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Smith v. Fortune Insurance Co., 404 So. 2d 821 (Fla. 1st Dist. Ct. App. 1981)

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CASE NOTES

Evidence—FLORIDA COURT USES BROAD ADVERSE PARTY WITNESS DEFINITION FOR BOTH IMPEACHMENT AND ADMISSIONS PURPOSES—*Smith v. Fortune Insurance Co.*, 404 So. 2d 821 (Fla. 1st Dist. Ct. App. 1981)

In *Smith v. Fortune Insurance Co.*,[1] the First District Court of Appeal expanded the definition of an adverse party witness for impeachment purposes to include persons not named as party opponents in the litigation.[2] Perhaps even more significantly, however, the court determined that the unnamed party's out-of-court statements were within the admissions exception to the hearsay rule.[3] The court reached that conclusion by extending its broad definition of adverse party witness for impeachment purposes to the area of admissions by a party opponent. The court determined "[o]ne need not be named in the pleadings . . . to be called as an adverse party witness."[4] Thus, the impeachment of an unnamed party or the introduction of his statements as admissions was proper if he " 'occupied an adverse position toward' the party seeking to call him . . . and could have been named as a party."[5]

By applying this broad test to the hearsay exception for admissions by a party opponent, out-of-court statements of an unnamed party become available as substantive evidence without the inconvenience of actual joinder of the unnamed party at the trial.[6] Such a holding ignores the need for a distinction between admissibility standards for statements made by an unnamed party when offered as substantive admissions and standards applicable to statements offered for impeachment purposes.

Fortune Insurance Company had issued Louis Smith a homeowner's policy on his mobile home. About one year later, a fire completely destroyed the mobile home and its contents.[7] The day after the fire, Lieutenant Moore of the Bradford County Sheriff's Department interviewed Smith's nineteen-year-old daughter,

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1. 404 So. 2d 821 (Fla. 1st Dist. Ct. App. 1981).
2. *Id.* at 822.
3. *Id.* at 822-23.
4. *Id.* at 823.
5. *Id.* (citation omitted) (quoting Degelos v. Fidelity & Casualty Co., 313 F.2d 809, 815 (5th Cir. 1963)).
6. 404 So. 2d at 823. *See infra* text accompanying notes 42-60.
7. *Id.* at 822.

Cathy. According to Moore, "Cathy told him she had been 'playing with matches' in her bedroom and the bed cover caught fire. . . . [A]lthough she knew her family was in the trailer, it did not really matter to her because 'she had had all she could stand, all she wanted was out.' "[8]

Fortune refused to pay any proceeds under the policy, relying on a provision excusing the company from liability for loss resulting from the malicious mischief or vandalism of any household member. Smith sued Fortune for recovery. Cathy did not join with him as a party plaintiff in the suit, although she was an insured under the terms of the policy.[9]

During the jury trial, Fortune called Cathy as an adverse party witness, but she denied starting the fire and denied any knowledge of how it started. Fortune then called Lieutenant Moore, who was permitted to testify to Cathy's prior statement made in the interview.[10]

After a judgment for Fortune, Smith appealed. Smith claimed Cathy was not an adverse party because she was not a named party to the suit. Therefore, he argued, she was not a proper subject for impeachment under the adverse party witness rule in Florida, Rule 1.450(a) of the Florida Rules of Civil Procedure,[11] and Fortune as a consequence had improperly impeached its own witness.[12] Further, Smith claimed Cathy was not a proper party as contemplated by the admissions exception to the hearsay rule and her out-of-court statements should not have been admitted as admissions.[13]

In rejecting Smith's assertions, the court fashioned a broad adverse party witness test encompassing any person who occupies an adverse position toward the calling party and who could have been named a party.[14] This test was met by Cathy, who occupied an adverse position toward Fortune since most of her belongings were destroyed in the fire and therefore she stood to gain financially from her father's insurance policy. The second facet of the test was met since Cathy was an insured under the terms of the policy and

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8. *Id.*
9. *Id.* at 823.
10. *Id.* at 822.
11. *See infra* text accompanying note 24.
12. 404 So. 2d at 822.
13. *Id. Fortune* was tried prior to the October 1, 1981, effective date of the Florida Evidence Code, so the common law rules of evidence applied to the case. However, the *Fortune* court cited the presently effective evidence code in addition to earlier authority.
14. *Id.* at 823.

could have voluntarily joined in the suit.[15]

Accordingly, the court held Fortune had properly attacked Cathy's credibility by impeaching her as an adverse party witness.[16] The opinion in *Fortune* then rather nonchalantly states that the same standard that made Cathy an adverse *party* means "testimony regarding Cathy's out-of-court statements came within the 'admissions' exception to the hearsay rule" and is admissible as substantive evidence.[17] No other court in Florida has adopted the broad adverse party test espoused in *Fortune* for both impeachment *and* admissions purposes.

I. WHO IS AN ADVERSE PARTY WITNESS FOR THE PURPOSE OF IMPEACHMENT?

Historically, the common law "voucher rule" prohibited a party from impeaching his own witness in any way.[18] The reason most frequently offered to support this doctrine was that a party should vouch for the credibility of his own witnesses; he should not call a witness he knows will testify untruthfully.[19] The rule often produced harsh results[20] because a party "does not select his witnesses, but simply takes the witnesses as he finds them."[21]

In response to such concerns, courts and legislatures eventually created exceptions to the rule in certain circumstances. The major exception in Florida is codified in the Florida Evidence Code. The Code permits a party to use prior inconsistent statements and other contradictory evidence to impeach a witness who proves to be adverse.[22] Adversity has been defined as giving testimony which

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15. *Id.* at 823 n.1. Under the policy, the word "insured" included the named insured (Louis Smith) and his spouse, relatives and any others under the age of twenty-one who were residents of the household.

16. *Id.* at 822.

17. *Id.* at 822-23.

18. *See* Johnson v. State, 178 So. 2d 724, 726 (Fla. 2d Dist. Ct. App. 1965); C. EHRHARDT, FLORIDA EVIDENCE § 608.2 (1977 & Supp. 1981); C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 38 (2d ed. 1972); 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 896-918 (Chadbourn rev. 1970); Graham, *Examination of a Party's Own Witness Under the Federal Rules of Evidence: A Promise Unfulfilled*, 54 TEX. L. REV. 917, 919-22 (1976).

19. C. EHRHARDT, *supra* note 18, § 608.2.

20. As applied to *Fortune* for example, the rule in its original form would prevent Fortune from attempting to impeach Cathy's trial testimony in any way. Because Fortune called Cathy as a witness, it would be expected to vouch for her credibility, an unrealistic expectation in view of her relationship to her family and her status as an insured.

21. Graham, *supra* note 18, at 920.

22. FLA. STAT. § 90.608 (1981). Who may impeach.—

(1) Any party, except the party calling the witness, may attack the credibility

affirmatively harms the case of the calling party.[23] Another exception and the one made available to the insurance company in *Fortune* is Rule 1.450(a) of the Florida Rules of Civil Procedure—the adverse witness rule:

> A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also and may be cross-examined by the adverse party only upon the subject matter of his

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of a witness by:

(a) Introducing statements of the witness which are inconsistent with his present testimony.

(b) Showing that the witness is biased.

(c) Attacking the character of the witness in accordance with the provisions of s. 90.609 or s. 90.610.

(d) Showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which he testified.

(e) Proof by other witnesses that material facts are not as testified to by the witness being impeached.

(2) A party calling a witness shall not be allowed to impeach his character as provided in s. 90.609 or s. 90.610, but, if the witness proves adverse, such party may contradict the witness by other evidence or may prove that the witness has made an inconsistent statement at another time, without regard to whether the party was surprised by the testimony of the witness. Leading questions may be used during any examination under this subsection.

Section 608 is the provision currently in effect in Florida. FLA. STAT. § 90.09 (1977) was the provision in effect prior to the adoption of the evidence code and still governs causes accruing prior to the effective date of the code.

Smith had argued Cathy did not qualify for impeachment as an *adverse witness* under § 90.09. Apparently, the First District Court of Appeal agreed, because the provision was not discussed in *Fortune*, nor cited as a ground for decision. The statute permitted a party to contradict and introduce the prior inconsistent statement of any witness who proved adverse. However, it had been judicially interpreted to require that the witness surprise the calling party and affirmatively harm his case. Failure to testify as beneficially as expected or failure to remember was not sufficient enough to show the affirmative harm necessary to invoke the statute. Presumably, Cathy's failure to remember was too insufficient a showing to classify her as an adverse witness. *See* Poitier v. State, 303 So. 2d 409, 410 (Fla. 3d Dist. Ct. App. 1974); Foremost Dairies, Inc. v. Cutler, 212 So. 2d 37, 40 (Fla. 4th Dist. Ct. App. 1968); Johnson v. State, 178 So. 2d 724, 728 (Fla. 2d Dist. Ct. App. 1965).

Section 608 specifically deletes the requirement of surprise. It still requires the witness's testimony to affirmatively harm the calling party's case. *See generally* Rossano v. Blue Plate Foods, Inc., 314 F.2d 174, 178 (5th Cir.), *cert. denied*, 375 U.S. 866 (1963); C. EHRHARDT, *supra* note 18, § 608.2; Graham, *supra* note 18, at 920.

23. C. EHRHARDT, *supra* note 18, § 608.2; C. MCCORMICK, *supra* note 18, § 38.

examination in chief.[24]

The effect of Rule 1.450(a) is to allow impeachment of adverse *parties* without the predicate of testimony which affirmatively harms the calling party's case. The only prerequisite to the invocation of this provision is that the witness called must actually be an adverse party.[25] Therefore, the definition one ascribes to an adverse party can be crucial if impeachment of that witness is essential to the effective presentation of the case.

Out-of-court statements introduced under Rule 1.450(a) are accepted *only* to attack a witness's credibility.[26] Since the rule only operates when an adverse party is called to the witness stand, the statements will not be introduced unless the party is in court testifying under oath. Rule 1.450(a) expressly provides that the impeached party is subject to cross-examination by both parties to the litigation. Therefore, opposing counsel will have an opportunity to rehabilitate the witness through cross-examination. This opportunity for rehabilitative cross-examination is considered a guarantee of reliability sufficient to overcome the possible prejudicial effect of introducing out-of-court statements for the limited purpose of impeachment.[27]

Usually, there is no question about whether a witness is an adverse party. The test is satisfied because the party witness will be named in the pleadings. In some cases, however, the witness whose credibility is under attack will not actually be named a party, perhaps due to oversight, faulty joinder, problems of venue, jurisdic-

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24. Fla. R. Civ. P. 1.450(a). The first sentence of Rule 1.450(a) permits a party to interrogate any hostile or unwilling witness by leading questions. The provision is unsatisfactory from the standpoint of trial strategy. It only permits the use of leading questions, not the proof of prior inconsistent statements, which was Fortune's goal. Therefore, Fortune could only hope to impeach Cathy as an adverse party witness under the second clause. *See* Pitts v. State, 333 So. 2d 109, 110-11 (Fla. 1st Dist. Ct. App. 1976); Foremost Dairies, Inc. v. Cutler, 212 So. 2d 37, 40 (Fla. 4th Dist. Ct. App. 1968).

25. *See also* Foremost Dairies, Inc. v. Cutler, 212 So. 2d 37, 40 (Fla. 4th Dist. Ct. App. 1968).

26. At the present time in Florida, prior inconsistent statements may be used only to impeach a witness; they are inadmissible as substantive evidence. *See* Adams v. State, 15 So. 905, 908 (Fla. 1894); Thomas v. State, 289 So. 2d 419, 420-21 (Fla. 4th Dist. Ct. App. 1974). The original enactment of the Florida Evidence Code allowed any prior inconsistent statement of a witness to be admitted as substantive evidence on its merit; however, the 1978 amendment to FLA. STAT. § 90.801(2)(a) limited the admissibility of prior inconsistent statements as substantive evidence to those given under oath, subject to the penalty of perjury during a trial, hearing, other proceeding or in a deposition. The Florida position is essentially the same as that of Fed. R. Evid. § 801. *See* C. EHRHARDT, *supra* note 18, § 801.6.

27. *See* Wigginton, *New Florida Common Law Rules*, 3 U. FLA. L. REV. 1, 26-27 (1950).

tion, service of process, or tactical considerations. Then the question arises as to whether the witness is an adverse party witness subject to impeachment.

Two lines of case law have developed interpreting the term "adverse party."[28] One endorses a narrow definition and limits adverse parties to *named* parties who are adversely aligned in the pleadings.[29] The other line of cases, followed primarily by the federal courts, is much broader. The federal standard potentially expands adverse party to include *anyone* who occupies an adverse position toward the calling party and who *could* have been named a party.[30]

The cases in Florida defining adverse party prior to *Fortune* reach conflicting results. The most widely cited case on the subject is *Foremost Dairies, Inc. v. Cutler*,[31] a Fourth District Court of Appeal case in which the narrow definition—named parties adversely aligned in the pleadings—is favored. A key witness in *Foremost* was not a named party, but because of his family ties to a party and his possible financial interest in the outcome of the suit, the opposing party tried to call him as an adverse party witness.[32]

The *Foremost* court stated the witness was "clearly not an 'adverse party' within the definition of Rule 1.450(a),"[33] and defined an adverse party as a "party to the litigation who had an adverse interest in its outcome."[34]

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28. Puccio v. Diamond Hill Ski Area, Inc., 385 A.2d 650, 655 n.6 (R.I. 1978). *See also* Graham, *supra* note 18, at 952.

29. *See* Alm v. General Tel., 327 N.E.2d 523 (Ill. 4th Dist. Ct. App. 1975); Miller v. Griesel, 297 N.E.2d 463 (Ind. 3d Dist. Ct. App. 1973); Serafin v. Peoples Community Hosp., 242 N.W.2d 438 (Mich. Ct. App. 1976); Kauffman v. Carlisle Cement Products Co., 323 A.2d 750 (Penn. Super. Ct. 1974).

30. *See* Melton v. O.F. Shearer & Sons, Inc., 436 F.2d 22 (6th Cir. 1970); Chumbler v. Alabama Power Co., 362 F.2d 161 (5th Cir. 1966); Degelos v. Fidelity & Casualty Co., 313 F.2d 809 (5th Cir. 1963).

31. 212 So. 2d 37 (Fla. 4th Dist. Ct. App. 1968). *See, e.g.*, C. EHRHARDT, *supra* note 18, § 608.2; Fla. Bar Cont. Leg. Ed., *Witnesses, Evidence in Florida* § 4.2.

32. 212 So. 2d at 39. In *Foremost*, Mrs. Cutler had sued Foremost for the wrongful death of her son who was killed when his motorbike collided with a Foremost truck during the early part of the evening. One issue discussed in the case was whether Foremost could call the deceased's brother as an adverse party witness and attempt to impeach him with an alleged statement he had made to the investigation officer that the headlights on his brother's motorbike were not in working condition at the time of the accident.

33. *Id.* at 41. Although the *Foremost* court stated that Cutler was not an adverse party within the definition of Rule 1.450(a), it should be noted the rule does not define the term "adverse party."

34. 212 So. 2d at 40. The definition could have been worded more precisely, but it is apparent when read with the facts of the case that the words "a party to the litigation" mean "a named party." The words "who has an adverse interest in its outcome" imply that not all named parties are adverse parties, only those named parties with an interest in its

Smith v. Fortune Insurance Co. chose to endorse the broader adverse party approach which includes unnamed parties in certain instances. The opinion relies exclusively on opinions utilizing the expansive adverse party definition.[35] A Third District Court of Appeal case cited in *Fortune* describes an adverse party as "not necessarily a party to the suit who is aligned in the pleadings in opposition to the party calling him."[36]

The *Fortune* court also cited two federal cases in which the broad test was adopted. In *Degelos v. Fidelity & Casualty Co.*,[37] the Fifth Circuit Court of Appeals, on a factual situation similar to *Fortune*, declared that "the insured, the alleged tortfeasor, occupied an adverse position toward the injured party plaintiff and as such was an 'adverse party.'"[38] Also cited in *Fortune* was a later Fifth Circuit case, *Chumbler v. Alabama Power Co.*,[39] in which the court affirmed the broad adverse party definition for impeachment purposes. The opinion states:

> [T]he sole issue is whether the party sought to be called occupies an adverse position to the party seeking to call him. . . . [T]he identity of the named party is irrelevant. The question is whether the party sought to be called could have been sued . . . . If so, and if the witness is an alleged tort-feasor, and if the standard for recovery would be the same whichever were sued, he is an adverse party.[40]

The *Fortune* opinion does not include the tortfeasor language so

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outcome contrary to that of the calling party.

35. 404 So. 2d at 823.

36. *See* Rubin v. Kapell, 105 So. 2d 28, 32 (Fla. 3d Dist. Ct. App. 1958). *See also* Young v. Metropolitan Dade Co., 201 So. 2d 594, 596 (Fla. 3d Dist. Ct. App. 1967). The *Rubin* and *Young* tests are worded in the negative and, standing alone, could be confusing and susceptible to other interpretations.

37. 313 F.2d 809 (5th Cir. 1963).

38. *Id.* at 815. In *Degelos*, a father who was a passenger in a car driven by his son was killed in a collision at an intersection with another car coming from the opposite direction. The widow sued Fidelity and Casualty Company, her son's insurer. The critical issue on which recovery under the policy hinged was whether the son was negligent in failing to stop at a posted sign at the intersection. The issue of negligence, in turn hinged on whether the son knew about or saw the sign. Therefore, his testimony was critical to resolution of the issue.

39. 362 F.2d 161 (5th Cir. 1966). In *Chumbler*, Mrs. Chumbler sued Alabama Power Company to recover damages for the accidental eletrocution of her husband. She claimed the power company was negligent in failing to de-energize a power line near a construction site at which her husband was working. The question of negligence depended on the testimony of a power company employee who was not a named defendant.

40. *Id.* at 163.

noticeably present in the two federal court cases.[41] Considering the precedent on which the opinion is based, such a limitation is certainly appropriate. While not unduly burdening the calling party, the federal court definition provides the named opponent with some measure of protection against being victimized through impeachment of a witness with little or no nexus to the case.

II. WHO IS A PARTY OPPONENT FOR THE PURPOSE OF THE ADMISSIONS EXCEPTION TO THE HEARSAY RULE?

Complicating a resolution of the adverse party issue in *Fortune* is the court's insistence on allowing the out-of-court statements made by the insured's daughter, Cathy, to be used as admissions against a party opponent. The opinion does not clearly explain the reasoning underlying the labeling of these statements as admissions by Cathy, an unnamed party.

The only case cited as support for the admission of Cathy's statements as substantive proof of the matter stated therein is *Hunt v. Seaboard Coastline Railroad.*[42] *Hunt* is the pre-evidence code authority for adopting the admissions exception to the hearsay rule.[43] *Hunt* states the common law rule that an admission by a party opponent or an adverse party is admissible as substantive evidence and not just for the limited purpose of impeachment.[44]

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41. *See, e.g.*, Iverson v. Lancaster 158 N.W.2d 507 (N.D. 1976), in which the Supreme Court of North Dakota stated that unless one is named as an adverse party he may not be examined as an adverse party unless his conduct gives rise to the cause of action.

The position on the subject in Florida prior to *Fortune* is somewhat unclear. Rule 1.450(a) was derived from Fed. R. Civ. P. 43(b), and the language of the two are identical. Thus, it could be argued that the more expansive federal definition of adverse party should prevail in Florida. However, it is not clear that the definition of adverse party was so expansive at the time the federal rule was adopted.

Instead, it seems the expansion developed through judicial decisions. Since these decisions were rendered after Florida's Rule 1.450(a) was originally enacted, it is unlikely that the broader definition of adverse party was contemplated at the time of its adoption.

42. 327 So. 2d 193 (Fla. 1976).

43. As *Fortune* was decided prior to the effective date of the evidence code, the common law rules of evidence applied.

44. The exception is now governed by the Florida Evidence Code. The *Fortune* opinion mentions FLA. STAT. § 90.803(18), the admissions exception to the hearsay rule, so the court apparently intended the opinion to apply to the law on the admissions exception both before and after the evidence code was adopted. The current statute provides:

> **90.803 Hearsay exceptions; availability of declarant immaterial.**—The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:
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> . . .
>
> (18) ADMISSIONS.—A statement that is offered against a party and is:
>
> (a) His own statement in either an individual or a representative

The opinion speaks of admissions by a party opponent *or* an adverse party, but does not explain whether the two terms have the same meaning. Although it suggests needless repetition, it seems reasonable to assume the court would have defined the terms if they were intended to produce different effects on the admissions exception. There is no mention in *Hunt* of who qualifies as an adverse party. Thus the *Fortune* court's reliance on *Hunt* to allow admissions against an unnamed, yet adverse, party remains something of a mystery.

Heretofore, it has been recognized that the only prerequisite to the introduction of an out-of-court statement as an admission is a showing that the statement was actually made by a *party to the litigation.*[45] Then the statement will be admitted as substantive evidence of the facts admitted by that declarant-party when it is offered by his adversary.[46] The party against whom the admissions are offered is not required to testify or to be present in court.[47] If the party does testify, the out-of-court statement is not required to be inconsistent with his trial testimony[48] or to be against the declarant's interest.[49]

There is no intrinsic assurance that statements offered as admissions are reliable or were made under reliable conditions. Because of this lack of reliability, admissions are unlike other exceptions to the hearsay rule.[50] The reason most frequently given for excluding

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capacity;

(b) A statement of which he has manifested his adoption or belief in its truth;

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

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

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

45. C. EHRHARDT, *supra* note 18, § 803.18.

46. *See, e.g.*, 327 So. 2d at 195-96. *See generally* D. BINDER, THE HEARSAY HANDBOOK § 28 (1975 & Supp. 1981); C. EHRHARDT, *supra* note 18, § 803.18; C. MCCORMICK, *supra* note 18, § 262; Hetland, *Admissions in the Uniform Rules: Are They Necessary?*, 46 IOWA L. REV. 308, 309 (1961).

47. 327 So. 2d at 195-96; C. EHRHARDT, *supra* note 18, § 803.

48. *Id.* § 803.18.

49. *Id.* C. MCCORMICK, *supra* note 18, § 262.

50. *See* C. MCCORMICK, *supra* note 18, § 262.

hearsay evidence is its unreliability, i.e., the statement is generated out of court and there is no immediate opportunity to test its veracity through cross-examination of the declarant under oath in front of a jury.[51] Most exceptions to the hearsay rule are recognized because there is some rational basis for assuming the out-of-court statements are truthful.[52]

The justification for permitting admissions as exceptions to the hearsay rule lies in the adversary system itself; a party cannot reasonably object that he cannot cross-examine himself or claim he is only credible when testifying in court under oath.[53] Additionally, admissions are not conclusive on the facts admitted therein. The party against whom the statements are offered can take the stand to dispute the veracity of the statements or the statements may carry little probative value in the context in which they are offered.[54] Thus, admissions against a named party are accepted because the procedural mechanism of the adversary system protects the rights of the party against whom the statements are admitted.

The issue presented by *Fortune* should not be confused with the *types* of statements that fall within the admissions exception. The court did *not* characterize Cathy's statements as either admissions of the named plaintiff in an individual or representative capacity, adoptive admissions, authorized admissions, admissions by an employee or servant, or as a statement of a co-conspirator.[55] None of the above categories would comprise Cathy's statements on the facts known to the court. The only way the statements could come

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51. *See* City of Miami v. Fletcher, 167 So. 2d 638, 639 (Fla. 3d Dist. Ct. App. 1964); C. EHRHARDT, *supra* note 18, § 801.1.

52. *See* C. MCCORMICK, *supra* note 18, § 262; J. WEINSTEIN & M. BERGER, 4 WEINSTEIN'S EVIDENCE § 801-136 (Supp. 1981); Hetland, *supra* note 46, at 309.

53. For a general discussion of the theories underlying the receipt of admissions, see C. MCCORMICK, *supra* note 18, § 262; J. WEINSTEIN & M. BERGER, *supra* note 52, § 801-136-37. One commentator has observed:

> A litigant can scarcely complain if the court refuses to take seriously his allegation that his extra-judicial statements are so little worthy of credence that the trier of fact should not even consider them. He can hardly be heard to object that he was not under oath or that he had no opportunity to cross-examine himself. Accordingly, his relevant utterances are everywhere receivable as admissions against him for the truth of the matter asserted in them, and it makes no difference whether they were self-serving or against his interest when made. There content may affect their weight; it cannot control their admissibility.

Morgan, *The Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461 (1929).

54. *See* C. EHRHARDT, *supra* note 18, § 803.18 n.14; C. MCCORMICK, *supra* note 18, § 262.

55. *See* C. EHRHARDT, *supra* note 18, § 803.18A-E; Morgan, *supra* note 53, at 479-82; Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 564, 580 (1937).

into the record as substantive evidence was for the court to somehow bring Cathy, an unnamed party, within the term "party" as used in the admissions exception. The First District accomplished this by enlarging the term "party opponent" to encompass adverse parties as that term had just been used to allow the impeachment of Cathy.

However, if admissions are received against a party not named in the pleadings, as was the case in *Fortune,* the requisite fairness underlying the admissions exception is not present. The most drastic example of the potential unfairness created by using the broad adverse party test propounded in *Fortune* involves the possible unavailability of the unnamed party at trial. Since the admission exception is applicable regardless of the presence at the trial of the person who made the out-of-court statement, the named party may suffer from the lack of opportunity to call the unnamed party to the stand to explain the statement or to test the reliability of the statement through cross-examination of the witness. Thus the named party's case or defense may be damaged without an opportunity to nullify or mitigate the statements. Moreover, to add insult to injury, the named party may not even be aware of the possibility of the unnamed party's statements being introduced against him and thus may fail to prepare accordingly.

Therefore, those parties already named in the pleadings must face the possibility of out-of-court statements by unnamed, absent parties coming into evidence as substantive proof without the protection of cross-examination. Although admissions by one party generally are not evidence against other parties so aligned,[56] the *Fortune* decision may be used to demonstrate the practical effect of admitting the out-of-court statements of an unnamed party as substantive evidence.

For example, in *Fortune,* Cathy's father, a named party, might well have complained about the lack of opportunity to cross-examine Cathy, an unnamed party, had she not in fact been called by the insurance company or if she was not otherwise available. Her admission was made out of his presence and could have been made under duress or for any number of reasons. There is no assurance Cathy's statement was truthful or reliable and it is unfair to expect her father to bear the burden of her statement without the benefit of cross-examination. In this case, however, Fortune did call Cathy to testify and did introduce her prior inconsistent statement to at-

56. C. McCORMICK, *supra* note 18, § 262.

tack her credibility under Rule 1.450(a). Thus her father's counsel was able to attempt to rehabilitate her and to test the reliability of her statement through cross-examination.

Courts in other jurisdictions have tended to accept admissions as substantive evidence on a much more restricted basis than the *Fortune* court.[57] Generally, if a person is not a named party, his admission will be admissible only when he is a real party in interest.[58] Otherwise, the unnamed party's statements are inadmissible in the suit and will be admissible only in a separate action in which the declarant is named a party.[59]

The real issue in *Fortune* is whether it is fair to admit the out-of-court statements of an unnamed party as substantive evidence. When the adversary system adequately protects the interests of all parties involved—in particular, when the declarant is in court testifying subject to cross-examination—it may indeed be fair to accept the admissions of an unnamed party if the statement provides relevant, probative evidence.[60]

III. CONCLUSION

It is inappropriate as a general rule to admit the out-of-court statements of unnamed parties as substantive evidence under the admissions exception to the hearsay rule. The *Fortune* court's use of the same broad adverse party test for impeachment and admissions purposes is a damaging judicial enlargement of a limited evidentiary exception. It would be more appropriate to admit the out-of-court statements only of named parties under the admissions

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57. *See, e.g.*, Huff v. White Motor Corp., 609 F.2d 286 (7th Cir. 1979). *But see* Melton v. O.F. Shearer & Sons, Inc., 436 F.2d 22 (6th Cir. 1970).

58. *See, e.g.*, Lewis v. American Road Ins. Co., 167 S.E.2d 729, 732 (Ga. Ct. App. 1969) ("An admission by a person not a party to the action however is admissible in evidence only where the party making the admission is the real party in interest, although not a party to the record . . . ."); Sherman v. Mountaire Poultry Co., 419 S.W.2d 619, 621 (Ark. 1967) ("The authorities have extended this to admissions or declarations against interest made by a person who is not a party of record but who is a real party in interest.").

In some cases, out-of-court statements made by named parties may not be accepted unless the named party has a vital interest in the outcome of the case. This limitation is intended to prevent the receipt of admissions in situations when the person making the statement could not be affected by the judgment and is a party only because an adversary chose to name him. *See* State Farm Mut. Auto. Ins. Co. v. Gudmunson, 495 F. Supp. 794, 796 n.1 (D. Mont. 1980).

59. *See* Scott v. State, 240 N.Y.S.2d 279 (N.Y. App. Div. 1963). *See also* Alabama Power Co. v. Ray, 32 So. 2d 219, 221 (Ala. 1947); Bristol v. Moser, 99 P.2d 706, 709 (Ariz. 1940); Atlantic Coast Line R.R. v. Bowen, 63 S.E.2d 804 (Va. 1951).

60. *See* Shell v. Parrish, 448 F.2d 528, 534 (6th Cir. 1971).

exception to the hearsay rule and thus as substantive evidence. Indeed, it may be well to limit admissions to only those named parties with a substantial interest in the outcome of the case.

At most, the adverse party definition in *Fortune* should be used to determine who is an adverse party witness for the purpose of impeachment under Rule 1.450(a). Although *Fortune* requires the witness to occupy an adverse position toward the party calling him and to be one who could have been named a party, it should be limited to tortfeasors or others with a sufficient nexus to the litigation. The possibility of construing the broad adverse party test in *Fortune* to cover both impeachment *and* admissions should not be recognized as an option by Florida courts in any event since to do so would defeat the policies underlying the statutorily limited admissions exception to the hearsay rule.

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