Judge; L.T. Case No. 99-7953 FD.

Disposition: Petition is granted, and the order authorizing release of the records to the psychologist and evaluator is quashed.

Core Terms

patient, records, custody, waive, confidentiality, evaluator, psychotherapist, psychologist, daughter, communications, emotional, appointed, circumstances, best interest, minor child, dissolution, psychiatric, best interests of the child, custody issue, 17 year old, trial court, psychiatrist, rights, litem

Case Summary

Procedural Posture
Petitioner daughter requested that an order of the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County (Florida) denying a motion for protective order involving discovery of medical and mental health records of petitioner be quashed, on the grounds that the information was privileged.

Overview
When respondent mother filed her petition for dissolution of marriage, she alleged that she should have sole custody of the petitioner daughter because respondent father had sexually abused the child. Respondent father denied the allegations and requested primary residential custody. When petitioner daughter started high school, she first began treatment for various mental and behavioral problems. Shortly after she began treatment with her psychotherapist, she alleged for the first time that respondent father had sexually abused her when she was between three and seven years old. Petitioner argued that she had a privilege not to disclose the records of her psychotherapist. The appellate court concluded that the petitioner had a statutory privilege in the confidentiality of her communications with her psychotherapists. The appellate court's conclusion that petitioner had a privilege which could be asserted, and which respondent parents could not waive or assert for the petitioner was limited to the facts of the case.

Outcome
The petition was granted, and the order authorizing

release of the records was quashed.

LexisNexis® Headnotes

Family Law > Guardians > General Overview

***HN1*[↓] Family Law, Guardians**

Traditionally, and by statute, parents are the natural guardians of their children. It is generally presumed that when children lack the capacity to make certain decisions, their parents as their natural guardians make those decisions for them.

Family Law > Parental Duties & Rights > Consent > Abortion

Healthcare Law > Medical Treatment > Abortion > Right to Privacy

Public Health & Welfare Law > Social Services > Disabled & Elderly Persons > General Overview

Family Law > Parental Duties & Rights > Duties > Care & Control of Children

Family Law > Parental Duties & Rights > Emancipation of Minors

Healthcare Law > Medical Treatment > Abortion > Minors

***HN2*[↓] Consent, Abortion**

Fla. Stat. ch. 743 (2000) provides for the removal of the disabilities of non-age under certain circumstances. Where such disabilities are removed, the minor may assume the management of his or her estate, contract and be contracted with, sue and be sued, and perform all acts that he or she could do if not a minor. *Fla. Stat. ch. 743.01*, (2000). Moreover, the disabilities of non-age are removed in a limited fashion for any child over the age of 13 to request treatment when the child experiences an emotional crisis to such a degree that the child perceives the need for such services. *Fla. Stat. ch. 394.4784(1)* (2000). While a parent must be notified if the services exceed two visits in any one week period, parental participation in such treatment is allowed when determined to be appropriate by the mental health professional or facility. Further, a minor has a right of privacy in some decisions. Thus, parents cannot in all circumstances control the exercise of their child's rights.

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Family Law > Parental Duties & Rights > Duties > Care & Control of Children

***HN3*[↓] Counsel, Right to Counsel**

Minors may invoke and waive constitutional rights without their parents. A minor may waive the right to remain silent and the right to an attorney. The totality of circumstances test is used to determine whether there has been a voluntary waiver by a minor. This includes an evaluation of the minor's age, experience, education, background, intelligence, and whether he or she has the capacity to understand his or her constitutional rights and the consequences of waiving them. An appellate court concludes that minors do have rights which they can assert themselves in their own best interest.

Family Law > Parental Duties & Rights > Duties > Care & Control of Children

Healthcare Law > ... > Reproductive Services > Reproductive Technology > General Overview

***HN4*[↓] Duties, Care & Control of Children**

Under the Florida Mental Health Act, also known as the Baker Act, a parent, as natural guardian of a minor, is entitled access to appropriate clinical records of the minor patient. *Fla. Stat. ch. 394.4615(2)(a)* (2000). Further, a parent can request and receive information limited to a summary of the child's treatment plan and current physical and mental condition. *Fla. Stat. ch. 394.4615(9)* (2000). While parents are entitled to hospital records of their children, these do not include psychiatric care records. *Fla. Stat. ch. 395.3025(1)-(2)* (2000).

Nicole Carlucci

Evidence > Privileges > Psychotherapist-Patient Privilege > General Overview

Healthcare Law > Medical Treatment > Patient Confidentiality > General Overview

HN5[] Privileges, Psychotherapist-Patient Privilege

Fla. Stat. ch. 456.059 provides that communications between a patient and a psychiatrist shall be held confidential and shall not be disclosed except upon the request of the patient or the patient's legal representative. Provision of psychiatric records and reports shall be governed by Fla. Stat. ch. 456.057.

Evidence > Privileges > Psychotherapist-Patient Privilege > General Overview

Healthcare Law > Medical Treatment > Patient Confidentiality > General Overview

HN6[] Privileges, Psychotherapist-Patient Privilege

Fla. Stat. ch. 456.057(4) provides that medical records shall be furnished to the patient or the patient's legal representative, except in the case of psychiatric records, a health care provider may provide a report of the examination and treatment in lieu of copies. The statutes thus favor confidentiality of psychiatric records, even a minor's psychiatric records in some instances.

Evidence > Privileges > Psychotherapist-Patient Privilege > General Overview

Healthcare Law > Medical Treatment > Patient Confidentiality > General Overview

HN7[] Privileges, Psychotherapist-Patient Privilege

See Fla. Stat. ch. 90.503 (1976).

Evidence > Privileges > Psychotherapist-Patient Privilege > General Overview

HN8[] Privileges, Psychotherapist-Patient Privilege

A "patient" is defined as a person who consults, or is interviewed by, a psychotherapist for purposes of diagnosis or treatment of a mental or emotional condition. Fla. Stat. ch. 90.503(1)(b), (2000). Under the general statutory definitions the word "person" includes individuals and children. Fla. Stat. ch. 1.01(3), (2000).

Evidence > Privileges > Psychotherapist-Patient Privilege > Waiver

Healthcare Law > Medical Treatment > Patient Confidentiality > General Overview

Evidence > Privileges > Psychotherapist-Patient Privilege > General Overview

HN9[] Psychotherapist-Patient Privilege, Waiver

The psychotherapist/patient privilege may be waived only by the patient or by someone acting on the patient's behalf.

Evidence > Privileges > Psychotherapist-Patient Privilege > General Overview

HN10[] Privileges, Psychotherapist-Patient Privilege

A child has a privilege in the confidentiality of her communications with her psychotherapist. Where the parents are involved in litigation themselves over the best interests of the child, the parents may not either assert or waive the privilege on their child's behalf.

Evidence > Privileges > Psychotherapist-Patient Privilege > Elements

Evidence > Privileges > Psychotherapist-Patient Privilege > General Overview

Evidence > Privileges > Psychotherapist-Patient Privilege > Scope

Evidence > Privileges > Psychotherapist-Patient Privilege > Waiver

Nicole Carlucci

***HN11*[↓] Psychotherapist-Patient Privilege, Elements**

Pursuant to *Fla. Stat. ch. 90.503(4)(c)* there is no privilege: For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

Family Law > Marital Termination & Spousal Support > General Overview

***HN12*[↓] Family Law, Marital Termination & Spousal Support**

See *Fla. Fam. Law R. P. 12.210.*

Evidence > Privileges > Psychotherapist-Patient Privilege > Elements

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > General Overview

Evidence > Privileges > Psychotherapist-Patient Privilege > General Overview

Evidence > Privileges > Psychotherapist-Patient Privilege > Scope

Family Law > Child Custody > Custody Awards > General Overview

Family Law > ... > Custody Awards > Standards > Best Interests of Child

Family Law > Family Protection & Welfare > Children > Abuse, Endangerment & Neglect

***HN13*[↓] Psychotherapist-Patient Privilege, Elements**

Pursuant to *Fla. Stat. ch. 61.13(2)(a)*, a court shall determine all matters pertaining to custody of minor children according to their best interest. That best interest calculation shall include an evaluation of all factors affecting the welfare and interests of the child, including, but not limited to: the love, affection, and other emotional ties existing between the parents and the child, the mental health of the parents, and evidence of child abuse. *Fla. Stat. ch. 61.13(3)(b)*, *(g) (l)* (2000). However, the statute contains no evidentiary standards. Instead, the psychotherapist/patient privilege is recognized to apply in dissolution of marriage proceedings involving child custody issues.

Evidence > Privileges > Psychotherapist-Patient Privilege > Elements

Criminal Law & Procedure > Defenses > General Overview

Evidence > Privileges > Psychotherapist-Patient Privilege > General Overview

Evidence > Privileges > Psychotherapist-Patient Privilege > Scope

Evidence > Privileges > Psychotherapist-Patient Privilege > Waiver

Family Law > Child Custody > Custody Awards > General Overview

Healthcare Law > Medical Treatment > Patient Confidentiality > General Overview

***HN14*[↓] Psychotherapist-Patient Privilege, Elements**

In a dissolution proceeding where custody is disputed, a party does not waive confidentiality of mental health treatment and make his or her mental health an element of his claim or defense simply by requesting custody. Only in situations where calamitous events such as an attempted suicide occur during a pending custody dispute have courts found that the mental health of the parent is sufficiently at issue to warrant finding no statutory privilege exists. Otherwise, the courts have instructed that the more appropriate method of securing the necessary information regarding the parent's psychological state to aid in determining the best interest of the child is to require an independent psychological or psychiatric examination of the parent or parents. In this way, the trial court obtains essential information without interfering with the psychotherapist/patient confidentiality privilege.

Evidence > ... > Testimony > Expert Witnesses > General Overview

Family Law > Parental Duties & Rights > Duties > Care & Control of Children

Healthcare Law > Medical Treatment > Patient Confidentiality > General Overview

Evidence > Privileges > Psychotherapist-Patient Privilege > General Overview

HN15 **Testimony, Expert Witnesses**

Under Fla. Stat. ch 90.705(1) an expert testifying to an opinion may be required, on cross-examination, to reveal the underlying facts and data upon which the opinion is based. Therefore, the expert could not rely on confidential psychotherapist/patient communications without revealing them to the parties and the court.

Counsel: James S. Margulis of Law Office of Matthew S. Nugent, West Palm Beach, for petitioner.

Keith H. Park of Keith H. Park, P.A., West Palm Beach, for respondent/father.

Jorge M. Cestero of Sasser, Cestero & Sasser, P.A., West Palm Beach, respondent/mother.

Judges: WARNER, C.J. DELL and FARMER, JJ., concur.

Opinion by: WARNER

Opinion

[*303] WARNER, C.J.

A minor child, through her attorney ad litem, petitions this court to quash an order of the trial court denying a motion for protective order involving discovery of medical and mental health records of the minor child. These records were requested by a psychologist appointed by the court to evaluate the entire family as to custody issues in a dissolution of marriage action between the minor child's parents. The seventeen year old minor, through her attorney, asserted her psychotherapist/patient **[**2]** privilege. Under the circumstances of this case, we grant the petition.

When the mother filed her petition for dissolution of marriage, she alleged that she should have sole custody of the parties' daughter because the husband had sexually abused the child, now seventeen years old. The husband denied the allegations and requested primary residential custody of both children.

In 1997, when the daughter started high school, she first began treatment for various mental and behavioral problems, with both parents' consent. She was admitted to two mental health treatment facilities and received therapy from at least two **[*304]** mental health professionals thereafter. Shortly after she began treatment with her current psychotherapist in June of 1999, she alleged for the first time that her father had sexually abused her when she was between three and seven years old. This precipitated the mother filing the petition for dissolution.

The parties agreed to the appointment of a certified custody evaluator and a psychologist to evaluate the entire family and agreed to provide both the evaluator and psychologist with the entire family's medical records. When the husband sought to obtain the daughter's **[**3]** records, the wife's attorney informed the husband and the court that the daughter might have a privilege in the records. To protect the child's rights, the court appointed an attorney ad litem who asserted a privilege on behalf of the daughter and opposed the production of the mental health records. Both the husband and wife agreed to the production of the child's records.

At the hearing on the daughter's assertion of the privilege, both the custody evaluator and the psychologist appointed by the court testified that it was in the best interest of both children to obtain all of the records to evaluate the custody issues. While the psychologist did not know what, if anything, would be relevant in the records he sought, he felt that his opinion would not be complete without having reviewed the records. However, he recognized the need to protect the confidentiality of the minor child and that using what he

saw in those records as a basis of his opinion would make him a conduit of privileged information and would not be in the best interests of the daughter. Likewise, the custody evaluator simply felt that her report could not be complete without seeing the entire psychological picture **[**4]** of the daughter because she had never before been refused access to records in preparing her report. Both the psychologist and the custody evaluator had met with and examined the daughter, and she had told both of them about the sexual abuse.

The trial court denied the attorney ad litem's motion for protective order and decided that the daughter's mental health records should be made available only to the custody evaluator and the appointed psychologist. While the court found that there was a confidential privilege, the court's order determined that the parents had waived the privilege, and the psychologist and custody evaluator had determined that the information was necessary to complete their evaluations. The child, through her attorney ad litem, petitions this court to quash the order on the ground that the information is privileged. [1]

[5] I. Minor's Right to Assert Psychotherapist/Patient Privilege**

HN1[↑] Traditionally, and by statute [2], parents are the natural guardians of their children. It is generally presumed that when children lack the capacity to make certain decisions, their parents as their natural guardians make those decisions for them. *Cf.* *Smith v. Org. of Foster Families for Equal. and Reform, 431 U.S. 816, 841 n.44, 53 L. Ed. 2d 14, 97 S. Ct. 2094 (1977)*.

However, not all decisions are removed from a minor. For instance, *HN2*[↑] Chapter 743, Florida Statutes (2000), provides for the removal of the disabilities of non-age under certain circumstances. **[*305]** Where such disabilities are removed, "the minor may assume the management of his or her estate, contract and be contracted with, sue and be sued, and perform all acts that he or she could do if not a minor." *§ 743.01, Fla. Stat.* (2000). Moreover, the disabilities of non-age are removed **[**6]** in a limited fashion for any child over the age of 13 to request treatment when the child experiences an emotional crisis to such a degree that the child perceives the need for such services. *See* *§ 394.4784(1), Fla. Stat.* (2000). While a parent must be notified if the services exceed two visits in any one week period, parental participation in such treatment is allowed "when determined to be appropriate by the mental health professional or facility." *Id.* Further, a minor has a right of privacy in some decisions, including the right to seek an abortion, without parental consent. *See* *In re T.W., 551 So. 2d 1186 (Fla. 1989)*. Thus, parents cannot in all circumstances control the exercise of their child's rights.

HN3[↑] Minors may also invoke and waive constitutional rights without their parents. A minor may waive the right to remain silent and the right to an attorney. *See* *Fare v. Michael C., 442 U.S. 707, 61 L. Ed. 2d 197, 99 S. Ct. 2560 (1979)*. *Cf.* *California v. Prysock, 453 U.S. 355, 69 L. Ed. 2d 696, 101 S. Ct. 2806 (1981)*. The "totality of circumstances" test is used to determine whether there has been **[**7]** a voluntary waiver by a minor. *Fare, 442 U.S. at 724-25*. This includes an evaluation of the minor's age, experience, education, background, intelligence, and whether he or she has the capacity to understand his or her constitutional rights and the consequences of waiving them. From the foregoing, we conclude that minors do have rights which they can assert themselves in their own best interest.

Turning to health care law specifically, there are several statutory provisions that appear to limit parents' access to their child's medical records. *HN4*[↑] Under the Florida Mental Health Act (also known as the Baker Act), [3] a parent, as natural guardian of a minor, is entitled access to "appropriate" clinical records of the minor patient. *§ 394.4615(2)(a), Fla. Stat.* (2000). Further, a parent can request and receive information "limited" to a summary of the child's treatment plan and current physical and mental condition. *§ 394.4615(9), Fla. Stat.* (2000). While parents are entitled to hospital

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[1] We reject the contention of the mother that we have no jurisdiction to consider this issue. She relies on *Perez v. Perez, 769 So. 2d 389 (Fla. 3d DCA 1999), rev. denied, 763 So. 2d 1044 (Fla. 2000)*, in which the third district suggested that there was no proper role for a guardian ad litem, who is appointed by a court as a fact finder in dissolution proceedings, to request appellate review. However, in this case, it is the attorney ad litem, who was appointed for the very purpose of protecting any privilege the minor child might have. *Section 61.401, Florida Statutes* (2000), clearly distinguishes between guardians ad litem and legal counsel for the child.

[2] See *§ 744.301(1), Fla. Stat.* (1999).

[3] *See* *§ 394.451-.4789, Fla. Stat.* (2000).

records of their children, these do not include psychiatric care records. *See* § 395.3025(1)-(2), **[**8]** Fla. Stat. (2000). ***HN5***[↑] Section 456.059 provides that "communications between a patient and a psychiatrist . . . shall be held confidential and shall not be disclosed except upon the request of the patient or the patient's legal representative. Provision of psychiatric records and reports shall be governed by s. 456.057." ***HN6***[↑] Section 456.057(4) provides that medical records shall be furnished to the patient or the patient's legal representative, except in the case of psychiatric records, a health care provider may provide a report of the examination and treatment in lieu of copies. The statutes thus favor confidentiality of psychiatric records, even a minor's psychiatric records in some instances.

In this case, the child argues that she has a privilege not to disclose the records of her psychotherapist, citing section 90.503. Who may claim this privilege, or waive it, on behalf of a child has not been addressed either by statute or case law, particularly where the child **[**9]** is asserting her privilege against her parents' decision to waive it.

At common law, no privilege existed between a physician and a patient. *See* Law Revision Council Note to section 90.503 (1976); Fidelity & Cas. Co. of New York v. Lopez, 375 So. 2d 59 (Fla. 4th DCA 1979). Generally, it was thought that later disclosure of a patient's confidences in the courtroom would not be a substantial factor in restricting the patient's freedom in providing essential information to the doctor **[*306]** for treatment. However, "it is fairly well settled that confidentiality is essential to the conduct of successful psychiatric care." Law Revision Council Note to section 90.503 (1976). Thus, in order to encourage patients to seek treatment for mental and emotional conditions, the statute provided confidentiality of those communications. ***HN7***[↑] The section provides:

(2) A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist . . . .

[10]** (3) The privilege may be claimed by:

(a) The patient or the patient's attorney on the patient's behalf;

(b) A guardian or conservator of the patient.

§ 90.503, Fla. Stat. (2000). ***HN8***[↑] A "patient" is defined as "a person who consults, or is interviewed by, a psychotherapist for purposes of diagnosis or treatment of a mental or emotional condition. . . ." § 90.503(1)(b), Fla. Stat. (2000) (emphasis added). Under the general statutory definitions "the word 'person' includes individuals [and] children. . . ." § 1.01(3), Fla. Stat. (2000) (emphasis added).

In *Wray v. Department of Professional Regulation, 410 So. 2d 960, 961 (Fla. 1st DCA 1982)*, the court held that ***HN9***[↑] the psychotherapist/patient privilege may be waived only by the patient or by someone acting on the patient's behalf. *See also Arias v. Urban, 595 So. 2d 230 (Fla. 3d DCA 1992)*. We therefore conclude that the daughter had a statutory privilege in the confidentiality of her communications with her psychotherapists.

The parents both assert that they can waive this claim for their child. In the instant **[**11]** case, it is questionable whether either or both parents are acting solely on their daughter's behalf in attempting to waive the privilege and obtain the records of confidential communications, when each has his or her own interests at stake in this lawsuit.

While there is no Florida authority that directly addresses this issue, we have found authority in other states operating under similar privilege statutes. In Nagle v. Hooks, 296 Md. 123, 460 A.2d 49 (Md. 1983), the court was asked to rule on who had the authority to waive the statutory psychiatrist/patient privilege of the child in a child custody proceeding. In connection with the husband's petition to modify custody, he sought to have the child's psychiatrist testify. However, the wife refused to consent to waive the statutory psychotherapist/patient privilege for the child. The intermediate appellate court affirmed the trial court's order which determined that only the parent with custody had the authority to assert the privilege. However, the supreme court granted certiorari and quashed the order.

Looking to the Maryland statute, which required the appointment of a guardian where a patient is incompetent **[**12]** to assert or waive the privilege, the court explained:

Certainly a minor under the age of 10 years would be incompetent to make such a decision. While the statute does not define "incompetent," we believe, in the context here, it's broad enough to encompass one under disability, as that term is generally understood . . . . It appears to us that the statute is mandatory, and,

accordingly, the chancellor erred in refusing to appoint a guardian to act for the child regarding the assertion or waiver of privilege of nondisclosure pursuant to section 9-109. Although arguably the parent who pursuant to court order has custody of a child could qualify as [a guardian under the statute], it is patent that such custodial parent has a conflict of interest in acting on behalf of the child in asserting or waiving the privilege of nondisclosure. We believe that it is inappropriate in a continuing **[*307]** custody "battle" for the custodial parent to control the assertion or waiver of the privilege of nondisclosure. In resolving custody disputes, we are "governed by what is in the best interest of the particular child and most conducive to his welfare . . . ."

. . . .

Accordingly, we hold that when **[**13]** a minor is too young to personally exercise the privilege of nondisclosure, the court must appoint a guardian to act, guided by what is in the best interests of the child. We also hold that, in this event, the parents, jointly or severally, may neither agree nor refuse to waive the privilege on the child's behalf.

460 A.2d at 51-52 (emphasis added). *Accord, Bond v. Bond, 887 S.W.2d 558, 561 (Ky. Ct. App. 1994)*.

In a dependency action in California, the intermediate appellate court held that a father was not entitled to access to communications between his child and a treating therapist where the father was accused of child molestation and the child was in therapy to deal with that issue. *See In re Daniel C.H., 220 Cal. App. 3d 814, 269 Cal. Rptr. 624 (Cal. Ct. App. 1990)*. Dealing with a statute similar to the Florida privilege statute, the court noted that the privilege was personal to the patient, unless the patient is dead or has a guardian. *See, 269 Cal. Rptr. at 632*. Although the statute does not specifically mention who holds the privilege when the child is a minor, "case law does suggest, however, that a minor child is entitled to the privacy **[**14]** granted by the privilege." *269 Cal. Rptr. at 630*. The court explained the need for confidentiality of the minor child's communications:

We believe that in a case such as this, where the father is accused of child molest [sic], and the child is in therapy, presumably to deal with the emotional aftermath of the alleged molest [sic], the accused parent should not be entitled to access to the communications made by the child to the therapist. The child has at stake a substantial privacy interest, and we can foresee substantial emotional harm to the child from a forced disclosure in these circumstances. For example, the child may fear the parent and consequently refuse to be open with the therapist for fear of disclosure to the parent.

Id. at 631.

Other courts have agreed that where the parents are involved in litigation themselves in which the child's mental state may be relevant, such as in a custody battle, the parents are not proper persons to assert or waive the privilege on behalf of the child. In *State ex rel. Wilfong v. Schaeperkoetter, 933 S.W.2d 407, 409 (Mo. 1996)*, the court stated:

Wilfong cannot waive the other children's privilege. "A parent, as **[**15]** natural guardian, would have the right to *claim* the privilege on behalf of his child when it would be to the best interests of the minor to do so." *In Re M.P.S., 342 S.W.2d 277, 283 (Mo.App. 1961)*(emphasis added). However, "where the privilege is claimed on behalf of the parent rather than that of the child, or where the welfare and interest of the minor will not be protected, a parent should not be permitted to either claim the privilege . . . or, for that matter, to waive it." *Id. See State v. Evans, 802 S.W.2d 507, 511* (Mo. banc. 1991). Here, Wilfong--a party to the suit individually and as Charles' parent and natural guardian--may not waive the privilege for her other children.

Thus, we conclude both from the plain meaning of our own statute, as well as the weight of authority from other jurisdictions, that ***HN10***[↑] a child has a privilege in the confidentiality of her communications with her psychotherapist. Where the parents are involved in litigation themselves over the best interests of the child, the parents may not either assert or waive the privilege on their child's behalf. This is particularly true in the instant case where the child, who is **[**16]** over seventeen years old, has the ability to obtain her own treatment **[*308]** under the statute and has sufficient mental capacity to assert the privilege herself, as she has done here.

We find *O'Keefe v. Orea, 731 So. 2d 680 (Fla. 1st DCA 1998)*, relied upon by respondents, is inapposite. The court, without citation to authority, stated that "implicit in the parent's right to consent to proposed medical treatment for his minor or otherwise incompetent child, is the right to be fully informed concerning the child's condition and prognosis." *Id. at 686*. In *O'Keefe*, the mother sued the child's psychiatrist for failing to disclose

to the parents information regarding the child's violent tendencies. The child, upon release from care, killed his father. No question of the child's privilege under the statute was raised. In fact, one could argue that under the circumstances in *Okeefe* the privilege is waived pursuant to section 490.0147(3) because there was a "clear and immediate probability of physical harm . . . to other individuals . . .," which authorizes the psychiatrist to communicate the danger to the appropriate family members.

Our conclusion that **[**17]** the child has a privilege which can be asserted, and which the parents cannot waive or assert for the child is limited to the facts of the case before us. Here, the parents are engaged in litigation, and each has a personal interest that could be in conflict with the child's interest in asserting the privilege. Further, just as the Maryland court noted in *Nagle*, the age of the minor is a factor which the court must look to in determining whether the child himself or herself can assert the privilege. A child less than twelve years old does not have the emotional maturity or capacity of a seventeen year old. A court faced with the child's desire to assert the privilege in such circumstances should determine whether the child is of sufficient emotional and intellectual maturity to make the decision on his or her own. If the court decides that the child is sufficiently mature, then the court should appoint an attorney ad litem to assert the child's position, as the court did here.

In the instant case, the daughter is almost a legal adult. In five months, she will not only be able to assert the privilege herself, but the entire custody issue with respect to her will be moot. Unless **[**18]** one of the statutory exceptions to the privilege applies, the daughter is entitled to assert the statutory privilege of confidentiality of her communications.

II. No Waiver of Privilege

The psychotherapist/patient privilege has limitations and may also be waived. ***HN11***[↑] Pursuant to *section 90.503(4)(c)* there is no privilege:

(c) For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

Despite the parents' arguments to the contrary, this exception does not apply as the child is not a party to these proceedings. *HN12*[↑] *Florida Family Law Rule of Procedure 12.210* provides:

Parties to an action . . . shall be governed by *Florida Rule of Civil Procedure 1.210*, except that *rule 1.210* shall not be read to require that a child is an indispensable party for a dissolution of marriage or child custody proceeding.

(Emphasis added). *Rule 1.210* also does not make a child a party.

In *Arias v. Urban, 595 So. 2d 230 (Fla. 3d DCA 1992)*, **[**19]** the parents and their minor child were sued for injuries caused by the minor child. The complaint alleged that the parents were negligent in the supervision of their child, which the parents denied. During discovery, the plaintiff subpoenaed psychotherapist records of the minor, to which the defendants objected. The court held that allowing the discovery of those records was a violation of the **[*309]** minor's confidential privilege, because the minor did not authorize anyone to waive his privilege. *See id. at 232.* In addition, the court pointed out that the minor was not relying on his condition as an element of his claim or defense to the action, negating a waiver under *section 90.503(4)(c)*. Thus, the court made a distinction between those claims and defenses that were being made by the parents and those made by the minor. Similarly, in this action, the child is not a party and is pursuing no claims or defenses.

We conclude that this statutory exception to the assertion of the privilege does not apply nor are any other exceptions relevant.

III. Best Interests of the Child

HN13[↑] Pursuant to *section 61.13(2)(a)*, the court shall determine all matters pertaining to **[**20]** custody of minor children according to their "best interest." That best interest calculation "shall include an evaluation of all factors affecting the welfare and interests of the child, including, but not limited to: . . . the love, affection, and other emotional ties existing between the parents and the child[,] . . . the mental . . . health of the parents[,] . . . [and] evidence of . . . child abuse. . . ." *§ 61.13(3)(b)*, *(g)*, and *(l)*, Fla. Stat. (2000). However, the statute contains no evidentiary standards. Instead, the psychotherapist/patient privilege is recognized to apply

in dissolution of marriage proceedings involving child custody issues. *See, e.g., McIntyre v. McIntyre, 404 So. 2d 208 (Fla. 2d DCA 1981)*. While the parents assert the need of the trial court for information necessary to decide the child custody issue, the trial court may not ignore the rules of evidence. Indeed, even if we could somehow construe *section 61.13* as a general authority for the court to gather all evidence necessary to decide the issue, purely on statutory construction principles, the specific privilege allowed under the evidence code would prevail over any general grant **[**21]** of authority under the dissolution statute. *See McKendry v. State, 641 So. 2d 45 (Fla. 1994)*; *Butterworth v. X Hospital, 763 So. 2d 467 (Fla. 4th DCA 2000)*.

HN14[↑] In a dissolution proceeding where custody is disputed, a party does not waive confidentiality of mental health treatment and make his or her mental health an "element of his claim or defense" simply by requesting custody. *McIntyre, 404 So. 2d at 209*. Only in situations where calamitous events such as an attempted suicide occur during a pending custody dispute have courts found that the mental health of the parent is sufficiently at issue to warrant finding no statutory privilege exists. *See Miraglia v. Miraglia, 462 So. 2d 507 (Fla. 4th DCA 1984)*; *Critchlow v. Critchlow, 347 So. 2d 453 (Fla. 3d DCA 1977)*. Otherwise, the courts have instructed that the more appropriate method of securing the necessary information regarding the parent's psychological state to aid in determining the best interest of the child is to require an independent psychological or psychiatric examination of the parent or parents. In this way, the trial court obtains essential **[**22]** information without interfering with the psychotherapist/patient confidentiality privilege. *See Leonard v. Leonard, 673 So. 2d 97 (Fla. 1st DCA 1996)*; *Schouw v. Schouw, 593 So. 2d 1200 (Fla. 2d DCA 1992)*.

Certainly, the evidence of the child's relationship with her father is important in determining what is in the best interest of the child and whether to award primary physical residence to the father. Through the appointment of the psychologist and evaluator the court can obtain information regarding this relationship without abrogating the privilege and invading the seventeen year old daughter's most private communications. Indeed, the daughter was evaluated by the psychologist and the custody evaluator and told both of them of the sexual abuse by the father. This provided the evaluator and the psychologist with important information regarding the child's relationship with her father and, we presume, the child's present mental state with respect to her relationship with both **[*310]** parents. Neither the custody evaluator nor the psychologist could articulate a specific need for the reports of the child's psychotherapist based upon their evaluation of the **[**23]** child. The psychologist simply expressed a desire to be thorough and to make the best evaluation possible. In fact, he even noted that he did not know whether the records would provide any information of relevance other than what he already had. The custody evaluator merely wanted the records because she had never done an evaluation without receiving all such records. We do not think that the patient/psychotherapist privilege should be overcome simply to satisfy the routine practice of the evaluator and psychologist.

Although the court limited the release of the records to the psychologist and custody evaluator, this would pose serious issues with respect to the rights of the parties. Opinions of the psychologist and evaluator which were in any way based on their review of these confidential materials could not be adequately examined at trial if the parents were not given access to the same records. Moreover, ***HN15***[↑] under section 90.705(1) an expert testifying to an opinion may be required, on cross-examination, to reveal the underlying facts and data upon which the opinion is based. Therefore, the expert could not rely on confidential psychotherapist/patient communications without revealing **[**24]** them to the parties and the court.

We recognize the tension apparent in the law between the rights and responsibilities of parents and the rights of children. Certainly, to promote strong families, parents should be involved and active in the lives of their children, including their health care, for which the parents are held responsible. Unfortunately, sometimes the parents are the cause of abuse, both emotional and physical, of their children. Allowing parents complete access to their children's health care records under all circumstances may inhibit the child from seeking or succeeding in treatment. The tension between the child's need for confidentiality and privacy to promote healing may conflict with the need of the court for information to inform its judgment as to the child's best interest. We commend to the legislature a more comprehensive review of the substantial policy issues which are raised by this case.

The petition is granted, and the order authorizing release of the records to the psychologist and evaluator is quashed.

Nicole Carlucci

Miraglia v. Miraglia

Court of Appeal of Florida, Fourth District

December 28, 1984

No. 83-1319

Reporter
462 So. 2d 507 *; 1984 Fla. App. LEXIS 16225 **; 10 Fla. L. Weekly 85

VINCENT P. MIRAGLIA, Appellant/Cross Appellee, v. EILEEN MIRAGLIA, Appellee/Cross Appellant

Subsequent History: [1]** Rehearing Denied February 8, 1985.

Prior History: Appeal from the Circuit Court for Martin County; Rupert Jasen Smith, Judge.

Core Terms

custody, suicide attempt, best interests of the child, guardian ad litem, primary custody, final judgment, trial court, trial judge, switch

Case Summary

Procedural Posture
Appellant father sought review of a judgment from the Circuit Court for Martin County (Florida) that awarded primary custody of children to appellee mother in dissolution action. Appellant asserted that trial court erred because appellee was experiencing mental problems and had attempted suicide. Appellant also asserted that trial court erred in refusing testimony of appellee's psychiatrist.

Overview
The court reversed a judgment that awarded appellee mother primary custody of children in a dissolution action. The court held that the trial court erred when the record was replete with testimony that appellee suffered mental problems and had attempted suicide recently. The court stated that the best interests of the children had to always take precedence over the interests of a parent. The court also held that the trial court erred in refusing to admit the testimony of appellee's long-time psychiatrist based on privilege. The court agreed with appellant father that the events, reflected in the suicide attempt, made appellee's mental health vital to a proper determination of permanent custody. The court did not order that custody be awarded to appellant, but instead remanded for further proceedings that the trial court would deem appropriate and for the appointment of a guardian ad litem for the children.

Outcome
The court reversed the order that granted appellee mother primary custody when the record indicated she was suffering from mental difficulties. The court did not award custody to appellant, but instead remanded for further proceedings to determine the best interests of the children. The court agreed that appellee's psychiatrist should testify when appellee's mental health was vital to custody determination.

LexisNexis® Headnotes

Nicole Carlucci

Family Law > Child Custody > Custody Awards > General Overview

HN1[⬇] **Child Custody, Custody Awards**

Children should never be used as a substitute for formal psychiatric treatment in order to help transform an unstable and unhappy home into a stable, happy one. In this regard, the best interests of the children must take precedence over those of their parent or parents.

Counsel: James J. Butler, Stuart, and Joan M. Bolotin of Greene & Cooper, Miami, for Appellant/Cross Appellee.

W. E. Gary, Stuart, and Edna L. Caruso, West Palm Beach, for Appellee/Cross Appellant.

Judges: Letts, J. Glickstein, J., and Scott, Robert C., Associate Judge, concur.

Opinion by: LETTS

Opinion

[*507] Pursuant to a dissolution proceeding, both mother and father seek "primary" custody of three children. The trial court declared the mother the victor, in part to help her resolve admitted emotional problems. We disagree with that declaration and remand for further proceedings.

HN1[⬆] Children should never be used as a substitute for formal psychiatric treatment in order to help transform an unstable and unhappy home into a stable, happy one. *Bienvenu v. Bienvenu, 380 So.2d 1164 (Fla. 3d DCA 1980)*; and *see Sherrod v. Sherrod, 448 So.2d 1234 (Fla. 1st DCA 1984)* and *Ashleman v. Ashleman, 381 So.2d 364 (Fla. 4th DCA 1980)*. In this regard, the best interests of the children must take precedence over those of their parent or parents. The record before us is **[**2]** replete with testimony that life with mother was difficult. For instance, during the pendency of a requested rehearing on the final judgment the mother attempted suicide and, arising therefrom, "temporary" custody was awarded to the husband, a transfer which for aught we know still pertains.

The attempted suicide raises another aspect of this cause. The final judgment gave primary custody to the mother, yet, as we have noted, the court understandably switched that custody to the father upon learning, by way of emergency motion, of the mother's attempt on her own life. Notwithstanding, the same court, one week after the ordered switch, denied the petition for rehearing, thereby in effect reaffirming the primary custody in the wife.

We can all agree that the polestar in these matters is exclusively the welfare of the children, but that star is obscured here by events which cloud the record and strongly suggest those best interests were not served. However, we stop short of outright reversal. This trial judge was on the firing line which we were not. We, **[*508]** therefore, content ourselves with asking him to reconsider the matter in the light of this opinion and receive **[**3]** such further evidence as he deems appropriate.

Another point we consider is the court's refusal to admit the testimony of the wife's long-time psychiatrist, based on the privilege enunciated in *Section 90.503(4)(c), Florida Statutes* (1983). The father argues that by alleging her fitness to have custody, the wife introduced her mental condition and waived the privilege. At the time the trial judge rejected this contention, he was faced with a situation on all fours with the one existing in *Roper v. Roper, 336 So.2d 654 (Fla. 4th DCA 1976)*, and his ruling was correct. However, subsequent to this ruling, unfolding events reflected the suicide attempt which we believe caused the wife's mental health to be "vital to a proper determination of permanent custody." *See Critchlow v. Critchlow, 347 So.2d 453, 455 (Fla. 3d DCA 1977)*. Accordingly, we direct this testimony be admitted upon remand.

To insure that the best interests of the children are given due consideration, we urge the trial court on remand to appoint for the children a guardian ad litem who has been trained pursuant to the guardian ad litem program promulgated by the Office of State Courts Administrator.

Nicole Carlucci

REMANDED [**4] FOR A FURTHER EVIDENTIARY HEARING. IN ALL OTHER RESPECTS THE JUDGMENT IS AFFIRMED SUBJECT TO POSSIBLE CHILD SUPPORT MODIFICATIONS IF CUSTODY IS TRANSFERRED.

GLICKSTEIN, J., and SCOTT, ROBERT C., Associate Judge, concur.

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Critchlow v. Critchlow, 347 So. 2d 453

Copy Citation

Court of Appeal of Florida, Third District

June 28, 1977

No. 77-492

Reporter
347 So. 2d 453 * | 1977 Fla. App. LEXIS 16129 **

John Wilbur CRITCHLOW, Appellant, v. Cynthia Bruce CRITCHLOW, Appellee

Core Terms

custody, depositions, patient, treating physician, mental condition, protective order, mental health, psychiatrist, dissolution of marriage, trial court, counterpetition, communications, temporary custody order, professional opinion, child custody, proper person, appointment, introduces, emotional, depose, suited, amend

Case Summary

Procedural Posture
Appellant husband sought review of a protective order issued by the trial court (Florida) preventing him from deposing appellee wife's treating physicians in a child custody contest arising out of a dissolution of marriage action.

Overview
When appellee wife filed to dissolve her marriage from appellant husband, she sought custody of their minor child. Subsequently, appellee committed herself to a hospital for mental health treatment. Appellant then filed for custody of the child. Appellee did not initially object to the taking of certain of her treating physicians' depositions; however, after the lower court granted appellant temporary custody of the child, appellee moved for a protective order requesting that the depositions not be continued. Appellant sought review of an order granting appellee's motion. The court found that since appellee had made no objection to the order authorizing the depositions of her treating physicians, she waived any privilege. The court also found that the depositions were an exception to the privileged communications between psychiatrist and patient found in Fla. Stat. ch. 90.242 (3)(b) (1975), because her mental condition was relevant to whether she was fit to have custody of the child. A determination of the parents' mental health was in accord with determining the best interest of the child. The order was reversed and remanded to enter an order authorizing the depositions.

Outcome
The order stopping the depositions of appellee wife's treating physicians was reversed and remanded with directions to allow appellant husband to take the depositions. Appellee had waived the privilege by agreeing to a prior deposition order. Further, since her mental health was relevant to the custody issue, the case fell within the exception to the statutory privileged communication between psychiatrist and patient.

▼ LexisNexis® Headnotes

Critchlow v. Critchlow, 347 So. 2d 453

Court of Appeal of Florida, Third District

June 28, 1977

No. 77-492

Reporter

347 So. 2d 453 * | 1977 Fla. App. LEXIS 16129 **

John Wilbur CRITCHLOW, Appellant, v. Cynthia Bruce CRITCHLOW, Appellee

Core Terms

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Case Summary

Procedural Posture

Appellant husband sought review of a protective order issued by the trial court (Florida) preventing him from deposing appellee wife's treating physicians in a child custody contest arising out of a dissolution of marriage action.

Overview

When appellee wife filed to dissolve her marriage from appellant husband, she sought custody of their minor child. Subsequently, appellee committed herself to a hospital for mental health treatment. Appellant then filed for custody of the child. Appellee did not initially object to the taking of certain of her treating physicians' depositions; however, after the lower court granted appellant temporary custody of the child, appellee moved for a protective order requesting that the depositions not be continued. Appellant sought review of an order granting appellee's motion. The court found that since appellee had made no objection to the order authorizing the depositions of her treating physicians, she waived any privilege. The court also found that the depositions were an exception to the privileged communications between psychiatrist and patient found in Fla. Stat. ch. 90.242 (3)(b) (1975), because her mental condition was relevant to whether she was fit to have custody of the child. A determination of the parents' mental health was in accord with determining the best interest of the child. The order was reversed and remanded to enter an order authorizing the depositions.

Outcome

The order stopping the depositions of appellee wife's treating physicians was reversed and remanded with directions to allow appellant husband to take the depositions. Appellee had waived the privilege by agreeing to a prior deposition order. Further, since her mental health was relevant to the custody issue, the case fell within the exception to the statutory privileged communication between psychiatrist and patient.

LexisNexis® Headnotes

Evidence > Privileges > Psychotherapist-Patient Privilege > General Overview

HN1 **Privileges, Psychotherapist-Patient Privilege**

Fla. Stat. ch. 90.242(3)(b) (1975). More like this Headnote

Shepardize® - Narrow by this Headnote

Counsel: [**1] Marks, Keith, Mack, Lewis & Allison and John R. Allison III, Miami, for Appellant.

Paul G. Block, Miami, for Appellee.

Judges: Haverfield, Judge.

Opinion by: HAVERFIELD

Opinion

[*454] Appellant John Critchlow, seeks review of a protective order preventing him from deposing his wife's treating physicians in this child custody contest arising out of a dissolution of marriage action.

Cynthia Critchlow, appellee, filed a petition for dissolution of marriage and prayed that custody of the parties' 3 1/2 year old child, Kelli, be awarded to her. John filed a counterpetition; but did not challenge Cynthia's prayer for custody of Kelli. Cynthia subsequently was committed to a hospital for mental treatment and with leave of court, John filed an amended counterpetition seeking custody of Kelli due to Cynthia's mental health. Thereafter, the parties agreed to the appointment of Dr. Richard Greenbaum, psychiatrist, to render a professional opinion as to which party is best suited to have care and custody of Kelli. After individually interviewing John, Cynthia and Kelli, Dr. Greenbaum submitted his report recommending that Cynthia be awarded custody. Pursuant to stipulation of respective [**2] counsel, each party obtained copies of Cynthia's hospital records. Upon motion, the trial court entered an order authorizing John to take the depositions of Drs. Bond, O'Lone and Greenbaum, Cynthia's treating physicians. Cynthia did not object to this order and her counsel attended the deposition of Dr. Greenbaum by John's counsel. Upon stipulation of respective counsel, the judge entered an agreed order authorizing John to depose Dr. Koenig, Cynthia's childhood physician. Subsequently, an order was entered granting John temporary custody of Kelli and enjoining Cynthia from attempting to remove Kelli from John's care. Cynthia then filed (1) a motion for protective order requesting that the depositions of Drs. Bond, O'Lone and Koenig not be taken, and (2) a motion to set aside the temporary custody order. After a hearing, the trial court entered an order denying the motion to set aside the temporary custody order; but granted the motion for a protective order. John appeals the entry of the protective order. We reverse.

Cynthia made no objection to the order authorizing the depositions of Drs. Bond, O'Lone and Greenbaum and even stipulated to the order authorizing the deposition [**3] of Dr. Koenig. Thus, we find that Cynthia waived any privilege with respect to the testimony of her treating physicians. Cf. *Savino v. Luciano*, 92 So. 2d 817 (Fla. 1957); *Tibado v. Brees*, 212 So. 2d 61 (Fla.2d DCA 1968).

In addition, this case falls within the exception to the privileged communication between a psychiatrist and his (or her) patient as set out in ***HN1*** Section 90.242(3)(b), Florida Statutes (1975):

> "90.242 Psychiatrists as witnesses; nondisclosure of communications with patient
>
> "(3) There shall be no privilege for any relevant communications under this section:
>
> * * *
>
> "(b) In a criminal or civil proceeding in which the patient introduces his mental condition as an element of his claim or defense, or, after the patient's death, when said condition is introduced by any party claiming or defending through or as a beneficiary of the patient. Laws 1965, c. 65-404, § 1, eff. June 25, 1965."

In her petition for dissolution of marriage, Cynthia alleges that she is a fit and proper person to have custody of Kelli. After her voluntary commitment to the hospital for mental treatment, John filed a motion for leave to amend his counterpetition **[*455]** [**4] to reflect that Cynthia is not a fit and proper person to have custody because of her current emotional instability. At a hearing on this motion to amend, the issue of Cynthia's mental condition was injected into the proceedings and Cynthia's counsel (upon ore tenus motion) agreed to the appointment of a psychiatrist to examine her and John, and to render a professional opinion as to which party is best suited to have custody thereby introducing Cynthia's mental condition as an element of her claim for Kelli's custody.

We also find that *Roper v. Roper*, 336 So. 2d 654 (Fla.4th DCA 1976) relied upon by Cynthia is not controlling because in the instant case, in contrast to Roper, Cynthia's mental health is a highly relevant issue.

Further, in a dissolution of marriage proceeding where the issue of child custody is presented, it is incumbent upon the chancellor to evaluate, among other crucial factors, the mental health of each of the parents in making a final custody determination which is in accord with the best interest of the minor child or children. See Section 61.13(3)(g), Florida Statutes (1975). In light of Cynthia's voluntary commitment for treatment of her mental condition, [**5] Cynthia's mental health is vital to a proper determination of permanent custody and, therefore, Section 90.242, Florida Statutes (1975) creating the patient-psychiatrist privilege cannot be invoked under the facts in this child custody case.

Accordingly, the protective order appealed is reversed and the cause remanded to the trial court to enter an order authorizing John to take the depositions of Cynthia's treating physicians; but limiting the scope of those examinations to communications, diagnosis and treatments insofar as Cynthia's mental and emotional state relates to her fitness as a mother.

Reversed and remanded with directions.