

CHAPTER 908

EVIDENCE — HEARSAY

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NOTE: Extensive comments by the Judicial Council Committee and the Federal Advisory Committee are printed with chs. 901 to 911 in 59 W (2d). The court did not adopt the comments but ordered them printed with the rules for information purposes.

908.01 Definitions. The following definitions apply under this chapter:

(1) **STATEMENT.** A "statement" is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by him as an assertion.

(2) **DECLARANT.** A "declarant" is a person who makes a statement.

(3) **HEARSAY.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(4) **STATEMENTS WHICH ARE NOT HEARSAY.** A statement is not hearsay if:

(a) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

1. Inconsistent with his testimony, or
2. Consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or
3. One of identification of a person made soon after perceiving him; or

(b) *Admission by party opponent.* The statement is offered against a party and is:

1. His own statement, in either his individual or a representative capacity, or
2. A statement of which he has manifested his adoption or belief in its truth, or
3. A statement by a person authorized by him to make a statement concerning the subject, or
4. A statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or

5. A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

History: Sup. Ct. Order, 59 W (2d) R220.

Witness' claimed nonrecollection of prior statement may constitute inconsistent testimony under (4) (a) 1. *State v. Lenarchick*, 74 W (2d) 425, 247 NW (2d) 80.

Admissibility under (4) (a) 2 and 3 of prior consistent statements discussed. *Green v. State*, 75 W (2d) 631, 250 NW (2d) 305.

Where defendant implied that plaintiff recently fabricated professed belief that contract did not exist, financial statement which showed plaintiff's nonbelief in existence of contract was admissible under (4) (a) 2. *Gerner v. Vasby*, 75 W (2d) 660, 250 NW (2d) 319.

Under (4) (b) 4, there is no requirement that the statement be authorized by the employer or principal. *Mercurdo v. County of Milwaukee*, 82 W (2d) 781, 264 NW (2d) 258.

Under (4) (b) 1, any prior out-of-court statements by a party, whether or not they are "against interest", are not hearsay. *State v. Benoit*, 83 W (2d) 389, 265 NW (2d) 298 (1978).

Sub (4) (a) 3 applies to statements of identification made soon after perceiving the suspect or his likeness in the identification process. *State v. Williamson*, 84 W (2d) 370, 267 NW (2d) 337 (1978).

Statements under (4) (b) 5 discussed. *Bergeron v. State*, 85 W (2d) 595, 271 NW (2d) 386 (1978).

Robber's representation that bottle contained nitroglycerine was admissible under (4) (b) 1 to prove that robber was armed with dangerous weapon. *Beamon v. State*, 93 W (2d) 215, 286 NW (2d) 592 (1980).

Prior inconsistent statement by a witness at a criminal trial is admissible under (4) (a) 1 as substantive evidence. *Vogel v. State*, 96 W (2d) 372, 291 NW (2d) 850 (1980).

See note to art. I, sec. 7, citing *State v. Dorcey*, 103 W (2d) 152, 307 NW (2d) 612 (1981).

Under (4) (b) 4, a party introducing a statement of an agent as the admission of a principal need not show that the agent had authority to speak for the principal. The rule only requires that the agent's statement concern "a matter within the scope of his agency or employment." *Perzinski v. Chevron Chemical Co.* 503 F (2d) 654.

908.02 Hearsay rule. Hearsay is not admissible except as provided by these rules or by other rules adopted by the supreme court or by statute.

History: Sup. Ct. Order, 59 W (2d) R248.

908.03 Hearsay exceptions; availability of declarant immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **PRESENT SENSE IMPRESSION.** A statement describing or explaining an event or condition

made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) EXCITED UTTERANCE. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) RECORDED RECOLLECTION. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly.

(6) RECORDS OF REGULARLY CONDUCTED ACTIVITY. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

(6m) HOSPITAL RECORDS. (a) *When witness unnecessary.* A custodian or other qualified witness required by sub. (6) is unnecessary if the party who intends to offer hospital records into evidence at a trial or hearing files with the court at least 10 days before the trial or hearing an accurate, legible and complete duplicate of the hospital records for a stated period certified by the record custodian and notifies all appearing parties at least 10 days before the trial or hearing that such records for the stated period have been filed.

(b) *Subpoena limitations.* Hospital records are subject to subpoena only if the hospital is a party to the action, or if authorized by an ex parte order of a judge for cause shown and upon terms, or if upon a properly authorized request

of an attorney, the hospital refuses, fails or neglects to supply within 2 business days a legible certified duplicate of its records at a minimum charge of \$5 per request. The rate shall be 10 cents per record page and \$2 per X-ray copy.

(7) ABSENCE OF ENTRY IN RECORDS OF REGULARLY CONDUCTED ACTIVITY. Evidence that a matter is not included in the memoranda, reports, records or data compilations, in any form, of a regularly conducted activity, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) PUBLIC RECORDS AND REPORTS. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) RECORDS OF VITAL STATISTICS. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) ABSENCE OF PUBLIC RECORD OR ENTRY. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with s. 909.02, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) RECORDS OF RELIGIOUS ORGANIZATIONS. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) MARRIAGE, BAPTISMAL, AND SIMILAR CERTIFICATES. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued

at the time of the act or within a reasonable time thereafter.

(13) **FAMILY RECORDS.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) **RECORDS OF DOCUMENTS AFFECTING AN INTEREST IN PROPERTY.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.

(15) **STATEMENTS IN DOCUMENTS AFFECTING AN INTEREST IN PROPERTY.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) **STATEMENTS IN ANCIENT DOCUMENTS.** Statements in a document in existence 20 years or more whose authenticity is established.

(17) **MARKET REPORTS, COMMERCIAL PUBLICATIONS.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) **LEARNED TREATISES.** A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in his profession or calling as an expert in the subject.

(a) No published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art may be received in evidence, except for impeachment on cross-examination, unless the party proposing to offer such document in evidence serves notice in writing upon opposing counsel at least 40 days before trial. The notice shall fully describe the document which the party proposes to offer, giving the name of such document, the name of the author, the date of publication, the name of the publisher, and specifically designating the portion thereof to be offered. The offering party shall deliver with the notice a copy of the document or of the portion thereof to be offered.

(b) No rebutting published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art shall be received in evidence unless the party proposing to offer the same shall, not later than 20 days after service of the notice described in par. (a), serve notice similar to that provided in par. (a) upon counsel who has served the original notice. He shall deliver with the notice a copy of the document or of the portion thereof to be offered.

(c) The court may, for cause shown prior to or at the trial, relieve the party from the requirements of this section in order to prevent a manifest injustice.

(19) **REPUTATION CONCERNING PERSONAL OR FAMILY HISTORY.** Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of this personal or family history.

(20) **REPUTATION CONCERNING BOUNDARIES OR GENERAL HISTORY.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) **REPUTATION AS TO CHARACTER.** Reputation of a person's character among his associates or in the community.

(22) **JUDGMENT OF PREVIOUS CONVICTION.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of no contest), adjudging a person guilty of a felony as defined in ss. 939.60 and 939.62 (3) (b), to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) **JUDGMENT AS TO PERSONAL, FAMILY OR GENERAL HISTORY, OR BOUNDARIES.** Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) **OTHER EXCEPTIONS.** A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

History: Sup. Ct. Order, 59 W (2d) R250; Sup. Ct. Order, 67 W (2d) xvii.

Hearsay in a juvenile court worker's report not admissible under (6) or (8) at a juvenile court delinquency hearing. *Rusecki v. State*, 56 W (2d) 299, 201 NW (2d) 832.

A medical record containing a diagnosis or opinion is admissible but may be excluded if the entry requires explanation or a detailed statement of judgmental factors. *Noland v. Mutual of Omaha Ins. Co.* 57 W (2d) 633, 205 NW (2d) 388.

Statement of operator that the press had repeated 3 times, which was made 5 minutes after the malfunction causing his injury, was admissible under the excited utterance exception to the hearsay rule. (2) cited in footnote. *Nelson v. L. & J. Press Corp.* 65 W (2d) 770, 223 NW (2d) 607.

Under the "res gestae" exception to the hearsay rule (described as the "excited utterance" exception under (2)), testimony by the victim's former husband that his daughter called him at 5 a.m. the morning after the murder and told him, "daddy, daddy, Wilbur killed mommy," was admissible. *State v. Davis*, 66 W (2d) 636, 225 NW (2d) 505.

Official minutes of the highway committee were admissible under (6) as "Records of regularly conducted activity." *State v. Nowakowski*, 67 W (2d) 545, 227 NW (2d) 697.

A public document, filed under oath, notarized by the defendant, is one having "circumstantial guarantees of trustworthiness" under (24). *State v. Nowakowski*, 67 W (2d) 545, 227 NW (2d) 697.

Statements made by the 5-year-old child to his mother one day after an alleged sexual assault by defendant were admissible under the excited utterance exception to the hearsay rule, since a more liberal interpretation is provided for that exception in the case of a young child alleged to have been the victim of a sexual assault. *State ex rel. Harris v. Schmidt*, 69 W (2d) 668, 230 NW (2d) 890.

Department of H&SS probation files and records are public records and admissible as such at probation revocation hearing. *State ex rel. Prellwitz v. Schmidt*, 73 W (2d) 35, 242 NW (2d) 227.

Statement by victim within minutes after stabbing that defendant "did this to me" was admissible under (2). *La Barge v. State*, 74 W (2d) 327, 246 NW (2d) 794.

Personal observation of startling event is not required under (2). *State v. Lenarchick*, 74 W (2d) 425, 247 NW (2d) 80.

Admission of hospital records did not deprive defendant of right to confrontation. *State v. Olson*, 75 W (2d) 575, 250 NW (2d) 12.

Trial court improperly excluded dying driver's "excited utterance" made shortly after collision in issue. *Christensen v. Economy Fire & Casualty Co.* 77 W (2d) 50, 252 NW (2d) 81.

Observations of prior trial judge in decision approving jury's award of damages were properly excluded as hearsay in later trial. *Johnson v. American Family Mut. Ins. Co.* 93 W (2d) 633, 287 NW (2d) 729 (1980).

See note to art. I, sec. 7, citing *Hagenkord v. State*, 100 W (2d) 452, 302 NW (2d) 421 (1981).

Children's out-of-court statements. *Anderson*, 1974 WBB No. 5.

Medical records discovery in Wisconsin personal injury litigation. 1974 WLR 524.

908.04 Hearsay exceptions; declarant unavailable; definition of unavailability. (1) "Unavailability as a witness" includes situations in which the declarant:

- (a) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement; or
- (b) Persists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so; or
- (c) Testifies to a lack of memory of the subject matter of his statement; or
- (d) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (e) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

(2) A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

History: Sup. Ct. Order, 59 W (2d) R302.

908.045 Hearsay exceptions; declarant unavailable. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) **FORMER TESTIMONY.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.

(2) **STATEMENT OF RECENT PERCEPTION.** A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.

(3) **STATEMENT UNDER BELIEF OF IMPENDING DEATH.** A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(4) **STATEMENT AGAINST INTEREST.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.

(5) **STATEMENT OF PERSONAL OR FAMILY HISTORY.** (a) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (b) a statement concerning the foregoing matters, and death also, of another person, if the declarant was

related to the other by blood, adoption or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(6) OTHER EXCEPTIONS. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

History: Sup. Ct. Order, 59 W (2d) R308; 1975 c. 94 s. 91 (12); 1975 c. 199.

Sub. (2) cited. *State v. Dean*, 67 W (2d) 513, 227 NW (2d) 712.

Good-faith effort to obtain witness' presence at trial is prerequisite to finding that witness is "unavailable" for purposes of invoking hearsay exception respecting former testimony. *La Barge v. State*, 74 W (2d) 327, 246 NW (2d) 794.

See note to art. I, sec. 7, citing *Nabbefeld v. State*, 83 W (2d) 515, 266 NW (2d) 292 (1978).

Statement against penal interest may be admissible under (4) if four factors indicating trustworthiness of statement are present. *Ryan v. State*, 95 W (2d) 83, 289 NW (2d) 349 (Ct. App. 1980).

See note to art. I, sec. 7, citing *State v. Zellmer*, 100 W (2d) 136, 301 NW (2d) 209 (1981).

908.05 Hearsay within hearsay. Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in this chapter.

History: Sup. Ct. Order, 59 W (2d) R323.

See note to Art I, sec. 7, citing *State v. Lenarchick*, 74 W (2d) 425, 247 NW (2d) 80.

908.06 Attacking and supporting credibility of declarant. When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

History: Sup. Ct. Order, 59 W (2d) R325.

908.07 Preliminary examination; hearsay allowable. A statement which is hearsay, and which is not otherwise excluded from the hearsay rule under ss. 908.02 to 908.045, may be allowed in a preliminary examination as specified in s. 970.03 (11).

History: 1979 c. 332.