DeMaria v. City of Bridgeport: Revisiting the "Absolute Right" to Cross-Examination in Civil Cases

By CHARLES D. RAY and MATTHEW A. WEINER

Ever since the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004), trying to understand the contours of a criminal defendant's sixth amendment right to confront witnesses has confounded law professors, judges, and practitioners alike. Pre-*Crawford*, the issue of whether the admission of hearsay violated the right to confrontation turned on the reliability of the hearsay as measured by whether it fell within a "firmly rooted hearsay exception" such as the business records exception—or whether it bore "particularized guarantees of trustworthiness." Post-*Crawford*, the substantive reliability of the hearsay is irrelevant. Fueled by the notion that the right to confrontation requires that reliability be assessed in a particular manner—i.e., through the "crucible of cross-examination"—the constitutional question now turns on whether the non-testifying declarant's hearsay statement was "testimonial," in that it resembles testimony that would be offered at trial in aid of a prosecution. Attempting to answer the question of what is "testimonial" has proven daunting in the criminal sphere.

In *DeMaria v. Bridgeport*, ____ Conn. ____ (2021), the Connecticut Supreme Court re-assessed the right of a defendant in a civil case to confront an adverse witness. In doing so, the Court—as the United States Supreme Court did in *Crawford*—abrogated precedent and set forth a new framework for determining whether certain hearsay statements may be admitted at trial when the declarant is unavailable to testify.

The facts giving rise to the litigation in *DeMaria* seemed straightforward enough.

Image credit: JasonDoiy/E+ Getty Images

The plaintiff, Victor DeMaria, tripped on a raised portion of sidewalk in Bridgeport. Initially, the plaintiff's injuries were limited to abrasions, a broken nose, and a broken finger. After two months, however, he began to experience, among other things, a burning sensation in his left arm. Eighteen months of treatment and consultations with various specialists did little to improve his condition. Eventually, the plaintiff's treating physician assistant, Miriam Vitale, "wrote a document for his

medical file titled 'Final Report of Injury,' in which she opined that the plaintiff had reached the maximum potential use of his left hand, retained only 47 percent of his former grip strength and continued to experience pain and neuropathy in that hand." She further wrote that the plaintiff's injuries "were caused with a reasonable degree of medical certainty" by his fall.

Medical opinion in hand, Mr. DeMaria sued the City of Bridgeport, claiming that the City's failure to remedy a defect in the sidewalk had caused his injuries. Given that the opinions contained in Vitale's expert report formed the basis of the plaintiff's suit, one might have expected Vitale to have been a star witness. However, Vitale was a physician assistant at the veteran's affairs hospital in West Haven. Because she was employed by the Department of Veterans Affairs, federal regulations precluded her from providing "opinion or expert testimony in any legal proceedings concerning official [Department of Veterans Affairs] information, subjects or activities, except on behalf of the United States or a party represented by the United States Department of Justice." 38 C.F.R. § 14.808(a).

Nevertheless, the plaintiff attempted to present Vitale's opinions to the jury by admitting into evidence Vitale's treatment records and reports. The plaintiff relied on General Statutes § 52-174(b) which provides, in relevant part, that in certain civil actions "any party offering in evidence a signed report…for treatment of any treating physician … may have the report… admitted into evidence as a business entry and it shall be presumed that the signature on the report is that of such treating physician…and that the report…[was] made in the ordinary course of business…." The defendant, relying on the common-law right to cross-examine witnesses, objected and argued that Vitale's records were inadmissible because she was unavailable to testify at trial or at a deposition. The trial court overruled the defendant's objections, the jury rendered a verdict in favor of the plaintiff in the amount of $92,795.47, and the defendant appealed.

The appellate court sided with the defendant and ordered a new trial. *DeMaria v. City of Bridgeport*, 190 Conn. App. 449 (2019). For the unanimous panel of Judge Sheldon, Judge Lavine, and Judge Prescott, existing Supreme Court precedent rendered the decision an easy one. Specifically, the Court, in *Struckman v. Burns*, 205 Conn. 542 (1987), recognized that there is an "absolute" common-law right to cross-examination in a civil case. The *Struckman* Court further held that the admission into evidence of medical reports from the plaintiff's out-of-state physician did not infringe on the defendant's common-law right to cross-examination where the out-of-state physician could have been questioned at a deposition. Two decades later, the Court determined that medical records from a chiropractor who invoked his fifth amendment privilege against self-incrimination and, therefore, was unavailable to testify at trial or at a deposition, were not admissible under § 52-174(b) because "the defendants did not have an adequate opportunity to cross-examine [the chiropractor]…." *Rhode v. Milla*, 287 Conn. 731, 744 (2008). The Appellate Court reasoned that Vitale was more like the completely unavailable chiropractor in *Rhode* than the out-of-state physician available for deposition but not trial in *Struckman* and determined that the trial court had improperly admitted the report that contained Vitale's opinions.

A unanimous Supreme Court disagreed. In an opinion authored by Chief Justice Robinson, the Court identified a distinction between medical records created in the ordinary course of diagnosing and treating a patient and those prepared exclusively for use in litigation. The former fall squarely within the language of § 52-174(b)—i.e., "any party offering in evidence a signed report…for treatment of any treating physician…may have the report…admitted into evidence as a business entry"—which supports the conclusion that reports like Vitale's are admissible regardless of whether their authors are tested by the crucible of cross-examination. Indeed, business records, though hearsay, are admissible because the circumstances under which they were created render them trustworthy.

The Court also explained that the policy underlying § 52-174(b) supports the admission into evidence of reports like Vitale's. According to the Court, the "very purpose for which § 52-174(b) was enacted was to avoid the delay and expense that obtaining the testimony of the author of the medical record would entail." To require, as a prerequisite for admission of medical records, that the author be available for cross-examination at trial or a deposition would subvert that purpose.

But what of the case law suggesting that medical records are not admissible if the defendant is unable to cross-examine the author? In short, it has, according to the Court, been misunderstood. The Court explained that *Struckman*'s reference to an "absolute right" to cross-examination must be understood based on the context in which it arose. Specifically, the defendant in *Struckman* argued that the plaintiff's medical reports were not properly admitted because they were prepared for litigation "and, therefore, were not entitled to the presumption of reliability." Thus, the defendant did not argue, and the *Struckman* Court did not hold, that medical records prepared for treatment rather than litigation are admissible under § 53-174(b) only if their author is subject to cross-examination. Rather, *Struckman*

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■ Any views expressed herein are the personal views of DASA Weiner and do not necessarily reflect the views of the Office of the Chief State's Attorney and/or the Division of Criminal Justice.

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President's Message

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and shrink the access to justice gap then become more, the type of "daily small acts of self-denial" that accumulate for the collective good. Our profession, and the profound potential of our work, cannot be seen as limited only to the wealthy, and the elite. We must be seen as accessible and available to all, because this influences the public perception of our profession, and by extension the public perception of the rule of law.

Solutions abound, some existing, and some under discussion now. Expansion of pro bono programs,[5] advocacy for legal services funding on the state and federal level,[6] and efforts to advance a civil right to counsel[7] are all areas of progress in recent years. Some also look to new technology, non-lawyer ownership of law firms, and new law firm business structures, seeking a market solution to the access to justice gap.[8] However these efforts advance in the coming years, one thing is certain: our profession is called to address the access to justice gap, and is uniquely situated to do so. Whether we do so effectively will rely upon our individual and collective will and efforts, for the greater benefit of society, and for our profession. ■

NOTES

1. Villazor, Rose Cuison, "The Immigration Act of 1965 and the Creation of a Modern, Diverse America," *Huffington Post Contributor Blog*, (Fall 2015) https://www.huffpost.com/entry/the-immigration-act-of-19_b_8394570
2. "An Introduction to South Asian American History," *South Asian American Digital Archive*, https://www.saada.org/resources/introduction (last retrieved on October 13, 2021)
3. The Constitution of the Connecticut Bar Association, Article II. https://www.ctbar.org/docs/default-source/resources/cba-constitution-bylaws-and-procedures_7-31-18.pdf
4. "A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means." *Connecticut Rule of Professional Conduct 6.1*
5. *See generally*, *CT Lawyer*, September/October 2021.
6. *See e.g.*, "ABA Day Features Member-Advocates for LSC, Judicial Security" (April 19, 2021), https://www.americanbar.org/news/abanews/aba-news-archives/2021/04/aba-day-2021/#:~:text=ABA%20Day%20features%20member-advocates%20for%20LSC%2C%20judicial%20security,issues%20important%20to%20lawyers%20and%20the%20justice%20system.
7. *See* Thomas, Cecil J., "Advancing Access to Justice in Unprecedented Times," *CT Lawyer* (July/August 2021)
8. *See e.g.*, "Utah became first state to change ethics regulations to allow for alternative business structures." *ABA Journal*, February 1, 2021.

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Time Mastery

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REFERENCES

Fisic, I. (2021, January 13). "Personal productivity guide: Maximize productivity with these methods and apps." Clockify. https://clockify.me/blog/productivity/personal-productivity-guide/

Rubinstein, J.S., Meyer, D.E., & Evans, J.E.(2001). "Executive control of cognitive process in task switching." *Journal of Experimental Psychology: Home Perception and Performance* (27)4 pp. 763-797.

Schwartz, B. (2004). "The paradox of choice: Why more is less." *Harper Perennial*

Hunter, M. & Wu, C. (2016). "Give me a better break: Choosing workday break activities to maximize resource recovery," *Journal of Applied Psychology*, 101(2), 302–311. https://doi.org/10.1037/apl0000045

Jyothi, N.S. & Parkavi, A (2016). "A study on task management system." 2016 International Conference on Research Advances in Integrated Navigation Systems (RAINS) pp. 1-6, doi: 10.1109/RAINS.2016.7764421.

Duffy, J. (2020, November 2) "20 Tips for working from home." *PC Magazine*. www.pcmag.com/news/get-organized-20-tips-for-working-from-home

Supreme Deliberations

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stands for the general rule that medical records prepared in the course of treatment are admissible under § 52-174(b), while medical records prepared for litigation are inadmissible because they were not made in the ordinary course of business. As for *Rhode*'s apparent conclusion that an opportunity for cross-examination is an "absolute prerequisite" for the admission of a medical record, the *Rhode* Court had simply misunderstood *Struckman*.

DeMaria, then, replaces one rule with another. Following *Rhode*, the admission of a medical report under § 53-174(b) turned on whether the defendant had the opportunity to cross-examine its author; under *DeMaria*, the question is whether the report was prepared for use in treatment as opposed to litigation. One can only hope that the new civil test will prove easier to apply than *Crawford* has proven in the criminal context. ■