HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 701 Florida Evidence Code
SPONSOR(S): Civil Justice Subcommittee; Logan and Holder
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 782

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	14 Y, 0 N, As CS	Smith	Bond
2) Judiciary Committee	14 Y, 0 N	Smith	Havlicak

SUMMARY ANALYSIS

Currently, a hearsay statement is not admissible in court, unless an exception applies. Under Florida law, exceptions fall into two categories: those where the availability of the person who made the statement is irrelevant, and those where the person who made the statement must be unavailable to testify in court.

The Federal Rules of Evidence provide an exception to the hearsay rule when the unavailability of a witness is caused by the opposing party's wrongful conduct. Florida law does not provide such an exception.

The bill creates a "forfeiture by wrongdoing" hearsay exception. The exception mirrors the language in the Federal Rules of Evidence. Under the exception, a hearsay statement would be admissible if the party against whom it is offered engaged in wrongdoing that caused the person who made the statement to be unavailable to testify.

The bill does not appear to have a fiscal impact on state or local governments.

The bill is effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

The Hearsay Rule

"Hearsay"[1] is a statement,[2] other than one made by the declarant[3] while testifying at trial or a hearing,[4] offered in evidence to prove the truth of the matter asserted.[5]

For example, a victim of domestic violence calls the police. When a police officer arrives, she tells him that "John Doe hit me." If the officer then testifies for the State at trial that he heard the victim say "John Doe hit me," the officer's testimony would be hearsay because "John Doe hit me" is:

- A statement;
- Made outside of the court proceeding; and
- Offered to prove the truth of what it asserts (i.e., that John Doe hit the victim).[6]

Current law provides that hearsay statements are not admissible at trial unless a statutory exception applies.[7] The reasoning behind excluding hearsay statements is that they are considered unreliable as probative evidence. There are many reasons for this unreliability, including: the statement is not made under oath; jurors cannot observe the demeanor of the declarant and judge the witness' credibility; and there is no opportunity to cross-examine the declarant and thereby test his or her credibility.[8]

Exceptions to the Hearsay Rule

Exceptions to the hearsay rule fall into two categories: those under s. 90.803, F.S., where the availability of the declarant is irrelevant, and those under s. 90.804, F.S., where the declarant must be unavailable to testify in court. Section 90.804, F.S., provides that a declarant is "unavailable" as a witness if the declarant:

- Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of the declarant's statement (for example, a declarant is unavailable if the trial court sustains an assertion of the Fifth Amendment privilege against self-incrimination);[9]
- Persists in refusing to testify concerning the subject matter of the declarant's statement despite a court order to do so;
- Has suffered a lack of memory of the subject matter of his or her statement so as to destroy the declarant's effectiveness as a witness during the trial;

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[1] Section 90.801, F.S.
[2] A "statement" is either an oral or written assertion or nonverbal conduct of a person if it is intended by the person as an assertion. Section 90.801(1)(a), F.S. For example, the act of pointing to a suspect in a lineup in order to identify her is a "statement." *See* Fed. R. Evid. 801 Advisory Committee Note.
[3] The "declarant" is the person who made the statement. Section 90.801(1)(b), F.S.
[4] Often referred to simply as an "out-of-court statement."
[5] Section 90.801(1)(c), F.S. For example, testimony that the witness heard the declarant state "I saw the light turn red" is *not* hearsay if introduced to prove the declarant was conscious at the time she made the statement. It *would* be hearsay if offered to prove the light was in fact red.
[6] *Rodriguez v. State*, 9 So.3d 745, 745-46 (Fla. 2d DCA 2009).
[7] Section 90.802, F.S.
[8] *Lyles v. State*, 412 So.2d 458, 459 (Fla. 2d DCA 1982); *see also* Charles W. Ehrhardt, *Florida Evidence*, s. 801.1, 770 (2008 ed.).
[9] *Perry v. State*, 675 So.2d 976, 980 (Fla. 4th DCA 1996).

- Is unable to be present or to testify at the hearing because of death or because of then-existing physical or mental illness or infirmity; or
- Is absent from the hearing, and the proponent of a statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means.[10]

The section also provides that a witness is not unavailable if the party who seeks to admit the statement caused the unavailability by wrongful conduct.[11]

The party seeking to introduce a hearsay statement under the exception at s. 90.804, F.S., bears the burden of establishing that the declarant is unavailable as a witness. The trial judge makes the determination of such unavailability at a pretrial hearing.[12]

Forfeiture by Wrongdoing of the Opposing Party

The Federal Rules of Evidence, and the evidence laws of some other states, provide an exception to the hearsay rule when the unavailability of a witness is caused by the opposing party's wrongful conduct. The Federal Rules of Evidence provide that a statement by an unavailable witness is admissible if the statement is "offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result."[13] Several states have passed legislation adopting the Federal hearsay exception.[14] Florida does not have a forfeiture-by-wrongdoing exception.

Effect of the Bill

The bill creates a new hearsay exception under s. 90.804(2)(f), F.S., that adopts the language of the Federal Rules of Evidence's "forfeiture by wrongdoing" exception.[15] Under the exception, a statement offered against a party is admissible if that party wrongfully caused, or acquiesced in wrongfully causing, the declarant's unavailability as a witness, and did so intending that result.

B. SECTION DIRECTORY:

Section 1 amends s. 90.804, F.S., relating to hearsay exceptions where the declarant is unavailable as a witness.

Section 2 provides for an effective date upon the bill becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

[10] Section 90.804, F.S.
[11] *Id*.
[12] *See Jones v. State*, 678 So.2d 309, 314 (Fla. 1996).
[13] Fed. R. Evid. 804(b)(6).
[14] *See, e.g.*: California (Cal. Evid. Code § 1350 (West 1995)); Delaware (Del. R. Evid. 804(b)(6)); Hawaii (Haw. R. Evid. 804(b)(7)); Louisiana (La. Code Evid. Ann. art. 804)); Michigan (Mich. R. Evid. 804(b)(6)); North Dakota (N.D. R. Evid. 804(b)(6)); Pennsylvania (Pa. R. Evid. 804(b)(6)); South Dakota (S.D. R. Evid. 804(b)(6)); Tennessee (Tenn. R. Evid. 804(b)(6)); Illinois (limited to domestic violence cases (725 Ill. Comp. Stat. Ann 5/115-10.2a (West 2004)).
[15] Fed. R. Evid. 804(b)(6).

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact local government revenues.

2. Expenditures:

The bill does not appear to have any impact local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The Confrontation Clause of the Sixth Amendment provides, in part, that "in all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him."[16] In *Crawford v. Washington*, the U.S. Supreme Court held that the Confrontation Clause applies to testimonial statements.[17] The Court has emphasized that there is no bright-line test to determine whether a statement is testimonial, the determination involves a "highly context-dependent inquiry."[18]

An out-of-court statement by a witness that is testimonial is inadmissible at trial under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.[19] An out-of-court statement that violates the Confrontation Clause is inadmissible at trial even if it falls within a state's statutory hearsay exception.[20] In contrast, if a statement is non-testimonial, it does not implicate the Confrontation Clause, and therefore admission of such statements is determined by state hearsay exceptions.[21]

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[16] Amend. VI, U.S. Const.

[17] The definition of a "testimonial statement" includes statements made during police interrogations. *Crawford*, 541 U.S. 36, 68 (2004). The Court has since clarified that "police interrogations" are not defined in the "technical, legal sense." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

[18] *Michigan v. Bryant*, 131 S.Ct 1143, 1158 (2011); *see also Davis*, 547 at 822 (The Court explained that in general, statements made to law enforcement where the circumstances indicate that the "primary purpose" of the statement is to aid the police in addressing an ongoing emergency are not testimonial. On the other hand, statements made to law enforcement where the circumstances indicate that the primary purpose of the statement is to establish the facts of a past event that may be relevant in prosecuting a defendant at trial are testimonial.).

[19] *Crawford*, 541 U.S. at 54.

[20] *Id.* at 51 (2004) (finding that CC applies to out-of-court statements introduced at trial, regardless of admissibility of statements under law of evidence); *see also State v. Lopez*, 974 So.2d 340, 345 (Fla. 2008); *22 Fla. Prac., Criminal Procedure* § 12:6 (2011 ed.).

[21] *Id*. at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law.").

However, in *Crawford*, the Court recognized the constitutional validity of the "forfeiture by wrongdoing" exception to excluding testimonial statements. Such wrongdoing "extinguishes [defendant's] confrontation claims on essentially equitable grounds."[22]

B. RULE-MAKING AUTHORITY:

Article V, s. 2(a) of the Florida Constitution provides that the Florida Supreme Court is responsible for adopting rules of practice and procedure in all state courts.[23] The case law interpreting Art. V, s. 2 focuses on the distinction between "substantive" and "procedural" legislation. Legislation concerning matters of substantive law are "within the legislature's domain" and do not violate Art. V, s. 2.[24] On the other hand, legislation concerning matters of practice and procedure, are within the Court's "exclusive authority to regulate."[25] However, "the court has refused to invalidate procedural provisions that are 'intimately related to' or 'intertwined with' substantive statutory provisions."[26] Evidence law is considered by the court to be procedural, although the court usually accedes to changes in the statutory evidence laws.

The Florida Supreme Court held in one case involving the hearsay exception at s. 921.141, F.S., does not violate art. V, s. 2(a).[27] In contrast, the First District Court of Appeals held that s. 90.803(22), F.S., the "former testimony" hearsay exception, violated Art. V, s. 2 because it infringed on the Court's authority to adopt procedural rules.[28] The court noted that one of the reasons the exception was different than other hearsay exceptions adopted by the Court was that it was not modeled after the Federal Rules of Evidence.[29] The bill adopts a portion of the Federal Rules of Evidence hearsay exception.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 31, 2012, the Civil Justice Subcommittee adopted a Proposed Committee Substitute ("PCS") for HB 701. The PCS deleted provisions regarding the spontaneous statement hearsay exception, the excited utterance hearsay exception, statements of a victim of domestic violence in a criminal proceeding, and a residual hearsay exception where certain guarantees of trustworthiness are established. The PCS also simplified the forfeiture by wrongdoing hearsay exception.

The analysis is drafted to the Committee Substitute as passed by the Civil Justice Subcommittee.

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[22] *Crawford*, 541 U.S. at 62 (citing *Reynolds v. United States*, 98 U.S. 145, 158 (1878) ("The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.").

[23] Art. V, s. 2(a), Fla. Const.

[24] *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So.2d 730, 732 (Fla. 1991).

[25] *Id*.

[26] *In re Commitment of Cartwright*, 870 So.2d 152, 158 (Fla. 2d DCA 2004) (citing *Caple v. Tuttle's Design-Build, Inc*., 753 So. 2d 49, 53-54 (Fla. 2000)).

[27] *Cartwright*, 870 So.2d at 161 (citing *Booker v. State*, 397 So.2d 910, 918 (Fla. 1981) (rejecting the challenge under article V, section 2(a), to the provision in section 921.141, Florida Statutes (1977), permitting the admission of hearsay evidence).

[28] *Grabau v. Dep't of Health, Bd. of Psychology*, 816 So.2d 701, 709 (Fla. 1st DCA 2002) (holding section 90.803(22) to be unconstitutional on various grounds, including "as an infringement on the authority conferred on the Florida Supreme Court by article V, section 2(a)")

[29] *Id*. at 708 (citing *In re Amendments to the Florida Evidence Code*, 782 So.2d 339, 340-42 (Fla. 2000)).