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Evidence - Admissions - Extra-Judicial Statements by an Adversary with an Identifiable Beneficial Interest - Haver v. Hinson

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EVIDENCE—ADMISSIONS—EXTRA-JUDICIAL STATEMENTS BY AN ADVERSARY WITH AN IDENTIFIABLE BENEFICIAL INTEREST—*Haver v. Hinson*, 385 So. 2d 605 (Miss. 1980).

Elizabeth Haver, a minor, brought an action for medical expenses incurred as the result of injuries caused by the defendant's alleged negligent operation of an automobile.[1] The action was brought by and through her parents as Next Friend.

Immediately prior to the accident, Deborah Haver, the plaintiff's mother, had been conversing with the defendent in the front yard.[2] At the trial, Mrs. Hinson offered testimony of extra-judicial statements made by Deborah Haver. Those statements indicated that Mrs. Haver felt that the accident was not the appellee's fault.[3] The Mississippi Supreme Court affirmed the lower court's decision to admit Mrs. Hinson's

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1. Haver v. Hinson, 385 So. 2d 605 (Miss. 1980). The suit was brought in the Circuit Court of Rankin County, Mississippi.

2. *Id.* at 606-07. Apparently Mrs. Haver did not actually observe the accident.

3. *Id.* at 608-09. The following is the testimony offered at the trial:

> Q. Would you state to us what Deborah Haver stated to you upon your visit during the second hospitalization of Elizabeth?
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> A. Well, we were in the waiting room and she said, "Well," said, "I might as well tell you, Jon is going to sue you." She said, "I've been trying to talk him out of it but I haven't been able to." Said, "I've tried to tell him that it's not your fault, we were negligent parents and we should have been watching after our child."
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> BY MR. MOORE:
>
> Objection your Honor. We would like to approach the bench please.
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> Whereupon an off the record conference was held at the bench after which the jury left the courtroom and the following proceedings were had and done:
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> *
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> BY THE COURT:
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> I'm going to sustain I think the objection to that part of it which says "We were negligent parents."
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> *
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> The jury returned to the courtroom and the following proceedings were had and done:
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> BY THE COURT:
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> Ladies and Gentlemen I have sustained the objection that was made just before you left the courtroom and you are to disregard that part of the answer concerning any parent's negligence.
>
> BY MR. DALEHITE, continuing:
>
> Q. Mrs. Ainsworth, did you have occasion to talk with Mrs. Haver in your home sometime around August or September 1977?
>
> A. Yes, sir.

testimony into evidence despite the fact that the testimony was clearly hearsay on its face and that it expressed "a conclusory opinion having doubtful foundation in the defendant's personal knowledge."[4] The court held that the testimony of Mrs. Haver's statements was correctly admitted as coming under the exception to the hearsay rule allowing the introduction of extra-judicial admissions by a party opponent.[5]

BACKGROUND AND HISTORY

A definition of hearsay has never been particularly difficult for the text writers to propound. McCormick's treatise gives as concise and as typical definition as any: "Hearsay evidence is testimony in court, or written evidence, of a statement made out-of-court, the statement being offered as an assertion to show the truth of the matters therein, and thus resting for its value upon the credibility of the out-of-court asserter."[6] The problem for the text writers and the courts has not been in deciding what *is* or *is not* hearsay; the problem has been in deciding which kinds of hearsay will be excepted from the general prohibition.[7]

Q. And would you relate what occurred at that time?

BY MR. MOORE:

We would object, your Honor, for the record.

BY THE COURT:

OVERRULE.

A. She came down to my house and she was very upset and she told me that Jon had been pressing her into signing this paper to sue me. In fact I think she hadn't signed it at that time, but she was upset about it, and she told me it was not my fault, she had been trying to tell Jon it was not my fault.

4. *Id.* at 609.

5. *Id.*

6. C. McCORMICK, A HANDBOOK ON THE LAW OF EVIDENCE § 246 (2d ed. 1972).

7. Over the years, this has been accomplished through the development of the well-known "exceptions" to the hearsay rule. *See, e.g.*, D. BINDER, THE HEARSAY HANDBOOK 35 (1975). As a practical matter, such a list of exceptions is usually quite satisfactory for the efficient determination of the admissibility of a particular piece of evidence. As a matter of legal theory, the precise status of a particular piece of evidence may be open to considerable debate. Admissions constitute a prime example of this dichotomy. The court in *Haver* refers to the fact that the statement in question is hearsay, but admissible under the exception to the hearsay rule which allows admissions by a party opponent. As is presently discussed in more detail, the question of whether admissions are hearsay and come under an exception to the rule, or are an entirely different brand of evidence, has been the subject of considerable debate. For a classic example of handling the status of admissions by simply

As one author has observed, the rule regarding the admissibility of admissions by a party-opponent forms "the single most irrational exception to the hearsay rule."[8] A plethora of legal scholars have offered varying theoretical bases which have attempted to provide a rigorous framework for evaluating admissions. An examination of the various viewpoints of admissions theory taken by Greenleaf,[9] Wigmore,[10] Strayhorn,[11] Morgan,[12] the Model Code of Evidence,[13] the Uniform Rules of Evidence,[14] and the Federal Rules of Evidence,[15] reveals sharp disagreement on the issue of the basis underlying the acceptance of admissions.

It may be argued that whether or not admissions are hearsay, and whatever the theoretical basis for their acceptance may be, the important factor is that they are admissible. Such an argument assumes that an admission by a party has been isolated, underlined and labeled, and merely re-

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defining them as not hearsay see FED. R. EVID. 801(d)(1). Whichever method of dealing with the theoretical basis for such evidence is employed, the practical result is usually the same.

8. Ball, *The Changing Shape of the Hearsay Rule*, 38 ALA. LAW. 502, 508 (1977).

9. "Such evidence seems, therefore, more properly admissible as a substitute for the ordinary and legal proof.... The simple and broad rule for receiving them is, in the language of Chief Barron Pollock, that 'if a party has chosen to talk about a particular matter, his statement is evidence against himself.' " 1 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 291 (16th ed. 1899).

10. 2 J.WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 505 (2d ed. 1923). Wigmore takes the position that, when offered against the party/declarant, admissions do not come under an exception to the hearsay rule, but exist independently.

11. Strayhorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 569 (1937). Strayhorn's view is that evidence of an admission by a party is actually evidence of an affirmative act of that party. As such, he contends, it should be admitted as would the eyewitness testimony of any other physical act of the party. This position cleanly avoids becoming involved in the hearsay/non-hearsay dispute. It does not address the question posed by *Haver* of whether or not a declarant is a party for the purpose of applying the rule.

12. Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355, 355-56 (1921). Morgan takes issue with Wigmore, arguing that admissions are hearsay and are admitted as an exception to the hearsay rule.

13. Rule 506 (1942). Admissions are included as hearsay but are admissible as an exception. Note that Professor Morgan was the official reporter.

14. Rule 63 (1953). Admissions are hearsay, but admissible as an exception. It is interesting to note that the authors of the Uniform Rule have demonstrated the true spirit of confusion regarding admissions by completely reversing this position in 1974 with the promulgation of Rule 801 (d). Rule 801 (d) simply redefines admissions as not being hearsay.

15. FED. R. EVID. 801 (d)(1). Admissions are not hearsay.

quires a decision of what to do with it. Such is not always the case. When the question arises as to whether a given statement qualifies as an admission, particularly when the circumstances surrounding its declaration put it into the "gray area" of the rule, then a clear understanding of the rationale behind the rule is vital. This requires an examination of the basic nature of admissions and the peculiar characteristics which qualify them as being admissible as substantive evidence in a court of law. Only then is it possible to fashion a practical set of criteria for determining which statements actually possess those characteristics and can therefore be admitted.

An admission is an oral or written statement by a party to a lawsuit, or attributable to that party, which is inconsistent with a position he is taking in the lawsuit.[16] Within this broad definition, admissions may be generally broken down into three basic types: judicial admissions, statements made during the course of judicial proceedings;[17] extra-judicial admissions by a party, statements made outside of court by a party to the suit;[18] vicarious admissions, statements made by persons not technically a party to the suit, but which are attributable to a party.[19]

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16. Technitrol, Inc. v. United States, 440 F. 2d 1362, 1370 (Ct. Cl. 1971); Vine St. Corp. v. City of Council Bluffs, 220 N.W.2d 860, 863, (Iowa 1974); Bolden v. Gatewood, 250 Miss. 93, 118, 164 So. 2d 721, 731 (1964); Hickey v. Anderson, 210 Miss. 455, 463, 49 So. 2d 713, 717 (1951).

17. "A judicial admission is a formal act done in the court of judicial proceedings." Arnett v. Thompson, 433 S.W.2d 109, 114 (Ky. 1968). The effect of such an admission is to waive or dispense with the production of evidence in regards to a contested fact by conceding that fact as true. Hofer v. Bituminous Cas. Corp., 148 N.W.2d 485 (1967) *citing* 31A C.J.S. *Evidence* §§ 299-302 (1964). For a few examples of acts in Mississippi courts which have been held to constitute judicial admissions see Huff v. Murray, 171 Miss. 656, 662, 158 So. 475, 477 (1935) (participation by defendant in a trial for unlawful detainer held admission of withholding land from the plaintiff); Simon v. Desporte, 150 Miss. 673, 679, 116 So. 534, 535 (1928) (signed complaint in a previous case is admissible in a subsequent case as an admission).

18. For a good distinction between judicial admissions and extra judicial admissions see Arnett v. Thompson, 433 S.W.2d 109, 114 (Ky. 1968). *See also* U.S. for Use and Benefit of Carter Equip. Co. v. H.R. Morgan, Inc., 544 F. 2d 1271, 1273 (5th Cir. 1977).

19. Vicarious admissions may be binding as the result of several types of relationships, *e.g.*, Thompson v. A. J. Lyon & Co., 152 Miss. 500, 506 (1874) (agents); Brown v. McGraw, 20 Miss. (12 S. & M.) 267 (1849) (by predecessor in interest of assignee of a chose in action or note). For a general discussion of vicarious admissions, see Morgan, *The Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461 (1929).

Admissions hold a unique position in the field of evidence for the dubious distinction of being admissible in spite of the absence of a number of otherwise vital evidentiary qualifications.[20] There is no requirement of first-hand knowledge.[21] There is no prohibition of opinions or conclusions.[22] There is no requirement that the declarant be unavailable to testify.[23] There is no requirement that the declarant have been consciously aware that the statement was against his interest.[24] No foundation need be laid for an admission's introduction.[25] Lastly, an admission is admitted as substantive proof of the matter asserted therein.[26] The reason for this lack of requirements may be due in part to the fact that admissions by a party were admissible as evidence long before the crystalization of the hearsay rule.[27] Testimony of admissions was historically allowed on the fundamental precept that a party should not be allowed to question the trustworthiness of his own statements.[28]

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20. A careful distinction should be made between the question of the admissibility of an admission and the weight it is to be given by the trier of fact once it is admitted. Other evidence on a particular matter is not precluded by the introduction of an admission. Reynolds v. McGehee, 220 Miss. 750, 753, 71 So. 2d 780, 782 (1954). An admission may be explained. Bradshaw v. Stieffel, 230 Miss. 361, 367, 92 So. 2d 565, 567 (1957). Admissions containing conclusions or statements of intentions may be outweighed and even overborne by superior evidence. Pannell v. Glidewell, 142 Miss. 77, 87-88, 107 So. 273, 275 (1926).

21. Johns v. Cotton, 284 A.2d 50, 52 (D.C. 1971); Matthews v. Carpenter, 231 Miss. 677, 683, 97 So. 2d 522, 524-25 (1957).

22. Owens v. Atchison, Topeka and S.F. R., 393 F.2d 77, 79 (5th Cir. 1968), *cert. denied* 393 U.S. 855 (1968); Mallonee v. Finch, 413 P.2d 159, 163 (Alaska 1966); Hickey v. Anderson, 210 Miss. 455, 463, 49 So. 2d 713, 717 (1951); Carpenter v. Davis 435 S.W.2d 382, 384 (Mo. 1968); Black v. Nelson, 246 Or. 161, 165, 424 P.2d 251, 253-54 (1967); Commercial Standard Ins. Co. v. Barron, 495 S.W.2d 276, 279 (Tex. Civ. App.-Tyler 1973).

23. Hunt v. Seaboard Coast Line R., 327 So. 2d 193, 195-96 (Fla. 1976). This "non-requirement" is only logical since in order to be a party in an action, the court must have obtained in personam jurisdiction, thus having brought the party into court.

24. *Id.*

25. White v. Weitz, 169 Miss. 102, 111, 152 So. 484, 486 (1934).

26. Bolden v. Gatewood, 250 Miss. 93, 118, 164 So. 2d 721, 732 (1964); Reynolds v. McGehee, 220 Miss. 750, 753, 71 So. 2d 780, 782 (1954).

27. Morgan, *Admissions*, 12 WASH. L. REV. 181, 182 (1937); Note, 47 GEO. L.J. 560 (1959). According to Wigmore, the hearsay rule began to be articulated in the 1500's and was firmly established in its present form by 1700. 5 WIGMORE ON EVIDENCE § 1364 (3rd ed. 1940). *See also* W. HOLDSWORTH, 9 A HISTORY OF ENGLISH LAW 126-34 (3rd ed. 1944).

28. Note, *supra* note 27, at 562.

In view of both the lack of most of the normal assurances of truth and the historical antedating of the hearsay rule by the use of admissions, the modern theoretical basis for accepting admissions seems to rest on the adversary system of litigation.[29] A party, through his pleadings, takes a formal position in a court of law that sets forth the interests he seeks to have litigated as against his opponent. As a direct result of taking this position, his opponent is given the affirmative right to require an explanation of any prior act or statement which is contrary to that position.

While the adversary system theory does allow more flexibility in justifying some of the idiosyncracies inherent in admissions, it also raises some questions. Why should the veracity of an extra-judicial statement by a party be more inherently susceptible of ascertainment by a jury than would evidence of a witness's prior inconsistent statement?[30] Attempting to answer such a question graphically illustrates the countervailing considerations of the inherent probative worth of a piece of evidence as juxtaposed with the fundamental characteristics of litigation rooted in the adversary system.

The importance of resolving these countervailing considerations becomes evident when the attempt is made to determine whether a particular statement comes under the admissions exception to the hearsay rule. Specifically, difficulty can arise in deciding whether or not the declarant of a particular statement falls within the definition of "party."[31] In the simple situation where A alleges an assault by B and files suit, there is no difficulty in ascertaining that A and B

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29. Felker v. Bartleme, 124 Ill. App. 2d 43, 50-1, 260 N.E.2d 74, 78 (1970); Morgan, *Admissions*, 12 WASH. L. REV. 181, 182 (1937).

30. A prior inconsistent statement is admissible, but only for the purpose of impeaching a witness. Capitol Constr. Co. v. Tullier, 210 So. 2d 654, 656 (Miss. 1968). A proper foundation must be laid for its introduction. Kelly v. King, 196 So. 2d 525, 528-29 (Miss. 1967). Thus the witness must be given a chance to deny or to explain his alleged inconsistency as a precondition to the introduction of the statement as evidence.

31. "The word party then is unquestionably a technical word, and has a precise meaning in legal parlance. By it is understood he or they by or against whom a suit is brought, whether at law or equity; the party plaintiff or defendant, whether composed of one or more individuals, and whether natural or legal persons; they are parties on the writ, and parties on the record, and all others who may be affected by the writ indirectly or consequentially are persons interested, but not parties." Merchants Bank v. Cook 21 Mass. (4 Pick.) 405, 411 (1826).

are the parties to the action. As a result, an admission by either is admissible against the declarant. As the number of persons involved in some aspect of an action increases and the interrelations become more complex, ascertaining the parties becomes more difficult. From the perspective of the adversary system theory of admissions, a "party" is limited strictly to the person who sets forth his interests in the pleadings. However, when evaluating the probative value of an admission, it is the totality of the circumstances surrounding the making of that admission which gives the greatest insight into the value of that admission.[32]

This delineation of the parameters of "party" becomes particularly important in a suit to recover damages suffered by an infant as a result of tortious conduct. The central issue is deciding to whom the interests being litigated belong. Any tort committed upon an infant creates two specific causes of action.[33] One cause of action lies with the parents for medical expenses and loss of the child's services during minority and the other lies with the child for those injuries which are personal in nature.[34]

The right to recover medical expenses derives from the parent/child relationship and the parents' resulting duty to care for and maintain the child.[35] It is more precise to say that for the most part, the right to recover medical expenses falls wherever the burden of payment should or does fall. This has resulted in some varying theories of the right of action. It has been held that the parents' action is strictly compensatory in nature and therefore any punitive damages

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32. Hope v. Evans, 1 (S. & M. Ch.) 195, 204 (Miss. 1843).

33. Wright v. Standard Oil Co., 319 F. Supp. 1364, 1374-75 (N.D. Miss. 1970), *rev'd on other grounds*, 470 F.2d 1280, *cert. denied*, 412 U.S. 938; Hunt v. Yeatman, 264 F. Supp. 490, 491 (E.D. Pa. 1967) (construing Pennsylvania law); Lopez v. Waldrun Estate, 249 Ark. 558, 563, 460 S.W.2d 61, 64 (1970); Walten v. City of Flint, 35 Mich. App. 603, 199 N.W.2d 264, 266 (1972); Lane v. Webb, 220 So. 2d 281, 286 (Miss. 1969); Natchez, J. & C. R. v. Cook, 63 Miss. 38, 42, (1885); Emanuel v. Clewis, 272 N.C. 505, 509, 158 S.E.2d 587, 590 (1968); Hughey v. Ausborn, 249 S.C. 470, 475, 154 S.E.2d 839, 841-42 (1967); Savard v. Cody Chev., Inc., 126 Vt. 405, 412, 234 A.2d 656, 661 (1967) *quoted in* Trapeni v. Walker, 120 Vt. 510, 516, 144 A.2d 831, 835 (1958). For collected cases on the subject see 37 A.L.R. 64 (1925); 32 A.L.R.2d 1060 (1953).

34. *Wright*, 319 F. Supp. at 1374-75; Emanuel v. Clewis, 272 N.C. 505, 509, 158 S.E.2d 587, 590 (1968).

35. *Wright*, 319 F. Supp. at 1374-75. *See also* Matthews v. State, 240 Miss. 189, 193, 126 So. 2d 245, 246 (1961). *But see* Central of Georgia R. v. McNab, 150 Ala. 332, 43 So. 222 (1907).

in a suit must go to the child.[36] Closely related to this idea is that if a minor pays his medical bills[37] or obligates himself to pay them,[38] the minor may collect the expenses incurred. In one jurisdiction the child may be liable for medical expenses as necessary expenses and therefore may bring suit in his own name.[39] The right of the parents to damages for loss of services during minority is derived from either a master/servant relationship[40] or simply from the parent/child relationship.[41]

The second cause of action arises in the infant. This action is for personal injuries to the infant such as pain and suffering, disfigurement, and loss of earnings after majority.[42]

These two causes of action are separate and distinct, therefore the bringing of an action by either the parents or the child for the appropriate damages does not bar the other from bringing a separate suit.[43] In fact, a verdict for either the child or the parent does not preclude an opposite verdict in a separate action by the other on the same set of facts.[44] Of course, if the parents and the child join their causes of action in the same suit, different verdicts are precluded.[45]

The parents' cause of action is not absolute. It is derivative in nature[46] and it may be lost or it may never arise. It will never arise if the child has been emancipated since the

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36. Hughey v. Ausborn, 249 S.C. 470, 475, 154 S.E.2d 839, 841-42 (1967).

37. Smith v. Gulf, M. & N. R., 158 Miss. 188, 193, 129 So. 599, 601 (1930).

38. Savard v. Cody Chev. Inc., 126 Vt. 405, 412, 234 A.2d 656, 661 (1967). *But see* Sulkowski v. Shaefer, 31 Wis.2d 600, 604 143 N.W.2d 512, 515-16 (1966) (since an infant cannot contractually obligate itself, it cannot collect medical expenses).

39. Scott County School Dist. I v. Asker, 324 N.E.2d 496, 499 (Ind. 1975) (by statute).

40. *See* Tide v. Skinner, 225 N.Y. 422, 423, 122 N.E. 247, 251 (1919); Central of Georgia R. v. McNab, 150 Ala. 332, 340, 43 So. 222, 224 (1907).

41. Gulf Ref. Co. v. Miller, 153 Miss. 741, 747, 121 So. 482, 484 (1929). Specifically this right to services has been seen as a type of reimbursement to the parents for their parental duty to support the child. Marlar v. Smith, 134 Miss. 76, 83, 98 So. 338, 339 (1924).

42. *Wright*, 319 F. Supp. at 1374-75.

43. Balandran v. Compton, 141 Kan. 321, 322, 41 P.2d 720, 721 (1935); Akers v. Fulkerson, 153 Ky. 228, 230-31, 154 S.W. 1101, 1102-03 (1913). *Contra* Hunt v. Yeatman, 264 F. Supp. 490, 491 (E.D. Pa. 1967) (by statute requiring all damages litigated in one suit).

44. Akers v. Fulkerson, 153 Ky. 228, 230-31, 154 S.W. 1101, 1102-03 (1913).

45. Grindell v. Huber, 28 Ohio St. 2d 71, 75, 275 N.E.2d 614, 616-17 (1971).

46. *Id.*

parents of an emancipated child are not responsible for its care and maintenance, and are not entitled to his services.[47] The parents' cause of action may be lost through either a formal waiver[48] or through an implied waiver which operates in favor of the child and estops the parents from maintaining an action in his own name for damages which were claimed in the child's suit.[49] This implied waiver and estoppel has been found when the infant brings suit and the parents either know or have reason to know of the existence of the suit.[50] The inaction of the parents has been deemed a waiver of the parents' cause of action in favor of the infant. In some jurisdictions the parents' act of testifying in a child's suit for medical expenses will estop the parents from later claiming them.[51]

The implied waiver of the parents' cause of action is also found when a parent as next friend of the infant brings an action which includes damages otherwise belonging to the parent.[52] In such a case, the parent is deemed to have waived his own cause of action in favor of the child and is estopped from claiming them in a subsequent suit.[53] The Mississippi Supreme Court described the effects of such a waiver in *Lane v. Webb*:[54] "In such a case the parent treats the child as emancipated in so far as recovery for damages is concerned

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47. Anderson v. Jenkins, 220 Miss. 145, 154, 70 So. 2d 535, 539 (1954). *See generally* Marlar v. Smith, 134 Miss. 76, 83, 98 So. 338, 339 (1924) (on waiver and emancipation).

48. National City Dev. Co. v. McFerran, 55 A.2d 342, 343 (D.C. 1947); Evans v. Caldwell, 52 Ga. App. 475, 485, 184 S.E. 440, 446 (1936).

49. Lane v. Webb, 220 So. 2d 281, 286 (Miss. 1969).

50. Vincennes Bridge Co. v. Guinn, 231 Ky. 772, 779, 22 S.W.2d 300, 303 (1929). This only occurs when the infant brings suit by a next friend other than his parents and claims damages otherwise belonging to his parents.

51. *E.g.*, Girard v. Irvine, 97 Cal. App. 377, 386, 275 P. 840, 844 (1929).

52. Central of Georgia R. v. McNab, 150 Ala. 332, 340, 43 So. 222, 224 (1907); Stone v. Yellow Cab Co., 221 P. 2d 131,135 (Cal. Dist. Ct. App. 1950); National City Dev. Co. v. McFerran, 55 A.2d 342, 343 (D.C. 1947); Behemoth Coal Co. v. Helton, 310 Ky. 810, 814, 222 S.W.2d, 845, 847 (1949); Miller v. Trascher, 145 So. 27, 28 (La. Ct. App. 1932); Lane v. Webb, 220 So. 2d 281, 286 (Miss. 1969); Garrison v. Ryno, 328 S.W.2d 557 (Mo. 1959); Kleibor v. Rogers, 144 S.E.2d 27, 30 (N.C. 1965); Johnson v. Knipp, 36 Ohio App. 2d 218, 220, 304 N.E.2d 914, 916 (1973); Texas & N.O.R. v. Ozuna, 266 S.W.2d 896, 901 (Tex. Civ. App.—San Antonio 1954).

53. Lane v. Webb, 220 So. 2d 281, 286 (Miss. 1969); Anderson v. Jenkins, 220 Miss. 145, 153-54, 70 So. 2d 535 (1954); Brookhaven Lumber & Mfg. Co. v. Adams, 132 Miss. 689, 697, 97 So. 484, 485 (1923).

54. Lane v. Webb, 220 So. 2d 281 (Miss. 1969).

and may not thereafter be permitted to claim that he and not the child was entitled to recover therefore."[55]

In Mississippi, an infant is required to bring and defend suit by "next friend" or "guardian ad litem."[56] Technically, a next friend or *prochien ami* brings suit for an infant plaintiff while a guardian ad litem defends a suit for an infant defendent. Other than this there is no real distinction between the two.[57] The requirement of a next friend or guardian ad litem has developed as a means of protecting the interests of an infant,[58] insuring the full and diligent assertion of the rights of an infant,[59] and giving the infant standing to sue.[60] Thus the next friend[61] is considered to be both a fiduciary to the

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55. *Id.* at 286.

56. Notice should be taken of the newly adopted Mississippi Rules of Civil Procedure provisions (MISS. R. CIV. PRO. 17 (c) and (d)) concerning infants and other persons under legal disability. The new provisions restate what Mississippi law has traditionally required for the protection of the interests of such persons. If an infant has a duly appointed legal guardian, the guardian may prosecute or defend on behalf of the infant. An infant defendant with no duly appointed legal guardian may have a guardian ad litem appointed by the court. One change instituted by the new rules is the requirement that a court-appointed guardian ad litem must be an attorney. An infant may still prosecute an action by his next friend. The independent use of the two distinct terms "next friend" and "guardian ad litem" would seem to indicate that the professional and procedural requirements for a guardian ad litem do not apply to a next friend. Rule 17 (c) specifically gives the court discretionary authority to make "any other orders it deems proper for the protection of the interests of the infant." This provision, particularly when coupled with the provisions for a court-appointed attorney to serve as guardian ad litem, raises questions about the duty and authority of the court in a case such as *Haver*. In view of the holding in *Haver*, as allowing into evidence admissions by the next friend, it would seem that the protection of the *infant's* interests in a similar fact situation would require a court to remove the parents from the role of next friend and appoint a guardian/attorney to prosecute the action on behalf of the infant. Such action would ensure that the infant's interests in the outcome of the suit could not be compromised by out-of-court statements of the parent/next friend.

57. Till v. Hartford Accident and Indem. Co., 124 F.2d 405 (10th Cir. 1942); Clark v. Green, 29 Conn. Supp. 436, 437, 290 A.2d 836, 837 (1971).

58. *In re* Prine's Estate, 208 So. 2d 187, 192 (Miss. 1968); *See also* Hunter v. North Mason H. S., 12 Wash. App. 304, 306-07, 529 P.2d 898,899 (1974) *aff'd*, 85 Wash. 2d 810, 539 P.2d 845 (1975).

59. *In re* Prine's Estate, 208 So. 2d 187, 192 (Miss. 1968).

60. Klaus v. State, 54 Miss. 644, 646 (1877).

61. For the purposes of the ensuing discussion, the terms "next friend" and "guardian ad litem" may be used interchangeably unless otherwise indicated. The fiduciary nature of the position and the degree of control exercised by the court are essentially the same.

infant[62] and an officer of the court.[63] The next friend's conduct during the course of litigation is closely scrutinized by the court, and all of his actions on behalf of the infant are subject to court approval.[64] Accordingly, the next friend may be removed and replaced by the court at any time.[65]

Given the dual role of officer of the court and fiduciary to the infant it is critical to determine the precise status of the relations between the infant involved in a suit and the next friend. Who is the real party in the action? It has been commonly held that it is the infant himself who is the real party in interest in such an action even though the action is being conducted through the *sui juris* of the next friend.[66]

The next friend is a party to an infant's suit only as to procedural matters,[67] since an infant has no procedural capacity to sue.[68] This "procedural party" aspect exists only so long as the substantive rights of the infant are not impaired.[69] Thus the infant is the real party in interest. As one court has observed,

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62. Pate v. Perry's Pride, Inc., 348 So. 2d 1038, 1040 (Ala. 1977). *In re* Prine's Estate, 208 So. 187, 192 (Miss. 1968).

63. Johnson v. Johnson, 544 P.2d 65, 73-74 (Alaska 1975); Youngblood v. Taylor, 89 So. 2d 503, 505-06 (Fla. 1956); Klaus v. State, 54 Miss. 644, 645-46 (1877); State v. Ovitt, 128 Vt. 572, 576, 268 A.2d 916, 918 (1970).

64. Dacanay v. Mendoza, 573 F.2d 1075, 1077-78 (9th Cir. 1978); Swoope v. Swoope, 173 Ala. 157, 163, 55 So. 418, 419 (1911); Phillips v. Nationwide Mut. Ins. Co., 347 So. 2d 465, 466 (Fla. App. 1977); *In re* Prine's Estate, 208 So. 2d 187, 192 (Miss. 1968); Klaus v. State, 54 Miss. 644, 646 (1877); Gallegos v. Clegg, 417 S.W.2d 347, 351-52 (Tex. Civ. App.—Corpus Christi 1967) *ref. n.r.e.*.

65. Klaus v. State, 54 Miss. 644, 646 (1877); Gallegos v. Clegg, 417 S.W.2d 347, 351-52 (Tex. Civ. App.—Corpus Christi 1967) *ref. n.r.e.*.

66. Stanczyk v. Keefe, 384 F.2d 707, 708 (7th Cir. 1967); Crowder v. Gordon Transports, 264 F. Supp. 137, 143 (W.D. Ark. 1967), *rev'd on other grounds* 387 F.2d 413 (1967), *on remand* 289 F. Supp. 166 (1968), *rev'd on other grounds* 419 F.2d 480 (1969); J. v. Superior Ct. of L.A. County, 4 Cal. 3rd 836, 840, 484 P.2d 595, 598 (1971); Wilmington Trust Co. v. Hahn, 241 A.2d 517, 521 (Del. 1968); Johnson v. McCabe, 42 Miss. 255, 260 (1868); King v. Grindstaff, 284 N.C. 348, 357, 200 S.E.2d 799, 805-06 (1973); Quenn v. Jolley, 219 Tenn. 427, 431, 410 S.W.2d 416, 418 (1966). The distinction between the infant and the next friend is sufficient to avoid a charge of res judicata. Irwin v. Alabama Fuel and Iron Co., 215 Ala. 328, 332, 110 So. 566, 569 (1926); Akers v. Fulkerson, 153 Ky. 228, 230-31, 154 S.W. 1101, 1102-03 (1913).

67. *See* Irwin v. Alabama Fuel and Iron Co., 215 Ala. 328, 332, 110 So. 566, 569 (1926).

68. Lopez v. Buras, 321 So. 2d 792, 794 (La. 1975); Burrus v. Burrus, 56 Miss. 92, 98 (1878).

69. This is seen in the fundamental precept that judicial admissions by a next friend or guardian ad litem are not binding on an infant. Ingersall v. Ingersall, 42 Miss. 155, 163 (1868); Reasoner v. State, 463 S.W.2d 55, 57 (Tex. Civ. App.—Houston

> [t]he next friend may be regarded as a party for some purposes. He is liable for costs of suit. He acts for the infant in the employment of an attorney, and, subject to direction of the court, in the management of the cause. But he has no interest in the subject matter nor in the recovery. The infant is the real party to the suit; his rights are the rights litigated, and the recovery belongs to him.[70]

INSTANT CASE

The Mississippi Supreme Court, in analyzing the testimony in *Haver* observed that the testimony of Mrs. Haver was clearly hearsay on its face and as such could not be admitted into evidence unless it came under an exception to the hearsay rule.[71] The court noted that the statement was conclusory and was probably completely outside Mrs. Haver's first-hand knowledge.[72] It should be observed at this point that both of these characteristics would preclude the admissibility of the testimony as substantive evidence on any basis other than as an admission by a party-opponent.[73] With this realization, the court was faced with the question as to whether the parent's status as next friend qualified her as a "party" for the purposes of the admission exception to the hearsay rule.

In *Mississippi Central Railroad v. Pillows*,[74] the court was confronted with an almost identical question. In that case, a minor fell (or was pushed) from the platform of a moving train resulting in the severing of his leg. The infant brought an action by his father as next friend. At trial, the defendant offered testimony of a statement by the father that he had purchased the boy's ticket after the accident occurred, thus establishing the boy's status as that of a trespasser rather than a passenger/invitee. The court in *Pillows* approved the rejection of such testimony, noting that the father as next friend was "a mere nominal plaintiff having no interest in the suit."[75]

1971). Neither may the guardian ad litem submit the rights of the infant to binding arbitration or compromise. Muncrief v. Green, 251 Ark. 580, 582-83, 473 S.W.2d 907, 908-09 (1971); Fort v. Battle, 21 Miss. (13 S. & M.) 133, 136 (1849).

70. Irwin v. Alabama Fuel and Iron Co., 215 Ala. 328, 332, 110 So. 566, 569 (1926).

71. 385 So. 2d at 609.

72. *Id.*

73. See notes 20-26 *supra* and accompanying text.

74. 101 Miss. 527, 58 So. 483 (1912).

75. *Id.* at 485.

There was no mention in *Pillows* of the specific type of damages the $1000 was intended to represent (i.e., medical expenses, loss of services, personal injury, etc.). The *Haver* court seized upon this point to distinguish the holding in *Haver* from that in *Pillows*. The present case, reasoned the court, was a suit for medical expenses, the ultimate legal liability for which lies with the parents.[76] This delineation of rights of action between parent and child was set forth in *Lane v. Webb*.[77]

In order to implement the distinction between the types of damages sought in *Pillows* and those in *Haver*, as such distinction impacts on the admissions exception to the hearsay rule, the court adopted a new test: the identifiable beneficial interest test.[78] The four criteria which apparently must be met to pass muster under this test are 1) an out of court statement 2) by the parents 3) suing as next friend 4) in a suit for medical expenses. Satisfaction of all four criteria will allow such testimony to be admitted as substantive evidence as "an admission by an adversary having an identifiable beneficial interest in the suit."[79]

ANALYSIS AND CONCLUSION

Analysis of the court's handling of the testimony in question requires examination from three perspectives. First, one must analyze the reasoning utilized by the court in defining the status of the parents as parties based on their interest in the suit. Then, one must examine the potential import of the court's decision to future cases. Finally, one must weigh the ultimate purpose of the rules of evidence against the rules regarding admissions, and the theoretical basis utilized in justifying the admission of this particular evidence.

In examining the court's definition of the Havers' status as parties[80] to the suit, one begins by analyzing the exact na-

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76. 385 So. 2d at 609.

77. 220 So. 2d 281, 285-86 (1969).

78. 385 So. 2d at 609.

79. *Id.*

80. It should be noted that the court never clearly refers to Mrs. Haver as a "party", but rather as an "adversary." 385 So. 2d at 609. However, the court specifically states that the only way the statement can come into evidence is by way of the "party-opponent admission exception." *Id.* Since the court did allow the statement into evidence, it would seem that they have defined "party" as an adversary with an identifiable beneficial interest.

ture of their interest in the subject matter of the litigation. The right to bring an action for medical expenses was indeed their right. From one point of view, they would be the ones whom the doctor and hospital would bill. In actuality, they have no cause of action themselves, having waived it in favor of their child. The court in *Lane* defined the nature of the parents' interest in a case such as this by considering the child as being emancipated from the parents with regard to the medical expenses.[81] In *Anderson v. Jenkins*[82] the court indicated that whoever actually pays or agrees to pay a plaintiff's medical expenses has no bearing on the ultimate question of the right *of the plaintiff* to recover.[83] This holding, when coupled with the fact that in a tort action by an infant, the next friend has no property interest in the outcome,[84] would seem without question to prevent the parents from being a party for the purposes of the exception.

The court sets forth the idea of an adversary with an identifiable beneficial interest as an attempt to circumvent the precise nature of the term "party"[85] while retaining the basic characteristics of the adversary system as they relate to admissions. This expansion of the rule regarding admissions by use of the identifiable beneficial interest test would seem to present problems in its applications in future cases. It is quite possible to envision a case similar to *Haver* with the only difference being that the damages sought are for pain, suffering and disfigurement as opposed to medical expenses. As previously discussed[86] the damages in such a case are purely the property rights of an infant. The court's language in *Haver* seems to indicate that in such a case, testimony of Mrs. Haver's statement would not be admissible.[87] It seems ludicrous to determine the admissibility of a given piece of evidence based on whether the infant is seeking medical expenses as opposed to damages for pain and suffering. In other words, it is difficult to understand how the inherent probative value of the testimony, by the same person,

81. 220 So. 2d at 286.
82. 220 Miss. 145, 70 So. 2d 535 (1954).
83. *Id.* at 154, 70 So. 2d at 539.
84. 215 Ala. 328, 332, 110 So. 566, 569 (1926).
85. See note 31 *supra* for a precise definition of the word "party."
86. See note 33 *supra* and accompanying text.
87. 385 So. 2d at 609.

about the same events, can be significantly altered by the type of damages the plaintiff is seeking.

On the other hand, had the court excluded the parent's statement as not having been made by a party, an equally untenable result would have confronted the court. The parents of a child who has suffered such an injury could exclude potentially damaging testimony by bringing suit in the child's name, thus waiving the parent's own claims.[88] By literally defining the parents out of the suit by the form in which the action is brought, such testimony could be totally excluded as substantive evidence regardless of its truthfulness or probative value.

The court is faced with another potential problem derived from the criteria set forth in their new test. The existence of a beneficial interest on the part of a parent is in no way related to his duties and obligations in his role as a next friend to the infant. If the parent's role as next friend is critical to satisfying the test the court has set up, another procedural device for excluding testimony may be employed. Securing the services of a third party to serve as next friend in place of a parent/declarant will defeat the test and exclude the evidence. Once again, the inherent probative worth of the evidence is not the determining factor in its admission or exclusion.

In the search for an acceptable pathway out of these dilemmas, it is necessary to return to the primary function of rules of evidence and, where necessary, re-evaluate the rules in light of this function. The purpose of a trier of fact is to sift through conflicting versions, facts, and perspectives and to arrive at the truth of a situation.[89] The primary function of the rules of evidence is to guide the trier of fact by screening from it evidence which is likely to get in the way of ascertaining the truth.[90]

If this premise is accepted as the cornerstone of a theoretical framework for determining the admissibility of evi-

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88. *Cf.* Reeves v. Eckles, 108 Ill. App. 2d 427, 429, 248 N.E.2d 125, 127 (1969) (a waiver of such claims of the parent in favor of the child could have defeated a defense of contributory negligence).

89. "Truth is the object of all trials." Guy v. Hall, 7 N.C. (3 Mur.) 150, 151 (1819).

90. *See* Woodward v. U.S., 185 F.2d 134, 137 (8th Cir. 1950) *rev'd on other grounds* 341 U.S. 112 (1951). *See generally* HOLDSWORTH, *supra* note 27.

dence, the fallacy of the technique the court utilized to admit the statement becomes apparent. In essence, the court has sought to bring the testimony into evidence by expanding the definition of "party." Unfortunately, by choosing this route and admitting the testimony based on the status of the declarant, the evidentiary safeguards[91] ensuring the evidence's probative value have fallen by the wayside. In addition, the court has defined this expanded version of "party" by use of the identifiable beneficial interest test in such a way as to preclude the use of potentially valuable evidence by strategically structuring damage claims.

Rather than admitting the testimony of Mrs. Haver's statements based on the status of the declarant, admissibility should be based on the nature and context of the statement itself allowing, within the discretion of the trial judge, the presentation of all the circumstances and factors which enhance or debase its probative value. The most natural way of accomplishing this would be to allow the statement[92] to be admitted as a prior inconsistent statement of a witness. As such, the declarant first would have opportunity to admit, explain or deny the statement. Likewise, its probative worth may be explored on the witness stand in regard to qualities of first hand knowledge, opinion, etc. The jury would be in the position of observing the courtroom demeanor of each witness and evaluating conflicting statements in light of all the evidence.

The principal difficulty with such an approach is the traditional view that evidence of a witness's prior inconsistent statements is admissible only for impeachment purposes and not as substantive proof of the matter asserted.[93] This view is supported by the bulk of the case law,[94] yet it is not without formidable opposition. Both the Model Code of Evidence[95] and the California Code of Evidence[96] have taken the viewpoint that evidence of such prior inconsistent statements

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91. Such as the opinion rule, the requirement of first hand knowledge, etc.

92. 385 So. 2d at 608-09.

93. Magee v. Magee, 320 So. 2d 779, 783 (Miss. 1975).

94. *See generally* C. McCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 251 (2d ed. 1972).

95. Rule 503 (b).

96. §§ 1235; 770 (West) (1966). *See also* Law Revision Commission Comment to § 1235.

may be admitted as substantive evidence. The Federal Rules of Evidence allow some specific types of prior statements[97] and, while not explicitly allowing all such statements to be admissible, does leave great leeway within the discretion of the trial judge.[98]

From a purely practical point of view, it makes very little difference whether one terms evidence of a prior inconsistent statement as substantive or merely impeaching. As Judge Learned Hand once observed:

> The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury sees of the witness, they conclude that what he says is not the truth, but what he said before, they are nonetheless deciding from what they see and hear of that person and in court. There is no mythical necessity that the case be decided only in accordance with the truth of words uttered under oath in court.[99]

Allowing testimony of Mrs. Haver's statement to be considered under a rule allowing evidence of certain prior inconsistent statements as substantive evidence would allow the judge to make an initial determination of the probative value of the statement. If it did have such value, the jury could then determine the basic truthfulness of the testimony and the weight it should be given. More importantly in an action for either the parent's damages or the infant's damages, the factor determining the statement's admissibility is the statement itself as measured against the fundamental tests for truthfulness, not a technical definition of the declarant.

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97. Rule § 801 (d) (1). *See also* Advisory Committee's Note to § 801.

98. *Id. See also* Huff v. White Motor Corp., 609 F.2d 286, 290-95 (7th Cir. 1979) for an excellent discussion of the residual hearsay exception and the trial judge's role in its application.

99. DiCarlo v. United States, 6 F.2d 364, 368 (2d Cir. 1925).