IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 81,478

DOUGLAS J. LOVE,

Petitioner,

vs.

LUZ MARIA GARCIA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

RESPONDENT'S BRIEF ON JURISDICTION

SHELDON J. SCHLESINGER, P.A.
1212 Southeast Third Avenue
Ft. Lauderdale, FL 33316
(305) 467-8800
and
JANE KREUSLER-WALSH, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(407) 659-5455

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PREFACE

The petitioner seeks discretionary review based on conflict from an en banc decision of the Fourth District Court of Appeal which affirmed the trial court's refusal to admit into evidence two laboratory reports showing blood alcohol. The petitioner, Douglas J. Love, was the appellant/defendant in the lower court and the respondent, Luz Maria Garcia, was the appellee/plaintiff. They are referred to herein as plaintiff and defendant.

The following symbols are used:

(A) - Petitioner's Appendix
(R) - Record
(SR) - Supplemental Record

STATEMENT OF THE CASE AND FACTS

The plaintiff cannot accept the defendant's statement of the case and facts because it is incomplete, and, in some respects, inaccurate. The issue is not what constitutes a proper predicate for admitting business records into evidence under Section 90.803(6), Florida Statutes, but, as the Fourth District phrased it, "the application of F.E.C. Section 90.803(6)(b) to trial court decisions excluding hospital records." (A 1-2).

The defendant's statement on page 4 of his brief, that the record is "devoid of any untrustworthiness of the evidence" is incorrect. The record is replete with evidence of untrustworthiness.

The first blood test, done at Smithkline, an outside laboratory, was not ordered by any doctor, nurse, or care provider at the hospital but by a policeman who accompanied the plaintiff to the hospital (A 11). There was no suggestion that any life or death medical decision was made or influenced by the test (A 11). The first blood sample was drawn on April 4, 1986, at 12:25 P.M. and showed a blood alcohol level of .23 (SR 56-58, p. 9, 18). The typed name on the report was "Jane Doe"; a handwritten notation on the side of the report indicated, "Garcia Luz 372-A" (SR 56-88, p.19). The results were reported on April 4, 1986 at 08:51 (SR 56-88, p. 19). The defendant's expert speculated that the time shown on the Smithkline report for drawing the sample was wrong and should have been 12:25 A.M (SR 56-88, p. 9, 18-19).

The second test was done in the hospital, but there was no showing as to who requested it or why, nor any suggestion that any health care provider at the hospital considered the blood alcohol in treating the plaintiff for her injuries (A 11). Nor was there evidence that by the time the results of either of these tests became available, they were relevant in any way to her treatment (A 11).

The plaintiff challenged the reliability and/or trustworthiness of the reports at the pretrial motion in limine. Plaintiff's counsel objected to the reports because there were no:

> witnesses who have any first-hand knowledge as to how those tests were administered; who drew

> the blood; what kind of tests were performed; the procedures that were followed or anything at all on how the specific blood tests were performed (R 8).

SUMMARY OF ARGUMENT

Prior decisions of this Court and other appellate courts routinely hold that the mere presence of a lab report showing blood alcohol in a hospital record does not make it admissible. The Fourth District's opinion is consistent with the prior case law interpreting Section 90.803(6) as requiring a predicate that relates to the accuracy, reliability, and trustworthiness of the entry. As with any evidentiary determination, the trial court retains the discretion to assess the evidence for admissibility from the standpoints of relevancy, materiality, competency, expert opinion, or the possibility that inherent prejudice may outweigh probative value.

The defendant produced nothing to connect the plaintiff to these tests. The defendant did not call the technician who performed the tests and in fact, the technician's identity was unknown. Because of the lack of any testimony authenticating these laboratory reports and the irreconcilable inconsistencies in the reports themselves, the trial court properly refused to admit them into evidence. The Fourth District's decision is consistent with established Florida law on this issue.

The only reason the Fourth District en banced this case was because that court had conflicting opinions on this issue: Thunderbird Drive-In Theatre v. Reed, By and Through Reed, 571 So. 2d 1341 (Fla. 4th DCA 1990), rev. denied, 577 So. 2d 1328 (Fla. 1991), and Kurynka v. Tamarac Hosp. Corp., Inc., 542 So. 2d 412 (Fla. 4th DCA), rev. denied, 551 So. 2d 462, 463 (Fla. 1989). The Fourth District's en banc opinion clarified what had been an inconsistency in that court. The petitioner/defendant claims no conflict on the specific narrow issue in this case. This is not a question of great public importance, there is no conflict, and review should be denied.

ARGUMENT

ISSUE

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY OTHER REPORTED APPELLATE DECISION.

None of the cases the defendant cites for conflict involve admission of blood alcohol tests through a records custodian. Southern Bakeries, Inc. v. Florida Unemployment Appeals Com'n., 545 So. 2d 898 (Fla. 2d DCA 1989), involved a urinalysis lab report. Dutilly v. Department of Health & Rehabilitative Serv., 450 So. 2d 1195 (Fla. 5th DCA 1984), involved blood test results for paternity. McEachern v. State, 388 So. 2d 244 (Fla. 5th DCA 1980), involved books and records of the sheriff's department.

Holley v. State, 328 So. 2d 224 (Fla. 2d DCA 1976), involved a motel registration card.

Prior decisions of this court and other appellate courts routinely hold that the mere presence of a lab report showing blood alcohol in a hospital record does not make it an admissible "business record". See, National Car Rental System, Inc. v. Holland, 269 So. 2d 407, 409 (Fla. 4th DCA 1972), cert. denied, 273 So. 2d 768 (Fla. 1973); Brevard County v. Jacks, 238 So. 2d 156 (Fla. 4th DCA 1970). In State v. Bender, 382 So. 2d 697 (Fla. 1980), this court stated on page 700:

> ... The results of blood alcohol tests are admissible into evidence ... if the traditional predicate is laid which establishes the reliability of the test, the qualifications of the operator, and the meaning of the test results by expert testimony.

Other appellate courts besides the Fourth District which have considered the issue all held that blood alcohol test results contained in hospital records are not admissible through the testimony of a hospital records custodian. Riggins v. Mariner Boat Works, Inc., 545 So. 2d 430 (Fla. 2d DCA 1989); City of Tampa v. Green, 390 So. 2d 1220 (Fla. 1st DCA 1980).

Chilton v. Dockstader, 126 So. 2d 281 (Fla. 2d DCA 1961), held as follows on page 282 of the opinion:

> Hospital records are defined by § 382.31, Florida Statutes, F.S.A. but not every hospital paper connected with the patient's case is admissible as a hospital record. See Florida Power & Light Co. v. Bridgeman, 133 Fla. 195,

> 182 So. 911. The documents involved in the case at bar were entitled "progress notes" and "consultation notes" and because of their hearsay content there was undoubtedly serious question about their admissibility. ...

As the Fourth District recognized in its en banc opinion, the Florida Evidence Code is different from the federal rules and requires that business records evidence be able to stand alone as opinion evidence, even if it meets the other requirements of the statute:

> The most important feature of the Florida version of the business records exception is in the addition of subsection (b) which is not contained in the federal rule. This provision adds a requirement that business record evidence be able to stand alone as opinion evidence, even if it otherwise meets the requirements of the statute. <u>The essential meaning of subsection (b) is thus the trial judge has broad discretion to exclude any medical record, or entry in a record or chart, upon a conclusion that it would not be admissible as an opinion</u>, even if the entrant of the record were present in court and testified. (Emphasis added) (A 78).

Section 90.803(6)(b), Florida Statutes, requires that the proponent demonstrate, at a minimum, the qualifications of the individual rendering the opinion or diagnosis in order to determine the admissibility of the evidence. Section 90.803(6)(b) provides as follows:

> (b) No evidence in the form of an opinion or diagnosis is admissible under paragraph (a) unless such opinion or diagnosis would be admissible under ss. 90-701-90.705 if the person whose opinion would be recorded were to testify to the opinion directly.

Some of the very cases that the defendant relies on for conflict support the Fourth District's interpretation of the business records exception as applied to blood alcohol tests. Dutilly v. Department of Health & Rehabilitative Serv., 450 So. 2d 1195, 1197 (Fla. 5th DCA 1984), held that in order for blood tests to be admissible under the business records exception, the proponent must demonstrate the following:

> the results were compiled in the course of regularly conducted activity, by someone or from information transmitted by someone with knowledge, that the practice of the "business" activity was to keep such record and that the opinion of paternity contained in the report would be admissible under Section 90.701 through 90.705. (Emphasis added)

The last phrase refers to Section 90.803(6)(b), which requires knowing the qualifications of the individual rendering the opinion or diagnosis to determine the admissibility of the evidence.

McEachern v. State, 388 So. 2d 244 (Fla. 5th DCA 1980), upon which petitioner relies, held that the trial court had properly exercised its discretion in determining that various books and records of the sheriff's department were admissible because the proponent laid the proper predicate and foundation for reception of business records under the statute. Conversely, the predicate and the historical basis for trustworthiness of a medical record is absent from the tests here (A 11).

Prior decisions of this court and other appellate courts routinely hold that the mere presence of a lab report showing blood alcohol in a hospital record does not make it admissible. As the Fourth District held, there are good reasons for treating blood alcohol readings differently (A 12). A high blood alcohol reading is a serious accusation to make against a plaintiff or a defendant in a civil case or a defendant in a criminal case. To reverse this case for a new trial, where the defendant presented no evidence that the plaintiff had a high blood alcohol reading, except two pieces of paper inserted into the hospital records, does not comport with logic and reason.

The Fourth District's en banc opinion does not, as the defendant claims, discard the business records exceptions to the hearsay rule. The Fourth District's opinion is consistent with prior case law interpreting Section 90.803(6) as requiring a predicate that relates to the accuracy, reliability and trustworthiness of the entry. Proper predicate means evidence as to the drawing of the blood, chain of custody, the administration of the tests, and the interpretation and reporting of the test results (A 13). As with any evidentiary determination, the trial court retains the discretion to assess the evidence for admissibility from the standpoints of relevance, materiality, competency, expert opinion, or the possibility that inherent prejudice may outweigh probative value (A 13).

The defendant produced nothing to connect plaintiff to these tests. The defendant did not call the technician who performed the test to explain what he did, how he did it, or the results. In fact, the technician's identity was unknown. In addition, the test results themselves were highly suspect. Because of the lack of any testimony authenticating these laboratory reports and the inconsistencies in the reports themselves which could not be reconciled, the trial court properly refused to admit these reports into evidence, merely because they happened to be contained in the hospital records. The Fourth District's decision is consistent with established Florida law on this issue and there is no conflict.

CONCLUSION

Review should be denied.

SHELDON J. SCHLESINGER, P.A.
1212 Southeast Third Avenue
Ft. Lauderdale, FL 33316
(305) 467-8800
and
JANE KREUSLER-WALSH, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(407) 659-5455

By: Jane Kreusler-Walsh
JANE KREUSLER-WALSH
Florida Bar No. 272371

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, this 19th day of April, 1993, to: HEINRICH, GORDON, BATCHELDER, HARGROVE & WEIHE, Broward Financial Center, #1000, 500 East Broward Boulevard, Ft. Lauderdale, FL 33394.

By: Jane Kreusler-Walsh
JANE KREUSLER-WALSH
Florida Bar No. 272371