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Evidence

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EVIDENCE*

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I. REFRESHING THE MEMORY

A. *Independent Recollection Required*

Notes, memoranda, or other documents may be used by a witness to refresh his memory.[1] The memoranda are to be used merely to stimulate the witness' memory, and his testimony must be based *only* on independent recollection.[2]

The court in *United Sand & Material Corp. v. Florida Industrial Commission*[3] held that it was error not to allow the court reporter to

* The decisions surveyed in this article have been reported in volumes 201 through 224 of the Southern Reporter, Second Series.

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1. Volusia County Bank v. Bigelow, 45 Fla. 638, 33 So. 704 (1903). Original notes or memoranda made contemporaneously with or soon after a transaction or event may be used as the basis of testimony given at a later time by the person who made the notes or memoranda. Such testimony is admissible as a past recollection recorded and is an exception to the hearsay rule. Only then is independent recollection not required.

2. *Id.*

3. 201 So.2d 451 (Fla. 1967).

testify at the workmen's compensation proceeding from her own shorthand notes made at an interview between the claimant and an adjuster.[4]

Testimony made merely from memoranda with no independent recollection is not permitted. In *Great Atlantic & Pacific Tea Company v. Nobles*,[5] the plaintiff in an overtime compensation action testified from a memorandum pertaining to overtime hours. He admitted that he could not testify to the overtime hours during each of the claimed weeks without looking at his memorandum, which had been made subsequent to the overtime. The court held that it was error to permit such testimony because the memorandum was not to be used for the purpose of stimulating the plaintiff's memory but only as a basis of his testimony pertaining to overtime worked. Since he had no independent recollection of the overtime,[6] he could not use the memorandum.

B. *Examining The Memoranda*

The trial court in *Kimbrough v. State*[7] refused to permit the defendant to inspect a written report used to refresh a police officer's memory before testifying. The court of appeal affirming the trial court, held that when a witness refreshes his memory by the use of memoranda *out of court*, he is not obliged to produce it to allow the opposing party to inspect the memoranda.

II. Opinion and Expert Testimony

A. *Competency of Experts*

It is generally recognized that experts need not have *personal* experience to qualify as competent expert witnesses. "[T]o give an opinion on a medical question, *one may be qualified by study without practice,* or by practice without study. . . . "[8] In *Hawkins v. Schofman*,[9] a malpractice action, a neurologist was not permitted to testify as an expert witness to show the approved medical standards for the operation in question. The trial court held that the expert was not qualified because he had *no personal experience* in performing such an operation. The Third District Court of Appeal reversed the lower court, holding that the neurologist should have been permitted to testify because he had medical

4. It is unclear whether the court permitted the court reporter's testimony into evidence because she merely refreshed her memory from her shorthand notes or because such testimony was based on the notes and, therefore, admissible as a past recollection recorded and as an exception to the hearsay rule.

5. 202 So.2d 603 (Fla. 1st Dist. 1967).

6. The court further stated that the memo was not made at or about the time of the happening of the overtime (memo of overtime work was made from old calendars long after overtime was worked); therefore, it was not a past recollection recorded, and such testimony was hearsay.

7. 219 So.2d 122 (Fla. 1st Dist. 1969).

8. Copeland v. State, 58 Fla. 26, 32, 50 So. 621, 624 (1909) (emphasis added).

9. 204 So.2d 336 (Fla. 3d Dist. 1967).

training and professional knowledge of the standards and procedure for such an operation. The court stated that the lack of personal experience in performing such an operation only goes to the weight of the testimony and not to the competency of the witness.

A party having experience for a substantial number of years in various aspects of rail transportation of particular goods from Florida to the Eastern United States was held to be competent to testify as an expert concerning the usual and customary time required for the rail transportation of the goods in question. The expert was qualified by virtue of his study of authoritative sources, although he had no *practical* experience in actually transporting the goods by rail.[10]

Once a clinical psychologist is qualified as an expert by reason of his education and experience, he is competent to testify as to his diagnosis of a person's mental condition based upon techniques ordinarily resorted to by such practitioners.[11] The dicta in *Reese v. Naylor*[12] indicates that although clinical psychologists are competent to testify as to one's mental condition, there might be a different ruling with regard to testifying as to the *cause* of the mental condition. The latter, the court said, is a medical question to be answered by medical doctors.

B. *Expert Subject Matter*

Once an expert is deemed competent to testify, it must be determined whether the subject of inquiry is an expert subject matter. If understanding the subject of inquiry requires special knowledge, skill, experience, or training; it is considered expert subject matter.

In an action for damages as a result of negligence,[13] the fourth district held that the following questions of inquiry to an expert witness were not expert subject matter; and, therefore, no opinion could be expressed thereon: (1) whether or not the driver of the car in qustion exhibited sensible control of it; and (2) whether or not the probable cause of the accident was the driver's going to sleep.[14] The court stated that:

> [e]xpert opinions are admissible only when the facts to be determined are obscure and can be made clear only by the opinions of persons skilled in relation to the subject matter of the inquiry; and when facts are within the ordinary experience of the jury, conclusions therefrom will be left to them. . . .[15]

C. *Hypothetical Questions*

It is generally recognized that a hypothetical question asked of an expert witness must be based on facts previously adduced in the evidence.[16]

10. Seaboard Air Line R.R. v. Lake Region Packing Ass'n, 211 So.2d 25 (Fla. 4th Dist. 1968).
11. Reese v. Naylor, 222 So.2d 487 (Fla. 1st Dist. 1969).
12. *Id.*
13. Smaglick v. Jersey Ins. Co., 209 So.2d 475 (Fla. 4th Dist. 1968).
14. *Id.*
15. *Id.* at 476.
16. Florida East Coast Ry. v. Morgan, 213 So.2d 632 (Fla. 3d Dist. 1968).

Facts which are set forth in a hypothetical question must, as stated above, be before the court; but *direct* proof of such facts is not required, and circumstantial proof will suffice.[17]

An action was brought against the insurer in *Nationwide Mutual Ins. Co. v. Griffin*[18] to recover death benefits allegedly due under an automobile policy providing for benefits if death was caused as a result of an accident with the insured automobile. Decedent was a passenger in the insured automobile. While in the hospital three weeks after the accident, decedent sustained a cerebral thrombosis and approximately one year thereafter she died. On trial, plaintiff's expert medical witness expressed an opinion based on a hypothetical question, stating that there was a causal connection between the automobile accident and the decedent's death. The expert's opinion was based on the assumption that the cerebral thrombosis occurring prior to death was in the same general area of the brain as the one occurring three weeks following the accident, although no *direct* proof of this was established. The court held that the hypothetical question was permissible because there was competent, substantial evidence in the record tending to prove the facts in the hypothetical question, and direct proof was not required.

D. *Opinions Based on Unreliable Information*

Opinions by expert witnesses must be based on reliable information.[19] Opinion testimony based on hearsay statements is inadmissible because the foundation of the expert's opinion is based on unreliable evidence.[20]

The unreliable information rule was illustrated in *Cirack v. State*.[21] Testimony of a psychiatrist as to the defendant's voluntary intoxication, thus establishing lack of premeditation in a first-degree murder case, was held inadmissible. The doctor's opinion was based on self-serving declarations made by the defendant and such facts were neither in evidence nor within the doctor's knowledge and were, therefore, clearly unreliable.[22]

Courts make a distinction between *treating* and *examining* physicians when determining the admissibility of a physician's opinion on the patient's condition which is based in whole or in part on the patient's history as related to the physician by the patient.[23] Thus, the court in *Marshall v. Papineau* stated:

> [T]he opinion of a physician or surgeon as to the condition of an injured plaintiff, based wholly or in part on the history of the case as told to him by the latter on a personal examination, is inadmissible when the examination was made for the purpose of

17. Nationwide Mut. Ins. Co. v. Griffin, 222 So.2d 754 (Fla. 4th Dist. 1969).
18. *Id.*
19. Cirack v. State, 201 So.2d 706 (Fla. 1967).
20. Smith v. Frisch's Big Boy, Inc., 208 So.2d 310 (Fla. 2d Dist. 1968).
21. 201 So.2d 706 (Fla. 1967).
22. *Accord*, Martin v. State, 218 So.2d 195 (Fla. 3d Dist. 1969).
23. Bondy v. West, 219 So.2d 117 (Fla. 2d Dist. 1969).

> qualifying the physician or surgeon to testify as a medical witness.[24]

The reason for the above rule is that when a physician is consulted for the purpose of *treating* the patient, it is safe to assume that he will tell the truth to the physician since he is interested primarily in being cured, but when a doctor is consulted merely to testify the tendency is to the contrary.

The "examining versus treating" concept relating to expert testimony was further deliniated in *Bondy v. West*.[25] The court found that the deposition of a physician as an expert witness was inadmissible because he was an examining physician, and his opinion of the plaintiff's condition was based in part on the history related to him by the plaintiff. The expert's opinion was based on unreliable information; therefore, it was inadmissible.

III. IMPEACHMENT

A. *Adverse Witness*

Under rule 1.450(a), Florida Rules of Civil Procedure, a witness who proves to be unwilling or hostile can be interrogated by leading questions but is not subject to impeachment as is a witness called by an adverse *party*. Any right to impeach one's own *witness* is derived from Florida Statutes section 90.09, where although impeachment through evidence of bad character is prohibited, if the witness proves *adverse*, a party can impeach such an adverse witness through the use of prior inconsistent statements.

Foremost Dairies, Inc. v. Cutler[26] interpreted "adverse" to mean that the party producing the witness has been surprised or entrapped by the statements made by such a witness. In the *Foremost* case, the defendant called the plaintiff's son as a witness. He was questioned as to whether or not he made a statement to the investigating officer to the effect that the headlight on his brother's bicycle was not working at the time of the accident. The witness answered in the negative, and the defendant called the investigating officer to impeach the witness's testimony through the use of a prior inconsistent statement made by the witness to the officer. The court stated that the defendant knew what the witness would testify to and such a witness was, therefore, not an adverse witness as the defendants were neither surprised not entrapped by the witness's testimony. A party can not put a witness on the stand knowing that his testimony will be adverse and claim surprise in order to impeach him.[27]

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24. 132 So.2d 786, 787 (Fla. 1st Dist. 1961).

25. 219 So.2d 117 (Fla. 2d Dist. 1969).

26. 212 So.2d 37 (Fla. 4th Dist. 1968).

27. Such strategy would allow a party to get evidence before the court which otherwise would be inadmissible.

B. *Prior Inconsistent Statements*

It is generally recognized that statements made out of court can be introduced in court against a witness for the purpose of impeachment, *i.e.*, impeachment through the use of the out-of-court statement as a prior inconsistent statement. Such statement does not come in for its truth and is, therefore, not hearsay.[28]

In *Wingate v. New Deal Cab Co.*,[29] a passenger in the defendant's car stated to the plaintiff's attorney that she had no knowledge of the plaintiff's speed at the time of the automobile accident. During the trial she testified that the plaintiff was traveling at seventy-five miles per hour. The court of appeal held it was error for the trial court to refuse to admit into evidence the prior inconsistent statements of the defendant's witness. Such inconsistency raises a doubt as to the veracity of the witness's testimony.

Under Florida Statutes section 92.33 it is required by every person taking a written statement of an injured person to furnish this person with a true and complete copy of the statement. Failure to comply with the statute prevents the use of the written statement as evidence in any civil action. In *United Sand & Material Corp. v. Florida Industrial Commission*,[30] the Florida Supreme Court held that the policy underlying the statute, *i.e.*, protecting injured persons against being disadvantaged by statements taken from them, can not be utilized to prevent a party from testing the truthfulness of a witness by impeachment through prior inconsistent statements. The statements made by the injured claimant to the employer's insurance adjuster were, therefore, admissible in the workmen's compensation proceeding to impeach the claimant.[31]

IV. COMPETENCY

A. *Confidential Communications*

Although by statute the common-law principle which precludes one spouse from testifying against another spouse in a judicial proceeding is abrogated,[32] neither may disclose communications between them on the grounds they are confidential or privileged.

This privilege was raised by the defendant in *Ross v. State*,[33] where the defendant gave his wife a sweater which was stolen. He argued that the physical act of delivering the sweater to his wife was just as much a

28. C. MCCORMICK, EVIDENCE § 226 (1954).

29. 217 So.2d 612 (Fla. 1st Dist. 1969).

30. 201 So.2d 451 (Fla. 1967).

31. Claimant had an interview with his employer's insurance adjuster where he stated that his work activities were normal on the morning he suffered the heart attack. At the hearing he stated he performed work not routine to his duties which involved strain and exertion. Claimant tried to invoke Florida Statutes section 92.33 (1967) because he never received a copy of the written statement given to the adjuster.

32. FLA. STAT. §§ 90.04, 932.31 (1967).

33. 202 So.2d 582 (Fla. 1st Dist. 1967).

communication to her as a statement that he stole the sweater; therefore, his wife should not have been allowed to testify as to the receiving of the sweater. The court concluded that the physical act of receiving the sweater did not constitute a confidential communication under common law, and his wife was competent to testify.

B. *Waiver of Privilege*

The privilege existing between husband and wife as to their communications is a personal privilege that may be waived.[34] When a party, without objection, testifies to a confidential communication between his wife and himself at an oral deposition prior to trial, he waives his right to invoke the privilege.[35] In *Tibado v. Brees*,[36] the court held that under rule 1.280(b)[37] the defendant did not have to answer any privileged matters. Because he voluntarily answered these same matters at the oral deposition, however, he waived the privilege and at trial could not object to the introduction of portions of the deposition, including the confidential communications.

V. RELEVANCY

A. *Generally*

Relevancy is generally defined as any evidence which tends to shed light on the facts in issue or evidence having any tendency in reason to prove any material fact. In *Wolfe v. State*,[38] the defendant was convicted of manslaughter. The prosecution's main witness testified that the defendant told her he had "beat up Frank."[39] The witness was asked what her relationship was with the deceased. She answered that he was her husband over an objection by the defendant of irrelevancy. The court held that such evidence was relevant because it helped the jury understand the witness's testimony about the defendant's admission by showing that the "Frank" in the statement made to the deceased's wife was the deceased. Therefore, the witness's relationship to the deceased was clearly relevant.

B. *Character of the Accused*

In a criminal case, the prosecution presented testimony which disparaged defendant's character. Defendant had not placed his character

34. Tibado v. Brees, 212 So.2d 61 (Fla. 2d Dist. 1968).

35. *Id.*

36. *Id.*

37. FLA. R. CIV. P. 1.280(b): *Scope of Examination.* "Unless otherwise ordered by the court as provided herein, the deponent may be examined regarding any matter, not *privileged*. . . ." (emphasis added).

38. 202 So.2d 133 (Fla. 4th Dist. 1967).

39. *Id.* at 134. Such statement, although hearsay, was admissible in evidence as an exception to the hearsay rule, an admission against an interest. *See* note 51 *infra* and accompanying text.

in issue; and the testimony adduced did not shed any light on motive, intent, or any relevant issues. The testimony was introduced solely for the purpose of showing the bad character of the accused and was, therefore, irrelevant.[40]

In *State v. Wadsworth*,[41] defendant was convicted of manslaughter as an intoxicated motorist.[42] Over objection, the prosecution introduced into evidence testimony that the defendant bought liquor two or three times per week, and while making these purchases told the store clerk that he had a problem. The court of appeal held that the sole relevancy of the above evidence was as an attack on the bad character of the accused; and it was, therefore, inadmissible.

The Supreme Court of Florida in reversing the above decision reasoned that evidence of the prior intemperate habits of a person is relevant to, and may be given as corroborating evidence on, the question of whether such person was intoxicated at any given time and place, when intoxication at such time and place is a material issue.[43]

C. *Evidence of Other Offenses*

The Supreme Court of Florida has stated that "relevant evidence will not be excluded *merely* because it relates to facts which point to the commission of a separate crime."[44] In *Jenkins v. State*,[45] a fingerprint card of the defendant's was admitted into evidence for a comparison of other fingerprint evidence taken at the scene of the crime. The fingerprint card showed a prior criminal record, and the court held that the fingerprint card was relevant. The fact that the card pointed to the commission of other crimes did not cause it to be excluded.

As long as the introduction into evidence of other related crimes is used to establish a common scheme, plan, motive, or intent, it is generally held admissible as being relevant.[46] The Florida Supreme Court in *Hawkins v. State*[47] affirmed the defendant's conviction of first-degree murder. The trial court admitted evidence of other related crimes. These crimes were robberies committed within eight days, each one resulting in the death of the filling station attendant on duty at the station robbed. Each victim was killed from a shotgun blast administered in approximately

40. Fitzgerald v. State, 203 So.2d 511 (Fla. 2d Dist. 1967). The defendant never objected to the testimony, and the error was not jurisdictional or fundamental error; therefore, testimony not objected to could not be raised on appeal.

41. 210 So.2d 4 (Fla. 1968), *rev'g* 201 So.2d 836 (Fla. 4th Dist. 1967).

42. FLA. STAT. § 860.01 (1967) (statute prohibits driving while intoxicated).

43. State v. Wadsworth, 210 So.2d 4 (Fla. 1968), *rev'g*, 201 So.2d 836 (Fla. 4th Dist. 1967).

44. Williams v. State, 110 So.2d 654, 659 (Fla. 1959).

45. 208 So.2d 276 (Fla. 3d Dist. 1968); *accord*, White v. State, 218 So.2d 484 (Fla. 3d Dist. 1969).

46. *See* Winkfield v. State, 209 So.2d 468 (Fla. 2d Dist. 1968); Blackburn v. State, 208 So.2d 625 (Fla. 3d Dist. 1968).

47. 206 So.2d 5 (Fla. 1968); *accord*, Schack v. State, 201 So.2d 580 (Fla. 4th Dist. 1967).

the same area of the body. The supreme court held such evidence relevant to the pattern, motive, and intent of the defendant.

A similar set of facts was presented in *Avis v. State*.[48] Attendants of service stations previously robbed testified that the defendants were the parties who had previously robbed the stations. The court of appeal held this testimony of prior related crimes (*i.e.*, robbery) admissible "as similar fact [e]vidence tending to show pattern, motive and intent."[49]

VI. HEARSAY

A. *Generally*

In a suit requiring the defendants to move their boundary line, the plaintiffs offered into evidence, over the defendant's objection, a plat showing a proposed subdivision of the lot in question as evidence of where the subdivision should have been. The witness introducing the plat admitted he did not run the lines of the survey and was not present when they were run. Therefore, the plat was not admissible as a business record (an exception to the hearsay rule). The appellate court held that such evidence was hearsay and inadmissible into evidence.[50]

B. *Admission Against Interest*

It is generally recognized that when a party makes an admission against his interest, the out-of-court statement is admissible in evidence as an exception to the hearsay rule.[51]

The Supreme Court of Florida has recognized the distinction between a criminal conviction and that of a criminal conviction based on a *plea of guilty*, the latter being admissible into evidence in a civil suit as an admission against interest.[52]

In the personal injury action of *Chimerakis v. Evans*,[53] the plaintiff sought to introduce into evidence the defendant's *plea of guilty* to a violation of the Metropolitan Dade County Traffic Code. The trial court refused to allow the evidence to be admitted because it was hearsay. The Supreme Court of Florida held such evidence admissible as an admission against interest.

In a declaratory judgment action, the creditor sought to have his judgment lien declared superior to the judgment debtor's claim of homestead exemption. The creditor introduced into evidence a statement made by the judgment debtor at the time of attempted levy upon her property as indicating doubt as to her ownership and, therefore, lack of homestead

48. 221 So.2d 235 (Fla. 1st Dist. 1969).
49. *Id.* at 239.
50. Williams v. Johntry, 214 So.2d 62 (Fla. 1st Dist. 1968).
51. C. MCCORMICK, EVIDENCE § 253 (1954).
52. Boshnack v. World Wide Rent-A-Car, Inc., 195 So.2d 216 (Fla. 1967).
53. 221 So.2d 735 (Fla. 1969).

status. The court held the statement admissible as an admission against interest.[54]

Statements made by an employee while acting within the scope of his authority can be used in an action against the employer.[55] This "admission against interest" exception was illuminated in *Continental Insurance Co. v. Levinson*,[56] an action against an insurer for the sinking of a vessel. The investigating insurance agent, authorized to represent the insurance company regarding the claim, testified for the plaintiff. The agent testified that during the investigatory stage he told the plaintiff that in his opinion coverage for loss would lie under the contract. The Third District Court of Appeal reasoned that while the insurance agent was acting as investigator of the claim he was the employee of the insurer, and his statements regarding coverage under the policy were made within the scope of his employment. The court held that the statements were admissible as admissions against interest by an authorized agent of the insurer acting within the scope of his authority.

Evidence of a defendant's actions in resisting the taking of a chemical test[57] for the presence of powder burns was suppressed at the trial court level. In *State v. Esperti*,[58] the court of appeal, assuming the test to be constitutional, reversed the trial court and held that such evidence was clearly relevant as indicating a consciousness of guilt. Such conduct was considered an admission by the defendant because the chemical test was compulsory.[59]

C. *Business Records*

In Florida, business records, insofar as they are relevant, are competent evidence if the requirements of the statute are fulfilled.[60] In *Smith v. Frisch's Big Boy, Inc.*,[61] the defendants had police officers run a test to determine the speed of plaintiff's car. Officer *A* drove the car, and officer *B* measured the skid marks. Officer *B* put the speed of the test car on the police report relying on what officer *A* told him. Officer *B* testified on trial as to the speed of the test car, and on appeal the court held the testimony was purely hearsay, as it was merely based on what officer *A* had told him. The testimony could not come in as a business record because the report was not made in the regular course of business.[62] The

54. La Gasse v. Aetna Ins. Co., 213 So.2d 454 (Fla. 2d Dist. 1968).

55. Continental Ins. Co. v. Levinson, 224 So.2d 445 (Fla. 3d Dist. 1969).

56. *Id.*

57. The test was administered to see if defendant had recently fired a gun.

58. 220 So.2d 416 (Fla. 2d Dist. 1969), *discussed in* Comment, *Admissibility of Testimonial By-Products of a Physical Test*, 24 MIAMI L. REV. 50 (1969).

59. If the chemical test was not compulsory the evidence should be inadmissible, because consciousness of guilt would not be the logical inference; *see* Annot., 87 A.L.R.2d 370 (1963).

60. FLA. STAT. § 92.36 (1967).

61. 208 So.2d 310 (Fla. 2d Dist. 1968).

62. FLA. STAT. § 92.36 (1967) (to be admissible, the record must have been made in the regular course of business).

court also held that the Uniform Business Records Act[63] applies only to the admissibility of business records themselves, not oral testimony pertaining to the contents of such records.

The second district court in *Holloman v. State*[64] held that the letters of two psychiatrists from the Florida State Hospital introduced as evidence of the defendant's insanity were inadmissible because the psychiatrists were not called as witnesses, and the letters were hearsay. The court further stated that the letters were not part of the hospital records and, therefore, were not admissible as business records.

Under Florida Statutes section 92.36, business records are admissible into evidence if the custodian or other *qualified witness* authenticates the records. In *Mastan Co. v. American Custom Homes, Inc.*,[65] the witness used to introduce the business records (ledger cards) was not the official custodian of the records and did not post the entries into the ledger cards. The court held that the ledger cards were inadmissible because the witness was not a *qualified witness* or custodian of the records and the statutory requirements for authentication were not fulfilled.[66]

D. *Coconspiracy Rule*

The requirements for admission of hearsay testimony under the coconspiracy exception were layed out in *Corba v. United States*[67] as follows:

1) the declaration must be in furtherance of the conspiracy,
2) the declaration must be made during the pendency of the conspiracy,
3) there must be independent proof of the existence of the conspiracy and of the connection of the defendant with the conspiracy.[68]

The coconspiracy rule was asserted in *Farnell v. State*[69] where the defendant, a school superintendent, was charged with embezzlement of school materials. A second party was also charged but never brought to trial. The trial court admitted into evidence instructions and statements made by the second party to school workers regarding the taking of school supplies and furniture for personal gain. The evidence was admissible under the theory that a conspiracy existed, and the second party charged was a coconspirator with the defendant. On appeal, the second district held that before the exception can be invoked there must first be independent evidence of the existence of the conspiracy and of the defendant's involvement in the conspiracy, *i.e.*, the evidence sought to be introduced is *not sufficient* by itself to establish the conspiracy and the defendant's involvement. The court found that the alleged conspiracy

63. *Id.*
64. 213 So.2d 618 (Fla. 2d Dist. 1968).
65. 214 So.2d 103 (Fla. 2d Dist. 1968).
66. FLA. STAT. § 92.36 (1967).
67. 314 F.2d 718 (9th Cir. 1963).
68. *Id.* at 735 n.21.
69. 214 So.2d 753 (Fla. 2d Dist. 1968).

was not established by independent evidence, and the testimony was inadmissible.

VII. Judicial Notice

Courts will generally judicially notice facts of general or common knowledge. This alleviates the necessity of proving the fact in question.[70]

The Florida courts have taken judicial notice of official journals of both the House and Senate of the Florida Legislature;[71] the record of extradition proceedings on file in the Secretary of State's office relating to a habeas corpus proceeding;[72] and a transcript of record filed in a previous direct appeal when reviewing a collateral attack proceeding.[73]

Florida courts will not take judicial notice of municipal ordinances, and they must be pleaded and proved.[74] In *Wilkens v. Tebbetts*,[75] a landlord brought an unlawful detainer action against the tenant. The tenant defended on the ground that the landlord cannot evict a tenant merely because the tenant notified the authorities regarding the landlord's inadequate electric system. The court held that although on appeal the tenant argued that the landlord violated a municipal ordinance and mere notification of this to the authorities was not grounds for eviction, no allegation in the pleading was made regarding the violation. Since the court would not judicially notice the municipal ordinance, the judgment on the pleadings was affirmed.

In the negligence action of *Barry v. Greyhound Lines, Inc.*,[76] the court admitted into evidence tests as to the average speed of cars driven on a particular street. These tests were taken around Christmas time. The court was asked to judicially notice that the traffic around Christmas time is heavier than at other times; and, therefore, the average speed was less than the average speed at other times of the year. The court would not take judicial notice of the above facts; and, since they were not proved up, they were not in the record.

The second district court in *Brown v. Ellingson*[77] would not judicially notice the number of property owners in question. Therefore, the necessary requirements of a proper class action were neither pleaded nor proved, to wit: that the class of plaintiffs is too numerous to all be joined in the suit.

VIII. Accident Reports

Under Florida Statutes section 317.171, no accident report or contents thereof made for the purpose of complying with chapter 317 of

70. *See, e.g.*, Bogan v. State, 211 So.2d 74 (Fla. 2d Dist. 1968).
71. Staplin v. Canal Auth., 208 So.2d 853 (Fla. 1st Dist. 1968).
72. Rion v. Purdy, 212 So.2d 304 (Fla. 3d Dist. 1968).
73. Bogan v. State, 211 So.2d 74 (Fla. 2d Dist. 1968).
74. Wilkens v. Tebbetts, 216 So.2d 477 (Fla. 3d Dist. 1968).
75. *Id.*
76. 216 So.2d 775 (Fla. 2d Dist. 1968).
77. 224 So.2d 391 (Fla. 2d Dist. 1969).

the Florida Statutes[78] can be used as evidence in a civil or criminal trial arising out of the accident. To invoke the statutory exclusion privilege, it must be clearly shown that the evidence sought to be excluded was directly or indirectly utilized in the accident report.[79]

In *Timmons v. State*,[80] the defendant was convicted of manslaughter for operating his vehicle while intoxicated. Officers investigating the accident called another officer to go to the hospital and obtain a blood test from the defendant. The court held that the officer obtaining the blood test was not part of the accident investigation process, and the blood test was not privileged and was admissible.[81]

The court of appeal in *Coffey v. State*[82] determined that although the defendant was informed that the investigatory process of the accident was completed and that the balance of the investigation would become criminal,[83] the blood test taken as part of the criminal investigation (consented to by defendant) and made part of the accident report came within the accident-report privilege. The Supreme Court of Florida reversed, holding that when the investigating officer has completed the accident investigation whereby any information included in the report up to that point would be entitled to the accident-report privilege, he may then "change his hat" and assume the duty of an officer charged with investigating a crime.[84] In the instant case the defendant was apprised of his constitutional rights and told that the blood test could be used against him in the manslaughter case, therefore, such tests were admissible into evidence. As long as it is clear to the defendant that the accident-report phase of the investigation had ended and the criminal investigation had begun, blood tests taken as part of the criminal investigation were admissible.

IX. Dead Man's Statute

A. *Generally*

Under the Dead Man's Statute[85] a *party* or person interested in the suit cannot testify as to any transaction or communication between such person and a deceased party when such testimony is sought to be used in a suit involving the administrator, executor, or other personal representative.

In a suit to quiet title, an executrix of a will was named as a party

78. Chapter 317 pertains to regulation of traffic on the highways.
79. Cannon v. Giddens, 210 So.2d 714 (Fla. 1968).
80. 214 So.2d 11 (Fla. 1st Dist. 1968).
81. *Accord*, Ashmore v. State, 214 So.2d 67 (Fla. 1st Dist. 1968).
82. 205 So.2d 559 (Fla. 1st Dist. 1967), *rev'd and rem'd*, 212 So.2d 632 (Fla. 1968).
83. After investigating the accident the officer was advised that the driver whom defendant hit was dead, and he thereupon advised defendant that the investigation would continue as one for manslaughter.
84. State v. Coffey, 212 So.2d 632 (Fla. 1968), *rev'g*, 205 So.2d 559 (Fla. 1st Dist. 1967)
85. Fla. Stat. § 90.05 (1967).

defendant. A deposition of the executrix was taken, reflecting testimony as to conversations between the executrix and the decedent regarding the establishment of a trust for the lands in question. The court held that the above testimony was inadmissible under the Dead Man's Statute although the executrix had no interest in the outcome of the suit because she was a *party* to the suit.[86]

The Dead Man's Statute applies where inter vivos transfers are sought to be set aside because of undue influence asserted against the decedent by the defendant. The defendant is not permitted to testify as to the conditions concerning the transfer because the statute seeks to prevent the surviving party from having the benefit of his own testimony where the personal representative is deprived of the decedent's version.[87]

What falls within the purview of the Dead Man's Statute was the subject of inquiry in *Pitts v. Pitchford*.[88] The court held that testimony regarding whether there was a seal on a note was not barred by the Dead Man's Statute. The personal representative of the payee brought suit against the maker of a note. If the note were under seal, the suit would not be barred by the statute of limitations. The maker of the note testified that the note was under seal when executed; and the plaintiff, the personal representative of the decedent, objected to such testimony, contending that it fell within the purview of the Dead Man's Statute. The court held that the testimony was not barred by the statute. Testimony concerning the signature of a party to a note is not subject to the statute because it is not a transaction or communication, and testimony as to whether the note was under seal is so closely related to the matter of the signature that it is not barred either.

B. *Waiver*

If the defendant does not object to affidavits for a summary judgment hearing containing statements by the plaintiff regarding communications and transactions with the decedent, he has waived his right to object to such testimony. Failure to object at the hearing removes the protective cloak of the Dead Man's Statute and the defendant's waiver continues throughout the proceeding.[89]

X. Demonstrative Evidence

Demonstrative evidence is generally admissible if it is relevant to the issues, and if it is a reasonably exact replica of the object in issue.[90]

86. Barber v. Adams, 208 So.2d 869 (Fla. 2d Dist. 1968).

87. Howland v. Strahan, 219 So.2d 472 (Fla. 3d Dist. 1969).

88. 201 So.2d 563 (Fla. 4th Dist. 1967).

89. Boling v. Barnes, 216 So.2d 804 (Fla. 2d Dist. 1968).

90. Wade v. State, 204 So.2d 235 (Fla. 2d Dist. 1967).

In *Wade v. State*,[91] the court allowed the introduction of a master brake cylinder as evidence of the murder weapon because the brake cylinder was an exact replica of the one used in committing the crime.

Although there was no testimony identifying the object with which the defendant assaulted the victim, the court allowed a knife with a red substance on it, found on the defendant, to be admitted into evidence. The court stated it was admissible for whatever probative value it might have had.[92]

Photos which are clearly inflammatory and prejudicial are generally inadmissible if they are not demonstrably material, although relevant, to the party's case.[93] In *Albritton v. State*,[94] the State introduced photographs (color and black and white) which were exceedingly gruesome and inflammatory in a second degree murder case. The court held the photos of the sixteen-month-old decedent were admissible because they were not only relevant but *demonstrably material.* The State had to prove that the bruises and burns on the decedent's body were so numerous and so aggravated that they would have resulted from physical mistreatment. The pictures provided visual evidence of the extent and severity of the child's injuries, indicating strongly their cause and source.

XI. Documentary Evidence

Under a Florida statute,[95] disputed writings can be compared with any writing proved to be genuine to the satisfaction of the judge. In *Barron v. State*,[96] the prosecution in a forgery case submitted sample writings of the defendant into evidence to be used as standards of comparison with the alleged forged writings. The defendant objected to the use of the sample writings, contending that the genuineness of the sample writing was not established. The court held that the genuineness of the writing can be established by evidentiary proof and not merely by admission of its genuineness by the parties and admitted the sample writings into evidence.

If the alleged forged writing is merely a copy of the original forged writing, the State must lay a predicate for using the copy rather than the original, otherwise comparisons will not be allowed between the forged copy and the standard (genuine writing).[97]

Under a Florida statute,[98] death certificates are prima facie evidence of the facts recited therein. Courts have held that such prima facie evidence can be overcome by competent evidence to the contrary. Where a

91. *Id.*
92. Studdard v. State, 214 So.2d 767 (Fla. 3d Dist. 1968).
93. Albritton v. State, 221 So.2d 192 (Fla. 2d Dist. 1969).
94. *Id.*
95. Fla. Stat. § 92.38 (1967).
96. 207 So.2d 696 (Fla. 3d Dist. 1968).
97. Wincor v. State, 212 So.2d 42 (Fla. 3d Dist. 1968).
98. Fla. Stat. § 382.20 (1967).

death certifiate recited 9:00 A.M., as the time of death of both of the parties, a doctor's testimony that the wife survived the husband by fifteen minutes was sufficient to overcome the prima facie evidence of the death certificate.[99]

XII. LEGISLATION

The 1967 legislature amended Florida Statutes section 92.05[100] to provide that all final judgments and decrees rendered and entered in *courts of record* of the State of Florida shall be admissible as prima facie evidence of the entry and validity of such judgments and decrees. A court of record means any court other than a small claims court, justice of the peace court, municipal court, or the metropolitan court of Dade County.[101]

99. Rimmer v. Tesla, 201 So.2d 573 (Fla. 1st Dist. 1967).

100. FLA. LAWS 1967, ch. 67-362.

101. Prior to the amendment only judgments or decrees of *circuit courts* of the state were admissible as prima facie evidence of the entry and validity of such judgments and decrees. FLA. STAT. § 92.05 (1965).