

**Use of Depositions of Employees  
By Ted Babbitt**

Most trial lawyers are familiar with Fla. R. Civ. P. 1.330(a)(3) which allows a deposition to be used under varying circumstances such as the death of a witness more than 100 miles away from the trial, a witness who is unavailable due to illness, infirmity or imprisonment, a witness who cannot be subpoenaed or an expert witness. Recent cases make it clear that the deposition of an employee of a party is admissible even if the witness does not meet one of the criteria of 1.330(a)(3) if the statements of the employee can be considered an admission against interest.

That question arose in the case of Petit-Dos v. School Board of Broward County, 2 So. 3d 1022 (Fla. 4<sup>th</sup> DCA 2009). In that case, the trial judge refused to allow the plaintiff to read excerpts from the deposition of an employee of the defendant regarding questions concerning her responsibility for the accident. In reversing, the Fourth District pointed out that Fla. R. Civ. P. 1.330(1) allows a deposition to be used by any party, not only in impeachment of a witness but “for any purpose permitted by the Florida Evidence Code.” Since sec. 90.803 of the Florida Evidence Code provides that even if a witness is available for testimony, statements which are admissions by a party’s employee concerning a matter within the scope of their employment while they were employed are admissible. Depositions of employees are admissible even though the witness does not meet the other criteria of the Rule regarding their unavailability. The Court quoted with approval the case of Castaneda v. Redlands Christian Migrant Assoc., Inc., 884 So. 2d 1087 (Fla. 4<sup>th</sup> DCA 2004). In that case, depositions of employees of a day

care center where the plaintiff's child was injured were not permitted in evidence and the Fourth District reversed citing the same rule and evidentiary code as relied upon in Petit-Dos, supra.

The opinion in Castaneda clears up the distinction between the admissibility into evidence of statements of employees as opposed to nonparty witnesses who may make admissions against interest. At 1091, the court holds:

“Statements of employees within the scope of their employment and during its existence are admissible in Florida:

Florida courts have consistently admitted into evidence statements by employees concerning matters arising from the course of their employment under the doctrine of admissions. It is important to note that such statements are admissible because they are the admissions of a party-opponent or adverse party and not because they are declarations against interest. The differences between these two well-recognized exceptions to the hearsay rule are: an admission is made by a party to the litigation, while a declaration against interest is made by a non-party; an admission comes into evidence despite the presence at trial of its author, while the general hearsay rule concerning unavailability of the declarant applies in the case of declarations against interest. The statement sought to be introduced as an admission need not have been consciously against the interest of its maker at the time it occurred, while the declarant in the case of the other hearsay exception must have been aware of a risk of harm to his own interests at the time he spoke.”

Allowing depositions of employees to be read to the jury makes consummate good sense. The very existence of the agency relationship between an employee and the employer defendant makes the employee's

statements usable against the employer because they are, in fact, admissions of a party. Particularly in the corporate world, an employer cannot act without its employees. The employee's actions are, in fact, actions of the corporate employer and not to recognize that their statements within the course of their employment bind their employer creates a legal fiction that makes no sense. In fact, at 1091, the Fourth District in Castaneda uses precisely that analogy.

“We analogize the introduction of employee depositions as admissions to the introduction of the deposition of a party or of the officer, director, or managing agent of a party, which may be done for any reason pursuant to Florida Rule of Civil Procedure 1.330(a)(2).”

These opinions are important because the constraints of Fla. R. Civ. P. 1.330(a)(2) allow only the depositions of an officer, director, or managing agent of a corporation to be used by the adverse party for any purpose. These opinions make clear that any employee's deposition regardless of that employee's status can be utilized as admissions against interest of the employer party.

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