# EVIDENCE

## Evidence: Damages

***McQueen v. Jersani, M.D.,***
909 So. 2d 491 (Fla. 5th Dist. App. 2005)

Although the statute does not mandate such consideration, some evidence relevant to the life expectancies of a decedent and surviving spouse is necessary for a damages claim under subsection (2) of the Florida Wrongful Death Act.

FACTS AND PROCEDURAL HISTORY

The plaintiff, Virginia McQueen, a widow serving as personal representative of the estate of her late husband, brought a medical malpractice action against the husband's cardiologist, Dr. Jersani. McQueen alleged that Dr. Jersani breached the applicable standard of care while treating her seventy-nine-year-old husband after he suffered a heart attack. Both sides presented expert medical evidence at trial, and the jury returned a verdict in favor of the widow for $60,000 in damages under the Florida Wrongful Death Act (Florida Statutes Section 768.21(2)). The jury then reduced the award to $36,000 due to the decedent's comparative negligence. The trial court then granted Dr. Jersani's motion for a judgment notwithstanding the verdict, ruling that the widow failed to establish that Dr. Jersani breached the standard of care, that the breach caused the decedent's death, and the amount of damages. McQueen appealed the trial court's order, arguing that because in reviewing such an order the court must view all evidence in the light most favorable to her and resolve all conflicts in her favor, doing so would establish plentiful support for the jury's award. On appeal, the Fifth District Court of Appeal reversed the judgment notwithstanding the verdict, finding that the jury was within its province to assign little weight to Dr. Jersani's expert's testimony and accept as true the widow's own testimony regarding her husband's health and vitality.

ANALYSIS

Subsection (2) of the Florida Wrongful Death Act, which addresses a surviving spouse's recovery for loss of companionship

and mental pain and suffering, does not, by its terms, require a fact-finder to consider the life expectancies of the respective spouses in calculating the claim. Fla. Stat. § 768.21(2) (2006).

Because subsection (2) does not require consideration of the life expectancies of the decedent and the remaining spouse, the court determined the evidentiary requirements by analogizing to subsection (3), which deals with recovery by a decedent's children for loss of a parent, and subsection (4), which provides recovery to parents for deceased minor children. The Fifth District was influenced by the case law interpreting the similarly phrased subsections, as well as the standard jury instructions regarding each. The court found that, although damages for loss of consortium are necessarily somewhat arbitrary, there must be some evidence relevant to joint life expectancies in order to arrive at a damages figure. The court conceded that damages must have an evidentiary basis and cannot be founded on mere guesswork. However, the widow's testimony stood on its own in assisting the jury in determining her life expectancy, and the testimony of an expert was unnecessary. Further, although the widow's testimony indicated that the husband had already exceeded his life expectancy at the time of his death (potentially foreclosing the damage award because the duration of the loss would be zero), the court determined that the widow's testimony regarding her husband's general health and physical condition was competent and sufficient to sustain the jury's verdict.

SIGNIFICANCE

This case is the first case in Florida to take up the issue of the evidentiary requirement regarding a decedent's life expectancy under subsection (2) of the Florida Wrongful Death Act. The practitioner should be aware that the Fifth District analyzed the case in much the same fashion as subsections (3) and (4) have been analyzed, finding that some consideration of joint life expectancies is necessary to calculate damages, but that the fact-finder remains free to weigh the testimony of witnesses as it sees fit.

RESEARCH REFERENCE

- 41 C.J.S. *Husband and Wife* § 117 (2006).

Jay Daigneault

## Evidence: Expert Opinion Testimony

***Gelsthorpe v. Weinstein,***
897 So. 2d 504 (Fla. 2d Dist. App. 2005)

Medical expert testimony derived solely from a physician's experience and training constitutes pure opinion testimony and is therefore not subject to a *Frye* analysis.

### FACTS AND PROCEDURAL HISTORY

Farrah Gelsthorpe and Travis Bacus, both individually and on behalf of their child, filed a medical malpractice action against their physicians and other healthcare providers. The plaintiffs' sole causation witness, Dr. Charash, intended to testify that the physicians' failure to perform a timely caesarean operation caused the plaintiffs' infant to sustain significant brain damage. Dr. Charash did not examine the child or review any medical literature; rather, he based his theory of causation on his clinical experience and training. Dr. Charash, a graduate of Cornell Medical School and board certified in pediatrics, relied on his forty-six years of experience as a practicing pediatric neurologist. Dr. Charash had treated approximately twenty children with similar (but not identical) delivery-induced injuries.

The physicians filed a *Frye* motion with the trial court to bar Dr. Charash's testimony. Expert affidavits that accompanied the motion stated that Dr. Charash's opinion was not generally accepted in the field of pediatric genetics and that medical literature did not support his theory of causation. The trial court granted the physicians' *Frye* motion and barred Dr. Charash's testimony. Because the plaintiffs conceded that without their expert witness' testimony summary judgment was warranted, the trial court granted the physicians' motion for summary judgment. The plaintiffs appealed the trial court's ruling barring Dr. Charash's testimony. The Second District Court of Appeal reversed and remanded the case with instructions.

### ANALYSIS

When a subject matter does not lie within the range of common knowledge or experience, the opinions of witnesses or experts skilled in the relevant science, art, or trade are admissible evi-

dence. *Frye v. U.S.*, 293 F. 1013, 1014 (D.C. Cir. 1923). However, the *Frye* test is only applicable to expert opinions concerning new or novel scientific techniques. Florida courts have adopted the *Frye* test because such evidence is "inherently unreliable and inadmissible." *Gelsthorpe*, 897 So. 2d at 509 (citing *Ramirez v. State*, 810 So. 2d 836, 843 (Fla. 2001)).

The physicians argued Dr. Charash's testimony was not scientifically established and reliable. The Second District Court of Appeal noted that although relevant scientific methodology and techniques must be sufficiently established, "it is not necessary that the expert's deductions based thereon . . . also be generally accepted." *Gelsthorpe*, 897 So. 2d at 509 (citing *U.S. Sugar Corp. v. Henson*, 823 So. 2d 104, 109 (Fla. 2002)). If the novel scientific theory is generally accepted in the relevant scientific community, thereby satisfying the *Frye* test, then the fact-finder can only assess the weight of the experts' opinions. While *Frye* does not apply to an expert's opinion if it is based solely on his own experience and training, the Second District distinguished between expert opinions based on clinical experience and those based on scientific studies. *Hadden v. State*, 690 So. 2d 573, 580 (Fla. 1997). Expert opinion testimony based upon scientific studies implies a level of accuracy, whereas pure opinion testimony does not carry the same "aura of infallibility . . . [and] does not have the same potential for misleading the jury as does testimony based on novel scientific methodology." *Gelsthorpe*, 897 So. 2d at 509. In forming his opinion concerning the issue of causation, Dr. Charash did not rely on novel tests or procedures. Therefore, the Second District found that because Dr. Charash's opinion concerning causation derived from his clinical training and experience, the opinion qualified as pure opinion testimony not subject to a *Frye* analysis.

The Second District determined that the physicians did not demonstrate any element that would subject Dr. Charash's opinion to a *Frye* analysis. Although the physicians argued that Dr. Charash misstated medical literature to support his opinion, the court found an alleged mistake does not require a *Frye* analysis, but can be properly challenged on cross-examination. The physicians further argued that Dr. Charash's opinion should be subject to a *Frye* analysis because he had never treated a child with the same condition. The court found this argument to be without merit because although medical expert witnesses must have prior

experience with similar patients, Florida Statutes Section 766.102(5)(a)(1) does not require that "medical expert testimony [be] based on personal experience that the expert previously encountered precisely the presentation of medical conditions at issue in the case." *Gelsthorpe*, 897 So. 2d at 511.

The Second District found that the mere fact Dr. Charash did not rely on specific authority or that other experts disagreed with his opinion did not render his opinion a "new principle" subject to a *Frye* analysis. Accordingly, the court held the trial court's overbroad application of *Frye* improperly barred Dr. Charash's testimony. Moreover, because the trial court accepted conclusory affidavits in support of the physician's *Frye* motion, if the Second District had upheld this action, it would have expanded the trial court's role in determining admissibility because

> the admission of expert testimony of any kind could successfully be challenged simply by submission of an affidavit from an expert in the same field stating in conclusory fashion that the proposed expert's scientific opinion is not based on a recognized scientific principle or procedure.

*Id*. at 512.

## SIGNIFICANCE

*Gelsthorpe* clarifies the limited application of *Frye*. A *Frye* analysis is not automatically employed to determine the admissibility of all scientific evidence; rather, *Frye* is only applicable to evidence that relies on new or novel scientific techniques or methodology. Practitioners may present expert medical testimony, even if the opinion is not generally accepted in the scientific community. As long as the expert's opinion does not derive from novel scientific evidence, the opinion is admissible evidence not subject to a *Frye* analysis. Ultimately, the fact-finder must weigh pure opinion testimony.

## RESEARCH REFERENCE

- 23 Fla. Jur. 2d *Evidence and Witnesses* § 392 (2005).

Shannon A. Treadway
Mary Ellen Pullum

**Evidence: Hearsay Exceptions—Confrontation Clause**

***Blanton v. State,***
880 So. 2d 798 (Fla. 5th Dist. App. 2004)

Statements made by a child victim are admissible under the child hearsay exception if the victim is eleven years old or younger at the time the statements are made. In addition, a discovery deposition is an opportunity to cross-examine a witness in accordance with the requirements of the Confrontation Clause.

FACTS AND PROCEDURAL HISTORY

Jesse L. Blanton, the appellant, was convicted of multiple counts of capital sexual battery and promoting sexual performances by a child. The primary pieces of evidence against Blanton were a videotape and photographs that depicted the aforementioned abuse being performed upon Blanton's then eleven-year-old adopted daughter. Shortly after Blanton's arrest, the child made a recorded statement to police that she was the person depicted in the lewd materials, and that the other person present was Blanton. The State attempted to submit the child's statements into evidence under the child hearsay exception, as defined by Florida Statutes Section 90.803(23). Subsequently, the defendant took a discovery deposition of the child under Florida Rule of Criminal Procedure 3.220(h), but did not take a deposition to perpetuate testimony under Florida Rule of Criminal Procedure 3.190(j). At the hearing required by Florida Statutes Section 90.803(23) to determine whether the child was unavailable for hearsay purposes, the circuit court found that because the child, now thirteen, suffers from post-traumatic stress syndrome, her participation in the trial would result in a substantial likelihood of severe emotional or mental harm. As a result, the trial court ruled that the child was unavailable and granted the state's motion to read the child's hearsay statements into evidence at trial. On appeal, the Fifth District Court of Appeal affirmed the trial court's admission of the statements.

ANALYSIS

Blanton raised two primary issues on appeal: (1) that the child hearsay statute requires that the declarant be eleven years

of age physically, mentally, emotionally, or developmentally, *at the time the statement is admitted into evidence*; and (2) that the court violated his right to confront his accuser by allowing the child's statements into evidence without a prior meaningful opportunity to cross-examine the declarant.

Addressing the first issue, the Fifth District performed a statutory interpretation of the language of the child hearsay exception and held that the language of the statute, stating that "an out-of-court statement made by a child victim . . . age of [eleven] or less describing . . . sexual abuse . . . is admissible in evidence in any civil or criminal proceeding" . . . "clearly and unambiguously pertains to statements made by a child victim who is [eleven] years old or less at the *time the statement is made*." *Blanton*, 880 So. 2d at 800 (emphasis added). As a result, the Fifth District ruled the child's hearsay statements fit the statute, even though the child was thirteen at the time of the hearing.

Next, the court addressed Blanton's claim that entry of the child's testimonial hearsay statement into evidence violated his Sixth Amendment right to confront his accuser. The Fifth District pointed out that shortly after Blanton filed his appeal, the United States Supreme Court issued its opinion in *Crawford v. Washington*, 541 U.S. 36 (2004). The Fifth District recounted *Crawford*'s requirement that testimonial hearsay cannot be entered into evidence unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. In this instance, the court conceded that, although not directly stated by *Crawford*, a prior opportunity to cross-examine must be *meaningful* to satisfy the Confrontation Clause.

Blanton argued that, even though he took a discovery deposition of the child, this was not a meaningful opportunity to cross-examine his accuser because Blanton could not use the child's statements taken in the discovery deposition as substantive evidence without also taking a deposition to perpetuate testimony under Florida Rule of Criminal Procedure 3.190(j). Blanton also argued that his confrontation rights were violated because his attorney did not conduct the discovery deposition questioning of the child with sufficient zeal.

The Fifth District addressed both of these arguments by pointing out that *Crawford* merely guarantees that a criminal defendant will have the *opportunity* to cross-examine his accuser

prior to a testimonial hearsay statement being entered into evidence. Therefore, the court reasoned that because the defendant could have asked the court to permit him to take a deposition to perpetuate testimony, Blanton was afforded the opportunity to confront the child, but did not avail himself of this opportunity. Moreover, the court noted that Blanton could have used the content of the discovery deposition for impeachment purposes, because the Florida Statutes allow hearsay statements entered into evidence under the various unavailability hearsay exceptions to be attacked without establishing the Queen Caroline predicate of allowing the witness an opportunity to review and explain the potentially inconsistent statement. Fla. Stat. § 90.806. For similar reasons, the Fifth District ruled that Blanton's attorney's choice not to depose the child more strenuously did not mean that Blanton did not have an opportunity to do so. Rather, Blanton did have a prior opportunity to cross-examine the child, which he failed to exercise.

Lastly, the Fifth District ruled that even if it was error to allow the child's hearsay statements to be entered into evidence, that error was harmless because the child's hearsay statements indicating that Blanton was the individual present in the videotape and photographs were supported by other independent evidence. Thus, the court found that the child's out-of-court statements were merely cumulative, since the victim's mother authenticated the identity of the individual on the videotape and photographs by giving substantially similar testimony to the child's hearsay statements and a police officer offered circumstantial evidence that established that the videotape and photographs were taken at Blanton's home.

## SIGNIFICANCE

*Blanton* is significant because it holds that a statement is clearly admissible under the child hearsay exception outlined in the Florida Evidence Code if the child is eleven years old or younger at the time the statement is made, not when it is admitted into evidence. Furthermore, *Blanton* holds that discovery depositions constitute a prior opportunity for a defendant to cross-examine his accuser and, thereby, satisfy the strictures of the Confrontation Clause set out in *Crawford*.

However, *Blanton* may also be read to mean that if a defendant fails to ask a for the opportunity to perform a deposition to perpetuate the testimony of a testimonial hearsay declarant, that defendant has been given an opportunity to confront his accuser, which he has chosen not to exercise. Further, one could argue that *Blanton* only requires a defendant to request a deposition to perpetuate testimony to preserve his Confrontation Clause challenge, if the defendant could reasonably foresee that the declarant would be unavailable.

RESEARCH REFERENCE

- 14B Fla. Jur. 2d *Criminal Law* § 1660 (West 2006) (explaining the child hearsay exception).

Philip McCormick

**Evidence: Hearsay Exceptions—Confrontation Clause**

***Lopez v. State,***
888 So. 2d 693 (Fla. 1st Dist. App. 2004)

A hearsay statement that qualifies as an "excited utterance" may still be inadmissible if the defendant is not afforded his constitutional right to confront the witness. Discovery depositions do not satisfy Confrontation Clause requirements because the defendant is not entitled to be present at the deposition and is thus not afforded the opportunity to cross-examine the witness.

FACTS AND PROCEDURAL HISTORY

The State charged Moroni Lopez with armed kidnapping, assault with a weapon, and possession of a firearm by a convicted felon after he allegedly abducted Hector Ruiz at gunpoint. At the crime scene, Ruiz made a statement to a police officer identifying Lopez as the person in possession of the firearm. Defense counsel was later able to question Ruiz at a discovery deposition. At trial, however, Ruiz was unavailable as a witness; therefore, Lopez's counsel moved to exclude Ruiz's statement identifying Lopez, asserting that the statement was inadmissible under the hearsay rule and that it did not fall within the excited utterance exception. Lopez also argued that admission of the statement would

violate his Sixth Amendment right to confront the witnesses against him. The trial court ruled that the statement was admissible, and the jury subsequently found Lopez guilty. Lopez appealed to the First District Court of Appeal, and the court reversed Lopez's conviction, finding that the trial court erred by admitting the statement.

ANALYSIS

The First District addressed whether the admission of Lopez's hearsay statement under the excited utterance exception would violate his Sixth Amendment right to confront opposing witnesses. The Sixth Amendment provides criminal defendants the right to confront the witnesses against them. The standard for deciding whether a hearsay statement violates this right of confrontation is now governed by the Supreme Court's holding in *Crawford v. Washington*, 541 U.S. 36 (2004). Under *Crawford*, a hearsay statement violates the Sixth Amendment if "(1) the statement was testimonial, and (2) the declarant was unavailable and the defendant lacked a prior opportunity for cross-examination." *Lopez*, 888 So. 2d at 698.

The First District concluded that Ruiz's statement was testimonial because it fell within one of the three categories of testimonial statements set forth in *Crawford*: Statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." 541 U.S. at 52. Because Ruiz's statement was made to a police officer at the scene of a crime for the purpose of accusing someone, the First District concluded that Ruiz's statement was a testimonial statement. The court reasoned that Ruiz must have known that his formal statements to the police might be used against the defendant at trial. The court disagreed with post-*Crawford* decisions questioning whether an excited utterance can ever be characterized as testimonial. The court stated that the *Crawford* formulation for identifying testimonial statements is based "on the purpose for which the statement was made, not on the emotional state of the declarant." *Lopez*, 888 So. 2d at 699. A statement does not lose its testimonial character simply because it was made when the declarant was excited.

The court's final determinations concerned the availability of the witness and the opportunity for cross-examination by the de-

fendant. First, the court held that Ruiz was clearly unavailable because the State was unable to serve him. Next, the court considered whether a discovery deposition provided the opportunity for cross-examination required under *Crawford*. The court ruled that a discovery deposition clearly does not offer the type of opportunity for cross-examination that *Crawford* intended. The court referred to two Florida Supreme Court decisions as support for this ruling. In *State v. Basiliere*, the Court found that declining to cross-examine a witness during a discovery deposition does not constitute a waiver of the defendant's confrontation rights. 353 So. 2d 820, 824 (Fla. 1977). The Court reasoned that a discovery deposition does not satisfy the defendant's right of cross-examination because it is intended to allow discovery of information, not adversarial testing of evidence. *Id.* at 824–825. Likewise, in *State v. Green*, the Florida Supreme Court recognized that the purpose of discovery depositions is not to perpetuate testimony for admission at trial. 667 So. 2d 756, 760 (Fla. 1995). Based on the reasoning in *Basiliere* and *Green*, the First District held that a discovery deposition cannot serve to "cure the confrontation problem" raised by the use of hearsay statements. *Lopez*, 888 So. 2d at 701.

A second basis for the First District's holding was the existence of an evidentiary rule providing that a defendant is not entitled to be present at a discovery deposition. The First District believed that it would be contrary to Sixth Amendment principles to conclude that a defendant's right to cross-examine a witness at a deposition has been satisfied when the defendant is not entitled to attend the proceeding. The court also expressed concern that a different holding would create dangerous precedent. The court decided that if discovery depositions satisfied confrontation rights, such a finding might eventually lead to a rule whereby the constitutional requirements of *Crawford* are satisfied simply by the declarant's availability for deposition before trial, regardless of whether the defendant actually exercised his right to take the deposition.

## SIGNIFICANCE

*Lopez* adds to the growing number of cases interpreting the new *Crawford* standard for deciding when hearsay evidence is admissible under the Confrontation Clause. The *Lopez* application

of *Crawford* provides guidance to practitioners seeking admission of hearsay statements made to a police officer at the scene of a crime. In addition, the First District has clearly established the rule that discovery depositions do not qualify as a "prior opportunity for cross-examination" under *Crawford*. Unfortunately, this holding has limited applicability because it directly conflicts with the Fifth District's decision in *Blanton v. State*, 888 So. 2d 798 (Fla. 5th Dist. App. 2004). In jurisdictions following *Lopez*, prosecutors may be able to substitute a discovery deposition for cross-examination at trial if they stipulate to the defendant's attendance at the deposition, and the defendant is then given the opportunity to attend. The cross-examination requirement might also be satisfied if it can be shown that defense counsel actually engaged in some kind of adversarial questioning of the witness at the discovery deposition.

RESEARCH REFERENCES

- Charles W. Ehrhardt, *Florida Evidence* vol. 1, § 802.2 (Thomson/West 2005) (available in WL, FLPRAC database).
- John F. Yetter, *Wrestling with* Crawford v. Washington *and the New Constitutional Law of Confrontation*, 78 Fla. B.J. 26 (Oct. 2004).

Paula P. Bentley

**Evidence: Hearsay Exceptions—Confrontation Clause**

***Contreras v. State,***
910 So. 2d 901 (Fla. 4th Dist. App. 2005)

Statements taken from victims of sexual molestation or abuse will be considered testimonial in nature and will implicate the Confrontation Clause of the Sixth Amendment when the statements may reasonably be expected to be used at trial.

FACTS AND PROCEDURAL HISTORY

During the investigation of a father suspected of sexually molesting his daughter, a Child Protection Team (CPT) coordinator, working in conjunction with the Palm Beach County Sheriff, took a videotaped statement from the daughter in which she stated

that she had been molested in 1998. After the father was charged, his original counsel deposed the victim and the substance of that deposition matched closely the substance of the ex parte videotaped statement. Ten months later, the father's new counsel was permitted to depose the victim, subject to limitations and with the trial judge observing via closed circuit television and ruling on objections. The second deposition revealed that the victim did not have a good memory of the incident, and prior to the deposition she asked to review the videotaped statement taken by the CPT coordinator. The father was not present at either of the depositions. When the case was ready for trial, the State argued successfully for the trial judge to declare the victim unavailable to testify on the basis of an expert opinion finding that the girl would suffer severe psychological harm if she did so. The State's case relied upon the videotaped ex parte statement and the father's confession, though he confessed only to molestation and not penetration. The father was convicted and he appealed, arguing that the State violated his Sixth Amendment rights.

On appeal, the State argued that the Confrontation Clause of the Sixth Amendment was not violated because defense counsel had the opportunity to cross-examine the victim at the second deposition, and because the child was found by the trial court to be unavailable, thereby satisfying the applicable hearsay exception. The Fourth District Court of Appeal addressed the question of whether the ex parte statement was testimonial as that term was intended by the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004), such that the Sixth Amendment required a face-to-face confrontation by the defendant of a witness against him. The Fourth District reversed the conviction, holding that the ex parte statement was testimonial in nature and the record did not support the finding of unavailability. The Fourth District reasoned that Florida precedent as well as decisions from other states, combined with the principles espoused in *Crawford*, compelled it to find such statements to be testimonial in nature and thus within the ambit of the Confrontation Clause.

## ANALYSIS

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to confront any witness who gives testimony against him. *Crawford*, 541 U.S. at 68–69. The

term "testimonial" applies at least to police interrogations and many other forms of pretrial testimony that a declarant may reasonably expect to be used in a prosecutorial manner. *Id.* at 51–52.

The Fourth District explained that the interview conducted by the CPT coordinator was indistinguishable from an ordinary police interrogation, which was specifically included in the definition of testimony in *Crawford*, and inferentially authorized under the statute allowing the Department of Children and Families to investigate child abuse "cases." Further, the court noted that at least three other states found similar statements made by child victims to be testimonial under *Crawford*, and clarified that the specific examples of statements catalogued in *Crawford* were not advanced as a complete, exhaustive, or exclusive list.

The State argued that the ex parte statement satisfied *Crawford* because its use comported with *State v. Townsend*, 635 So. 2d 949 (Fla. 1994), allowing admission of a hearsay statement under a child victim exception, so long as the statement contains specific guarantees of trustworthiness. The court observed, however, that the foundation for the *Townsend* holding, *Ohio v. Roberts*, 448 U.S. 56 (1980), had been explicitly disapproved by *Crawford*, thereby casting doubt on the viability of the child victim hearsay exception contained in Florida Statutes Section 90.803(23).

SIGNIFICANCE

This case indicates that the Confrontation Clause of the Sixth Amendment is implicated when child victims of molestation or abuse statements are taken during investigations. Practitioners should be aware that any similar statements will be considered testimonial, and therefore, the defendant should have the opportunity for a face-to-face confrontation with the witness when the witness is giving testimony. Further, regarding the issue of whether a criminal discovery deposition can substitute for the right of confrontation at trial, the Fourth District found itself somewhere in between the First District's holding in *Lopez v. State*, 888 So. 2d 693 (Fla. 1st Dist. App. 2004), and the Fifth District's ruling in *Blanton v. State*, 880 So. 2d 798 (Fla. 5th Dist. App. 2004), certifying conflict with *Blanton* and further illuminating the disagreement between the district courts on this issue. Finally, the ongoing validity of the child victim hearsay exception

of Florida Statutes section 90.803(23) is in question, at least insofar as that exception relies on *Ohio v. Roberts*.

RESEARCH REFERENCE

- John F. Yetter, *Wrestling with* Crawford v. Washington *and the New Constitutional Law of Confrontation*, 78 Fla. B.J. 26 (Oct. 2004).

Jay Daigneault

**Evidence: Hearsay Exceptions—Confrontation Clause**

***Johnson v. State,***
2005 WL 3556038 (Fla. 2d Dist. App. Dec. 30, 2005)

Documents that qualify under the business records hearsay exception may still be excluded from evidence during a criminal prosecution if the declarant prepared the document for the purpose of introducing it as proof of the defendant's guilt, since the document is testimonial evidence and is subject to the additional restrictions of the Confrontation Clause.

FACTS AND PROCEDURAL HISTORY

The State charged Lorenzo Johnson with four drug-related offenses and obtained a conviction against him on each count. Two of the four counts were based on possession of illegal substances, one for marijuana and the other for cocaine. During Johnson's trial, the State proffered two central pieces of evidence against him to prove its possession charges. First, the State offered the testimony of Johnson's arresting officers, who stated that field tests on the seized substances yielded positive results for the two drugs. Second, since positive officer field tests alone cannot establish a prima facie case of possession, the State offered a Florida Department of Law Enforcement (FDLE) lab report prepared by Anna Deakin against Johnson, which confirmed that the seized substances were marijuana and cocaine. However, Deakin did not give testimony at Johnson's trial regarding her report.

Prior to entry into evidence of the FDLE report, Johnson contemporaneously objected to it as inadmissible hearsay, on the ground that it violated his right to confront his accuser, since he

had received no opportunity to cross-examine Deakin. In response, the State informed the circuit court that Deakin, now working for the FBI in Virginia, had expressed a willingness to be available to testify in Florida on the following day. However, the State believed the expense of securing Deakin's testimony was unreasonable and unnecessary. After considerable argument between the State and defense counsel, the circuit court told the State it would either permit the FDLE lab report to be entered into evidence under the business records hearsay exception, or issue a continuance and receive Deakin's live testimony the following day. The State chose to enter the FDLE report as a business record without providing Johnson an opportunity to cross-examine Deakin either before or after the entry of the FDLE report into evidence in his trial. On appeal, the Second District Court of Appeal reversed three of Johnson's convictions, finding that the trial court erred in admitting the lab report into evidence.

ANALYSIS

In reviewing the circuit court's decision to allow the FDLE report into evidence under the business records hearsay exception, the Second District pointed out that *Crawford v. Washington*, 541 U.S. 36 (2004), while binding precedent upon the Second District, also presented an interesting contradiction upon the instant facts. The court noted that *Crawford* contained dicta suggesting that business records are not testimonial hearsay and therefore will not offend the Confrontation Clause of the Sixth Amendment if the defendant has no opportunity to cross-examine the individual who created them. However, the court declared that it was faced with a question as to what result should occur when a business record that meets the correspondent hearsay exception was created for the purpose of establishing an element of a crime in a defendant's prosecution.

The Second District concluded that admission of the FDLE report against the defendant, though seemingly permissible under the business records hearsay exception, implicated the defendant's right to confront his accuser because the FDLE report was testimonial hearsay. The Second District found, despite *Crawford's* suggestion that business records are non-testimonial, that the FDLE report was testimonial because the out-of-court state-

ment was made to government actors, with the purpose of being used against a criminal defendant at trial.

Having concluded that the defendant's Sixth Amendment rights were implicated, the Second District considered whether the defendant's rights were violated by introduction of the testimonial FDLE report. The court reiterated the *Crawford* rule that when testimonial hearsay is introduced against a criminal defendant, the declarant must be unavailable and the defendant must have a prior meaningful opportunity to cross-examine the declarant. The Second District ruled that Deakin was not unavailable because the State did not take reasonable measures to produce her, since the State was aware that Deakin was willing to travel to the circuit court to offer testimony the following day. As a result, the court did not have to address whether Johnson had a meaningful opportunity to cross-examine the witness, and therefore ruled that Johnson's right to confront his accuser had been violated, reversed the circuit court's decision, and ordered a new trial as to the possession charges. Lastly, perceiving this issue—whether using FDLE reports to identify illegal substances in criminal prosecutions violates the Confrontation Clause when the declarant does not testify—to be one of "great public importance," the Second District certified this question to the Supreme Court of Florida.

SIGNIFICANCE

The Second District has declared that a hearsay report, though meeting the business records hearsay exception, may still be excluded from evidence if the report is testimonial—created for the purpose of offering testimony against a criminal defendant—and the additional restrictions of the Confrontation Clause are not observed. As to a defendant's right to a prior meaningful opportunity to cross-examine an unavailable testimonial declarant, the practitioner should be aware that according to the Second District, Florida's criminal depositions do not provide such an opportunity as a matter of law.

RESEARCH REFERENCE

- 14B Fla. Jur. 2d *Criminal Law* § 1661 (West 2006).

Philip McCormick

**Evidence: Hearsay Exceptions—Confrontation Clause**

***Belvin v. State,***
922 So. 2d 1046 (Fla. 4th Dist. App. 2006)

Breath test affidavits are testimonial in nature. Thus, they may not be introduced in a criminal proceeding unless the affiant testifies in court or the affiant is unavailable and the defendant had a prior opportunity to cross-examine him or her.

FACTS AND PROCEDURAL HISTORY

Bruce Belvin was arrested for driving under the influence (DUI) and taken to a breath testing facility, where he submitted to a breath test that measured alcohol levels of 0.165, 0.144, and 0.150. At Belvin's non-jury trial in county court, the State introduced a breath test affidavit that was signed by both the arresting officer and the breath test technician, who administered the test and prepared the affidavit. Because the technician did not testify at trial, Belvin objected to the introduction of the breath test affidavit, asserting a violation of his Sixth Amendment confrontation rights under *Crawford v. Washington*, 541 U.S. 36 (2004). The trial court overruled Belvin's objection and admitted the affidavit into evidence. Belvin was then convicted of DUI.

Belvin appealed his conviction to the Circuit Court for the Fifteenth Judicial Circuit in its appellate capacity. The Fifteenth Circuit initially reversed Belvin's conviction, but it affirmed the conviction on rehearing, finding that the breath test affidavit was not testimonial. Belvin then filed a petition for writ of certiorari with the Fourth District Court of Appeal. The Fourth District granted certiorari, quashed the Fifteenth Circuit's decision, and certified the question about the testimonial nature of certain portions of breath test affidavits as one of great public importance.

ANALYSIS

In his petition for writ of certiorari, Belvin claimed that the circuit court's decision violated a clearly established principle of law because it held that breath test affidavits were not testimonial. Although the State argued that statutes and precedent supported the trial court's decision to admit the breath test affidavit, the Fourth District recognized that recent controlling develop-

ments in constitutional law—the United States Supreme Court's decision in *Crawford*—constituted clearly established principles. *Belvin*, 922 So. 2d at 1049. In *Crawford*, the Court ruled that an out-of-court testimonial statement "is inadmissible in criminal prosecutions unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness," regardless of the statement's reliability. *Id.* at 1048. The State argued that the breath test affidavit was not testimonial in nature and, even if it were, Belvin had a prior opportunity to cross-examine the breath test technician.

First, the State argued that breath test affidavits are not testimonial in nature and thus are not subject to *Crawford*'s strict restrictions on the admission of testimonial evidence. Although the *Crawford* opinion lists affidavits as being within the core class of testimonial statements, the State argued that breath test affidavits are different because they "simply involve the technician's observations," not a "give-and-take of questions and answers." *Id.* at 1050. The Fourth District rejected this distinction because a breath test affidavit contains the technician's personal observations regarding the examination period, testing procedures, and inspection of the testing instrument. Moreover, the State argued that breath test affidavits are not testimonial because Florida Statutes Sections 316.1934(5) and 90.803(8) expressly include breath test affidavits in the hearsay exception for public records and reports. The court rejected this argument as well, indicating that a statutory listing does not control the constitutional question as to whether breath test affidavits are testimonial. Reasoning that the purpose of a breath test affidavit is for later use at a criminal trial or driver's license revocation proceeding, the Fourth District found that the breath test affidavit was testimonial in nature and that *Crawford* thus applied. *Id.* at 1050–1051. In doing so, the Fourth District specifically acknowledged that *Crawford* abrogated the court's decision in *Gehrmann v. State*, 650 So. 2d 1021 (Fla. 4th Dist. App. 1995), which concluded that a breath test affidavit is admissible in its entirety under Section 316.1934(5). The court further indicated that its holding was consistent with recent decisions from the First District Court of Appeal and other jurisdictions outside of Florida.

Second, the State argued that, even if breath test affidavits were testimonial in nature, the admission of the affidavit in this

case was proper because the breath test technician was unavailable and Belvin had a previous opportunity to cross-examine her prior to trial. The State argued that, under Florida Rule of Criminal Procedure 3.220(h)(1)(D), Belvin could have sought to depose the breath test technician before trial after showing good cause to the trial court. The State cited *Blanton v. State*, 880 So. 2d 798, 801 (Fla. 5th Dist. App. 2004), for the proposition that discovery depositions ordinarily qualify as a prior opportunity for cross-examination, for purposes of *Crawford*. The Fourth District, however, cited to a conflicting First District decision, *Lopez v. State*, 888 So. 2d 693, 701 (Fla. 1st Dist. App. 2004), in which the First District disagreed with the Fifth District's holding in *Blanton*. In addition, the court noted that it had recently certified conflict with *Blanton* in *Contreras v. State*, 910 So. 2d 901 (Fla. 4th Dist. App. 2005). The Fourth District agreed with the First District's reasoning in *Lopez* that finding that a discovery deposition satisfies the right to confrontation would lead to a slippery slope that could render the Supreme Court's constitutional requirements in *Crawford* meaningless. Because a discovery deposition "does not offer the kind of opportunity the Court was referring to in *Crawford*," the Fourth District rejected the State's argument that Belvin had a prior opportunity to cross-examine the technician before trial. *Belvin*, 922 So. 2d at 1053.

The Fourth District concluded that the breath test affidavit was testimonial in nature and that Belvin had no prior opportunity to cross-examine the breath test technician before trial. Because the admission of the breath test affidavit violated Belvin's Sixth Amendment right to confront witnesses against him, the court granted certiorari and quashed the circuit court's decision.

## SIGNIFICANCE

As a practical matter, the Fourth District's decision means that, in most instances, a breath test affidavit signed by a breath test technician will not be admissible unless the breath test technician testifies in court. Thus, prosecutors will be forced to take steps to ensure that breath test technicians who sign affidavits will be available to testify in court during the criminal prosecution of DUI offenders.

As a matter of Sixth Amendment jurisprudence, this decision provides the Fourth District's interpretation of two Confrontation

Clause issues under *Crawford*. First, the court's determination that breath test affidavits are testimonial in nature is significant because it relied on the language in *Crawford* that indicates that affidavits are testimonial in nature. In light of the court's rejection of the State's argument that breath test affidavits are fundamentally different than the affidavits that were referenced in *Crawford*, practitioners may argue that any affidavit is per se testimonial. Second, the court's determination that discovery depositions do not constitute an opportunity to cross-examine a witness exacerbates the current split between Florida's district courts of appeal. As more district courts weigh in on the issue, it becomes more likely that the Florida Supreme Court may exercise its jurisdiction to resolve the conflict.

RESEARCH REFERENCE

- 14B Fla. Jur. 2d *Denial of Right* § 1654 (Westlaw database updated July 2005).

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