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ARTICLES

Hearsay in Illinois: A New Look at Some Old Problems

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I. INTRODUCTION

Despite the fact that the hearsay rule is one of the fundamental and most discussed rules of evidence, recent case law continues to suggest that both lawyers and judges do not sufficiently understand the rule and its exceptions. This view is further borne out by numerous discussions this author has had with judges and lawyers at various continuing legal education seminars. Much of the uncertainty and difficulty with the rule centers around such issues as: the difference between hearsay and non-hearsay use of out of court statements; prior statements of witnesses (including prior identifications) as an exception in criminal cases; and all the various kinds of admissions. Other areas causing confusion include: hearsay statements as a basis for expert opinion under *Wilson v. Clark*;[1] judgments of conviction as evidence; declarations against interest; and the possibility of Illinois recognizing a so-called "catchall" or general trustworthiness exception to the rule.

Although the foregoing do not exhaust the hearsay issues that could be discussed, they, nonetheless, are a representative sample of the issues that typically cause trouble for lawyers and judges trying to apply the hearsay rule and its exceptions. Moreover, two recently crafted statutory exemptions from the rule for prior inconsistent statements[2] and prior identifications,[3] just now reaching the appellate courts, make the time ripe for a look at how such statutes are being interpreted.

The purpose of this article is to set out the basic principles that govern some of the typical, recurring hearsay problems and hopefully provide some guidance for lawyers and judges who must wrestle with these issues on a daily basis.

II. DEFINITION OF HEARSAY

Hearsay is defined as an out of court statement used to prove the truth of the matter asserted. It is excluded because the truth or falsity of an out of court statement depends on the credibility of the declarant who (ordinarily) is neither in court nor subject to cross-examination.[4]

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1. 84 Ill. 2d 186, 417 N.E.2d 1322 (1981).
2. ILL. REV. STAT. ch. 38, para. 115-10.1 (1987).
3. ILL. REV. STAT. ch. 38, para. 115-12 (1987).
4. *See* People v. Lopez, 152 Ill. App. 3d 667, 672, 504 N.E.2d 862, 866 (1987); People v. Rogers, 81 Ill. 2d 571, 577-78, 411 N.E.2d 223, 226 (1980); People v. Carpenter, 28 Ill. 2d 116, 121, 190 N.E.2d 738, 741 (1963).

Although the definition itself has only two elements ("out of court statement" and "used to prove the truth of the matter asserted"), there are at least six underlying principles or components to the concept of hearsay. These are:

1. A Witness	The person in the witness chair, under oath. (There can be many "witnesses" to an incident, but there can be only one WITNESS, one person in the chair at any given time for hearsay purposes.)
2. A Declarant	A person who has made a statement "out of court."
3. The Statement	The words used or acts done by the declarant that assert something.
4. The Matter Asserted by the Statement	What the declarant intended to and did assert by his words or acts.
5. The Purpose for Which the Statement is Offered	What the lawyer's purpose is in having the witness repeat the declarant's out of court statement.
6. The Possibility of Testing the Credibility of the Declarant by Cross	Whether the declarant will testify and be subject to cross-examination as to his sincerity, ambiguity, accuracy of memory, and accuracy of perception.

Thus, when a witness on the stand testifies to an out of court statement made by a declarant and offers the testimony to prove the truth of the matter asserted in the declarant's statement, the witness' testimony is excludable hearsay. For example, if a witness testifies that a bystander told him that "the truck exploded just as it hit the bridge," the witness' repetition of the declarant's statement is hearsay if used to convince the trier of fact that the accident happened just as the declarant said it did. The party opposing the testimony has no way of testing the sincerity of the declarant, his ability to correctly perceive or remember the incident, or even what he meant by saying the truck exploded when it "hit the bridge." Thus, when hearsay is allowed, the opponent has no opportunity to test the declarant's memory, perception, sincerity, or meaning.

Although the foregoing principles are well established rules of black letter law, occasionally hearsay will slip by a trial court. For example, in *People v. Lopez*,[5] an officer investigating a shooting death was allowed to testify that when he opened up the back door of the squadrol transporting the defendant, a woman looked in and screamed "that's him, that's him there" and that other people then came running out of a tavern and started screaming "that's him."[6] The unnamed woman's statement did not qualify as a spontaneous utterance because the shooting incident had occurred at the tavern one and one-half hours before the squadrol arrived.[7] The only possible use such statement could have had was to prove the truth of the matter asserted: "That man was the Shooter." The statement was therefore hearsay.

Although hearsay can be considered harmless error when it is not used as either a substitute for an in court identification[8] or "used to strengthen or corroborate a weak identification,"[9] the *Lopez* court was "not convinced that the jury would have found [the] identification of defendant to be as strong . . . in the absence of the State's introduction and repeated exploitation of the squadrol identifications."[10] The defendant's conviction was therefore reversed.

In *Lopez*, some of the hearsay was not initially objected to. However, the court stated that "[b]ecause of the cumulative impact of the unobjected-to and objected-to instances concerning this testimony, . . . justice dictates we ignore waiver of this issue."[11] Ordinarily, unobjected-to hearsay can be used to prove the truth of the matter asserted.[12]

III. NON-HEARSAY

A. DEFINITION

It is important to remember that not all out of court statements are hearsay. Out of court statements not used to prove the truth of

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5. 152 Ill. App. 3d 667, 504 N.E.2d 862 (1987).

6. People v. Lopez, 152 Ill. App. 3d 667, 673, 504 N.E.2d 862, 866 (1987).

7. *Id.* at 675, 504 N.E.2d at 867.

8. *See id.* at 676, 504 N.E.2d at 868 (citing People v. Anthony, 90 Ill. App. 3d 859, 418 N.E.2d 757 (1980)).

9. *Id.*

10. *Id.* at 676-77, 504 N.E.2d at 868-69.

11. *Id.* at 676, 504 N.E.2d at 868.

12. *See* People v. Merideth, 152 Ill. App. 3d 304, 314, 503 N.E.2d 1132, 1141 (1987).

the matter asserted therein are not excludable as hearsay. They will be thus admissible if relevant and otherwise competent.

In *People v. Britz*,[13] for example, the court held that tapes of defendant's conversations with a youth counselor, even though they contained some self-serving denials of involvement by the defendant, should have been admitted to show the possible seductive effect the counselor's urgings may have had in connection with the defendant's later confession.[14] Because the defendant was attracted to the counselor, the court concluded that "he, in a twisted way, might have thought Penman [the counselor] would be impressed by the confessions."[15] Hearsay, therefore, was not involved, "as the stimulating language of Penman is admissible not for its truth, but for its effect on the [defendant]."[16] The tapes were being used as circumstantial evidence of the defendant's state of mind, not for the truth of the matter asserted, and it was reversible error to exclude them.[17]

Similarly, in *People v. Gaurige*,[18] a voluntary manslaughter case, it was held that the trial court should have allowed defendant to introduce the properly authenticated 911 tape of his own phone call to the 911 operator after he had hit the victim with a liquor bottle.[19] The tape was an out of court statement; however, the defendant did not seek to use it to prove the truth of the matter asserted. Rather, he intended to show "that he was frantic, fearful, and agitated at the time he called 911 and that he subjectively believed that he was in imminent danger of death or serious bodily harm."[20] Although the tape was not hearsay, the court held that excluding it was not reversible error.[21]

B. OTHER EXAMPLES OF STATEMENTS NOT USED TO PROVE THE TRUTH OF THE MATTER ASSERTED

Common examples of out of court statements used to prove something other than "the truth of the matter asserted" are the

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13. 112 Ill. 2d 314, 493 N.E.2d 575 (1986).
14. People v. Britz, 112 Ill. 2d 314, 319-20, 493 N.E.2d 575, 577 (1986).
15. *Id.* at 320, 493 N.E.2d at 577.
16. *Id.* at 320, 493 N.E.2d at 578.
17. *Id.* at 320-21, 493 N.E.2d at 578.
18. 168 Ill. App. 3d 855, 522 N.E.2d 1306 (1988).
19. People v. Gaurige, 168 Ill. App. 3d 855, 862-64, 522 N.E.2d 1306, 1310-11 (1988).
20. *Id.* at 864, 522 N.E.2d at 1311.
21. *Id.*

following: statements to show notice or warning,[22] for example, "lady look out for the ketchup on the floor!"; to show threats or duress,[23] for example, "the gang members told me I had to carry this gun or they would shoot me!"; and statements introduced to prove an oral contract or its terms.[24]

The foregoing are generally considered not to be hearsay because they have a legal significance that is independent of the truth of the declaration or the sincerity of the declarant. The "independent significance" is often the effect such statements have on the person hearing them; for example, they amount to duress, notice, or warning. Even if the declarant did not intend to warn, or give notice, or threaten, if he used words that achieved that effect, those words can be introduced into evidence. The mere making of these kinds of statements, when relevant, has legal consequences for the resolution of the case. Such out of court statements are therefore not excludable as hearsay.

In *Lundberg v. Church Farm, Inc.*,[25] for example, statements made by the corporate defendant's farm manager concerning the terms of a horse breeding contract were properly admitted to show the contract terms contemplated at the time the contract was signed. The statements were admitted simply to show that they were made. Whether the farm manager was authorized by the corporate defendant to make such statements and whether such statements would therefore be weighed as admissions were held to be matters for the jury to decide.[26] A judgment for plaintiff for breach of the breeding contract was affirmed.

People v. Wilson,[27] is also an example of an out of court statement used to show something other than the truth of the matter asserted. In this murder and armed robbery case, a police officer testified that, after a conversation with a person who was defendant's accomplice, he proceeded to gather information on defendant. The officer did not testify as to the contents of the conversation or reveal

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22. *See* Safeway Stores, Inc. v. Combs, 273 F.2d 295 (5th Cir. 1960) ("Please don't step in that ketchup" was a statement as to the fact of warning—a prime element in the defense—and therefore not covered by the hearsay rule).

23. *See* Subramaniam v. Public Prosecutor, Judicial Committee of the Privy Council, 100 SOLICITOR'S J. 566 (1956), *reprinted in* J. KAPLAN & J. WALTZ, CASES AND MATERIALS ON EVIDENCE 91 (6th ed. 1987) (statements made to defendant amounted to duress and were not hearsay).

24. *See* Lundberg v. Church Farm, Inc., 151 Ill. App. 3d 452, 502 N.E.2d 806 (1986); *see also infra* text accompanying notes 25-26.

25. 151 Ill. App. 3d 452, 502 N.E.2d 806 (1986).

26. *Lundberg*, 151 Ill. App. 3d at 459, 502 N.E.2d at 811.

27. 168 Ill. App. 3d 847, 523 N.E.2d 43 (1988).

that the accomplice had been convicted of a crime. The court affirmed the admission of the testimony stating, "[w]here such testimony is confined strictly to the officer's physical activities, the bare occurrence of the conversation and the testimony is subject to cross-examination, this evidence is not within the legal definition of hearsay."[28]

C. VERBAL ACTS

Where an act requires spoken words to complete it, and the act is done and the words are said at the same time, the words are considered part of a "verbal act" and are not hearsay. Examples include the statement by a donor, when giving a birthday gift, "this is for your birthday" and a statement by a tenant when giving money to his landlord, "this is for the rent."[29] To qualify as a verbal act, the words must be said at the time the act is done. For example, a customer's statement to a bank officer that "the money I sent in yesterday was for the loan" would be hearsay if used to show a payment on the loan had been made. Verbal acts are generally singled out as examples of "non-hearsay," but they are also just another example of words having "independent legal significance."

D. STATEMENTS ADMISSIBLE FOR ONE PURPOSE; INADMISSIBLE FOR ANOTHER

When a statement can have a hearsay use and a non-hearsay use (an impermissible and a permissible use), the general rule is that such evidence is admissible for its permitted (non-hearsay) use as long as its probative value on the permitted purpose is not outweighed by the prejudicial effect it may have if the jury uses it as hearsay to prove the truth of the matter asserted.

In *People v. Monroe*,[30] a drug sale case against defendant Monroe, an Illinois Bureau of Investigation agent testified that he had made prior purchases from a non-defendant, Ghigi, who was involved in the sale by defendant. On appeal, the supreme court held that the relevance of prior purchases by Ghigi, as background information to show why the IBI officer approached Ghigi, was sufficient to allow evidence of those purchases to be admissible even though it might have some prejudicial spill-over effect on defendant. The probative force of Ghigi's drug selling as background information was not

28. People v. Wilson, 168 Ill. App. 3d 847, 850, 523 N.E.2d 43, 45 (1988).
29. *See generally* Hanson v. Johnson, 161 Minn. 229, 201 N.W. 322 (1924).
30. 66 Ill. 2d 317, 362 N.E.2d 295 (1977).

outweighed by the danger that the jury would use it to conclude that the defendant associated with drug pushers.[31]

This so called "narrow purpose/broad purpose" rule (evidence admissible for a narrow purpose/inadmissible for a broader purpose) was used in *People v. Escobar*[32] to exclude a statement because the danger of its hearsay use was great and the probative value of its background for the arrest was small to non-existent. In this murder case, a witness' testimony that he gave a shell casing to police because he had been told it came from defendant's car was inadmissible to show the casing came from defendant's car. To the State's argument that it was using the statement only to show why the witness brought the shell to the police, the court responded that "the danger [of] the jury misus[ing] the evidence [was] so much greater than [its] value [in] detailing why the witness went to the police that the evidence should have been excluded."[33] The conviction was therefore reversed.

E. OUT OF COURT ACTS AS HEARSAY, ASSERTIVE VS. NON-ASSERTIVE CONDUCT

Hearsay statements generally involve words and verbal expressions. However, out of court acts can also be hearsay if they are "intended" by the actor/declarant to be assertions on an issue in the case and are used to prove the truth of such assertions.[34]

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31. *See* People v. Monroe, 66 Ill. 2d 317, 323, 362 N.E.2d 295, 297 (1977). Defendant Monroe's conviction was ultimately reversed because of improper admission of hearsay and other errors.

32. 77 Ill. App. 3d 169, 395 N.E.2d 1028 (1979).

33. People v. Escobar, 77 Ill. App. 3d 169, 177, 395 N.E.2d 1028, 1034 (1979).

34. "The definition of hearsay itself is deceptively simple and is generally accepted to be testimony of an out-of-court statement offered to establish the truth of the matter asserted therein, and resting for its value upon the credibility of the out-of-court asserter." People v. Rogers, 81 Ill. 2d 571, 577, 411 N.E.2d 223, 226 (1980). Federal rule 801(a) defines hearsay similarly as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." FED. R. EVID. 801(a).

The federal rule explicitly states that non-verbal conduct can be an assertion only if the actor/declarant intends it to be an assertion. Illinois law does not explicitly state that conduct is assertive only if the actor/declarant intends it be assertive, but it is likely an Illinois court would hold that way and follow the federal rule under most circumstances. A case where Illinois might not strictly follow the federal rule is the following scenario suggested at a recent Illinois Judicial Conference by Professor Jamie Carey of Loyola University School of Law.

A man and his wife are attacked in their home by an intruder. The intruder flees. The man, bleeding profusely, gets in his car with his wife and starts to drive to the hospital. A few hundred yards from their driveway a man appears in the car's

Courts have recognized that "assertive conduct, as well as verbal statements, may be inadmissible hearsay."[35] In *People v. Higgs*,[36] the court held that testimony that the defendant was attacked by bystanders when the police arrived was being used to show that the bystanders "said" out of court that the defendant killed the deceased. Defendant's conviction was therefore reversed because the out of court actors were held to be asserting by their acts that the defendant was the killer and the State was asking the jury to accept those assertions as true.[37]

When out of court acts are not intended by the actor to be an assertion of an issue in the case, such out of court acts are said to be

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headlights. As the car pulls near the runner, it suddenly swerves and hits the runner squarely, knocking him off the road. The driver never says anything and subsequently dies from his injuries. The runner is charged with the home invasion. The State wants to call the wife to testify to the driver's conduct. The State's argument is that the driver never intended to "assert" anything, but just probably intended to hurt the runner. That act, the State argues, is something from which the jury may "infer" the driver's probable but unexpressed belief. (This is the intruder.) In other words, even though the driver was not sending a message, the jury could "infer" one anyway. There would be no danger of "lying" because the driver was not trying to "assert anything." Because there was no "conduct" intended to be an assertion, under the federal rule, there would be no hearsay.

An Illinois court, although it might acknowledge that there was no act "intended" to be an assertion (and thus no assertion or danger of insincerity), might, nonetheless, conclude that the act is not admissible because the danger of ambiguity is too great. Further, there is also the danger that the jury might treat it as an assertion, as hearsay, for the truth of the matter asserted. Therefore, even if an act was not intended to be an assertion, an Illinois court might still exclude the act from evidence if ambiguity creates too great a risk that the jury would consider the act for hearsay purposes.

One might argue that the act, even if hearsay, should be admitted as an excited utterance or dying declaration, but this would require a ruling that there is enough evidence to conclude that the declarant intended to hit the runner as opposed to the declarant having a seizure or falling on the steering wheel as he lost consciousness. As to how much evidence is needed to find a statement or act admissible as an exception to the hearsay rule, see Redmon v. Austin, 188 Ill. App. 3d 220, 543 N.E.2d 1351 (1989) (rescue worker's testimony that someone "he believed to be" an occupant of car involved in collision told him the driver had lost control of the car was not admissible either as an admission or an excited utterance when rescue worker admitted on cross-examination that he did not know then and could not tell now who made the declaration (occupant or non-occupant) and there was not enough evidence that the declarant (whoever it was) had witnessed the facts he asserted.).

35. People v. Higgs, 11 Ill. App. 3d 1032, 1037, 298 N.E.2d 283, 288 (1973) (citing People v. Reeves, 360 Ill. 55, 195 N.E. 443 (1935) and People v. Hazen, 104 Ill. App. 2d 398, 244 N.E.2d 424 (1969)).

36. 11 Ill. App. 3d 1032, 298 N.E.2d 283 (1973).

37. *Id.* at 1037, 298 N.E.2d at 288.

"non-assertive" conduct and are not excludable as hearsay. Such acts are thus used to show the probable, but unexpressed, belief of the actor. Examples of conduct used to show such implied belief include "silence,"[38] under certain circumstances, as well as calls by unknown declarants to a phone number the State charges is used for gambling.[39]

The key to whether an out of court act is assertive is whether the court believes the actor was intending to assert or express something on an issue in the case.[40] If the actor had no such intention, there is no assertion, no out of court "statement," and the conduct is not hearsay. Moreover, because no "assertion" was intended, there can be no "truth of the matter asserted." Such conduct may then, if relevant, be ordinary, ambiguous, circumstantial evidence to show what he probably believed.[41]

The difference between assertive and non-assertive conduct is that, if the actor does not intend to assert anything on an issue in the case, his conduct does not have the danger of insincerity that a bald, out of court, direct assertion would have. His conduct is merely analogous to, not the same as, an out of court assertion. However, though this "non-assertive conduct" thus avoids the risk of insincerity, it still carries with it the risk of ambiguity because the "probable" belief of the actor may not be his actual belief.

Examples of assertive conduct include any pointing out or signalling by the declarant that is intended to be assertive (intended to be a message) on an issue in the case. For example, a police officer testifies that when he asked who the owner of the gun was, a bystander pointed to the defendant. Or the officer testifies that when he asked "Where is Smith?", a bystander pointed to defendant. The conduct here is used to prove what the actor intended to say without using words.

Non-assertive conduct generally involves acts of a declarant which circumstantially show the actor's probable but unexpressed belief as to a state of affairs. The issue in such cases will usually be the relevance of the actor's probable unexpressed belief (that was acted upon) to the issues in the case.

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38. *See infra* notes 45-50 and accompanying text.

39. *See infra* notes 51-52 and accompanying text.

40. When confronted with an out of court act that may not have been intended to be an assertion, the trial court must decide the declarant's intent on the basis of circumstantial evidence. If it is determined that the declarant intended by his act to make an assertion on an issue in the case, the statement is excludable as hearsay just as if the declarant had made an explicit out of court statement.

41. *See generally* FED. R. EVID. 801(a)(2); Advisory Committee's Note, 56 F.R.D. 183, 293 (1973).

The classic, apocryphal example of non-assertive conduct involves a witness who testifies that he saw a ship captain inspect a vessel from stem to stern before setting sail on it with his family.[42] The conduct of the captain, if used to show his probable but unexpressed belief that the vessel was seaworthy, is non-assertive conduct. Its relevance is not as a direct assertion (the vessel is seaworthy) but as circumstantial evidence that he probably believed the vessel was seaworthy because he put his family on it and sailed away.

Although such non-assertive conduct is admitted because it does not have the danger of insincerity, there are other dangers. For example, with regard to the ship captain, suppose the trial court is wrong in "guessing" what his unexpressed belief was. Suppose his actual, unexpressed belief was, "This ship is leaky and in terrible shape, but I'll risk it." Such dangers, however, have not been sufficient to exclude non-assertive conduct if it is relevant. The usual response is that non-assertive conduct is being used as circumstantial evidence and that all circumstantial evidence is ambiguous in the sense that it is always consistent with more than one theory.[43]

Other examples of non-assertive conduct would be: testimony by a witness that he saw a man walking down a wet street with an opened umbrella over his head, introduced to show it was probably raining (conduct of the declarant to show his probable, unexpressed belief); and testimony by a nurse that a patient was being treated in the AIDS ward of the hospital, introduced to show the patient probably had AIDS (conduct of the hospital to show its probable, unexpressed belief). In both of these examples, the conduct is being used as circumstantial evidence, and, in both, the actual belief could be different from the "probable" belief. For example, in the first case, the man with the umbrella could have been trying out his new umbrella, and, in the second, the hospital could have put the patient in the AIDS ward because he was also being treated with an experi-

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42. This example is discussed in the case of Wright v. Tatham, 112 Eng. Rep. 488, 516 (Exch. Ch. 1837). *See also* C. MCCORMICK, MCCORMICK ON EVIDENCE 737-38 (3d ed. 1984).

43. *See, e.g.*, People v. Rhodes, 85 Ill. 2d 241, 422 N.E.2d 605 (1981) (The presence of the defendant's "fresh" fingerprint at victim's residence is enough circumstantial evidence of burglary to allow a jury to find the defendant guilty beyond a reasonable doubt. The presence of the defendant's fingerprint is consistent with the theory that he was the burglar and is also consistent with the theory that he came on the scene after the burglary occurred. Cases based on circumstantial evidence go to a jury because the evidence is consistent with either guilt or innocence, and the jury must decide if it is persuaded beyond a reasonable doubt that the prosecution's theory is true.).

mental new drug. These difficulties, however, are difficulties with "ambiguity," not sincerity, and have not been considered sufficient to exclude the non-assertive conduct or other circumstantial evidence.[44]

1. *Silence as Non-Assertive Conduct*

Silence on the part of an actor/declarant can, at times, be found to be "non-assertive conduct" that is admissible as circumstantial evidence of what the declarant probably believed. Such conduct is thus used to show the probable but unexpressed belief of the actor/declarant.

In *Silver v. New York Central Railroad*,[45] a plaintiff brought suit against a railroad for failing to keep adequate heat in a railway passenger car. The appellate court ruled that a railway porter was improperly prohibited from testifying at trial that eleven other passengers made no complaint to him as to the temperature in the car. The court held that the silence of the passengers should have been admissible as non-assertive conduct to show their probable but unexpressed belief that the temperature was proper.[46] However, had the porter testified that he asked if anyone in the car was cold and got no response, then the silence of the declarants would likely have been assertive and inadmissible.[47]

In *Blackwell v. City Nat'l Bank & Trust Co.*,[48] a slip and fall case, the Illinois appellate court held there was no error in allowing the defendant bank's maintenance contractor to answer a question as to whether any of the bank's customers had ever complained to him about falling on a floor where a particular type of wax was used.[49] The court, while questioning the relevance of the matter, concluded the statement presented no hearsay problem.[50] The declarants were the people who said nothing, and their out of court statement was

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44. For an example of when ambiguity will prevent an act from being considered admissible as non-assertive conduct see *supra* note 34.

45. 329 Mass. 14, 105 N.E.2d 923 (1952).

46. Silver v. N.Y. Cent. R.R., 329 Mass. 14, 21, 105 N.E.2d 923, 926-27 (1952).

47. *Id.* ("This would not seem to be a situation where one might prefer to remain silent rather than to make any statement. Indeed if the car was too cold, ordinary prudence might seem to require that one speak out. . . . [t]he uniform result of silence in the cases of a large number of passengers . . . would not be inconclusive." *Id.* at 21, 105 N.E.2d at 927.

48. 80 Ill. App. 3d 188, 399 N.E.2d 326 (1980).

49. *See* Blackwell v. City Nat'l Bank and Trust Co., 80 Ill. App. 3d 188, 193, 399 N.E.2d 326, 330 (1980).

50. *See id.*

their silence. Because they likely did not intend to assert anything by their silence, that silence was non-assertive conduct and non-hearsay. The silence was, at most, circumstantial evidence on the issue of the dangerousness, or lack thereof.

2. *"Bookie Joint" Exception: Phoned in Bets as Non-Assertive Conduct*

Another instance in which an actor's conduct has been used to show his probable, unexpressed belief is in the so-called "bookie joint" cases when the prosecution wants to use phone calls from unidentified declarants to a phone number as evidence that the location is being used as a gambling house. In *People v. Roti*,[51] for example, a police officer was properly allowed to testify to the out of court conduct of unknown callers (placing bets) to show their probable, but not explicitly expressed, belief that they were dealing with a betting parlor. The court found no hearsay in the callers' statements (possibly, "Place two dollars on Blue Note in the Fifth") and stated that a contrary conclusion would be warranted only if the callers' statements had contained explicit assertions that the address was being used as a betting parlor[52] (perhaps, "This is the best bookie joint we have ever had in the neighborhood, keep up the good work."). Thus, the conduct of the callers, as evidence of their probable unexpressed belief, was used as circumstantial evidence that defendant's premises were being used as a betting parlor.

IV. Prior Statements of Witnesses as Hearsay

Prior out of court statements of a witness have generally been considered hearsay and inadmissible to prove the truth of the matter asserted therein.[53] This has been so even though the "witness" and the declarant were the same person and the witness was in court and subject to cross-examination about the statements made out of court.[54]

Prior statements of witnesses are of two types: those that are consistent with what the witness is testifying to in court and those that are inconsistent with what the witness has just said in court. Prior consistent statements can be used only in limited circumstances to bolster in court testimony. Prior inconsistent statements are not hearsay when used to impeach because they are not being used for

51. 2 Ill. App. 3d 264, 276 N.E.2d 480 (1971).
52. *See* People v. Roti, 2 Ill. App. 3d 264, 270, 276 N.E.2d 480, 484 (1971).
53. *See* People v. Collins, 49 Ill. 2d 179, 274 N.E.2d 77 (1971).
54. *See id.* at 183, 274 N.E.2d at 85.

their truth but only to show that, on another occasion, the witness said something different from what he is saying in court. Prior inconsistent statements may be used for substantive purposes in Illinois only in criminal cases in situations specified by statute.[55]

A. PRIOR CONSISTENT STATEMENTS

When prior statements are consistent, litigants sometimes seek to use them to bolster the in court testimony, the notion being that the fact that a witness has said the same thing many times before trial will make the trial testimony more believable. The law, however, excludes such prior consistent statements as hearsay because the jury is being asked to accept them as true.

1. *Admissible to Rebut a Charge of Recent Fabrication*

There are, however, two exceptions to the rule that prior consistent statements are inadmissible hearsay. Under the first exception, prior consistent statements are admissible if they are used to rebut the charge of a witness' recent fabrication. In other words, if the opponent, through cross-examination or otherwise, charges that the witness is lying and has just made up the story testified to, the proponent may show that, prior to trial, his witness has made statements that are consistent with what he is testifying to at trial. The prior statements, however, must have been made before the witness has had any motive to lie.[56]

"[A] prior consistent statement offered to rebut a charge of recent fabrication is admissible only if the declarant told the same story before the motive came into existence or before the time of the alleged fabrication."[57] For example, in *People v. Silvestro*,[58] a State's accomplice witness was questioned on cross-examination about dis-

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55. ILL. REV. STAT. ch. 38, para. 115-10.1 (1985) (prior inconsistent statements). For a discussion of para. 115-10.1, see *infra* notes 67-101 and accompanying text. *See also* ch. 38, 115-12 (prior identifications). For a discussion of para. 115-12, see *infra* notes 144-157 and accompanying text.

56. *See* People v. Andino, 99 Ill. App. 3d 952, 425 N.E.2d 1333 (1981) (where the motive to lie—to get a lighter sentence by framing other inmates—was the same on the day of the attack as it was at trial; the witness' post-attack consistent statements could not be used by the State to rebut the charge of recent fabrication; conviction reversed and remanded because of improper bolstering of the complainant's testimony with prior consistent statements).

57. *Id.* at 955, 425 N.E.2d at 1336 (citing People v. Clark, 52 Ill. 2d 374, 288 N.E.2d 363 (1972)).

58. 148 Ill. App. 3d 980, 500 N.E.2d 456 (1986).

crepancies between statements made prior to trial and his testimony at trial, and the defense raised the issue of what promises were made to the witness to testify. The prior consistent statements of the witness were held properly used by the State on rebuttal.[59] Presumably the prior consistent statements of the witness were made prior to his arrest or charge, at a time when he would have had no motive to falsify his testimony in exchange for a better deal.

2. *Consistent Prior Identifications Admissible*

The second exception to the rule excluding prior consistent statements as hearsay involves statements that are "prior identifications." As stated by the Illinois Supreme Court in *People v. Shum*,[60] "the general rule that witnesses may not testify as to statements made out of court to corroborate their testimony given at trial does not apply to statements of identification."[61]

A recent statute also allows the substantive use of prior identifications in criminal cases. It provides that a statement "is not rendered inadmissible by the hearsay rule if (a) the declarant testifies at the trial or hearing, and (b) the declarant is subject to cross-examination concerning the statement, and (c) the statement is one of identification of a person made after perceiving him.[62]

It should be noted that a prior identification is more than a mere "prior accusation." For example, "Lucky is the one who shot me" is a mere accusation, not a identification under the statute. An identification "made after perceiving him" means an identification at the time of a *subsequent* sighting of the person, after the initial sighting at the incident. This "second" sighting, or picking out, or pointing out, can be from photographs, or "identi-kit" type drawings, or can be made in person.[63]

Thus, although prior consistent statements can be used to bolster in court testimony only in limited situations, prior (consistent) identifications can generally be used to bolster in court identifications.

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59. *See* People v. Silvestro, 148 Ill. App. 3d 980, 986, 500 N.E.2d 456, 461 (1986).

60. 117 Ill. 2d 317, 512 N.E.2d 1183 (1987) (no error in allowing in court identification to be bolstered by prior identifications; conviction and death sentence for murder of victim and unborn child affirmed).

61. People v. Shum, 117 Ill. 2d 317, 342, 512 N.E.2d 1183, 1191 (1987) (citing People v. Rogers, 81 Ill. 2d 571, 578-79, 411 N.E.2d 223, 227 (1980)).

62. ILL. REV. STAT. ch. 38, para. 115-12 (1985) ("Substantive admissibility of prior identification").

63. *See* People v. Rogers, 81 Ill. 2d 571, 411 N.E.2d 223 (1980).

Although, in theory, prior identifications made at or near the time of the incident are said to be reliable because of their closeness in time to the incident, they need not be made close in time to be admissible. In *People v. Arteman*,[64] for example, a prior identification made out of court on the day of trial was held properly admitted as substantive evidence to bolster an in court identification. Although it has been said that the basis for allowing prior identifications in evidence is that an earlier identification is more likely to be accurate than a later one, the *Arteman* court held that, because there is nothing in *People v. Rogers*, section 115-12, or federal rule 801(d)(1)(C) that requires a "substantial interval between the prior identification and the in court identification, . . . none is required."[65] Also, in *People v. Robinson*,[66] a prior identification made in court (as opposed to a typical out of court identification) was held admissible as substantive evidence. The court wrote:

> We think the identification testimony exception to the hearsay rule contained in section 115-12 properly embraces not only prior statements of identification made at a lineup, showup or photo session, but also those made under oath at a hearing, former trial or in the secrecy of a grand jury room.[67]

B. PRIOR INCONSISTENT STATEMENTS

Prior inconsistent statements have traditionally been considered hearsay and inadmissible for substantive purposes; they could not be used to make a prima facie case. They have always, however, been admissible to impeach—to tear down the other side's witnesses and thus its case.[68]

Under a 1984 statute, however, prior inconsistent statements of witnesses can be used for substantive purposes in criminal cases if

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64. 150 Ill. App. 3d 750, 502 N.E.2d 85 (1986).

65. People v. Arteman, 150 Ill. App. 3d 750, 754, 502 N.E.2d 85, 88 (1986). In People v. Rogers, 81 Ill. 2d 591, 411 N.E.2d 223 (1980), the Illinois Supreme Court held that, if a witness makes an in court identification, evidence that the witness also made an out of court identification of the same person is admissible to corroborate the in court identification.

66. 163 Ill. App. 3d 991, 516 N.E.2d 1322 (1988).

67. People v. Robinson, 163 Ill. App. 3d 991, 995, 516 N.E.2d 1322, 1325 (1988).

68. *See* People v. Collins, 49 Ill. 2d 179, 274 N.E.2d 77 (1971) (where State's principal witness disavowed earlier out of court statements linking defendants to the murder, it was reversible error for the court to allow the jury to consider the extensive signed prior inconsistent statements of witness as substantive evidence).

they meet certain specified criteria. According to section 115-10.1 of chapter 38, Illinois Revised Statutes, a prior inconsistent statement of a witness cannot be excluded as hearsay if:

> (a) the statement is inconsistent with [the witness'] testimony at the hearing or trial, and
> (b) the witness is subject to cross-examination concerning the statement, and
> (c) the statement—
> (1) was made under oath at a trial, hearing, or other proceeding, or
> (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and
> (A) the statement is proved to have been written or signed by the witness, or
> (B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding, or
> (C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.[69]

Thus, the principal requirements for substantive use of a prior inconsistent statement in a criminal trial are that the witness be subject to cross-examination at trial concerning the statement and that the statement be either: 1) a statement "made under oath at a trial, hearing, or other proceeding"[70] (for example, grand jury or preliminary hearing testimony), or 2) a statement based on personal knowledge that describes a relevant event or condition and that has either been (a) written or signed by the witness, (b) acknowledged under oath by the witness at the trial or an earlier proceeding, or (c) proved to have been accurately recorded electronically.[71]

An example of the substantive use of prior inconsistent statements can be seen in *People v. O'Neal*.[72] In this unlawful possession of narcotics case, the State's witness "turned around" on the State and denied making statements to the defendant offering to cut the defendant in on the deal and denied seeing the defendant roll a marijuana

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69. ILL. REV. STAT. ch. 38, para. 115-10.1 (1987).
70. ILL. REV. STAT. ch. 38, para. 115-10.1(c)(1) (1987).
71. ILL. REV. STAT. ch. 38, para. 115-10.1(c)(2) (1987).
72. 139 Ill. App. 3d 791, 488 N.E.2d 277 (1985), *aff'd on other grounds*, 148 Ill. App. 3d 87, 499 N.E.2d 83 (1986).

cigarette. He did, however, admit under oath that he had made untrue statements to that effect to the police officers prior to trial. His prior statements were therefore admissible as substantive evidence to prove that the things he described in his prior statements did happen.[73]

Moreover, in *People v. Wilson*,[74] the defendant's conviction for attempted murder was reversed for ineffective assistance of counsel when counsel's lack of awareness of the Statute allowing substantive use of prior inconsistent statements precluded the jury from considering certain preliminary hearing testimony as substantive evidence.[75]

Another example of the substantive use of prior inconsistent statements with a reluctant witness is found in *People v. Hastings*.[76] There a witness at trial denied being an eyewitness; however, he had given three prior out of court statements to detectives indicating he had been an eyewitness, giving some details of the occurrence in each account. The trial court allowed the State to use one of the statements substantively because the witness acknowledged under oath making it, the events described were based on personal knowledge, the statement was inconsistent, and the witness was subject to cross-examination. However, the State could only use the other two prior statements to impeach its own witness because the witness had not admitted making them under oath and they were not signed by the witness or electronically recorded.

The appellate court, in affirming, commented on several of the requirements of the Statute. As for inconsistency, the court stated, "The definition of inconsistency does not require a direct contradiction, but only a tendency to contradict the witness' present testimony."[77] The witness' statement at trial that he had not been an eyewitness was clearly inconsistent with his prior statement that he had seen the events in question. As for personal knowledge, the court noted, "To be within the personal knowledge of a witness, the witness must have observed, and not merely heard, the subject matter underlying the statement."[78] Because the witness' statements concerned his

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73. *See* People v. O'Neal, 139 Ill. App. 3d 791, 794-95, 488 N.E.2d 277, 279 (1985), *aff'd on other grounds*, 148 Ill. App. 3d 87, 499 N.E.2d 83 (1986).

74. 149 Ill. App. 3d 1075, 501 N.E.2d 863 (1986), *appeal denied*, 114 Ill. 2d 556, 508 N.E.2d 735 (1987).

75. *See* People v. Wilson, 149 Ill. App. 3d 1075, 1078-79, 501 N.E.2d 863, 865 (1986), *appeal denied*, 114 Ill. 2d 556, 508 N.E.2d 735 (1987).

76. 161 Ill. App. 3d 714, 720, 515 N.E.2d 260, 264 (1987), *appeal denied*, 118 Ill. 2d 547, 520 N.E.2d 389 (1988).

77. *Id.* at 719, 515 N.E.2d at 264.

78. *Id.* at 720, 515 N.E.2d at 264.

observations of events at the time of the occurrence, there was no problem with satisfying this requirement.

1. *Can an Inconsistent Statement About an Admission be Used as Substantive Evidence?*

The court's observation in *People v. Hastings*[79] that, to be used substantively, a witness' out of court statement must be based on first hand knowledge, not something he "merely heard," seems to clearly and concisely restate the personal knowledge requirement of the Statute. However, it does not answer the question of what is to happen when what the witness observes is a damaging out of court statement by a party—which statement itself is admissible as an admission. The "event" in such a case is something the witness "merely heard," but what is heard would independently be admissible under the admission exception to the hearsay rule.

This question arose in *People v. Coleman*[80] where the court held that two witnesses' prior inconsistent statements about a defendant's admission could not be used substantively because the Statute requires that the witnesses have personal knowledge of the underlying event that the defendant admitted to, not just the admission. The witnesses had said prior to trial that they were present when the defendant made incriminating statements about the murder and robbery at issue. At trial the witnesses acknowledged the written statements as their own, but would not confirm their accuracy. In concluding that the trial court had erroneously allowed such inconsistent statements to be used substantively, the *Coleman* court rejected the State's argument that the "admission" was itself "an event or condition of which the witness had personal knowledge."[81] In support of its conclusion, the court relied in part on *Hastings*, stating, "In *Hastings*, the court adopted the definition asserted by defendant, that personal knowledge means more than being present when defendant makes incriminating statements. The witness must have personally observed the subject matter of his statement."[82] *Hastings*, however, did not involve an inconsistent statement about an admission and does not address

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79. 161 Ill. App. 3d 714, 515 N.E.2d 260 (1987), *appeal denied*, 118 Ill. 2d 547, 520 N.E.2d 389 (1988).

80. 187 Ill. App. 3d 541, 543 N.E.2d 555 (1989), *appeal denied*, 129 Ill. 2d 567, 550 N.E.2d 560 (1990).

81. People v. Coleman, 187 Ill. App. 3d 541, 548, 543 N.E.2d 555, 560 (1989), *appeal denied*, 129 Ill. 2d 567, 550 N.E.2d 560 (1990).

82. *Id.* at 547, 543 N.E.2d at 559.

whether knowledge of an out of court statement independently admissible can be knowledge of an "event."

The court further relied on a legislative discussion had just prior to the final vote on section 115-10.1 in which one legislator (Representative Cullerton) who was "anxious that the legislative history be complete . . . read into the record a portion"[83] of a law review article urging that prior inconsistent statements about admissions not be used substantively if the statements are not based on personal knowledge of the underlying event.[84] Because the "motivating force for Justice Steigmann and the legislators who sponsored the bill was an article written by"[85] Professor Michael Graham,[86] the court considered the author's comments as adopted by Representative Cullerton to be persuasive.[87]

The *Coleman* court further relied for its conclusion on an article written by Justice Robert Steigmann,[88] widely regarded as the principal author of section 115-10.1, in which the author specifically addressed this issue and concluded that prior inconsistent statements about admissions should not be used substantively unless the witness has personal knowledge of the underlying event that was admitted to in the statement.

Thus, although the plain meaning of the text suggests an admission can be an "event," and the legislative history cited in *Coleman* is at least ambiguous, those who have thought about this Statute the most and were involved in its drafting believe that it should not and does not allow prior inconsistent statements about admissions to be

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83. *Id.* at 548, 543 N.E.2d at 560.

84. *See id.*

85. *Id.*

86. *See* Graham, *Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A), 613, and 607*, 75 MICH. L. REV. 1565, 1587-88 (1977).

87. A problem with citing the comments of the one legislator as proving the intent of the whole body is that the other legislators' silence may indicate only an intent to get to a vote on a matter and avoid a discussion. In fact, when Representative Cullerton stated his view that the legislative intent was that inconsistent statements about admissions should not be used substantively if there was not also personal knowledge of the underlying crime, he then asked another legislator, Representative McCracken, "Is that your understanding of our intent with respect to this Bill?" Representative McCracken replied, "I know I'm supposed to say yes, but I'll be candid. I did not think that was the limitation on it." Illinois Debates on S.B. 619, 83d Gen. Assembly (statements of Rep. Cullerton and Rep. McCracken (Nov. 1, 1983)) (available on microfiche #111 at 37).

88. Steigmann, *Prior Inconsistent Statements as Substantive Evidence in Illinois*, 72 ILL. B.J. 638, 640-41 (1984).

used substantively unless the witness has personal knowledge of the underlying event admitted to in the statement. It therefore seems that the *Coleman* court was correct in its interpretation of the Statute.[89]

A consequence of taking the *Coleman* position is that "(c)(2)" statements (115-10.1(c)(2): inconsistent statements not made under oath at trial hearing or other proceeding) must be based on personal knowledge but that "(c)(1)" statements (115-10.1(c)(1): inconsistent statements made at a trial, hearing, or other proceeding) need not be made on personal knowledge. The Steigmann article and the *Coleman* court acknowledge this result.[90] The *Coleman* court, moreover, used this very distinction to uphold the conviction before it.[91] It noted that although the inconsistent statements could not be used substantively under (c)(2) because they were not based on personal knowledge of the underlying event, they could be used substantively under (c)(1) because the statements had been acknowledged and confirmed under oath before a grand jury. It therefore affirmed the conviction based on the use of those statements.

The *Coleman* court noted, however, that in order for the prior inconsistent statement about an admission to be used substantively under (c)(1), the witness must not only admit making the statement under oath but must also confirm its truth under oath. A mere acknowledgement by the witness under oath that he had made the inconsistent statement about the defendant's making an admission would not be enough to allow it to be used substantively.[92] Thus,

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89. The reasons given for not allowing an inconsistent statement about an admission to come in unless based on knowledge of the underlying event include the devastating effect of such an alleged admission, the ease of fabrication, and the possibility that interrogation through leading questioning by authorities could put conclusory words into the mouth of the witness that exaggerate or distort what the witness knows and is willing to swear to in court. *See* Steigmann, *supra* note 88, at 640-41; Graham, *supra* note 86, at 1587-88.

90. *See* Steigman, *supra* note 89, at 641; People v. Coleman, 187 Ill. App. 3d 540, 548-549, 543 N.E.2d 555, 560 (1989). Stating that (c)(1) inconsistent statements (those made under oath at a trial, hearing, or other proceeding) need not be based on personal knowledge to the same extent as (c)(2) inconsisent statements, does not mean that (c)(1) statements can be based on hearsay. It means only that (c)(1) statements can be based on out of court statements that qualify as exceptions to the hearsay rule; for example the "admissions" referred to in the grand jury testimony in *Coleman*.

91. *See Coleman*, 187 Ill. App. 3d at 548-49, 551, 543 N.E.2d at 560-61.

92. In this case, the prosecutor read the witnesses' statements to the grand jury and carefully questioned the witnesses [before the grand jury] regarding the authenticity and the accuracy of the statements. We find this sufficient to qualify the statements as (c)(1) statements and make them admissible as

although a (c)(1) inconsistent statement about an admission need not be based on personal knowledge of the underlying event, the witness must affirm under oath that he did hear the admission—he must affirm that the statement about the admission is true.

2. *Prior Case Law*

This Statute would apparently overturn the result in *People v. Collins*[93] and allow the substantive use of the type of long and detailed pre-trial inconsistent statement signed by the witness in that case. In *Collins*, it was held error to put the many pages of inconsistent statements before the jury under the guise of the State's impeaching a court's witness. Under the Statute, such a statement can be used as substantive evidence. However, it should be noted that, although such an inconsistent statement would be clearly admissible as substantive evidence if the witness is in court and subject to cross-examination, it is not clear that such a statement alone would be sufficient to make a prima facie case against the defendant.[94]

3. *Constitutionality of Section 115-10.1*

Although the Illinois Supreme Court has not, as of yet, held this Statute constitutional, there are indications that it will likely uphold

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> substantive prior inconsistent statements. In so finding we emphasize that the facts now before us bring the case under (c)(1) because the witness 'under oath at a trial, hearing, or other proceeding' . . . not only admitted to having made a previous statement, but verified its accuracy, whereas subsection (c)(2)(B) would have applied if the witness at the grand jury acknowledged having made such a statement but had not verified its accuracy. . . .

Coleman, 187 Ill. App. 3d at 549, 543 N.E.2d at 560-61. Note, if (c)(2) applies, the personal knowledge element is applicable; if the personal knowledge of the witness is only of the making of the admission, and not of the underlying event, such an inconsistent statement cannot be used substantively.

93. 49 Ill. 2d 179, 274 N.E.2d 77 (1971) (where State's principal witness disavowed earlier out of court statements linking defendants to the murder, it was reversible error for the court to allow the jury to consider the extensive, signed, prior inconsistent statements of witness as substantive evidence).

94. *See, e.g.*, People v. Gould, 54 Cal. 2d 621, 354 P.2d 865, 7 Cal. Rptr. 273 (1960) (Prior identification and admission of one defendant sufficient to support conviction for burglary. Prior identification alone not sufficient to support the conviction of second defendant. In this case, the victim could not make an in court identification so the prior identifications were also inconsistent statements used substantively. What she said prior to trial was stronger than what she said at the trial.).

it. In *People v. Orange*,[95] although the defendant did not challenge the constitutionality of section 115-10.1 at trial and so the argument was considered waived, the court stated in dicta that "the defendant's argument must fail, for the statute was clearly within the legislature's authority."[96] It further added that the fact that "this court has previously refused to allow the substantive use of prior inconsistent statements did not preclude the legislature from doing so."[97]

Several appellate decisions have found the Statute constitutional. In *People v. Edwards*,[98] the court found that the legislature had not unconstitutionally infringed on the judiciary's inherent power to determine the manner in which evidence is to be considered and the trial to be conducted. "[S]ubstantive use of prior inconsistent statements of two of defendant's friends who had personal knowledge of the events related in their statements, who were shown to have signed those statements, and who were subject to cross-examination at trial,"[99] was held a proper use of the Statute. And in *People v. Hastings*,[100] the court held that section 115-10.1 did not conflict with the provisions of Supreme Court Rule 238 allowing impeachment of one's own witness and therefore the Statute was not an unconstitutional violation of the principle of separation of powers. The court also denied the defendant's contention that the Statute violated his sixth amendment right to confront witnesses at trial, noting that the United States Supreme Court had already held in *California v. Green*,[101] that using a witness' prior inconsistent statement substantively does not violate the confrontation clause if the witness testifies and is subject to cross-examination.

4. *The Sixth Amendment and the Forgetful or Mute Witness*

In connection with the substantive use of prior inconsistent statements, a number of cases have recently considered what should

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95. 121 Ill. 2d 364, 382, 521 N.E.2d 69, 77 (1988).

96. People v. Orange, 121 Ill. 2d 364, 381-82, 521 N.E.2d 69, 77 (1988).

97. *Id.* at 381, 521 N.E.2d at 77 (citation omitted) (referring to People v. Collins, 49 Ill. 2d 179, 274 N.E.2d 77 (1971)).

98. 167 Ill. App. 3d 324, 521 N.E.2d 185 (1988).

99. People v. Edwards, 167 Ill. App. 3d 324, 336, 521 N.E.2d 185, 194 (1988). *See also* People v. Redd, 135 Ill. 2d 252, 553 N.E.2d 316 (1990). The court held that it was a denial of a defendant's right to effective cross-examination to allow a witness' prior inconsistent grand jury testimony to be used as substantive evidence under section 115-10.1 when the turncoat witness took the fifth amendment at trial and "refused to answer any questions put to him by either the prosecution or the defense." *Redd*, 135 Ill. 2d at 306, 553 N.E.2d at 340. The constitutionality of section 115-10.1 was apparently assumed and not even raised on this appeal.

100. 161 Ill. App. 3d 714, 515 N.E.2d 260 (1987).

101. 399 U.S. 149 (1970).

happen when the so-called turncoat witness appears at trial and testifies to having no personal knowledge either of making the prior statement or the events the prior statement refers to. An Illinois appellate court, in *People v. Yarbrough*,[102] held that the prior inconsistent statement of a witness who cannot remember making it cannot properly be used substantively because that witness is not subject to effective cross-examination concerning the out of court statement.[103] "By claiming loss of memory at trial, [the witness] effectively made impossible any cross-examination with respect to the truth or falsity of the out-of-court statements."[104] The court relied heavily on *Douglas v. Alabama*,[105] a case decided ten years before rule 801(d)(1)(A) of the Federal Rules of Evidence was adopted to allow for the substantive use of prior inconsistent statements.

Recently, however, the United States Supreme Court, in *U.S. v. Owens*,[106] confronted a similar question and came to a conclusion opposite to that reached by the *Yarbrough* court. In *Owens*, the victim of a severe beating suffered memory impairment. The first time an FBI agent visited him in the hospital he could remember nothing. The second time the FBI agent visited him, he named the defendant as his attacker and identified defendant from an array of photographs. At trial, the victim could not identify his attacker. However, he clearly remembered identifying defendant as his attacker during his interview with the FBI agent.

On cross-examination, the victim admitted that he could not remember seeing his assailant, and, though there was evidence that he received numerous visitors in the hospital, he could not remember any of them except the FBI agent. Defense counsel also unsuccessfully attempted to refresh his recollection with a hospital record that indicated he had identified someone else as his attacker.[107] The trial

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102. 166 Ill. App. 3d 825, 520 N.E.2d 1116 (1988).

103. *See* People v. Yarbrough, 166 Ill. App. 3d 825, 831, 520 N.E.2d 1116, 1120 (1988); *see also* People v. Flores, 128 Ill. 2d 66, 88, 538 N.E.2d 481, 489 (1989) ("Contrary to the defendant's assertions, a gap in the witness' recollection concerning the context of a prior statement does not necessarily preclude an opportunity for effective cross-examination."). In *Flores*, although the witness could not remember the underlying events upon which his prior statement was based, the prior statement was made before a grand jury and the witness acknowledged his grand jury testimony and confirmed its accuracy at the subsequent trial. *Id.*

104. *Id.*

105. 380 U.S. 415 (1965).

106. 484 U.S. 554 (1988). The rationale of *Owens* was adopted by the Illinois Supreme Court in People v. Flores, 128 Ill. 2d 66, 89, 538 N.E.2d 481, 489 (1989) (no violation of sixth amendment right to confrontation when witness cannot remember underlying events upon which his grand jury testimony was based).

107. *See* United States v. Owens, 484 U.S. 554, 556 (1988).

court allowed the prior identification as evidence and the court of appeals reversed.

The United States Supreme Court, in an opinion by Justice Scalia, held that the testimony was properly admissible and that there is no denial of a defendant's sixth amendment confrontation rights "when a witness testifies as to his current belief but is unable to recollect the reason for that belief."[108] The Court went on to say that "[i]t is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight and even . . . the very fact that he has a bad memory."[109]

As to the related question of whether the witness was subjected to adequate "cross-examination concerning the statement" within the meaning of the federal rule the court stated:

> [L]imitations on the scope of examination by the trial court or assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination within the intent of the rule no longer exists. But that effect is not produced by the witness's assertion of memory loss—which, as discussed earlier, is often the very result sought to be produced by cross-examination, and can be effective in destroying the force of the prior statement. Rule 801(d)(1)(C), which specifies that the cross examination need only 'concer[n] the statement,' does not on its face require more.[110]

In *People v. Flores*,[111] the Illinois Supreme Court affirmed the trial court's use of a witness' inconsistent grand jury testimony when, at trial, the witness could not remember either the events he had testified to at the grand jury or the content of his testimony.[112] When confronted with a transcript of the grand jury proceedings, the immunized witness did acknowledge that it contained an accurate description of his grand jury testimony. In ruling that there was no error in using the inconsistent statements substantively, the court first concluded that there was no abuse of discretion in the trial court's finding that the witness' "professed loss of memory" at trial was "inconsistent" with his testimony at the grand jury.[113] The court

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108. *Id.* at 559.
109. *Id.*
110. *Id.* at 562.
111. 128 Ill. 2d 66, 538 N.E.2d 481 (1989).
112. *See* People v. Flores, 128 Ill. 2d 66, 88, 538 N.E.2d 481, 489 (1989).
113. In interpreting the meaning of the term 'inconsistent' in Rule 801(d)(1)(A), there are Federal decisions holding that inconsistency is not limited to direct

further held that using this witness' inconsistent testimony did not violate the defendant's sixth amendment right to confront witnesses, noting, "Contrary to the defendant's assertions, a gap in the witness' recollection concerning the content of a prior statement does not necessarily preclude an opportunity for effective cross-examination."[114]

In both *Owens* and *Flores*, the turncoat witness acknowledged at trial making the prior statement. In both, the witness claimed no personal knowledge of the underlying events, but the circumstantial evidence would permit a conclusion that the declarations were probably based on personal knowledge.[115] In *Yarborough*, however, the witness did not acknowledge making the prior statement. There was less input from the witness upon which cross-examination could focus and from which the jury could assess the reliability of the out of court statement. The *Yarborough* court, without the benefit of cases like *Owens* and *Flores*, held the inconsistent testimony of the forgetful witness could not be used.

Whether the *Yarborough* holding can survive *Owens* and *Flores* depends on whether a court will conclude that, even though the witness does not recall making any prior statement, there are still "realistic weapons" to test his credibility.[116] The question in a *Yarborough*-type situation is, at what point does cross-examining a witness with no memory become just like cross-examining a person who is, in fact, incompetent to testify, for example, someone who, through injury or otherwise, has lost the ability to speak or to narrate and recall events accurately.

> contradictions but 'may be found in evasive answers, . . . silence, or changes in position.' . . . The determination of whether a witness' prior testimony is inconsistent with his present testimony is left to the sound discretion of the trial court.

People v. Flores, 128 Ill. 2d 66, 87-88, 538 N.E.2d 481, 488-89 (1989). *See also* United States v. Williams, 737 F.2d 594, 608 (7th Cir. 1984) ("[W]e do not read the word 'inconsistent' in Rule 801(d)(1)(A) to include only statements diametrically opposed or logically incompatible. Inconsistency 'may be found in evasive answers, . . . silence, or change in positions.'").

114. People v. Flores, 128 Ill. 2d 66, 88, 538 N.E.2d 481, 489 (1989) (citing People v. Owens, 484 U.S. 554 (1988)).

115. The evidence would also support the drawing of a contrary conclusion in *Owens*, i.e., the statements were not made from personal knowledge, but from the suggestibility of the interviewer.

116. *See Owens*, 484 U.S. at 560. In *Owens*, the defendant emphasized the witness' memory loss and argued that his prior identification was the product of suggestibility.

It is clear that a person who is unconscious or dead, though subject to having leading questions hurled at him, is not subject to "meaningful cross-examination" either under the Illinois statute or under the sixth amendment. This is true even though, in such instance, the cross-examiner is able to demonstrate "the very result sought to be produced by cross examination,"[117] that the deceased or unconscious "witness" has suffered a memory loss. One distinction between the unconscious or deceased "witness" and the witness who can remember neither making the prior statement nor its underlying basis is that, at least with the witness in court claiming memory failure, the jury can look at his demeanor in trying to decide if he is "faking" a memory loss or whether the memory loss is something over which he has no control. Whether this small window for cross-examining such a witness would be enough to satisfy the sixth amendment and the statute might depend on the extent of the memory loss and what, if anything, is left to be subject to cross-examination.

According to *Owens*, even though a witness who cannot remember making a statement is considered unavailable under Federal Rule 804(a)(3), such an unavailable witness can still be "subject to cross-examination." The fact that an unavailable witness can still be subject to cross-examination is considered "only a semantic oddity" and not a "substantive inconsistency."[118]

In considering whether meaningful cross-examination can occur when a witness suffers a memory loss as to both making the prior statement and its basis, two related issues should be addressed. One is whether there can be meaningful cross-examination when the turncoat witness refuses to testify by invoking his fifth amendment privilege as to matters relating to the prior statement. The other is whether a witness who invokes no privilege but simply refuses to testify at all, even in the teeth of a contempt finding, can be subject to meaningful cross-examination.

With respect to the first issue, the Illinois Supreme Court recently held in *People v. Redd*[119] that the State could not make substantive use of a witness' prior inconsistent testimony before a grand jury when the witness appeared at trial, invoked his fifth amendment privilege, and "refused to answer any questions put to him by either the prosecution or the defense."[120] Under those circumstances, the

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117. *Id.* at 562. *See supra* note 110 and accompanying text.

118. *See Owens*, 484 U.S. at 562.

119. People v. Redd, 135 Ill. 2d 252, 553 N.E.2d 316 (1990).

120. *Id.* at 306, 553 N.E.2d at 340. The court also held that the inconsistent

witness "was not subject to effective cross-examination."[121] The court also held that "it was error for the circuit court to construe [the witness'] assertion of the privilege as being inconsistent with his out-of-court statements to the grand jury."[122]

The court also distinguished *Owens*, *Flores*, and *United States v. Dicaro*.[123] In *Dicaro*, a witness' memory loss was held not to preclude cross-examination of a witness and the substantive use of that witness' prior inconsistent statements. The *Redd* court pointed out that "The *Dicaro* court was careful to 'avoid a construction [of the requirement that a witness be subject to cross-examination concerning the statement] that would render the requirement effectively meaningless,'"[124] and noted that, in *Flores*, the court held that a mere "gap" in the witness' recollection "concerning the content of a prior statement" would not necessarily preclude an "opportunity for effective cross examination" as long as the declarant was "actually testifying as a witness and [was] subject to full and effective cross-examination."[125] On the facts before it, the *Redd* court held that the "'[witness'] 'assertions of privilege . . . undermine[d] the process to such a degree that meaningful cross-examination within the intent of the rule no longer exist[ed]'"[126] and declared that the "'mere fact' that [the

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statements of the witness who claimed the privilege not to testify could not be used to impeach that witness. "The purpose of impeaching evidence is to destroy the credibility of a witness, not to establish the truth of the impeaching evidence . . . . Since Mr. Bea did not testify, it was error to allow him to be impeached by prior statements allegedly made by him concerning [the] defendant. . . ." *Id.* at 316-17, 553 N.E.2d at 345.

121. *Id.* at 306, 553 N.E.2d at 340.

122. *Id.*

> The court refused to treat the assertion of a privilege the same as a memory loss and, therefore, refused to find that the witness' silence at trial was inconsistent with his prior testimony. 'We conclude the assertion of the fifth amendment privilege may not be treated as a memory loss for purposes of satisfying the requirement of inconsistency in section 115-10.1(a). When a witness is permitted to assert the privilege not to incriminate himself, he is not claiming to be unable to recollect prior affirmations of asserted facts. The witness is not asserting a 'gap in [his] recollection concerning the content of a prior statement.' . . . The witness is asserting only that he believes the answers to questions posed may tend to incriminate him. The circuit court erred in holding Mr. Bea's assertion of his fifth amendment privilege to be inconsistent with his prior testimony.'

People v. Redd, 135 Ill. 2d 252, 308, 553 N.E.2d 316, 341 (1990).

123. 772 F.2d 1314 (7th Cir. 1985).

124. *Redd*, 135 Ill. 2d at 309, 553 N.E.2d at 341.

125. *Id.* at 310, 553 N.E.2d at 342.

126. *Id.* at 312, 553 N.E.2d at 343 (citing People v. Owens, 484 U.S. 554 (1988)).

witness] was present and sat 'still long enough for questions to be put' to him simply [did] not substitute for effective cross-examination within the meaning of subsection (b) of section 115-10.1. . . ."[127]

In remanding the case for a new trial, the court observed that if the witness again refuses to testify based on his fifth amendment privilege, the trial court must make a determination as to whether there are reasonable grounds for invoking that privilege. It then noted that, if no reasonable grounds exist to claim the privilege or if grounds exist and immunity is granted, "the witness should not be allowed to refuse to testify based on the fifth amendment privilege."[128]

The Court's language suggests that the problem in the *Redd* case can be solved by either properly denying a claim of privilege or granting the witness immunity. However, if the witness refuses to testify without claiming a privilege or even with immunity, the problem for the defendant remains. Is such a witness who refuses to take the stand subject to effective cross examination or is he just like the witness who refuses to testify because he properly invokes a privilege? In *United States v. Carlson*,[129] such a case arose. There a witness refused to testify even after being granted immunity and being held in contempt. The court concluded after a lengthy analysis that use of the inconsistent grand jury testimony of the witness would violate the defendant's sixth amendment rights unless the defendant could be found to have waived those rights. On the facts before it, the court found that the defendant did waive those rights by threatening and scaring the witness off the stand.[130]

As far as a defendant is concerned, his problem in cross-examining a witness who claims a privilege is similar to the problem in cross-examining a witness who simply will not take the stand. If Illinois holds that claiming a privilege renders a witness not subject to cross-examination, it seems it would also have to hold that a witness who simply refuses to testify at all is not subject to cross-examination within the meaning of section 115-10.1. There may be some reluctance to do this, however, because if a witness is willing to pay the price of a contempt sentence, he, and not the court, can determine whether his prior statements can be used substantively

127. *Redd*, 135 Ill. 2d at 312, 553 N.E.2d at 343.

128. *Id.* at 314, 553 N.E.2d at 344.

129. 547 F.2d 1346 (8th Cir. 1976). *See also* United States v. Mastrangelo, 693 F.2d 269 (2nd Cir. 1982) (grand jury testimony of a murdered witness can be used substantively against the defendant if the defendant was involved in the death of the witness; confrontation rights waived under such circumstances).

130. *See* United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976).

against the defendant. Nonetheless, cases cited in the special concurring opinion by Justice Miller further suggest this result.[131]

As was noted above, there are similar problems with cross-examining a witness who asserts a lack of memory both as to the making of prior inconsistent statements and their content. The cases suggest that whether such witnesses can be subject to effective cross-examination about their prior statements will depend on a case by case determination of whether "realistic weapons" exist by which the cross-examiner can test (and the jury can come to a determination of) the sincerity and reliability of the witness' statements.

5. *Impeachment vs. Contradiction with Inconsistent Statements*

In *James v. Illinois*,[132] the United States Supreme Court held that an illegally obtained incriminating statement by a defendant could not be used under the "impeachment" exception to the exclusionary rule to contradict a witness who had testified favorably for the defendant. The State had, in effect, contended that the illegally obtained statement was inconsistent with the defendant's defense and therefore could be used to "impeach" a favorable defense witness.[133]

James had been charged with murder and attempted murder. The day after the shooting he was taken into custody and interrogated. At the time he was picked up, he was found at his mother's beauty parlor under a hair dryer, his hair black and curly. He told police, however, that the day before (the day of the shooting) his hair had been reddish-brown, long, and combed straight back. He admitted he had gone to the beauty parlor to have his hair dyed black and to change his appearance. These statements were later suppressed as the

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131. *See* United States v. Fiore, 443 F.2d 112 (2d Cir. 1971) (requirement of then-proposed Federal Rule of Evidence 801(d) that declarant testify at trial and be subject to cross-examination concerning statement not satisfied when declarant makes evident his refusal to testify); *see also* United States v. Chapman, 866 F.2d 1326, 1330 (11th Cir. 1989) (wife rendered unavailable as witness by assertion of spousal privilege not to testify against husband); United States ex rel. Thomas v. Cuyler, 548 F.2d 460, 463 (3rd Cir. 1977) ("A witness who refuses to be sworn or to testify at all or one who, having been sworn, declines to testify on Fifth Amendment grounds, has not been thus made available for cross-examination."). The basis of Justice Miller's special concurrence (joined by Justice Stamos) appears to be his concern with the majority's conclusion that a witness' invoking a fifth amendment privilege "cannot be construed as being inconsistent with what the witness said on a prior occasion." People v. Redd, 135 Ill. 2d 252, 327, 553 N.E.2d 316, 350 (1990) (Miller, J., specially concurring).

132. 110 S. Ct. 648 (1990).

133. *See* James v. Illinois, 110 S. Ct. 648, 650 (1990).

fruit of a warrantless arrest for which there was no probable cause.[134]

At trial witnesses identified the defendant as the shooter and stated he had long, reddish hair which he combed back. The defendant did not testify but called a witness who testified that on the day of the shooting defendant's hair was black. The State was then allowed to "impeach" this witness with the illegally obtained statements of the defendant that his hair was reddish. The Illinois Supreme Court, with three Justices dissenting, affirmed the use of such illegally obtained statements on the ground that such evidence, although not usable for substantive purposes, could be used for impeachment purposes, and that what was done here was impeachment.[135]

In reversing the Illinois Supreme Court, the United States Supreme Court held that the "impeachment" exception to the exclusionary rule[136] would not be expanded to allow illegally obtained statements from a defendant to be used to contradict or impeach anyone other than the defendant. Allowing the State to use such statements against defense witnesses other than the defendant "would significantly weaken the exclusionary rule's deterrent effect on police misconduct,"[137] and "would vastly increase the number of occasions on which such evidence could be used."[138] The prosecution's access to such illegally obtained evidence would not just deter perjury by defendant, "it would also deter defendants from calling witnesses in the first place . . . ."[139] Because expanding the impeachment exception to permit the State to impeach not only the declarant/defendant but his whole case would not, on balance, sufficiently further the truth seeking process and "would appreciably undermine the deterrent effect of the exclusionary rule . . ." the court declined to expand the impeachment exception and allow such illegally obtained statements to impeach someone other than the declarant.[140]

Although the *James* case deals with an illegally obtained statement, it shows that substantive use of a statement which is admissible only for impeachment can be prejudicial and reversible error. If a

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134. *See id.*

135. 123 Ill. 2d 523, 528 N.E.2d 723 (1988).

136. Under the exception, illegally obtained evidence can be used for impeachment purposes but not as a part of "the government's direct case, or otherwise, as substantive evidence of guilt." *James*, 110 S. Ct. at 652 (quoting United States v. Havens, 446 U.S. 620, 628 (1980)).

137. 110 S. Ct. 648, 654 (1990).

138. *Id.* at 655.

139. *Id.*

140. *See id.* at 656.

statement is used to attack the credibility of the person who made it, for example a self-contradiction, that is impeachment, and the statement need not fit within any hearsay exception. But, if an out of court statement is used to contradict or rebut the testimony of someone other than the person who made it, that is a substantive use.[141] To use such a statement substantively, it must either fit within a recognized hearsay exception or some other rule authorizing its substantive use.[142]

C. PRIOR INCONSISTENT STATEMENTS VS. PRIOR INCONSISTENT IDENTIFICATIONS

Current law allows substantive use of some prior inconsistent statements in criminal cases. However, it is not clear whether a witness' prior identification, in the absence of an in court identification, can be used substantively. In other words, in the case of the turncoat witness who makes a prior identification, but makes no in court identification, the question is whether the inconsistent prior identification can be used substantively.

Prior inconsistent statements are governed by paragraph 115-10.1 of chapter 38, Illinois Revised Statutes,[143] and prior identifications are governed by paragraph 115-12 of the same chapter.[144] As written, the statute allowing for the substantive use of prior identifications is silent as to whether the prior identification must be consistent with a current in court identification, i.e., whether it must corraborate an in court identification. However, the Illinois Supreme Court in *People v. Rogers*,[145] acknowledged that the federal rule (whose language is virtually identical to 115-12) "has been construed as permitting the

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141. *See, e.g.*, People v. Manning, 185 Ill. App. 3d 597, 541 N.E.2d 797 (1981) (Error to use pretrial statement, admissible only for impeachment, as substantive evidence in rebuttal. State cannot use prior inconsistent statements to impeach defendant without confronting defendant on the stand with the details of each statement and giving him an opportunity to admit or deny making it).

142. *See supra* text accompanying notes 62-92.

143. ILL. REV. STAT. ch. 38, para. 115-10.1 (1985). *See supra* text accompanying note 69 for the content of paragraph 115-10.1.

144. ILL. REV. STAT. ch. 38, para. 115-12 (1985). The text of this statute reads as follows:

> Substantive Admissibility of Prior Identification. A statement is not rendered inadmissible by the hearsay rule if (a) the declarant testifies at the trial or hearing, and (b) the declarant is subject to cross-examination concerning the statement, and (c) the statement is one of identification of a person made after perceiving him.

145. 81 Ill. 2d 571, 411 N.E.2d 223 (1980).

introduction of such evidence, not merely for corroboration, but as substantive proof of the issue of identity."[146]

The *Rogers* case allowed prior identifications only to support an in court identification.[147] The 1984 statute can be seen as a response to *Rogers*, and its language suggests that the statute would allow the use of prior identifications even if they are inconsistent with the in court testimony; that is, even if there is no in court identification. This is, in fact, what was done by the United States Supreme Court in *United States v. Owens*.[148]

Recently, however, the Illinois Supreme Court has indicated that it would not allow the substantive use of prior identifications if there has been no in court identification. In *People v. Shum*,[149] after acknowledging that the officer's testimony about the victim's own prior identification did not violate the hearsay rule because of the opportunity to cross-examine both the victim and the officer, the court then stated, "The evidence of the out-of-court identification by the witness and the third person should be used only in corroboration of an in court identification and not as substantive evidence."[150] Section 115-12, however, was not mentioned in the opinion.

The reasoning may be that, unless the inconsistent identification qualifies under the criteria of 115-10.1—that it was signed, acknowledged under oath, recorded electronically, or made under oath at a trial, hearing or other proceeding—it should not be used substantively. However, if the declarant is in court and subject to cross-examination about a prior identification he now disavows, the reason for excluding the prior identification is not lack of opportunity for cross-examination but a concern over the reliability and sufficiency of such a statement of identification as evidence.

In *People v. Davis*,[151] the court held that a prior identification made under oath at a preliminary hearing could not be used substantively to contradict a turn-coat witness who changed his story at trial because the prior identification statute[152] and *Rogers* did not permit the use of inconsistent prior identifications.[153] And, although the prior

146. *Id.* at 582, 411 N.E.2d at 228.

147. *See id.*

148. 484 U.S. 554 (1988). For a discussion of *Owens*, see *supra* notes 106-110 and accompanying text.

149. 117 Ill. 2d 317, 512 N.E.2d 1183 (1987).

150. *Id.* at 342, 512 N.E.2d at 1191.

151. 137 Ill. App. 3d 769, 484 N.E.2d 1098 (1985).

152. ILL. REV. STAT. ch. 38, para. 115-12 (1985).

153. *See* People v. Davis, 137 Ill. 2d 769, 770-72, 484 N.E.2d 1098, 1099-1100 (1985).

identification would have qualified under the prior inconsistent statement statute, that paragraph had not been in effect at the time of the defendant's trial.[154] Defendant's conviction was, therefore, reversed. However, the language of 115-12 pertaining to prior identifications would seem to allow them regardless of whether they are consistent or inconsistent with in court testimony and regardless of whether section 115-10.1 had ever been enacted. The doubt about whether inconsistent prior identifications can be used substantively comes not so much from the Section's language as from language in Illinois Supreme Court cases such as *Shum*[155] and *Rogers*.[156] In any event, even if prior inconsistent identifications are admissible, the question still remains whether they alone will be sufficient to make a prima facie case.[157]

V. ADMISSIONS

A. DEFINITION

Anything a party has ever said or done that is contrary to what that party is now contending at trial[158] is admissible against that party as an admission (assuming that such statements or acts are also competent and relevant).[159] In criminal cases, admissions are sometimes defined as anything said or done by a defendant from which guilt of the criminal charges may be inferred.[160]

Admissions can also be made by the State in criminal cases; however, to be an admission, a statement has to be made by someone authorized to speak on the State's behalf about the case. Statements

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154. *See id.* at 771-72, 484 N.E.2d at 1100.

155. 117 Ill. 2d 317, 512 N.E.2d 1183 (1987).

156. 81 Ill. 2d 571, 411 N.E.2d 223 (1980).

157. *See supra* note 94.

158. *See* Goad v. Evans, 191 Ill. App. 3d 283, 547 N.E.2d 690, 703 (1989) ("Statements by parties which are contrary to their positions at trial are admissions, which are admissible under an exception to the hearsay rule."). If the party's out of court statements are helpful to his or her case, they are not ordinarily admissible in that party's favor because they would be prior consistent statements. *See* People v. Andino, 99 Ill. App. 3d 952, 425 N.E.2d 1333 (1981).

159. *See* Breslin v. Bates, 14 Ill. App. 3d 941, 303 N.E.2d 807 (1973); Haskell v. Siegmund, 28 Ill. App. 2d 1, 170 N.E.2d 393 (1960); Casey v. Burns, 7 Ill. App. 2d 316, 323, 129 N.E.2d 440, 444 (1955).

160. *See* People v. George, 38 Ill. 2d 165, 230 N.E.2d 851, 858 (1967) (An "admission is any statement or conduct from which guilt of the crime may be inferred but from which guilt does not necessarily follow."). *Id.* (quoting People v. Stanton, 16 Ill. 2d 459, 466, 158 N.E.2d 47, 51 (1959)).

made by victims are not admissions against the State because the victims are not parties.[161]

1. *Requirements for an Admission*

Only parties to the lawsuit or criminal case can make admissions. A "damaging statement" by a non-party (a statement hurtful to the non-party), though not an admission, may be admissible as a "declaration against interest" if the declarant is "unavailable" and the other requirements for that exception are met.[162]

To qualify as an admission, a statement need not be against the party's interest when made; it need only turn out to be against the party's interest at the time of trial.[163] Statements or acts that were "innocent" when made by a party can turn out to be admissions at trial if they are now contrary to what that party is contending at trial or if they are something from which guilt of a crime may be inferred.

For example, in *People v. Veal*,[164] a defendant's statement to an officer that he owned a rifle but that it did not work properly was held admissible as an admission even though the statement had been made more than two weeks prior to the shooting with which the defendant was charged.[165] Also, in *Dari v. Uniroyal*,[166] it was held error, though harmless, to exclude an out of court admission made by an insured some sixteen months before the insured became a party by filing suit.[167]

The basis for admitting admissions is found in the assumption that a party said to have made an admission will, in all likelihood, be present at trial and can, through himself or other witnesses, deny making the admission, attempt to explain it away, or contradict the substance of it.[168] The admissibility is not founded on the notion that a party does not ordinarily make statements damaging to himself unless they are true. That is the basis for admitting declarations

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161. However, such statements can be used to impeach the victim if he or she testifies and the testimony is inconsistent with the statements.

162. *See* Buckley v. Cronkite, 74 Ill. App. 3d 487, 393 N.E.2d 60 (1979); *see also* text accompanying notes 258-268.

163. *See infra* text accompanying notes 163-164.

164. 58 Ill. App. 3d 938, 374 N.E.2d 963 (1978).

165. *See* People v. Veal, 58 Ill. App. 3d 938, 966, 374 N.E.2d 963, 983 (1978).

166. 41 Ill. App. 3d 122, 353 N.E.2d 298 (1976).

167. *See* Dari v. Uniroyal, Inc., 41 Ill. App. 3d 122, 126-27, 353 N.E.2d 298, 303 (1976).

168. *See* Hendricks v. Bettner, 40 Ill. App. 3d 1038, 353 N.E.2d 83 (1976).

against interest made by non-party, unavailable declarants.[169] Admissions come in as a consequence of the principle of the adversary system that allows anything one ever says or does to be used against him.[170]

It is because admissions have no particular guarantee of trustworthiness that the Federal Rules of Evidence characterize them as "non-hearsay" under rule 801(d)(2).[171] Illinois courts allow admissions to be used as substantive evidence[172] and are apparently not concerned about whether they are hearsay or non-hearsay.

An admission need not be based on the personal knowledge of the party making it; the party need only endorse or adopt a view in an act or statement contrary to what he is later contending at trial to have such act or statement admissible against him. In *Casey v. Burns*,[173] for example, a dram shop case, a police officer testified that the tavern owner said he had not been present at the time of the

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169. *See* Buckley v. Cronkite, 74 Ill. App. 3d 487, 393 N.E.2d 60 (1979). For a discussion of declarations against interest see section VII of this article.

170. *See* Bourjaily v. United States, 483 U.S. 171 (1987). However, a co-conspirator's declaration implicating a defendant cannot be admitted unless the defendant has been connected to the conspiracy in the opinion of the trial judge by a preponderance of evidence. In determining whether the target defendant has been connected to the conspiracy by a preponderance of evidence, the trial judge may consider as evidence the very hearsay declaration seeking admission. This follows from federal rule 104(a) which allows a court to consider inadmissible evidence in making preliminary findings of fact (e.g., connection to the conspiracy) upon which admissibility turns. *See* dissenting opinion of Justice Blackmun (joined by Justices Brennan and Marshall):

> Thus, unlike many common-law hearsay exceptions, the co-conspirator exemption from hearsay with its agency rationale was not based primarily upon any particular guarantees of reliability or trustworthiness that were intended to ensure the truthfulness of the admitted statement and to compensate for the fact that a party would not have the opportunity to test its veracity by cross-examining the declarant. . . . As such, this exemption was considered to be a 'vicarious admission.' . . . As with all admissions, an 'adversary system,' rather than a reliability, rationale was used to account for the exemption to the ban on hearsay: it was thought that a party could not complain of the deprivation of the right to cross-examine himself (or another authorized to speak for him) or to advocate his own, or his agent's, untrustworthiness.

Id. at 190 (Blackmun, J. dissenting) (referring to C. MCCORMICK, MCCORMICK ON EVIDENCE § 262 at 775 (E. Cleary ed. 1984)).

171. *See* FED. R. EVID. 801(d)(2) advisory committee's note (admission by party opponent).

172. *See supra* notes 161-162, 175 and accompanying text.

173. 7 Ill. App. 2d 316, 129 N.E.2d 440 (1955).

incident, but knew that his bartender had hit the patron with a blackjack. The statement of the owner was properly held admissible as an admission.[174]

An admission is admissible as substantive evidence, and no warning of the type required before one can impeach a witness with a contrary statement[175] is necessary before introducing evidence of an admission. In the case of a written statement signed by a party, the statement must be authenticated as the party's statement before it can be used as an admission against that party.[176] In some cases, a bare signature may not be a sufficient foundation. A good example of the kind of authentication problems that can arise with written admissions is found in *Laughlin v. Chenoweth*.[177] There, defense counsel confronted the ten-year old plaintiff with a damaging statement signed by him and his mother, of which plaintiff denied any recollection. No further foundation was introduced. The court held that there was no error in the trial court excluding the statement:

> Had it been shown that the minor had read the statement prior to signing, that would have been sufficient to require its admission. Similarly, had his mother testified to having read the statement and stated that it accurately portrayed what her son had said, admission of the document would have been required. However, a trial judge has discretion in determining whether a sufficient showing of the accuracy of evidence has been made before allowing its admission.[178]

A damaging statement by a party in his discovery deposition that amounts to an admission is admissible against that party under Illinois Supreme Court Rule 212.[179]

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174. *See id.* at 325, 129 N.E.2d at 445.

175. See, *e.g.*, Security Savings & Loan Ass'n v. Commissioner of Savings & Loan, 77 Ill. App. 3d 606, 396 N.E.2d 320 (1979) (plaintiff should have been allowed to introduce admissions the defendant's president made in his discovery deposition without having to call the president as a witness and confront him with the admissions).

176. *See* Laughlin v. Chenoweth, 92 Ill. App. 3d 430, 414 N.E.2d 1296 (1980).

177. 92 Ill. App. 3d 430, 414 N.E.2d 1296 (1980).

178. *Id.* at 435, 414 N.E.2d at 1300.

179. *See id.*; *see also* ILL. REV. STAT. ch. 110A, para. 212 (1987). Rule 212 provides that a discovery deposition "may be used . . . (2) as an admission made by a party or by an officer or agent of a party in the same manner and to the same extent as any other admission by that person . . . ."

B. VICARIOUS ADMISSIONS; EXPRESS AUTHORITY TO SPEAK ON BEHALF OF EMPLOYER

The law on vicarious admissions is clearly stated by *Taylor v. Checker Cab Company*:[180] if a damaging out of court statement is made by an employee expressly authorized to make such a statement on behalf of the employer, the employee's damaging statement is admissible against the employer as a vicarious admission. The damaging statement can also be admissible if it is later ratified by the employer.[181]

1. *Implied Authority to Speak*

If there is no ratification, and if the employee has not been expressly authorized to speak about that matter on behalf of his employer, then there must be implied authority to speak on behalf of the employer before such employee's out of court statement can be used as an admission against the employer. For authority to be implied: (1) it must be implied from the nature of the employee's duties; (2) the statement must be about a matter within the scope of the employee's duties; and (3) the statement must have been made while the employee was engaged in performing his duties.[182]

In *Taylor v. Checker Cab Co.*,[183] a post-accident statement by a cab driver was held not impliedly authorized and was furthermore made after the driver had ceased being an employee. The statement was therefore inadmissible against the employer.

2. *No Express or Implied Authority to Speak*

Under Illinois law then, most damaging post-accident statements by ordinary employees, such as truck drivers, laborers, and others not expressly authorized to speak, will not be admissible against their employers as admissions because such employees are not authorized to speak and the nature of their duties will not often carry implied authority to speak. For example, in *Fortney v. Hotel Rancroft*,[184] a guest brought suit against a hotel. The court held there was no error in precluding a witness from testifying to a damaging out of court

180. 34 Ill. App. 3d 413, 339 N.E.2d 769 (1975).
181. *See id.* at 419, 339 N.E.2d at 775.
182. *See id.*
183. *Id.*
184. 5 Ill. App. 2d 327, 125 N.E.2d 544 (1955).

statement by a hotel clerk that he had let two men into plaintiff's hotel room on the night in question.[185]

Thus, damaging statements by employees who are at home, or "off duty," or in discovery depositions,[186] ordinarily will not be admissible against their employers as vicarious admissions. However, they may be admissible if they qualify as declarations against interest or excited utterances or some other hearsay exception. Of course, if such employees testify in court, they can properly testify to anything within their personal knowledge.

A case which retains the requirement that damaging statements must be expressly or impliedly authorized to be admissible against an employer, but, nonetheless, finds authority to speak implied by the nature of the job, is *Cornell v. Langland.*[187] There, an out of court post-accident statement by the managing golf pro at defendant's club to plaintiff's husband that the hole was shorter than the 315 yards marked, was held admissible as an admission against the club in an action to recover for injuries suffered when plaintiff was hit by another golfer's drive. Because the golf pro was the "overseer" of the course, he was found to have had implied authority to speak with patrons concerning the problems about the course.[188]

In keeping with Illinois' requirement of implied authority, a statement about the actual length of a hole, made by a caddy at a golf club to a golfing patron prior to the accident, would probably be admissible given the likelihood of implied authority to speak to the golfers. However, that same statement made after an incident, in response to a question about the accident, or off the club premises, would not likely qualify as a vicarious admission under *Taylor.*[189] There would be no implied authority to speak on behalf of the club under such circumstances and the speaker would not be engaged in the performance of his duties for the employer at that time.

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185. *See* Fortney v. Hotel Rancroft, 5 Ill. App. 2d. 327, 332-33, 125 N.E.2d. 544, 547 (1955).

186. Generally, a statement made while an employee is "off duty" or in a deposition will not be expressly authorized. Though some executives may be expected to be on duty 24 hours a day and thus have implied or express authority during that time, even they, however, would probably not be considered to have implied authority to speak for the employer while being deposed and, further, any arguable authority to speak for the employer in the deposition might have been expressly withdrawn.

187. 109 Ill. App. 3d 472, 440 N.E.2d 985 (1982).

188. *See* Cornell v. Langland, 109 Ill. App. 3d. 472, 476, 440 N.E.2d. 985, 988 (1982).

189. *See id.*

That ordinary damaging statements by employees are not admissible as admissions against employers in Illinois is further illustrated by the recent case of *Waechter v. Carson Pirie Scott & Co.*[190] In *Waechter*, the plaintiff was injured when an escalator suddenly stopped. Immediately after her fall, the plaintiff walked over to the customer service counter and reported the incident to an unidentified woman behind the counter. According to the plaintiff, the unidentified employee responded, "Oh no, not again. The escalator repairman has been out here I don't know how many times in the past two weeks."[191] This out of court statement was held inadmissible and found not to qualify as an admission against the employer.[192]

The plaintiff in *Waechter*, apparently aware of Illinois law, did not attempt to offer this out of court statement as an admission (to prove the truth of the matter asserted) against Carson's. Instead, the plaintiff argued that the statement was admissible as circumstantial evidence that defendant Carson's had received notice of the escalator's dangerous condition prior to the accident. This contention was properly rejected by the court.[193] For the out of court statement ("The repair man has been out here many times in the past two weeks") to count as notice to the employer, it would have to be accepted to prove the truth of the matter asserted ("I saw the man out here many times"). It would therefore have to count as a vicarious admission to be admissible.

Even if the employee's statement had been "my boss told me this is the second time the repairman has been here this week," such a statement still would not be admissible against the employer unless the employee was shown to have implied authority to make such a damaging acknowledgement. Under Illinois law, an employee's post-accident statements must spring from either express authority or authority to speak implied from the nature of the job in order for them to count as admissions against the employer.[194] No such authority was shown in *Waechter*.

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190. 170 Ill. App. 3d 370, 523 N.E.2d 1348, *appeal denied*, 122 Ill. 2d 595, 530 N.E.2d 266 (1988).

191. Waechter v. Carson Pirie Scott and Co., 170 Ill. App. 3d 370, 372, 523 N.E.2d 1348, 1348, *appeal denied*, 122 Ill. 2d 595, 530 N.E.2d 266 (1988).

192. *See id.* at 372, 523 N.E.2d at 1348.

193. *See id.* at 373, 523 N.E.2d at 1349.

194. *See* Waechter v. Carson Pirie Scott & Co., 170 Ill. App. 3d 370, 523 N.E.2d 1348, *appeal denied*, 122 Ill. 2d 595, 530 N.E.2d 266 (1988); Cornell v. Langland, 109 Ill. App. 3d 472, 440 N.E.2d 985 (1982); Taylor v. Checker Cab Co., 34 Ill. App. 3d 413, 339 N.E.2d 769 (1975).

Even if such a statement were offered to prove the "present mental state" of the employee ("I know the escalator man was here"), that expressed mental state would not be admissible against the employer as an admission. It would be an "unauthorized" damaging statement that would not qualify as a vicarious admission of the employer. If the plaintiff could have produced the employee in court, that employee could have testified to what she observed, just like any other witness. But if the plaintiff wishes to rely on the witness' out of court statement to prove its truth, or use it against the employer, under Illinois law, the statement must be based on express or implied authority.

Under the Federal Rules of Evidence, an out of court statement by an employee needs no authorization, express or implied, to be admissible against the employer as an admission.[195] To be admissible, the statement need only be made by an agent or servant and concern "a matter within the scope of [his] agency or employment, made during the existence of the relationship . . . ."[196] The treatment of the admissibility of an employee's damaging statements represents one of the most important differences between Illinois evidence law and the Federal Rules of Evidence. Illinois, apparently because of the difficulty in defending against "alleged" vicarious admissions, gives employers more protection from such admissions than does Federal Rule 801(d)(2)(D).[197]

C. CO-CONSPIRATOR'S DECLARATIONS

Illinois law recognizes the co-conspirator's statement exception to the hearsay rule which permits declarations made "in furtherance of and during the pendency of the conspiracy to be admitted not only against the declarant, but also his co-conspirators upon an independent, prima facie showing of a conspiracy."[198] In order for a co-conspirator's declaration to qualify as an admission, a party must show that the declaration was made in furtherance of the conspiracy and must establish a prima facie case of conspiracy against the person who will be implicated by the declaration.[199]

In *People v. Parmly*,[200] a murder case, the State's accomplice witness testified that another conspirator, Foutch, told him after the

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195. FED. R. EVID. 801(d)(2)(D).
196. *Id.*
197. *Id.*
198. People v. Goodman, 81 Ill. 2d 278, 283, 408 N.E.2d 215, 216 (1980).
199. *See id.*
200. 117 Ill. 2d 386, 512 N.E.2d 1213 (1987).

incident that he (Foutch) and the defendant had shot the victim but that the defendant had fired the shot that killed the victim. Because declarant Foutch's statements were made after the principal object of the conspiracy was completed, the State sought to admit the statements "as furthering a subordinate conspiracy or an extension of the conspiracy to conceal the . . . [offense]."[201] The supreme court held that, "[a]ssuming . . . the co-conspirator exception does include so-called 'concealment phase' statements,"[202] these statements did not come within the exception because they had not been made "in furtherance of any effort at concealment."[203] The convictions were therefore reversed for admission of improper hearsay.

Chief Justice Clark did not join in the majority opinion because the "novel" determination that the declarant's statement was not in furtherance of an effort at concealment "finds no support in the case law and rests wholly upon a foundation riddled with conjecture."[204]

D. ADMISSIONS BY SILENCE AND ADOPTIVE ADMISSIONS

Where an accusatory statement is made in the presence and hearing of a party, and the court concludes that a reasonable person would deny those statements if not true, and such statements are not denied, they are considered to be an admission by the target, with the result that such accusations may be accepted by the jury as true. In *People v. Morgan*,[205] an equivocal response to an incriminating accusation was considered the equivalent of silence because it did not

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201. People v. Parmly, 117 Ill. 2d 386, 393, 512 N.E.2d 1213, 1216 (1987).

202. *Id.* at 393, 512 N.E.2d at 1216.

203. *Id.*

204. *Id.* at 396-97, 512 N.E.2d at 1218 (Clark, C.J. concurring). Justice Clark did, however, join in the judgment of the court because of his belief that the trial judge abused his discretion "in refusing to excuse a juror notwithstanding substantial evidence that the juror was a friend of [the victim] and had been less than candid on voir dire in revealing the true nature of their relationship." *Id.* at 397, 512 N.E.2d at 1218 (Clark, C.J. concurring).

205. 44 Ill. App. 3d 459, 358 N.E.2d 280 (1977), *cert. denied*, 122 Ill. 2d 587, 530 N.E.2d 257 (1988). In *Morgan*, the court affirmed a conviction for burglary and arson on the strength of both an "adoptive admission" and defendant's fingerprint found at the scene. When a friend of the defendant asked him, in the presence of his brother and other friends, why he burned the cleaners down, he replied, "How do you know I did it?" When the friend replied, "Your brother told me," and the brother then told Virgil Morgan he might as well own up to it because the accuser knew it, the defendant "just sort of laughed and shrugged it off." *Id.* at 462, 358 N.E.2d at 283.

amount to a denial or a clear statement of non-acquiescence where such was called for.[206]

The key to admissibility of an adoptive admission is not just whether the statement was made in the presence of the party and directed to that party, but whether, in the opinion of the trial judge, circumstances were such that a reasonable person would have denied the statement if it were untrue. The focus then is on the circumstances in which the accusation is made.[207]

Such adoptive admissions are also recognized in civil cases. See, for example, *Breslin v. Bates*,[208] where, in affirming a judgment against an automobile driver, the court found that the driver's failure to deny her excessive speed when confronted by her companion's accusations constituted an adoptive admission. The driver did not remain silent, but made an equivocal remark that did not amount to a denial.[209]

E. EVIDENTIARY VS. JUDICIAL ADMISSIONS

Ordinary damaging statements made by a party are considered "evidentiary" admissions. The party against whom they are used can deny them or introduce evidence to contradict their substance. The trier of fact, as with other evidence, can accept them or not. Judicial admissions, however, once made, estop a party with respect to the matter admitted. Once made, they cannot be taken back or contradicted. They remove an issue from the trier of fact.

Judicial admissions are damaging statements made by a party under formal judicial circumstances.[210] The most typical example is an admission in a live pleading that has not been amended or superseded.[211] Other examples include testimony by a party at trial and statements made in court under formal circumstances by a party's lawyers. In addition, statements made by a party in a discovery deposition, if they are clear and unequivocal[212] statements of fact

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206. *See* People v. Morgan, 44 Ill. App. 3d 459, 462-64, 358 N.E.2d 280, 282-83 (1977), *cert. denied*, 122 Ill. 2d 587, 530 N.E.2d 257 (1988).

207. *See id.*

208. 14 Ill. App. 3d 941, 303 N.E.2d 807 (1973).

209. *See* Breslin v. Bates, 14 Ill. App. 3d. 941, 947, 303 N.E.2d 807, 812 (1973).

210. *See* Tom Olesker's Exciting World of Fashion v. Dun & Bradstreet, Inc., 71 Ill. App. 3d 562, 390 N.E.2d 60 (1979).

211. *See* Colt Constr. and Dev. Co. v. North, 168 Ill. App. 3d 913, 916, 523 N.E.2d 90, 92 (1988).

212. *See* Hansen v. Ruby Constr. Co., 155 Ill. App. 3d 475, 480, 508 N.E.2d 301, 304 (1987); *see also* Hansen v. Ruby Constr. Co., 164 Ill. App. 3d 884, 518

about a matter peculiarly within that party's knowledge, can amount to judicial admissions which will forever estop the party from contending the contrary in the current litigation.[213]

For example, in *Hansen v. Ruby Constr. Co.*,[214] a plaintiff postal worker's statements in a discovery deposition that he injured himself when he tripped over rubber bumpers on defendant's loading dock amounted to a judicial admission which estopped the plaintiff from later showing that he had actually fallen over some metal plates. Because the defendant had no responsibility for the rubber bumpers, summary judgment for defendant was affirmed.[215] As the *Hansen*

N.E.2d 354 (related case). As stated by the *Hansen* court:

> A judicial admission is a deliberate, clear, unequivocal statement of a party about a concrete fact within that party's peculiar knowledge. . . . The frequently stated purpose of the doctrine of judicial admissions is to eliminate the temptation to commit perjury . . . . Thus, assertions made in a deposition constitute binding judicial admissions only if they are unequivocal.

Hansen, 155 Ill. App. 3d at 480, 508 N.E.2d at 303-304.

213. The following two cases illustrate under what circumstances a statement made in a discovery deposition will and will not likely amount to a judicial admission. *Compare* Tom Olesker's Exciting World of Fashion v. Dun & Bradstreet, Inc., 71 Ill. App. 3d 562, 390 N.E.2d 60 (1979) (plaintiff is estopped by a judicial admission, made in his discovery deposition, that he first learned of his cause of action on a date more than one year prior to his filing suit) *with* Young v. Pease, 114 Ill. App. 3d 120, 448 N.E.2d 586 (1983) (statements made by a plaintiff in his discovery deposition as to when he first found out about his cause of action were not so clear and unequivocal as to amount to judicial admissions that would estop plaintiff on that issue).

214. 155 Ill. App. 3d 475, 508 N.E.2d 301 (1st Dist. 1987). This case was before the appellate court on two occasions. *Hansen I*, 155 Ill. App. 3d 475, 508 N.E.2d 301 (1987), involved an unsuccessful appeal by the plaintiff from summary judgment granted to the defendant architect because of plaintiff's judicial admission made in his discovery deposition. *Hansen II*, 164 Ill. App. 3d 884, 518 N.E.2d 354 (1987), involved an equally unsuccessful appeal by the plaintiff from summary judgment granted to the defendant construction company. In *Hansen II*, the plaintiff offered the deposition of an eyewitness to contradict his judicial admission. The court held that the law was "indisputable" that he could not use the deposition to relieve himself from the effect of a judicial admission. Hansen v. Ruby Constr. Co., 164 Ill. App. 3d 884, 887, 518 N.E.2d 354, 355 (1987).

215. *See* Hansen v. Ruby Constr. Co., 155 Ill. App. 3d 475, 479, 508 N.E.2d 301, 303 (1987). In *Hansen I*, several days after the plaintiff gave his deposition, he returned to the post office, for the first time in three and one-half years since the accident, and inspected the premises. After this visit, his attorney sent a letter to defendant's counsel stating that his client had been confused and that the rubber bumpers his client described were at his previous place of employment, not at the station where he was injured. The letter stated he had actually caught his heel on a

court noted, "a party cannot create a factual dispute by contradicting a previously made judicial admission . . . "[216] and "a party may not create a genuine issue of material fact by taking contradictory positions, nor may he remove a factual question from consideration just to raise it anew when convenient."[217]

Cases such as *Trapkus v. Edstrom's Inc.*[218] seem not to acknowledge the possibility of judicial admissions occurring in discovery depositions because of Supreme Court Rule 201(j) which states, "Disclosure of any matter obtained by discovery is not conclusive, but may be contradicted by other evidence."[219] The concern may be that the remedy is too drastic for a slip of the tongue. However, the case law cautions that, if the court concludes there was a slip of the tongue or an actual mistake, it should not find a judicial admission.[220]

The line of cases recognizing judicial admissions in discovery depositions was not mentioned in *Trapkus*. Moreover, there is a long line of cases that recognize the possibility of such admissions in discovery depositions.[221] These cases indicate that a trial judge has discretion in determining whether the facts before him give rise to a

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dock-plate assembly.

One and one-half years later, the defendant moved for summary judgment. Plaintiff filed a counter affidavit asserting that, after refreshing his recollection, he realized he had actually tripped over the metal plates, not the rubber bumpers. The defendant's motion was granted and affirmed on appeal. *Id.* at 478-79, 508 N.E.2d at 302-03.

216. *Hansen I*, 155 Ill. App. 3d at 480, 508 N.E.2d at 303-04 (citations omitted).

217. *Hansen I*, 155 Ill. App. 3d at 480, 508 N.E.2d at 304 (quoting Schmahl v. A.V.C. Enter., Inc., 148 Ill. App. 3d 324, 331, 499 N.E.2d 572, 577 (1986)).

218. 140 Ill. App. 3d 720, 489 N.E.2d 340 (1986).

219. ILL. REV. STAT. ch. 110A, para. 201(j) (1987).

220. *See* McCormack v. Haan, 23 Ill. App. 2d 87, 97, 161 N.E.2d 599, 604 (1959) ("[T]he doctrine of judicial admissions . . . requires the most thoughtful study for its sound application lest injustice be done on the strength of a chance statement made by a nervous unreflecting party.") (citing J. WIGMORE, WIGMORE ON EVIDENCE § 2594a (3rd ed.). However, the appellate court's conclusion that the plaintiff, nevertheless, made a judicial admission on the stand was reversed by the supreme court which held that whether a party has made a judicial admission "depends upon an evaluation of all his testimony, . . . not just a part of it," as well as an evaluation of all the testimony of the other witnesses and their opportunity to observe the facts about which they testify. McCormack v. Haan, 20 Ill. 2d 75, 78, 169 N.E.2d 239, 241 (1960).

221. *See, e.g.*, Hansen v. Ruby Constr. Co., 164 Ill. App. 3d 884, 518 N.E.2d 354 (1987); Hansen v. Ruby Constr. Co., 155 Ill. App. 3d 475, 508 N.E.2d 301 (1987); Young v. Pease, 114 Ill. App. 3d 120, 448 N.E.2d 586 (1983); Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 71 Ill. App. 3d 562, 390 N.E.2d 60 (1979); Haskell v. Siegmund, 28 Ill. App. 2d 1, 11, 170 N.E.2d 393, 398 (1960); Meier v. Pocius, 17 Ill. App. 2d 332, 150 N.E.2d 215 (1958).

judicial admission and also counsel that care be used in the application of such device so that injustice is not done.

In addition to deposition statements giving rise to judicial admissions, two recent cases provide concrete examples of the long known principle that lawyers can be held to have made judicial admissions binding on their clients based either upon what they say in open court or on what they put in pleadings.

The case of *Lowe v. Kang*,[222] an automobile-parking lot knock-down case, presents the rather unusual situation in which an attorney's statement during closing argument was held to be a judicial admission of liability estopping the client from contending to the contrary and resulting in a directed verdict on liability. In closing argument, defense counsel made numerous acknowledgements of the negligence of his client: "There is no question that there was fault on the part of both parties to this occurrence." "I'm not trying to say that Stephen Kang did nothing wrong. . . . There is no question he is somewhat responsible for this. . . .";[223] "As I've said, I believe this is a 50/50 case. Both parties were equally at fault."[224] Apparently defense counsel was trying to keep damages down by being frank with the jury. After defense counsel's closing argument, plaintiff's motion for a directed verdict as to defendant's liability was granted.

On appeal, the court affirmed the ruling that defense counsel had made a judicial admission of his client's liability when he "stated unambiguously that defendant was 'at fault' and 'responsible' for the accident."[225] Accordingly, the court held that, not only did the statements admit negligence, but also proximate cause and therefore liability.[226]

In *Colt Constr. and Dev. Co. v. North*,[227] the defendant's answer to the plaintiff's counterclaim stated that the maximum amount owed for certain work was $7,273. In a supporting affidavit defendant also stated that he owed plaintiff no more than that figure. In affirming a summary judgment for the plaintiff, the court stated, "In our judgment, these admissions by [the defendant] in his answer and attached affidavit constitute binding judicial admissions, and may serve as the basis for summary judgment."[228]

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222. 167 Ill. App. 3d 772, 521 N.E.2d 1245 (1988).

223. Lowe v. Kang, 167 Ill. App. 3d 772, 778, 521 N.E.2d 1245, 1249 (1988).

224. *Id.* at 779, 521 N.E.2d at 1249.

225. *Id.* at 780, 521 N.E.2d at 1250.

226. *See id.*

227. 168 Ill. App. 3d 913, 915, 523 N.E.2d 90, 92 (1988).

228. Colt Constr. & Dev. Co. v. North, 168 Ill. App. 3d 913, 916-17, 523 N.E.2d 90, 92 (1988).

A judicial admission may also arise in two other situations. At least one case[229] suggests that a party's answer to interrogatories can constitute a judicial admission if the answers are based on the party's personal knowledge and are sufficiently definite and specific. However, the appellate court there refused to find a judicial admission on the facts of the case and reversed the trial court's dismissal of the plaintiff's case for not being timely filed. In addition, failure to respond to a request to admit facts within twenty-eight days under Illinois Supreme Court Rule 216 can have the effect of a judicial admission and estop the party as to the facts requested. However, courts have some discretion in deciding whether to allow a party to file a response after the twenty-eight day period has expired.[230]

F. EVIDENTIARY ADMISSIONS: LEGAL CONCLUSIONS AS ADMISSIONS

In two recent cases, the appellate courts from the First and Fifth Districts have differed over the question of whether a party's damaging legal conclusions can be admitted against that party as an admission. The First District said no and the Fifth District said yes.

1. *Party's Damaging "Conclusion" Not an Admission*

In *Ferry v. Checker Taxi Co.*,[231] the defendant cab company took a statement from the plaintiff the day after a collision between the Checker cab in which the plaintiff was riding and another cab. Although the plaintiff had sued Checker, in his out of court statement he had blamed the other cab for the accident. The trial court granted a motion in limine excluding reference to that portion of the statement in which the plaintiff blamed the other cab driver. In affirming the verdict for the plaintiff, the First District held that "Ferry's statement placing the blame on the other driver was a legal conclusion . . . and, as such, properly inadmissible"[232] as an admission. "[A] party's reference to another person as being the one at fault is not an admission, rather it is an improper expression on the ultimate issue of the case and an invasion on the province of the jury."[233]

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229. *See, e.g.*, Kirby v. Jarrett, 190 Ill. App. 3d 8, 545 N.E.2d 965 (1989).

230. *See* Sims v. City of Alton, 172 Ill. App. 3d 694, 526 N.E.2d 931 (1988); Deboe v. Flick, 172 Ill. App. 3d 673, 526 N.E.2d 913 (1988); Magee v. Walbro, Inc., 171 Ill. App. 3d 774, 525 N.E.2d 975 (1988).

231. 165 Ill. App. 3d 744, 520 N.E.2d 733 (1987).

232. Ferry v. Checker Taxi Co., 165 Ill. App. 3d 744, 749, 520 N.E.2d 733, 736 (1987).

233. *Id.* at 748, 520 N.E.2d at 736 (citing Schall v. Forrest, 51 Ill. App. 3d 613, 366 N.E.2d 1111 (1977)).

2. *Traditional Definition of Admission Not Followed*

The court in *Ferry*, by not allowing the plaintiff's damaging statement to be used against him, backs away from the general concept that anything ever said by a party that is contrary to what that party is contending at trial is an admission. If Ferry's statement had been used by him only to place blame on another cab company, then obviously such a statement is improper opinion. However, if his statement is damaging to his own case, it is admissible as an admission. The rule excluding opinion testimony by non-expert witnesses[234] should not be used to prevent a party's damaging statement from being held against that party. The fact that it was an opinion should go to weight, not admissibility.[235] In addition, even if a party has no personal knowledge of the matters stated in the opinion, the admission is still admissible because an admission need not be based on "personal knowledge."[236]

3. *Party's Conclusion Can be an Admission*

A contrary approach, and one consistent with the traditional definition of an admission, was followed in *Wright v. Stokes*.[237] In reversing a jury verdict awarding defendant motorist damages and denying damages to plaintiff, the Fifth District held that the trial judge should have admitted defendant's guilty plea to a traffic ticket given to him in connection with the accident, even though the defendant received supervision and the underlying charge was dismissed without an adjudication of guilt. As to the defendant's contention that his plea was merely a legal conclusion and that a legal conclusion is not an admission, the court held that "the use of the term 'fault' does not constitute a legal conclusion which is inadmissible as an admission. It has been held that a party's statement that he may have been at fault can constitute an admission."[238]

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234. *See* 7 J. WIGMORE, EVIDENCE § 1917 at 10 (Chadbourn rev. ed. 1978); *see also* Freeding-Skokie Roll Off Service v. Hamilton, 108 Ill. 2d 217, 221, 483 N.E.2d 524, 526 (1985) (acknowledging this rule).

235. Admissibility would turn on the fact that what was said was damaging. That the statement was unlikely to be true would go to how much credence the trier would give it. This is similar to the rationale for allowing non-vicarious admissions to be admitted against a party where what the party said was not based on personal knowledge. *See* section V.B.2 of this article.

236. Casey v. Burns, 7 Ill. App. 2d 316, 324, 129 N.E.2d 440, 445 (1955).

237. 167 Ill. App. 3d 887, 522 N.E.2d 308 (1988).

238. Wright v. Stokes, 167 Ill. App. 3d 887, 892, 522 N.E.2d 308, 311 (1988) (citing Asher v. Stromberg, 78 Ill. App. 2d 267, 223 N.E.2d 300 (1966)).

4. *Wright v. Stokes: Proper View of Admissions*

It would seem that the correct approach, and the one most consistent with the definition of an admission, is that followed by the Fifth District. When a party makes a damaging conclusory statement, it should generally be admissible as an admission because the party can always take the stand and explain the reason why it was made. The fact that the statement is a legal (or medical) conclusion should not disqualify its use as an admission if it is the party himself who makes the statement. Such an approach is consistent with the basis for admitting admissions: anything a party ever says or does prior to trial that is inconsistent with what he is contending at trial is admissible against him as an admission.[239]

5. *Conclusion May be Excludable Where Admission is Vicarious*

If, however, the damaging statement is not made personally by the party but is a vicarious admission made by an agent or servant, then it makes sense to exclude it if it is a "conclusory" statement that goes beyond the "authority" given to the speaker or goes beyond things that fall within the scope of the speaker's employment. If the damaging statement is the personal statement of a party, however, there should be no reason to ask whether the party has "authorized" his own statement or has made a statement beyond his own "competence." In short, if the statement is one made personally by a party, there seems to be no good reason to prevent the jury from hearing a damaging but perhaps extravagant or conclusory statement made by that party.

G. CROSS BEYOND THE SCOPE OF THE DIRECT TO ELICIT AN ADMISSION IS IMPROPER

In *Cuellar v. Hout*,[240] the court reaffirmed the principle that admissions, as substantive evidence, should be introduced as a part of a party's case in chief, not on cross-examination during the other party's case in chief if the cross-examiner has to go beyond the scope of the direct to elicit the damaging material. A party may go beyond the scope of the direct to elicit impeaching material,[241] but not to bring out admissions; they belong in the examiner's case in chief. However, if cross does not go beyond the scope of the direct (or an

239. *See supra* text accompanying notes 158-59.

240. 168 Ill. App. 3d 416, 522 N.E.2d 322 (1988).

241. *See* People v. Hudson, 171 Ill. App. 3d 1029, 1037, 526 N.E.2d 164, 169 (1987), *appeal denied*, 121 Ill. 2d 577, 526 N.E.2d 835 (1988).

admission is elicited as part of proper impeachment questioning), then any admissions elicited on cross are properly admitted as part of the cross-examination.[242]

In *Cuellar*,[243] the court held that there was no error in excluding testimony of an admission when the plaintiff sought to extract the admission on cross-examination of a defense witness and had to go beyond the scope of the direct to do so. Apparently the plaintiff had not attempted to prove the admission as part of its own case in chief.[244] "Cross-examination in which a party attempts to put its theory of a case before a jury, but which is beyond the scope of the direct examination of the witness, is improper."[245]

VI. HEARSAY UNDER *Wilson v. Clark* (Federal Rules of Evidence 803 and 705); EXPERT'S OPINION

With the adoption of Federal Rules of Evidence 703 and 705 in *Wilson v. Clark*,[246] experts are allowed to base their opinions on data that has not been admitted in evidence. For unadmitted data to be the basis for an opinion, it need only be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences."[247]

The principal issues that have arisen under this rule include the following:

(a) What kind of inadmissible or unadmitted evidence can an expert rely on in giving his or her opinion?
(b) What does "data reasonably relied on by experts in the field" include, and how is that to be determined? and
(c) To what extent can an expert describe to the jury, on direct examination, the inadmissible or unadmitted evidence on which his or her opinion is based?

It is clear that, although an expert may rely on certain unadmitted evidence in giving his opinion, only that opinion, not the unadmitted

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242. *See id.* This is implicit in the notion that if a matter is important enough for the party being cross-examined to mention it on direct, then the cross-examiner ought to be able to bring out related items on cross that put what was just said on direct in context.

243. 168 Ill. App. 3d 416, 522 N.E.2d 322 (1988).

244. Plaintiff also apparently did not ask to reopen its case to put the admission in evidence after it had been ruled out on cross-examination.

245. Cuellar v. Hout, 168 Ill. App. 3d 416, 425, 522 N.E.2d 322, 328 (1988) (citing Brynlesen v. Carrol Constr., 27 Ill. 2d 566, 569, 190 N.E.2d 315, 317 (1963).

246. 84 Ill. 2d 186, 417 N.E.2d 1322 (1981).

247. FED. R. EVID. 703.

data, is admissible as substantive evidence.[248] The unadmitted data may be admitted under certain circumstances to "illustrate or explain" the expert's testimony, but it is not substantive evidence.

For example, in *Henry v. Brenner*,[249] a testifying physician could properly rely on medical records made by staff physicians at a clinic in forming his opinion as to the plaintiff because such records were commonly used and relied upon by the medical staff at the clinic. The physician could also testify to the contents of those records because such inadmissible hearsay was "admitted solely to illustrate and explain his opinion."[250] The court acknowledged that placing otherwise inadmissible hearsay before the jury "raises a serious potential for abuse."[251] Here, however, the inadmissible hearsay was a medical record prepared by a disinterested third party, and the doctor customarily relied upon reports from other staff doctors whom he trusted.[252]

In some cases it will be reversible error to refuse to allow an expert to recite the hearsay to illustrate the basis for the opinion.[253] In *People v. Anderson*,[254] the Illinois Supreme Court held that the trial court improperly refused to allow the defendant's psychiatric expert to disclose the facts and opinions contained in reports on which he relied.[255] The reports included evaluations by psychiatrists and counselors made while the defendant was in the army and in jail, reports by the State's psychiatric experts, and information regarding a prior criminal offense.[256]

To refuse to allow the expert to refer "to the contents of the materials upon which he relied"[257] compels him "to appear to base his diagnosis upon reasons which are flimsy and inconclusive when in fact they may not be."[258] "Absent a full explanation of the expert's

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248. *See* Mayer v. Baisier, 147 Ill. App. 3d 150, 154, 497 N.E.2d 827, 831 (1986).

249. 138 Ill. App. 3d 609, 486 N.E.2d 934 (1985).

250. Henry v. Brenner, 138 Ill. App. 3d 609, 614, 486 N.E.2d 934, 937 (1985).

251. *Id.* at 615, 486 N.E.2d at 937.

252. *See id.* The court also acknowledged that the use of a limiting instruction helped to control any possible abuse.

253. *See* People v. Anderson, 113 Ill. 2d 1, 495 N.E.2d 485 (1986).

254. *Id.*

255. *See id.* at 7, 495 N.E.2d at 487. At trial, the psychiatrist was only allowed to state that "he utilized these reports." *Id.*

256. *See id.* at 7, 495 N.E.2d at 487.

257. *Id.* at 10, 495 N.E.2d at 489.

258. *Id.* at 11, 495 N.E.2d at 489 (quoting State v. Myers, 159 W. Va. 353, 358, 222 S.E.2d 300, 304 (1976)).

reasons, including underlying facts and opinions, the jury has no way of evaluating the expert testimony . . . and is therefore faced with a 'meaningless conclusion' by the witness."[259] Any problems with this approach can be resolved by proper limiting instructions.[260]

The supreme court noted that, "A trial judge, of course, need not allow the expert to recite secondhand information when its probative value in explaining the expert's opinion pales beside its likely prejudicial impact or its tendency to create confusion."[261]

Also, in *In re Scruggs*,[262] a commitment proceeding, a psychologist was properly allowed to rely on inadmissible third person hearsay statements and statements by hearsay declarants he had talked to concerning the patient. The manager of an apartment building told the psychologist that the patient had opened her apartment door in the nude to let in a carpenter and had left her keys lying on the counter in the building office and that her lease had been terminated as a result of these incidents. In holding that it was permissible to let the expert disclose to the jury the hearsay that the psychologist relied upon for his opinion that the patient was a danger to herself, the court stated:

> If it is normal and reasonable within a field of expertise to rely upon the statements of others, then opinions premised on those statements must necessarily be allowed to demonstrate their factual underpinnings. The facts underlying the opinion provide no substantive proof at trial, but are instead limited to establishing the worth of the opinion derived therefrom. They may either enhance or diminish the resultant opinion and the expert delivering it and that is their sole purpose.[263]

As was noted in *Anderson*, courts can give limiting instructions on the hearsay statements used to illustrate the basis for an expert's opinion, and need not allow the hearsay statements in at all if their probative or illustrative force is outweighed by the danger of improper use or confusion by the jury.[264]

A. CAN AN EXPERT'S OPINION CONVERT HEARSAY TO SUBSTANTIVE EVIDENCE?

A case has raised the question whether, under rule 703, an expert's opinion can convert the hearsay he relies on into substantive evidence.

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259. *Id.* at 11, 495 N.E.2d at 489.
260. *See id.* at 12, 495 N.E.2d at 490.
261. *Id.*
262. 151 Ill. App. 3d 260, 502 N.E.2d 1108 (1986).
263. *In re* Scruggs, 151 Ill. App. 3d 260, 263, 502 N.E.2d 1108, 1110 (1986).
264. *See* People v. Anderson, 113 Ill. 2d 1, 495 N.E.2d 485 (1986).

The answer to that question should be, "No, it cannot, but it should not make any difference." As long as the expert's opinion is reasonably based on the data (which itself must be of a kind reasonably relied upon by experts in the field), the data does not have to be "converted" into substantive evidence. The expert's opinion is substantive evidence; the data do not have to be. However, one case appears to take a different view.

In *Mayer v. Baisier*,[265] plaintiff's expert's testimony was based exclusively on his review of hospital records and an autopsy report, neither of which were introduced into evidence. The expert's opinion was that, because the records showed the defendant surgeon had seen the patient only once from the 18th of October until December 31st when plaintiff died, such conduct was "definitely and strongly a deviation below the accepted standards of care."[266] A directed verdict was entered on the ground that the plaintiff had not established a prima facie case. This was affirmed on appeal.

The plaintiff argued that his expert's opinion was admissible as substantive evidence under rule 703 and such evidence made a prima facie case. The court in *Mayer* concluded that *Wilson v. Clark*[267] allows an expert to use hearsay as a basis for his opinion but that the opinion cannot convert the hearsay into substantive evidence.[268]

The appellate court, noting that "the trial court properly permitted . . . [the expert] to testify that he relied upon the decedent's hospital records in formulating his opinion"[269] and was correct in allowing him "to testify to the contents of those records in explaining the basis of his opinion,"[270] concluded, however, that the "testimony did not transform the hospital records . . . into substantively admissible evidence."[271] This testimony was admissible only for the limited purpose of explaining the basis for his opinion. Accordingly the court held that the expert's "testimony cannot be considered substantive proof of [defendant's] alleged negligent conduct"[272] and, therefore, is insufficient to establish a prima facie case for negligence.[273]

Questions raised by this opinion include: (1) If the opinion does not come in as substantive evidence, for what purpose is the opinion

265. 147 Ill. App. 3d 150, 497 N.E.2d 827 (1986).
266. Mayer v. Baisier, 147 Ill. App. 3d 150, 154, 497 N.E.2d 827, 829 (1986).
267. 84 Ill. 2d 186, 417 N.E.2d 1322 (1981).
268. *See Mayer*, 147 Ill. App. 3d 150, 156-57, 497 N.E.2d 827, 830-31 (1986).
269. *Id.* at 157, 497 N.E.2d at 831.
270. *Id.*
271. *Id.*
272. *Id.* at 158, 497 N.E.2d at 832.
273. *See id.*

admitted at all? What is it that the "contents of the records" are illustrating? (2) If the medical records are reasonably reliable, why can not the expert base his opinion on them? (3) If medical records are not reasonably reliable, what was the basis for the *Wilson v. Clark* opinion? (4) If the expert's opinion would have been admitted if the attorney had had the hospital records admitted, is the result in *Mayer* inconsistent with the court's intent in *Wilson v. Clark* to lessen the need for introduction of medical records?

The question raised here is whether *Mayer v. Baisier* misapplied rule 703 to throw out not only the underlying hearsay but also the expert opinion. This appears to be the kind of case *Wilson v. Clark* was designed to cover. It also seems clearly inconsistent with the supreme court's ruling in *Melecosky v. McCarthy Bros.*[274] that experts can rely on inadmissible hearsay in forming their opinions. Moreover, the fact that the opinion was being given for "litigation" rather than medical purposes should not be fatal given that experts testifying in court will generally be giving their opinions for purposes of litigation.

The basic problem with this opinion is that the court seems unwilling to accept the consequences of recognizing rule 703. This rule allows an expert to base an opinion on inadmissible evidence (hearsay) if it is of a type reasonably relied upon by experts in the witness' profession. Such an opinion is admissible as substantive evidence. In *Mayer*, the expert's opinion, based on the hospital records, was that the surgeon had breached a duty of care by abandoning the patient after the operation. Although the court found the opinion admissible, it found that, despite the expert testimony, there was no prima facie case.

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274. 115 Ill. 2d 209, 503 N.E.2d 355 (1986). The Illinois Supreme Court again affirmed the propriety of experts basing their opinion on unadmitted hearsay statements. "Although *Wilson* dealt only with the admissibility of an expert opinion based upon hospital records, the language of the *Wilson* opinion indicates a general approval of the rationale of rules 703 and 705. Rule 703 allows expert witnesses to base an opinion upon inadmissible facts or data." Melecosky v. McCarthy Bros., 115 Ill. 2d 209, 215, 503 N.E.2d 355, 357 (1986) (citations omitted).

The court held that it was reversible error to bar plaintiff from using the evidence deposition of a non-treating physician whose opinions were based in part upon plaintiff's subjective statements. The court relied on rule 703 to overturn long standing decisional law that a non-treating physician could testify only about "objective" symptoms and could not give an opinion based on the "subjective" symptoms of the patient. The court concluded that "since experts in their own practice normally rely on such [subjective hearsay statements] it is consistent with the purposes of Rule 703" to allow the doctor to rely on them in arriving at his medical opinion. *Id.* at 216, 503 N.E.2d at 358.

If the court believed that the expert's opinion, based on a lack of entries in the hospital record, was not sufficient to show abandonment by the surgeon, it should have found that it was unreasonable for the expert to draw such a conclusion and excluded the opinion.[275] With the opinion excluded, there could have been no prima facie case. However, if the court had excluded the opinion because it was not a reasonable one to draw from the data, it would have had to exclude the opinion even if the records had been admitted into evidence.

What the court apparently did, however, was to conclude that the opinion was based on hearsay, therefore it could not be substantive evidence, thus there was no prima facie case. The court stated: "Massell's reliance upon and testimony regarding certain contents of the hospital records was permissible,"[276] however this testimony "did not transform the hospital records . . . into substantively admissible evidence. . . ."[277] The implication is that the records must be admissible to allow this opinion. Therefore, the unavoidable conclusion is that the court found the opinion was insufficient to establish a prima facie case because it was based on hearsay. This is the exact opposite of what rule 703 permits.

The question remains, should the outcome of a case like this depend on the medical records actually being admitted in evidence before the expert can base an opinion on them? If so, will medical records have to actually be admitted in all cases again? Such a result is inconsistent with the supreme court's apparent intent in *Wilson v. Clark* to make it easier for experts to base opinions on unadmitted hospital records rather than to make it easier to get the records themselves admitted through the testimony of a custodian under rule 236.[278]

A different approach to the problem was taken in *People v. Sassu*.[279] In *Sassu*, a medical expert testified as to the results of a blood test performed by a Canadian laboratory that showed no traces of marijuana in the blood of either murder victim. The expert received the test results verbally and testified to them in court. To the defen-

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275. *But cf.* FED. R. EVID. 803(6) (absence of an entry in a business record about an event is not excludable as hearsay to show non-occurrence of the event if an entry would regularly be made if the event had occurred).

276. Mayer v. Baisier, 147 Ill. App. 3d 150, 157, 497 N.E.2d 827, 831 (1986).

277. *Id.* at 157, 497 N.E.2d at 831.

278. *See supra* note 246 and accompanying text; *see also* People v. Anderson 113 Ill. 2d 1, 495 N.E.2d 485 (1986).

279. 151 Ill. App. 3d 199, 502 N.E.2d 1047 (1986).

dant's contention that the expert was thus testifying to hearsay, the court stated:

> With respect to the hearsay contention, since the Illinois Supreme Court's adoption in 1981 of Federal Rules of Evidence 703 and 705, Illinois courts have permitted expert witnesses to give an opinion based upon either firsthand or secondhand facts not in evidence, provided that the information relied upon is of a type reasonably relied upon by experts in their particular field in forming opinions or inferences upon the subjects.[280]

Because, in giving his opinion, "Dr. Schaffer stated that the information he received from the Canadian forensic laboratory was of the type customarily relied upon in his profession,"[281] the court found no error in allowing Dr. Schaffer's expert testimony as to the test results.[282]

Thus, although clearly some hearsay can be relied on and disclosed to the trier of fact for illustrative purposes, the type of hearsay and the extent it can be used to form the basis for the expert's opinion are still matters to be fleshed out. Nonetheless, the *Anderson* and *Melecosky* cases suggest the Illinois Supreme Court favors a broad interpretation of the Rule that will allow experts a great degree of latitude in relying on hearsay statements.

VII. JUDGMENTS OF CONVICTION AS EVIDENCE

Illinois law allows certain criminal convictions to be used as substantive evidence in civil cases where the facts at issue are the same. The criminal conviction can be considered as evidence of any fact necessary to the conviction.[283] The conviction need not be a felony, but it must be for a "serious" offense.[284]

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280. People v. Sassu, 151 Ill. App. 3d 199, 205, 502 N.E.2d 1047, 1051-52 (1986).

281. *Id.* at 205-06, 502 N.E.2d at 1052.

282. *See Sassu*, 151 Ill. App. 3d 199, 502 N.E.2d 1047 (1986).

283. *See, e.g.*, Smith v. Andrews, 54 Ill. App. 2d 51, 203 N.E.2d 160 (1964), *cert. denied*, 382 U.S. 1029 (1966) (rape conviction admissible in civil case as prima facie evidence defendant had in fact committed a rape).

284. *See* Thorton v. Paul, 74 Ill. 2d 132, 384 N.E.2d 335 (1978) (serious misdemeanor convictions are admissible as substantive evidence; defendant bartender's conviction for misdemeanor battery should have been admitted in a later civil case as prima facie evidence that the bartender's striking the plaintiff was a battery, was intentional, and was not covered by the insured's policy); Bay State Ins. Co. v. Wilson, 108 Ill. App. 3d 1096, 440 N.E.2d 131 (1982), *aff'd*, 96 Ill. 2d 487, 461 N.E.2d 880 (1983) (battery conviction, a class 3 felony, admissible in civil case to show shooting by insured was intentional and not covered by the policy).

The criminal convictions do not act as an estoppel in the later civil case unless they are being introduced against the criminal himself and he is a party in the civil case.[285] The person against whom they are introduced can put in evidence to contradict the facts inherent in the criminal conviction.

This hearsay exception applies to criminal convictions only, not pleas.[286] However, a guilty plea in a criminal case may be admitted in a later civil trial as an admission if it is relevant to the factual issues.[287] In such a situation, a plea of guilty to even a minor traffic offense such as running a stop sign, if relevant, will be admissible as an admission.[288] Thus, unlike a conviction for a minor traffic offense

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285. If a criminal conviction against one defendant, *e.g.*, the driver of a grocery truck convicted for involuntary manslaughter in running down the pedestrian (plaintiff's decedent), is introduced in evidence against another party, *e.g.*, the grocery store owner sued by plaintiff in connection with the pedestrian's death, the conviction cannot estop the grocery store owner since he was not a party to the criminal case and could not have cross-examined witnesses or introduced evidence. It can, however, be introduced against the store owner as evidence of any fact necessary to the rendition of the criminal judgment, *e.g.*, reckless conduct of the driver that caused the death of the pedestrian. However, if the driver himself was being sued in the civil suit, his criminal conviction could well estop him from relitigating these issues since he had already done so and the issues had been resolved against him beyond a reasonable doubt.

286. "Proof of a criminal conviction is admissible in a civil case as prima facie evidence of the facts upon which the conviction was based." Rockford Mut. Ins. Co. v. Shattuck, 188 Ill. App. 3d 787, 789, 544 N.E.2d 843, 845 (1989). The criminal conviction must be for a felony or at least a "serious" misdemeanor. *See supra* notes 283-284 and accompanying text.

287. *See* People v. Powell, 107 Ill. App. 3d 418, 470 N.E.2d 1258 (1982). "A guilty plea to a traffic offense is a judicial admission which, although not conclusive, is proper evidence against [the driver] in a civil proceeding arising from the same incident." *Id.* at 419, 470 N.E.2d at 1259-60 (Plea of guilty to DUI in traffic court case can be used as an admission in a civil implied consent hearing). Note, however, the guilty plea will be a judicial admission (will create an estoppel and be conclusive) only in the case in which it is entered, *i.e.*, the traffic court case. When the traffic court admission is used in the civil case, as the court points out, it will not be "conclusive," it will not be a judicial admission.

288. The introduction of the plea differs in theory from introduction of the judgment entered thereon. The judgment of conviction constitutes a hearsay exception when offered to prove that any facts essential to the judgment have been previously found to exist; whereas the plea is offered to prove only that the offender admitted facts constituting guilt and not that such facts were adjudicated to exist . . . . The plea would not estop the driver from offering testimony to explain the plea, which the trier-of-fact may consider along with all other evidence.

Id. at 420, 470 N.E.2d at 1260 (1982). Note, the judgment of conviction for a minor

when no plea has been entered, pleas of guilty for such minor offenses can have a second life as part of a related civil case.

A. TRAFFIC CONVICTION NOT ADMISSIBLE IN CIVIL CASE; TRAFFIC PLEAS ARE ADMISSIBLE

The early cases indicate that only felonies or "serious" misdemeanor convictions can later be used as substantive evidence. In *Hengels v. Gilski*,[289] the court held that a "hit and run" conviction of the defendant driver could not be used as substantive evidence in a related civil case because the charges may not have been taken seriously enough to make the findings of fact reliable for use in other cases. The court observed that a "traffic court conviction will often result from expediency, convenience and compromise; the constitutional safeguards are often perfunctory and the defendant's opportunity and motive to defend vigorously are often lacking."[290] The court also held that a traffic court conviction does not possess:

> the adequate assurance of reliability necessary to justify its admission into evidence at a later civil trial based upon the same facts. To hold otherwise, we believe could conceivably turn a mechanical and summary traffic court hearing into the cornerstone of a significant civil action filed under the conclusion of the criminal proceedings.[291]

Thus, although pleas for any offense, serious or not, are admissible as admissions, traffic convictions for "non-serious" traffic offenses are not admissible as evidence of the facts found. The court in *Hengels* did not state what kind of traffic offense would be serious enough, but it is likely that a conviction for driving under the influence might rise to that level.

VIII. DECLARATIONS AGAINST INTEREST

Declarations against interest are like admissions in that they are statements "hurtful" to the declarant. They are hurtful, however, only to declarants who are not parties to the lawsuit at issue. State-

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traffic offense, (*e.g.*, running a stop sign) would probably not estop the driver from contesting that fact in a related civil case because the stakes were probably not high enough to say he had his one "day in court" on that issue. However, if the conviction were for a serious traffic offense, perhaps DUI, it might raise an estoppel against the convicted defendant in a subsequent civil case arising out of the same incident.

289. 127 Ill. App. 3d 894, 469 N.E.2d 708 (1984).

290. Hengels v. Gilski, 127 Ill. App. 3d 894, 910, 469 N.E.2d 708, 721 (1984).

291. *Id.* at 910, 469 N.E.2d at 721.

ments hurtful or damaging to a party, or more specifically the party's case, are considered admissions. A statement hurtful or damaging to a declarant who is not a party cannot be an admission but may qualify as a declaration against interest.

For a non-party declarant's damaging statement to be admissible as a declaration against interest, the declarant must be unavailable and the statement must have been against his pecuniary or proprietary interest when made.[292] This represents another principal difference between an admission and a declaration against interest in that an admission need not be hurtful or damaging when made.

A. DECLARATIONS AGAINST PENAL INTEREST

Until recently, declarations against interest had to be against the pecuniary or proprietary interest of the declarant.[293] The statement had to hit the declarant "in the pocketbook," and an acknowledgement of a debt was a clear example.[294] Declarations against so called "penal interest," that is, out of court confessions by absent declarants used to exculpate a defendant currently on trial, generally were not admitted in Illinois unless required by the interests of justice.[295] However, in light of the Illinois Supreme Court's decision in *People v. Bowel*,[296] such declarations are now admissible if they comply with the requirements set out in that opinion.

Previous to *Bowel*, Illinois courts held that declarations against interest to exculpate an accused could be admitted only if all of the following criteria were met: (1) the statement had to be against the interest of the declarant; (2) it had to have been made spontaneously to a close friend, as opposed to a stranger; (3) it had to be corroborated by circumstantial evidence; and (4) the declarant had to be available.[297] One of the curious aspects of requiring "availability" before admitting the declaration is that the very thing previously required for a declaration to be admissible (unavailability) was now being discarded.

In *Bowel*, the court reiterated the four requirements for admissibility, but noted that there was some uncertainty whether all four requirements had to be met before the statement could be admitted.

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292. *See* Buckley v. Cronkite, 74 Ill. App. 3d 487, 393 N.E.2d 60 (1979).

293. *See id.* at 492, 393 N.E.2d at 65.

294. *Id.*

295. *See* People v. Tate, 87 Ill. 2d 134, 143-44, 429 N.E.2d 470, 475 (1981).

296. 111 Ill. 2d 58, 488 N.E.2d 995 (1986).

297. *See* People v. Foster, 66 Ill. App. 3d 292, 383 N.E.2d 788 (1978) (citing People v. Ireland, 38 Ill. App. 3d 616, 348 N.E.2d 277 (1976)).

At least one case, *People v. Foster*,[298] had so held. The *Bowel* court, however, ruled that all four indicia need not be present to admit the declaration: "The four factors which the [Supreme] [C]ourt enumerated in *Chambers v. Mississippi*, are to be regarded simply as indicia of trustworthiness and not as requirements of admissibility."[299] After *Bowel*, the question to be resolved by a court considering the admissibility of such a declaration is "whether the declaration was made under circumstances that provide 'considerable assurance' of its reliability by objective indicia of trustworthiness."[300]

Federal rule 804(b)(3) requires that declarations against penal interest to exculpate an accused be, in fact, supported by "corroborating circumstances" that "clearly indicate the trustworthiness of the statement."[301] Given the language in *Bowel*, the Illinois and federal standard for determining reliability seem very close. However, under the federal rule, the declarant must be unavailable.[302] Under *Bowel*, the availability of the declarant for cross-examination can be considered a plus in favor of admitting the statement.

IX. Does Illinois Recognize A "Catchall" Exception?

The Federal Rules of Evidence recognize what has been referred to as a "catchall" exception to the hearsay rule for those out of court statements that do not meet the requirements of any traditional exception but which do have "equivalent circumstantial guarantees of trustworthiness" to exceptions already recognized.[303] Those exceptions already recognized are set out in 803(1) to (23), and 804(b)(1) to (4). Probably, statements having equivalent circumstantial guarantees of trustworthiness to 801(d)(1) prior statements as non-hearsay, and 801(d)(2), admissions, would also qualify for admissibility under the catchall exception, even though these statements are considered "non-hearsay" and not exceptions.

To qualify under this catchall exception, a statement must meet several requirements: the statement must be of a material fact; it must be more probative on the point than other evidence the proponent can procure through reasonable effort; and the general purposes of the rules and the interests of justice must be served by admitting the

298. 66 Ill. App. 3d at 295, 383 N.E.2d at 789 (1978).

299. People v. Bowel, 111 Ill. 2d 58, 67, 488 N.E.2d 995, 999 (1986) (citing Chambers v. Mississippi, 410 U.S. 284, 300-01 (1973)).

300. *Bowel*, 111 Ill. 2d at 67, 488 N.E.2d at 1000.

301. Fed. R. Evid. 804(b)(3).

302. Fed. R. Evid. 804(b).

303. Fed. R. Evid. 803(24), 804(b)(5).

statement.[304] However, the statement seeking admission must also have "equivalent guarantees of trustworthiness."[305] This is perhaps the most important criterion to be met. Thus, under the federal catchall rule, the question arises, to what are these "guarantees of trustworthiness" to be equivalent? Presumably the guarantees of the statement to be admitted must be equivalent to those that accompany statements qualifying under all the other exceptions and 801(d)(1) and 801(d)(2).

The language "equivalent circumstantial guarantees of trustworthiness" was added by the Senate Judiciary Committee in place of "comparable circumstantial guarantees of trustworthiness" contained in the original draft of the rules submitted to Congress.[306] It is likely that the Senate intended the added language to make it clear that this is not to be a vague, "open ended," general trustworthiness type of exception. Moreover, the Senate said as much in its comments to the Rule in its report. "It is intended that the residual hearsay exception will be used very rarely, and only in exceptional circumstances."[307]

There is surprisingly little case law in Illinois dealing with the catchall notion. One case which raised the issue is *In re T.D.*[308] In this juvenile case, the court held that the label on a tube of glue the respondent was charged with sniffing "was sufficiently reliable and trustworthy on its face to be considered an exception to the hearsay rule."[309] The label was therefore admitted to prove what the tube contained. In recognizing such an exception, the court did not cite any Illinois authority for such a "trustworthiness" exception. The court was impressed, however, by the fact that the substance in question was hazardous and that the label was required by law to be on the product. It therefore concluded that "the trustworthiness of the label is beyond suspicion and though technically it does not meet the requirements for a business record, it should be an exception from the rule against hearsay."[310]

Although no Illinois authority was cited in support of a general trustworthiness exception, the court did note that its holding was

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304. *See* FED. R. EVID. 803(24) and 804(b)(5). Under 803(24) and 804(b)(5), there is also a pretrial notice requirement for using a catchall exception.

305. FED. R. EVID. 803(24), 804(b)(5).

306. Report on the Senate Committee on the Judiciary, Fed. Rules of Evidence, S.Rep. No. 1277, 93rd Cong. 2d Sess., p. 18 (1974); 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7065.

307. *Id.*

308. 115 Ill. App. 3d 872, 450 N.E.2d 455 (1983).

309. *Id.* at 876, 450 N.E.2d at 458.

310. *Id.* at 877, 450 N.E.2d at 458.

consistent with the general rule permitting the self-authentication of trade inscriptions: "[i]nscriptions, signs, tags, or labels purported to have been affixed in the course of business and indicating ownership, control, or origin, should be considered self-authenticating."[311] The basis for allowing self-authentication is the day-to-day reliance by the public on the accuracy of such items.

The State cited a line of cases from other jurisdictions which held that writing on a product's label is competent proof of the product's contents, thus extending the trade inscription rule to cover contents, in addition to ownership, control, or origin. The court acknowledged this line of cases, but did not find that the label was admissible as a trade inscription. Instead, again stressing that the label was statutorily required, it held simply that the label "was sufficiently trustworthy to be an exception."[312]

Under the Federal Rule requiring circumstantial guarantees of trustworthiness equivalent to exceptions already recognized, a case could probably be made that—under circumstances where contents are not likely to be switched (such as glue, toothpaste, etc.)—a label is just as trustworthy for proving contents as it is for proving origin, ownership, or control. However, the court in *In re T.D.* chose not to follow such a path. The importance of *In re T.D.* is that it is some authority for the proposition that Illinois courts have recognized some form of a catchall or residual exception to the hearsay rule. Moreover, the Illinois Supreme Court, in *United Electric Coal v. Industrial Commission*,[313] has also recognized a trustworthiness exception; however, it did so in an administrative hearing and without much discussion of the issue.

In *United Electric Coal*, the administrator allowed in evidence an audiogram made by the plaintiff's doctor and a letter by the doctor to the plaintiff's lawyer, describing plaintiff's condition and making a diagnosis. In upholding the arbitrator's admission of this "hearsay," the court stated that "The rule against the admission of hearsay is not absolute; under certain circumstances the probability of accuracy and trustworthiness may serve as a substitute for cross-examination under oath."[314] The court therefore held that the exhibits were trust-

311. *Id.* at 877, 450 N.E.2d at 459 (citing E. CLEARY & M. GRAHAM, HANDBOOK OF ILLINOIS EVIDENCE § 902.6 at 498-99 (3d ed. 1979)).

312. *Id.* at 878, 450 N.E.2d at 459.

313. 93 Ill. 2d 415, 444 N.E.2d 115 (1982).

314. United Elec. Coal v. Indus. Comm'n, 193 Ill. 2d 415, 420, 444 N.E.2d 115, 117 (1982).

worthy and that the arbitrator did not err in allowing them into evidence.

Although *United Electric Coal* dealt only with hearsay in administrative hearings and cited only an Industrial Commission case in support of its holding, the implication is that the Illinois Supreme Court would not be antagonistic to the notion of a catchall or residual hearsay exception. Moreover, when the opinion in *In re T.D.* is also taken into account, it is clear that there is some basis for the development of such an exception in Illinois law. However, *People v. Redd*[315] refused to recognize a catchall or residual exception in connection with a prior inconsistent statement the State sought to use substantively under section 115-10.1. Under this section, a prior inconsistent statement can be used substantively if certain conditions are met[316] and if the declarant appears as a witness and is subject to cross-examination about the statement. The court held that because the witness invoked his fifth amendment privilege he was "not subject to effective cross-examination"[317] and his inconsistent statement could not be used substantively.

In the alternative, the State urged the court to adopt Federal Rule of Evidence 804(b)(5), a so-called catchall exception, as the law of Illinois. The court declined to adopt this "residual exception to the hearsay rule," noting that, "Our General Assembly has made a determination that prior inconsistent statements may be admitted as substantive evidence only when the requirements of section 115-10.1 are met."[318]

The court went on to state that it was "unwilling to judicially amend section 115-10.1 to include a catchall 'residual exception' to the hearsay rule"[319] and that, "If a prior inconsistent statement is to be admitted in Illinois in a criminal case against a defendant, the statement must meet the requirements set out by the General Assembly in section 115-10.1."[320] Being very specific on this point, the court declared that, "If the prior statement fails to meet these requirements, it is not admissible as substantive evidence."[321]

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315. People v. Redd, 135 Ill. 2d 252, 553 N.E.2d 316 (1990).
316. *See supra* note 69 and accompanying text.
317. People v. Redd, 135 Ill. 2d 252, 306, 553 N.E.2d 316, 340 (1990).
318. *Id.* at 313, 553 N.E.2d at 343.
319. *Id.* at 313, 553 N.E.2d at 344.
320. *Id.* at 313-14, 553 N.E.2d at 344.
321. *Id.* at 314, 553 N.E.2d at 344.

Thus, the court indicates it is not willing to judicially fashion a catchall exception to a legislatively created hearsay exception. The implication is that, since the legislature created the exception in the first place, it must decide whether it also wants an applicable catchall exception. This sentiment would seemingly be applicable to such other legislatively created exceptions as those allowing substantive use of prior identifications under section 115-12, the hearsay exception under section 115-10 for statements by a child under the age of thirteen in cases involving sexual acts against such a child, and the hearsay exception under section 115-13 for statements to medical personnel by victims of sex offenses.

It is worth noting that even if the State had succeeded in convincing the Court to adopt the federal catchall exception of Rule 804(b)(5), that catchall exception may well not have permitted the use of the grand jury statements the State wanted admitted. This is so because under the federal catchall exception, any statement admitted must have "equivalent circumstantial guarantees of trustworthiness" to a recognized exception.[322] Certainly, the grand jury testimony sought to be used in *Redd* could not have "equivalent circumstantial guarantees of trustworthiness" to former testimony since there was no cross-examination at the grand jury. Moreover, it is unclear whether it would have guarantees of trustworthiness substantially equivalent to those of any other hearsay exception.

The federal catchall exception is not a general, open ended "trustworthiness" exception.[323] Thus, merely getting the court to recognize a catchall exception will not make a statement admissible if a defendant never had a chance to cross-examine the declarant and the statements sought to be admitted are not similar to those already recognized as exceptions.

If a catchall exception is to be recognized in Illinois, either by the court for exceptions judicially created or by the legislature for exceptions it has enacted, like the federal exception, it should not be a general trustworthiness exception, but one that is limited to those kinds of statements that have substantially equivalent circumstantial guarantees of trustworthiness to those that already qualify for exception to the hearsay rule.[324]

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322. *See supra* text accompanying note 303.

323. *See* Huff v. White Motors, 609 F.2d 286 (7th Cir. 1979).

324. This appears to be what the Illinois General Assembly has done with ch. 40, para. 2312-13.1(3) "Hearsay Exception" in actions for an order of protection

X. CONCLUSION

Many of the problems that have arisen with the hearsay rule can be traced to a failure on the part of lawyers and judges to focus on the basic elements of the hearsay rule when applying it: witness, declarant, statement, matter asserted, purpose for which the statement is offered, and possibility of cross-examination. Although most lawyers and judges can define hearsay as "an out of court statement used to prove the truth of the matter asserted," this shorthand definition does not provide much help in applying the rule to concrete situations. For help, one needs to go to the basic principles that are subsumed under that definition. It is only when one can parse the six implicit elements of the rule for each situation, that one can be sure the shorthand definition is being correctly applied. Failure to square the shorthand definition with the implicit elements of the rule can often lead to confusion and misunderstanding.

This article has attempted to make what is implicit in the rule, explicit. It has attempted to do this, not just for the hearsay rule itself, but also for some of the typical areas that have caused the most trouble: admissions, prior statements, declarations against interest, *Wilson v. Clark*, judgments of conviction, and catchall considerations. It is the author's belief that a thorough understanding of these implied principles will make for a better understanding of the rule and a quicker, more accurate, use of the shorthand definitions in everyday discussions of the hearsay rule and its exceptions.

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under the Illinois Domestic Violence Act, ILL. REV. STAT. ch. 40, paras. 2311-1 to 2313-5 (1989), brought "on behalf of a high risk adult with disabilities." This Section, effective January 1, 1990, requires "equivalent circumstantial guarantees of trustworthiness," notice of intent to use the Section, and lists examples of some guarantees of trustworthiness in connection with recognizing a residual or catch all exception.