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SUPREME COURT OF FLORIDA

81,478

CASE NO. 81,748

DOUGLAS J. LOVE,

Petitioner,

vs.

LUZ MARIA GARCIA,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

I

Statement of the Case

As described in the jurisdictional briefs, this case arose from an automobile accident on April 3, 1986 in which petitioner, Douglas Love, struck respondent, Luz Maria Garcia, a pedestrian who was crossing the street against a red light. The jury awarded respondent $2 million, which was reduced to $1 million by a 50% comparative negligence factor.

The central issue involved here is whether medical records showing plaintiff's blood alcohol levels were properly excluded as evidence at trial for lack of trustworthiness.[1]

Petitioner's pre-trial catalogue, filed on March 3, 1988, included in his list of witnesses the records custodians of both Florida Medical Center and SmithKline Bioscience Laboratories ("SmithKline"). (R. 1210-11) At the pre-trial conference held on March 7, 1988, petitioner's counsel specifically referred to the inclusion of the records custodian of SmithKline in relation to the blood alcohol tests. (R. 1226) Petitioner also listed Leonard Bednarczyk, Ph.D., a toxicologist, as an expert witness, and

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[1] As explained later, three subissues are raised by the central question. First, the Fourth District applied the wrong standard of appellate review in this case by characterizing the exclusion as a discretionary act, then -- contrary to the standard of review of discretionary acts -- determined that it would not substitute its judgment for the trial court. Second, the Fourth District improperly determined that the proponent of a business record carries the initial burden on the issue of trustworthiness. And third, the Fourth District improperly determined that petitioner did not lay a proper predicate for the business records to be admitted.

included the hospital records of Florida Medical Center in his exhibit list. Respondent also listed Dr. Bednarczyk and the records custodian of Florida Medical Center in her pre-trial catalogue and included the hospital records in her list of exhibits. (R. 1247, 1249)

On April 25, 1988, the court entered an order resetting the trial from March 28, 1988, to the October 10, 1988 calendar. (R. 1253) On October 13, 1988, petitioner moved for an order excusing him from being called for trial during the week of October 17, 1988, because his expert toxicologist, Dr. Bednarczyk, would be unavailable for trial and his videotape deposition could not be taken beforehand. Petitioner asked that the trial be postponed until after October 24, 1988, because the testimony of Dr. Bednarczyk was essential to LOVE's case. (R. 1277-78) Dr. Bednarczyk was to testify about the so-called "burn out" rate for alcohol. The court granted the motion to be excused from trial, and the matter was reset for the trial docket commencing January 30, 1989. (R. 1279-80) Due to the court's docketing, the cause was again reset, with trial eventually commencing on September 18, 1989. (R. 1, 1290)

During trial, respondent introduced into evidence the Florida Memorial Center records with the results of the blood alcohol tests redacted. (R. 1431) Evidence relating to respondent's alleged intoxication, including the blood alcohol test results, was excluded by the trial court. (R. 16, 22, 261) This appeal followed the adverse verdict to petitioner.

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II

Statement of the Facts

The accident occurred on April 3, 1986, at the intersection of University Drive and Sunset Strip in Sunrise, Florida. Some time after 11:00 p.m., petitioner was travelling north on University Drive toward his home in Coral Springs after leaving Doctor's Hospital where he had seen two patients who were scheduled for surgery the following day. (R. 833-34) Petitioner's vehicle struck respondent when she was attempting to cross University Drive on foot against a red light. The record discloses that she was wearing black or dark clothing. (R. 297-99, 838-39, 858-59)

Immediately prior to the accident, respondent had been observed by Officer William Collins of the City of Sunrise Police Department standing by herself on the south side of Sunset Strip, east of University Drive. (R. 813-14) Officer Collins was proceeding west on Sunset Strip in his patrol car, and respondent was waving her arms up and down as if gesturing for the officer to come over to her. (R. 815) Officer Collins made a u-turn and pulled up to respondent, who asked him whether he would take her to the Mobil gas station, which she identified by pointing in a westerly direction. (R. 816) Respondent told Collins that she wanted to make a telephone call. (R. 818) Officer Collins testified that respondent appeared to be upset and looked like she had been crying. (R. 817) Officer Collins took her to the station on the southwest corner of University Drive and Sunset Strip. However, upon arrival there, respondent told Collins it was the

wrong Mobil station and that she wanted to go to the one with the "waterfalls." (R. 820) Collins told respondent that he was not a taxi service and could not drive her to the other station which was outside his jurisdiction. (R. 821) Respondent then asked Collins how much she owed him for the ride. (R. 829)

Shortly after dropping respondent off, Collins was summoned to the scene of the accident. He testified that the accident could have occurred within five or ten minutes after he left respondent at the gas station. (R. 823)

Respondent testified that she could not remember anything about the accident and that the last thing she could recall was leaving her sister's place of work to see her nephew. (R. 776-77) She could not remember flagging down a police officer to take her to the gas station. (R. 795)

The only independent eye witness to the accident was Christopher Caviness. When the accident occurred, he was standing on the north side of the intersection. (R. 272) Caviness testified that respondent was wearing dark clothes. He said that, when he first saw respondent, he remembered seeing her stumble. (R. 304) Caviness testified that after respondent had hesitated at the median for a couple of seconds and began to walk, he yelled at her because he could see petitioner's car approaching. When he yelled, respondent just looked at him, "put her head down and kept walking." (R. 306, 309, 311)

Petitioner testified that he was proceeding in the left northbound lane of University Drive within the speed limit and with

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his low beams on. (R. 835) He said that the intersection was dark and that he did not see respondent until she "lurched" off the median into his lane of travel. (R. 838-39) The investigating officer, Sam Pagano, testified that the end of the median began some four feet north of the crosswalk. (R. 142) This testimony supported a finding that respondent was not walking within the crosswalk at the time she was struck. Petitioner further testified that after seeing respondent, he immediately applied his brakes but did not have time to avoid hitting her. (R. 838-39)

On the first day of trial, petitioner filed a motion in limine seeking to exclude certain evidence, including the results of two blood alcohol tests and testimony that respondent was intoxicated or otherwise affected by alcohol at the time of the accident. (R. 1300-1300b) The court heard argument on the motion immediately prior to jury selection. (T. 5) (App. B) Respondent's counsel contended that the results from two blood alcohol tests taken while respondent was hospitalized after the accident should be excluded because no witness listed by petitioner in the pre-trial catalogue could lay a proper predicate for admission of the results. (T. 8)

Petitioner sought to introduce the results of two blood alcohol tests of respondent taken while she was hospitalized immediately after the accident. Petitioner also sought to introduce testimony that respondent was intoxicated at the time of the accident. The first blood test, showing a .23 blood alcohol level, was performed by SmithKline on a specimen taken immediately upon respondent's arrival at the hospital. The second test,

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showing a .14 blood alcohol level, was performed at the hospital on a specimen taken a couple of hours after respondent was admitted.

In his pre-trial catalogue, petitioner listed and planned to call the records custodians of both SmithKline and the hospital to lay the predicate for the admission of the test results. Respondent moved in limine to exclude the test results claiming solely that petitioner had failed to list any witnesses in his pre-trial catalogue who could lay a proper predicate for admission. Despite the records custodians being listed, the trial court granted respondent's motion in limine. It held essentially that the records custodian could not adequately authenticate the documents. In this regard, the following colloquy took place between respondent's attorney, Mr. Kelley, petitioner's attorney, Mr. Donahoe, and the court:

* * *

> [Mr. Kelly] . . . The first point deals with a blood alcohol report that was allegedly performed on our client when she was taken to Florida Medical Center on the night of the accident.
>
> . . .
>
> [W]hen they took her to the hospital, they performed - or allegedly performed some blood alcohol tests which indicated that under the Florida Statutes she would have been intoxicated at the time of the accident.
>
> We have filed a motion in limine to preclude any reference to those tests because Mr. Donahoe has not listed on his witness list any witnesses who have any firsthand 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 these specific blood

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tests were performed. (T. 7-8) (App. B) (emphasis added)

* * *

[Mr. Kelley]: So we move in limine in this case to exclude any reference to the blood alcohol reports because there is no witness listed that can lay a predicate to get them into evidence.

THE COURT: Okay.

MR. DONAHOE: Judge, I have listed the records custodian of Florida Medical Center and the records custodian of Smith Kline Bioscience Lab. . . .

The specimen was sent down to Smith Kline Bioscience Lab in Miami under the name of a Jane Doe at the hospital with a hospital code number. The test was done. It came back .23. And in this situation it's going to be extremely critical. (T. 12-13) (App. B) (emphasis added)

* * *

[Mr. Donahoe]: The hospital themselves ran a blood alcohol test which came out to a .14 which my toxicologist has already testified - we took his video tape deposition for use at trial - that this would be consistent with the burnoff rate for the alcohol back to the original .23 when she was brought into the hospital.

So in this case it's not only - it's not the only evidence. There were two separate blood tests, both of which are consistent. (T. 14) (App. B) (emphasis added)

* * *

[THE COURT]: . . . [Y]ou know darned well that what you're doing is letting an unqualified piece of evidence that the jury is going to consider for the truth of what is sought to be proved by it?

Not that there is medical - I mean not that that reading was obtained and the doctor acted

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on the strength of that, but rather that the test is there? It's in the medical records; therefore she must have been drunk.

MR. DONAHOE: No sir. I don't think I had to use the toxicologist. The fact that the test revealed that her blood alcohol or the blood alcohol level was .23 --

THE COURT: And then from there, what does that mean?

MR. DONAHOE: Well, if that were the case, I would submit that the lab tests in the medical records would be admissible. (T. 16) (App. B)

* * *

MR. DONAHOE: My next question would be - there were records of Smith Kline Bioscience Lab in there, and I have the records custodian of Florida Medical Center. And I would propose that I would subpoena the proper personnel from those facilities to testify as to the procedures whereby these tests are given.

And so the question is whether my listing of the record custodians is sufficient to bring personnel. I think it was rather obvious when I listed a records custodian that I was going to use those records, and if the ruling is going to be that I am required to adduce testimony from these people, I can bring them in and do it, unless Your Honor rules that because I didn't list them specifically as opposed to personnel from the facility, that I can't use them. (T. 17) (App. B) (emphasis added)

* * *

MR. KELLEY: Judge, Mr. Donahoe has listed the records custodian of the hospital and the records custodian of the lab. A records custodian is a records custodian, to bring in records. But he didn't list any medical personnel. He hasn't listed the medical records or anyone at the lab by name.

I have no idea who those people are. I'm sure as he sits here, he has no idea who they

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are. We are scheduled to start the trial now. I think it's a little bit untimely. (T. 18) (App. B)

* * *

[MR. DONAHOE]: We've got Smith Kline Bioscience Lab doing a test at something like 11:45 or something showing a .23, and we have an entirely independent lab report on the same patient three hours - three or four hours later showing a .14, and testimony that these are consistent.

So I would think that this - I would think that the kind of rationale in this case where it was the only testimony doesn't exist in our case. That's a back-up argument anyway.

THE COURT: All right, sir. Well, the problem with that as I see it is that you're using - I mean you take a lab test which is of a certain quality and has certain infirmities, and you seek to avoid the thrust of that particular ruling by saying we've got another one which is of the same condition, and what you're doing is trying to bootstrap each other with it.

I don't see how that cures anything.

Do you object to his enlarging his witness list to call these other people?

MR. KELLEY: Yes. Definitely.

THE COURT: Response on it, Jack?

MR. DONAHOE: Judge, the only thing I can say is that the nature of the disclosure rules is to disclose what your evidence is going to be. And I don't think it's a matter of playing games and picking the right person.

We knew we were going to use the hospital records. We listed the custodian of the records, and I don't think it's any surprise or anything else if I come up with a ruling here that I've got to have him - to say that I'm going to use one personnel from the

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hospital or Smith Kline as opposed to another personnel.

THE COURT: All right.

MR. KELLEY: Well the problem, Judge, is he listed a records custodian. A records custodian is a records custodian. So that's what I'm prepared to try.

Now we are going to start picking a jury. We are here to do opening statements today, and I can't pick a jury when this alcohol question may or may not come in. I can't give an opening statement where the question may or may not come in.

We have to know where we are going. And the problem is trying to find out what tests they performed. And it's extremely unfair to the Plaintiff. So I would object to it.

THE COURT: As I understand the prevailing law on the subject, when you seek to enlarge or amend a catalog, a witness list, at any time after the cut-off date for adding witnesses, you have to approach it from the point of view of whether or not there is any unfair prejudice to the opposing party. Now the general rule is that you should try a case on all of the relevant evidence.

But when that rule flies in the face of the fairness doctrine, then you have to consider whether or not that would constitute unfair prejudice to the opposing parties.

Counsel claims prejudice?

MR. KELLEY: Yes.

THE COURT: All right, sir. Anything further for me to decide?

MR. DONAHOE: No, sir.

THE COURT: All right, sir.

The motion to enlarge the witness list to bring these as yet unnamed people who might be able to support and qualify the document is

declined and denied by the court. Objection is sustained. (T. 19-22) (App. B)

Neither respondent's counsel nor the trial court explained how respondent would be prejudiced by petitioner's calling of any necessary listed witnesses.

Petitioner's counsel thereafter announced to the court that petitioner was filing a motion for continuance to permit him either to amend the pre-trial witness list or to call the personnel of Florida Medical Center and SmithKline to lay the necessary predicate for the introduction of the blood test results. (T. 31) Petitioner later filed a written motion for continuance (R. 1298), which was denied by the trial court. (T. 32)

At trial, petitioner introduced the videotape deposition of Caviness, the sole eyewitness to the accident. Prior to the introduction of Caviness' deposition testimony, and at respondent's counsel's request, the court struck the cross-examination of Caviness concerning whether respondent was intoxicated at the time of the accident. (R. 261)

At his videotape deposition, Caviness was asked whether he had observed anything that gave him the impression that respondent either had been drinking or was not completely "straight" at the time she crossed the intersection. (Supp. R. 44; 257-58) Caviness had testified earlier in his video tape deposition that respondent appeared either upset or to have a great deal on her mind. (Supp. R. 8; R. 276) After Caviness gave an equivocal answer to the pending question, defense counsel referred Caviness to the following testimony from his previous deposition:

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> Q: [By Mr. Donahoe] Chris, at the time from what you observed of the lady, did you observe anything to indicate to you that she might have been under the influence of any alcoholic beverages or anything?
>
> A: [By Caviness] You - she - it -- you know. I always figure since it was like 11:30 and the way she stumbled and stuff, the way that she acted, the way that she looked up at me when I called, you know, to tell her to watch out and then looked over, it looked like she might have been drinking a lot - not a lot, but a little bit, because she wasn't drunk, but she wasn't straight. (Supp. R. 44-45; R. 258-59)

This cross examination of Caviness was stricken. (R. 261) Caviness' answer to the pending question, however, was read to the jury. Caviness answered:

> A: . . . See, I don't know how to answer that. When she stumbled, she just sort of lost her footing or whatever. I can't tell what happened to her. It wasn't like a drunken stumble.
>
> She wasn't like she was walking drunk, but I can't answer whether she was or wasn't because I'm not her. (R. 313-14)

During its deliberations, the jury requested that the court re-instruct it on the definition of negligence. (R. 1146) Two hours later, the jury notified the court that it could not come to an agreement on the percentage of negligence. (R. 1149) The foreman advised the court that the jury was split into two sides -- one believing that respondent was more responsible and the other believing that petitioner was primarily to blame. This resulted in the "compromise" verdict. (R. 1152)

On appeal, the Fourth District initially reversed the trial court's ruling. In its first opinion, set forth in its entirety in

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footnote 8 of the *en banc* decision, Love v. Garcia, 611 So. 2d 1270 (Fla. 4th DCA 1992) (attached hereto as App. A), the court focused directly on the fact that respondent's sole ground for objecting was respondent's assertion that the records custodian could not properly authenticate the documents, and since petitioner was prepared to call the records custodians of both businesses conducting the tests, the court held that the trial court had abused its discretion in refusing to admit the evidence. Id. It said:

> [T]he [business records] rule was developed to eliminate the inconvenience and sometimes impossibility of producing witnesses who could testify from their personal knowledge as to the truth of the entries made. The business records exception "is generally recognized because of the reliability of business records supplied by systematic checking, by regularity and continuity which produces habits of precision, by actual experience of business in relying on them, and by a duty to make an accurate record as part of a continuing job or occupation. . . . Thus, as long as a party properly authenticates the records through the testimony of the records custodian or other qualified witness, as prescribed by the rule, they are admissible."

Love, 611 So. 2d at 1278 n.8. (citations omitted) (App. A)

A petition for rehearing *en banc* was then filed.

By a six to five margin, the Fourth District withdrew the panel decision and substituted an affirmance of the trial court's exclusion of the blood test results. Love v. Garcia, 611 So. 2d 1270 (Fla. 4th DCA 1992) (App. A) In reversing itself, the court held that a proper predicate to admit a blood test as a business record under Section 90.803(6) must include "evidence as to the

drawing of the blood, the chain of custody, the administration of the test, and the interpretation and reporting of the test result."[2] The Fourth District followed a two-step reasoning process for excluding the evidence. First, it said:

> [W]e now hold that when medical record entries are sought to be admitted under FEC section 90.803(6), if properly challenged by the opponent with a sufficient showing that relates to the accuracy, reliability or trustworthiness of the entry, the trial court may in its discretion decline to admit them unless the proponent of the evidence lays the proper predicate for the entry. By a proper predicate, we mean evidence as to the drawing of the blood, the chain of custody, the administration of the test, and the interpretation and reporting of the test result.

Id. at 1276 (emphasis added). Second, the court recognized this Court's "discretionary act" test of reasonableness from Canakaris,[3] and claimed that the exclusion of this evidence, so viewed, was not subject to an appellate court substituting its judgment for the trial judge. In other words, the court took a legal question regarding who carries the "burden of proof" on trustworthiness, characterized it as a "discretionary" matter, then applied the standard of review relating to fact matters reviewable on appeal.

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[2] Since the record is devoid of any claim of untrustworthiness of the evidence, the majority has effectively rewritten the evidence code by finding an implied presumption of untrustworthiness of all blood alcohol tests as perhaps an "exception to the exception." Recognizing the court's attempt at burden shifting, Judge Warner noted in her dissent that the evidence should have been admitted because "medical records are admissible under section 90.803(6) through a records custodian, unless the opponent carries the burden showing the untrustworthy nature of the evidence." 611 So. 2d at 1279-80. (App. A)

[3] Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980).

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In so doing, it claimed that it could not "substitute its judgment" for the trial court. Specifically in its effort to meld all three standards, the Fourth District said:

> We review decisions on the admission or exclusion of evidence [relating to who has the burden on the issue of trustworthiness] under the reasonableness test of *Canakaris v. Canakaris*, 382 So.2d 1197, 1202-03 (Fla. 1980). So viewed, we are unable to say that this judge, an esteemed and extremely capable trial judge of great experience, abused his considerable discretion in refusing to admit these particular blood alcohol test results solely as business records and without the protection of expert testimony as to their uses and meaning. [footnote omitted] To do so would be to substitute our judgment for that of the judge on the scene. We can find nothing in FEC section 90.803(6) that empowers us to do so.

Id. at 1276-77 (emphasis added) (App. A)

SUMMARY OF ARGUMENT

This case presents essential questions relating to what constitutes a proper foundation for admitting business records under Section 90.803(6) of the Florida Statutes as an exception to the hearsay rule, and who carries the burden therefor on the issue of trustworthiness. The trial record contains no claim that the records are untrustworthy, but the Fourth District's *en banc* decision used this case as an opportunity to discuss that issue. In the process, it blew a straightforward evidence problem out of proportion. In addition, it has created a presumption of untrustworthiness of business records. In doing so, it has

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established a "chain of custody" predicate not contemplated by this hearsay exception.[4]

Petitioner contends three points require reversal. First, the *en banc* decision should have been a *de novo* review of the main issue relating to the burden of proof on the issue of trustworthiness. The Fourth District incorrectly viewed the trial court's decision in this respect as a discretionary act. Second, the burden of proof on the issue of trustworthiness is carried by the party opposing the evidence, and not on the proponent, as the court held. And third, a proper predicate either was, or could have been laid, yet the Fourth District held that the trial court was correct in not permitting petitioner to call available witnesses to authenticate the tests.

[4] Although the original panel decision certified three questions to the Court as being of great public importance, a further attempt to have questions certified after the <u>en banc</u> decision was unsuccessful.

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ARGUMENT

I

THE FOURTH DISTRICT APPLIED THE INCORRECT STANDARD OF REVIEW

A. "Burden of Proof" As a Legal Standard.

The business records exception to the hearsay rule, codified by statute in Florida under Section 90.803(6), provides as follows:

> (6) RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY.--
>
> (a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
>
> (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 is recorded were to testify to the opinion directly.

The statute sets forth a requirement of minimum reliability of a business record with trustworthiness presumed " unless sources of information or other circumstances show lack of trustworthiness." Only when there is this rebuttal showing of untrustworthiness are such records deemed not admissible. Unfortunately, the Fourth District has taken a rather simple evidentiary problem and in the

process of its analysis, has made it unduly complex. It then attempts to reason itself out of its misconception.

In an exhaustive interpretation of the federal counterpart to the business records exception, the Third Circuit in In re Japanese Electronic Products, 723 F. 2d 238 (3rd Cir. 1983), rev'd on other grounds, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), held that only where the source of information or the method of circumstances of preparation indicate a lack of trustworthiness is the burden of showing such untrustworthiness placed on the party offering the evidence. As the court said in Japanese Electronic Products, the scope of appellate review on the issue of "trustworthiness" depends upon the basis for the ruling. And, "a determination of untrustworthiness, if predicated on factors properly extraneous to such determination, would be an error of law." Id. at 265. The court makes it clear that "[t]here is no discretion to rely on improper factors." Id. (emphasis added)

Unlike the Third Circuit, the Fourth District decision under review first shifts the burden on trustworthiness, and second, applies the wrong standard of review. As an implied justification for its reasoning process, the majority points out in its *en banc* opinion that the Florida version of the business records exception adds subsection (b), which is not contained in the federal rule. It goes on to say that the additional requirement creates "broad discretion" on the part of a trial judge to exclude any medical record, or entry therein, upon a conclusion that it would not be admissible as an opinion, even if the person providing the

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information in the records were present in court and testifying. 611 So. 2d at 1274.

Subsection (b) does not take what subsection (a) gives. Rather, it simply addresses the age old "hearsay within hearsay" problem by placing a limitation on what is admissible as a business record. If the record contains an opinion, the opinion must itself be admissible since clearly the business records exception is not a "back door" method for introducing inadmissible opinions. The majority's interpretation of subsection (b) however, reduces the entire statute to an oxymoron. In any event, the point here is that in addressing the threshold question of admissibility, the issue of who carries the burden of showing trustworthiness (or the lack thereof) is a legal issue. And legal issues are subject to a standard of review different from that used by the Fourth District. The point is explained below.

B. Three Standards of Appellate Review.

The court states in its *en banc* opinion that the admissibility issue of the evidence in question is reviewed under the "reasonableness" test of Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980). 611 So. 2d at 1276. Without discussing the Canakaris rationale (which relates solely to discretionary rulings), the majority leaps to yet another standard of appellate review -- "substitution of judgment" regarding fact determinations. Thus, of the three basic review standards -- *de novo*, abuse of discretion and substitution of judgment -- the court elects to go with the

latter two which have no application whatsoever to the "burden" ruling. 611 So. 2d at 1276-77. See, Padovano, Florida Appellate Practice § 5.4A, et seq. (1993 Supp.) When it ruled regarding the burden of trustworthiness, the court should have applied only the *de novo* standard of review since the issue presents exclusively a legal question.

II

"TRUSTWORTHINESS" OF BUSINESS RECORDS IS PRESUMED

The sole ground for objecting to the admission of plaintiff's blood test results was respondent's assertion that the records custodian could not properly authenticate the documents. (T. 7-8, 12) (App. B) Since petitioner was prepared to call the records custodians of both businesses conducting the tests, the Fourth District initially held that the trial court abused its discretion in refusing that request. The court said in its initial opinion:

> The predicate for admitting these records is no different from that for admitting other business records. The trial court abused its discretion by ruling that the blood tests were inadmissible because [petitioner] did not have the proper witnesses to authenticate those records.

Id. at 1280 note 8.

A. Inherent Reliability of Business Records

In affirming the exclusion of the reports of the hospital and the independent laboratory by its *en banc* ruling, the Fourth District has condoned the improper exclusion of relevant evidence,

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and has ruled contrary to the justification and need for the business records exception.

Business records are deemed inherently reliable for several reasons. They are customarily checked for accuracy, and in actual experience the business of the entire country functions in reliance upon them based upon a circumstantial probability of trustworthiness. 30 Am. Jur. 2d Evidence § 933. This point is emphasized as the polestar of the exception in Ehrhardt Florida Evidence § 803.6 (1993 Edition):

> The exception makes it possible to introduce relevant evidence without the inconvenience of producing all persons who had a part in preparing the documents during the trial. The evidence is reliable because it is of a type that is relied upon by a business in the conduct of its daily affairs and the records are customarily checked for correctness during the course of the business activities.

Id. at 613; see, McCormick, Evidence §§ 284-86 (4th ed. 1992).

Now, however, a litigant cannot depend upon the reliability factor since under the present ruling there is no "circumstantial probability of trustworthiness." Instead, to be admissible, records must virtually be recreated. The Fourth District has essentially thrown out the use of the exception by permitting objections -- regardless of the presumed trustworthiness of the evidence implicit in the statute -- to trigger an overwhelming "foundation" burden requiring evidence of the drawing of the blood, chain of custody, and administration and interpretation of the test. Moreover, the opinion suggests that even if this foundation were properly laid, the trial judge can still exclude the evidence

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as a discretionary matter whether or not the opposition offers anything on rebuttal. This analysis belies the underpinnings of this hearsay exception.

B. Rule Adopted To Liberalize Admissibility

In Holley v. State, 328 So. 2d 224 (Fla. 2d DCA 1976), the Second District addressed the foundation requirement for admitting business records as a "serious problem," but emphasized that the rule was adopted as an attempt to liberalize the admissibility of business records "to avoid the necessity of bringing to court every person who played a part in the preparation of a particular business record." Id. at 226. At issue there was the trial court's refusal to admit a motel registration card on the theory that the testimony of only the custodian of the record was an insufficient predicate to admit the document. The Second District reversed petitioner's conviction, holding that the custodian's testimony would have been sufficient, and that exclusion of the evidence was error. In so holding, the Second District looked to the underlying rationale of the business records exception (then Section 92.36, currently Section 90.803(6)). The court explained:

> [T]he justification for . . . [the business records] exception to the hearsay rule is the probability of trustworthiness which is incident to a record kept in the regular course of business and made at or near the time of the act, condition or event of which it purports to be a record.

Id. at 225. (emphasis added)

Years later, in Southern Bakeries Inc. v. Fla. Unemployment Appeals Comm'n, 545 So. 2d 898 (Fla. 2d DCA 1989), the Second

District addressed the same question. In that case, a SmithKline report was also in issue. The specific test was a urinalysis which an appeals referee (the administrative equivalent of a trial judge) had determined to be inadmissible as a business record unless each person in the "chain of custody" testified. On appeal, the court emphatically disagreed, holding that the appeals referee held a "grand misperception of the manner in which section 90.803(6) [wa]s intended to be applied." As in Holley, the Second District again explained that the statute was intended to avoid the necessity of parading into court each and every person in the "chain of custody", and that the testimony only of the custodian of the business record was sufficient. 545 So. 2d at 900. In reviewing the extent of the conflict, it is again emphasized that in this case, like Southern Bakeries, there was nothing in the record even claiming -- much less establishing -- that the records were untrustworthy. Id.; see 611 So. 2d at 1278 (Warner, J., dissenting).

The Fifth District is aligned with the Second District on this issue. In McEachern v. State, 388 So. 2d 244 (Fla. 5th DCA 1980), the Fifth District affirmed the trial court's admission of business records from the sheriff's department where only the custodian of the records testified. The Fifth District concluded that this was a sufficient predicate to admissibility, adopting the Second District's reasoning in Holley that the intent of the statute was to avoid bringing in everybody in the chain of custody to testify.

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To the same effect is Dutilly v. Dep't of Health & Rehabilitative Serv., 450 So. 2d 1195 (Fla. 5th DCA 1984). Although Dutilly involved a summary judgment review, the "business records" exception was in issue. The court explained that one way to establish an adequate foundation for consideration of a business record as competent evidence in a summary judgment proceeding is simply to submit an affidavit of the custodian of the report.

Unlike the Fourth District's present posture, the Second and Fifth Districts expressly reject the notion that the rule requires a "chain of custody" predicate. The very reason for adoption of the rule is the inherent trustworthiness of a business record. Ehrhardt, supra at 614-15.

Indeed, the decisions which are now in conflict clearly underscore the reason for the business records exception -- only testimony of a records custodian is required to admit such evidence because the purpose for which the rule was enacted is to avoid the necessity of having to bring to court every person who played a part in the preparation of a particular business record. The rationale is clear -- there is a circumstantial guarantee of trustworthiness. The Fourth District has decided that just the opposite is true, however, and has so enmeshed itself in the theory behind the hearsay exclusionary rule, that it has blinded itself to the practical necessity for the exceptions and had completely lost sight of the original legal and factual scenario presented below. In doing so, the court has ignored the human experience that the commerce of this entire country constantly functions in reliance

upon records kept in the ordinary course of a business's operation. That is a universal fact, and that is why they are presumed trustworthy.

C. "Trustworthiness" Burden Is Not Discretionary

The Fourth District's ruling gives a trial judge the discretion to shift the "trustworthiness" burden to the proponent by the mere assertion of an objection by the party opposing its admission. This view establishes a "foundation" burden not contemplated by the framers of the evidence code. The wording of the majority opinion makes the point clear. The opinion states that the Fourth District now requires for admissibility evidence of the drawing of the blood, chain of custody and administration and interpretation of the medical test before the records are admitted. Id. at 1276. Worse yet, even if this foundation were laid, a trial judge can still exclude evidence as a discretionary matter. Id. This faulty interpretation by the majority has been addressed throughout the dissenting opinions, as is the fact that accuracy, reliability and trustworthiness were never "properly challenged." To further its reasoning process on this illicit point, the court cites subparagraph (b) as meaning something more than it really is. Respondent's counsel simply argued that "chain of custody" witnesses are necessary to introduce this type of evidence, and the trial court agreed. No specific reason was given why blood alcohol test results should be treated differently than any other piece of evidence or be considered generally untrustworthy. Both the trial court's ruling and the *en banc* affirmance appear to be based upon

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the unsupported assumption that blood alcohol tests are unreliable when in fact, just the opposite view prevails. In Pardo v. State, 429 So. 2d 1313 (Fla. 5th DCA 1983), the Fifth District stated:

> [W]e start with the premise that the ability of consumed alcohol to impair normal human facilities is an accepted fact and the reliability of certain chemical testing of blood to determine its alcoholic content is scientifically well established and, therefore, the result of such tests, when relevant, is, under general law, admissible in evidence.

Id. at 1315 (emphasis added). If these blood test results were inherently unreliable as the court implies, doctors would not be relying upon them in making treatment decisions. More importantly, no testimony or other evidence was advanced showing that the particular test results in this case were unreliable or untrustworthy.

First, the lab test results did not constitute opinion or diagnosis evidence. The blood alcohol tests produce a percentage which represents the weight of alcohol in a person's blood. This involves no subjective aspect or "opinion," and the same results would be obtained no matter who conducts the tests. Indeed, the decision marks a sharp departure from existing case law, see e.g., Hogan v. State, 583 So. 2d 426 (Fla. 1st DCA 1991) (business records exception to hearsay rule applies to lab test results if made and kept in regular course of business); Davis v. State, 562 So. 2d 431 (Fla. 1st DCA 1990) (testimony of laboratory's toxicologist supervisor, as custodian of urine test report, qualified report as business record under exception to hearsay

rule, justifying admission in parole revocation hearing in absence of showing of lack of trustworthiness of report).

Second, the exclusion of the medical records based on this record was not a proper exercise of judicial discretion. Clearly, the trial court erred as a matter of law in this case. But even if the decision as to admissibility were deemed within the court's discretion, that discretion was abused. To be valid, an exercise of discretion must have some basis in law or fact. Little v. Sullivan, 173 So. 2d 135 (Fla. 1965) (judicial discretion is not available as support for conclusion in face of positive rule to the contrary); Imperial Indus., Inc. v. Moore Pipe & Sprinkler Co., 261 So. 2d 540 (Fla. 3d DCA 1972) (judicial discretion must rest upon facts ascertainable from the record). Here, absolutely no basis was given, much less established, upon which the trial court could have concluded legally or factually that the test results were untrustworthy. Nothing was in the record on this point. The trial court, therefore, abused any discretion it may have had. Cf., e.g., Town of Palm Beach v. Palm Beach County, 460 So. 2d 879, 882 (Fla. 1984) (although trial court has broad discretion in determining subject on which expert may testify, its decision will be disregarded if that discretion has been abused).

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D. Any "Abused Discretion" Relates to the Exclusion of Petitioner's Witnesses

If any discretion were abused, it was the denial of petitioner's opportunity to call unlisted witnesses to establish the "chain of custody." In footnotes one and seven of the *en banc* opinion, the court refers to the prejudice to respondent due to the failure of petitioner's counsel to list these witnesses. However, the exact manner in which respondent would be prejudiced by permitting petitioner to call the necessary witnesses is not specified. In fact, neither at trial nor on appeal has respondent pointed to any actual or even potential prejudice. Moreover, the trial judge did not make a "finding" of prejudice, as the panel states in footnote one. The court's inquiry into this factor consisted solely of asking respondent's counsel whether respondent claimed prejudice. Respondent's counsel, to be sure, gave the "right" answer.

E. Respondent Prevailed By "Ambush"

In direct contravention of the Florida Supreme Court's teaching in Binger v. King Pest Control, 401 So. 2d 1310 (Fla. 1981), the Fourth District has permitted respondent's "ambush" tactics to prevail over petitioner's right to a fair trial. Respondent's counsel brought the motion in limine the day of trial, many months after the records custodians had been listed. Respondent took no discovery concerning the testing, and it is clear from the record that she had absolutely no basis for questioning the reliability of the results. On the other side, petitioner's counsel was justified in believing the records

custodians would be sufficient to lay the foundation for introduction of the blood test results, since this is all the statute requires. Until the *en banc* decision, the law supported defense counsel's action. Nonetheless, despite respondent's obvious disingenuous trial tactics and petitioner's counsel's good faith reliance on the law, by its opinion, the court approves the denial of petitioner's right to a fair trial. Under the Fourth District's decision, every person involved in testing, transporting, and storing blood samples must now be listed as a witness and be prepared to testify. The disruption to hospitals and independent laboratories is obvious. Undoubtedly, if these people are listed, opposing parties will find it necessary to depose them. If one break in the chain is found, the proponent can argue that the evidence should be kept out. Moreover, any decision by the trial judge to exclude the evidence would be virtually unreviewable under this court's opinion.

As a policy matter, any witness who would be called to testify as to chain of custody or the testing would likely have since participated in dozens, if not hundreds, of other tests and would probably be unable to recall specifics without referring to the very same business records that § 90.803(6) provides can be admitted through the testimony of a records custodian. If left to stand, future trials will involve either wasted effort to establish the trustworthiness of unquestionably reliable evidence or trustworthy evidence will be excluded on a technicality for the proponent's failure to secure all the necessary witnesses or

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testimony. Either way, the policies underlying the business records exception to the hearsay rule will be defeated. Apparently, the Fourth District forgot what it said when deciding Brevard County v. Jacks, 238 So. 2d 156, 158-59 (Fla. 4th DCA 1970):

> [Section 92.36 (now section 90.803(6)] should be construed so as to effectuate its purpose which is to provide reliable evidence regarding the hospitalization, yet to avoid the necessity of the expense, inconvenience, and sometimes impossibility of calling as witnesses the attendants, nurses, and physicians who collaborated to make the hospital record.

III

PETITIONER LAID A PROPER PREDICATE FOR ADMISSION OF BUSINESS RECORDS

The Fourth District cites to its own decisions in Thunderbird Drive-In Theatre, Inc. v. Reed, 571 So. 2d 1341 (Fla. 4th DCA 1990), rev. denied, 577 So. 2d 1328 (Fla. 1991) and Kurynka v. Tamarac Hosp. Corp., 542 So. 2d 412 (Fla. 4th DCA 1989), rev. denied, 551 So. 2d 463 (Fla. 1989) and claims to "withdraw" from those decisions. An analysis of those cases underscores the soundness of petitioner's argument.

A. The Thunderbird Drive-In Decision

In Thunderbird Drive-In, the trial court had refused to admit portions of a hospital record which recorded two blood test results. One of the tests was performed by the hospital and the other by an independent laboratory. Defendant attempted to call the hospital records custodian as a witness to authenticate the

records and lay the necessary foundation for their admissibility, but the court sustained the plaintiff's objections to the custodian as a witness. Defendant was prevented from laying the appropriate foundation to admit the records, and the court refused defendant's proffer of the custodian's testimony. In addressing the propriety of the trial court's rulings, the court stated:

> We are unable to discern the real reason the court refused to allow the witness to lay the necessary foundation to admit [the test results] as hospital business records under section 90.803(6), Florida Statutes (1987). Had the foundation been properly laid, and the record reflects the [defendant] was in the process of doing so, the records would have been admissible.
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> * * *
>
> The parties went to great lengths in their briefs to demonstrate that the hospital records reflecting the blood tests were, or were not, admissible under section 90.803(6). Obviously, we cannot make that determination from this record because the proffer was precluded. However, such information contained in a hospital record is ordinarily admissible, if a proper foundation is laid by a witness such as the records custodian of the hospital.

Id. at 1268 (emphasis added).

Petitioner intended to call the SmithKline and Florida Medical Center records custodians to authenticate and validate the blood alcohol tests reports. Indisputably, these witnesses were listed on petitioner's pre-trial catalogue and were under subpoena. Under the Thunderbird Drive-In rationale, these witnesses were clearly sufficient to establish the predicate for the introduction of these records, but the Fourth District admonishes itself by stating

incorrectly that it forgot to address "accuracy" and "reliability" of the records. This statement is nonsense.

As repeatedly stated, the courts of this state recognize the inherent accuracy and reliability of blood alcohol tests. For example, in Pardo v. State, 429 So. 2d 1313 (Fla. 5th DCA 1983), the court addressed the issue of the admissibility of a blood alcohol test in a criminal proceeding. The defendant in Pardo caused an automobile collision. A blood test taken by the hospital revealed that the defendant had been intoxicated at the time. The result of the test was used as evidence against the defendant in a trial for manslaughter. The defendant was convicted and appealed. In affirming, the Fifth District stated:

> [W]e start with the premise that the ability of consumed alcohol to impair normal human facilities is an accepted fact and that the reliability of certain chemical testing of blood to determine its alcoholic content is scientifically well established and, therefore, the result of such tests, when relevant, is, under general law, admissible in evidence . . . This leads us to the conclusion that, subject to all other and usual qualification and limitations relating to competency, relevancy and weight, the result of blood alcohol tests is admissible in civil and criminal proceedings quite independent of Sections 322.261 and 322.262, Florida Statutes (1981), or other statutory authority. . . .

Id. at 1315 (emphasis added).

If blood alcohol tests are considered sufficiently reliable for hospitals to treat patients in life and death situations, they certainly are reliable enough to be used as evidence in a civil negligence suit.

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B. The "Kurynka" Decision

Kurynka v. Tamarac Hosp. Corp., 542 So. 2d 412 (Fla. 4th DCA), rev. denied, 551 So. 2d 462, 463 (Fla. 1989), was relied on by the trial court to exclude the records. However, it is distinguishable and not controlling. Kurynka involved a medical malpractice action against a hospital and doctor for treating the decedent for a bronchial condition and asthma when she went into cardiac arrest in the emergency room. The sole issue was whether the trial court impermissibly admitted into evidence an unverified laboratory report of a urine test performed by an independent outside laboratory which was contained in the hospital records. Test results suggested that the decedent had used cocaine.

Significantly, in Kurynka, defendants attempted to introduce the report through a laboratory's "executive" -- not a records custodian -- who had been hired long after the report was made. Also, the indication of drug use from the report was uncorroborated. No other evidence that the defendant used cocaine was presented. In finding that the report was inadmissible, the court stated that it "is undisputed that evidence of uncorroborated and unauthenticated test results is generally inadmissible." Id. at 413 (emphasis added). The court recognized that the records would have been admissible under the business records exception to the hearsay rule if a proper predicate had been established. Id.

In this case, the reports were neither uncorroborated nor unauthenticated. Here two blood alcohol tests were performed -- one by Florida Medical Center and one by SmithKline. Both reports

independently found that respondent's blood contained alcohol. Moreover, as Dr. Bednarczyk would have testified, the difference in the readings was consistent with the accepted "burn-off" rate of alcohol. Each report corroborated the other. This was not a "bootstrap" maneuver, as characterized by the trial court. (T. 19) (App. B) In addition, other evidence existed to corroborate respondent's intoxicated state. The evidence established that respondent was wandering around late at night, hailing down police cruisers as if they were taxi cabs. She was disoriented and did not know where she was going. Respondent stumbled when she was crossing the intersection, never noticed the headlights of an oncoming car and ignored the warning of a bystander alerting her of the danger. There was also evidence showing that respondent was not in the crosswalk but had crossed University Drive north of the crosswalk and over the median strip.

Petitioner listed the records custodians for both the Florida Medical Center and SmithKline, and each record custodian was under subpoena to testify to establish a proper predicate for introduction of the hospital records. This was not a case, like Kurynka, where a lab "executive," was being asked to establish the necessary predicate. Kurynka simply requires a records custodian to establish the predicate for hospital records -- nothing more. Unlike this case, in Kurynka no witness was available who could establish the report as a business record.

Furthermore, Kurynka does not require a "special" witness to testify regarding the results of the blood alcohol tests separate

and apart from establishing the admissibility of the hospital records. As noted by Chief Judge Hersey in his dissent in Kurynka, "[a]ssuming the hospital records themselves are properly authenticated, neither Section 90.704, Florida Statutes, nor the case law contemplates or requires authentication of separate items contained within those reports." Id. at 414. Accord Grant v. Brown, 429 So. 2d 1229, 1231 (Fla. 5th DCA) (blood tests are unquestionably admissible as part of hospital records), rev. denied, 438 So. 2d 832 (Fla. 1983).[5]

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[5] While the issue of "conflict," and not the individual injustice to petitioner, is at issue, it is nevertheless important to focus on the prejudicial effect of the trial court excluding petitioner's witnesses under the circumstances.

A trial court's discretion to exclude the testimony of a witness must not be exercised blindly but should be guided by the consideration of factors set forth in Binger v. King Pest Control, 401 So. 2d 1310 (Fla. 1981). The trial court should consider such factors as: (1) the prejudice to the objecting party resulting from surprise in fact; (2) the ability to cure any prejudice; (3) possible intentional or bad faith non-compliance with the pre-trial order; and (4) possible disruption of the orderly and efficient trial of the case. Binger, 401 So. 2d at 1314; Lugo v. Florida E. Coast Ry., 487 So. 2d 321, 324 (Fla. 3d DCA 1986); Haines v. Haines, 417 So. 2d 819, 820 (Fla. 4th DCA 1982).

None of the pertinent Binger factors supports the exclusion of testimony concerning the blood alcohol test results in this case. For over a year and a half before trial, respondent knew that petitioner intended to introduce evidence of the blood alcohol test results. At the pre-trial conference held on March 7, 1988, petitioner's counsel made specific references to the records custodian of SmithKline in relation to the blood alcohol test performed at the laboratory. Respondent deposed Dr. Bednarczyk in January, 1989, and had listed him as a potential witness. Respondent had ample notice of petitioner's intent to use the blood alcohol tests results and had plenty of time to gather evidence to attempt to show that the results lacked trustworthiness.

The record does not establish that respondent would have suffered any prejudice if petitioner had been allowed to call the witnesses considered necessary by the trial court to lay a

The stringent standards for admission now required by the Fourth District are simply not justified. In reviewing the same issue involving the federal counterpart (Rule 803.6), the Third Circuit in Japanese Electronic Products, supra, stated:

> We do not believe that Rule 803(6) as drafted requires that the court independently analyze the procedures used by a business or its employees in making regularly kept records of regularly conducted business activity. The principal indice of reliability is that reliance on routine record keeping is essential to ongoing business activity. Deficiencies in the manner in which specific records are kept may be called to the court's attention in carrying the burden of showing that the "method or circumstances of preparation indicate lack of trustworthiness." Fed. R. Evid. 803(6). Given the separate treatment in Rule 803(6) of untrustworthiness, we think the regular practice requirement should be generously construed to favor admission.

Id. at 289.

Placing the burden of trustworthiness on petitioner is not only incorrect in the context of this case, but legally unsound.

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predicate to the admissibility of the test results. See Pimentel v. Alamo, 555 So. 2d 895 (Fla. 3d DCA 1990) (plaintiff not substantially prejudiced by omission of authenticating witness to deed from the pre-trial catalogue and the deed should have been admitted given plaintiff's knowledge and possession of deed in question); Melrose Nursery Inc. v. Hunt, 443 So. 2d 441 (Fla. 3d DCA 1984) (exclusion of expert witness reversible error though witness not listed in defendant's pre-trial catalogue as plaintiff had possession of expert's report for several months prior to trial and thus could not claim prejudice by expert's testimony); Clarke v. Sanders, 363 So. 2d 843 (Fla. 4th DCA 1978) (failure to list physicians on pre-trial statement not so prejudicial to require disallowance of testimony where physicians' names appeared in answers to interrogatories and opposing party was quite aware of proposed evidence.)

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The evidence code is a practical tool. To permit this decision to stand is to emphasize the hearsay, and not the exception to it.

CONCLUSION

The Fourth District has misconstrued the business records exception to the hearsay rule by improperly placing a burden of establishing trustworthiness on the proponent of the records. The evidence code was enacted for practical reasons, yet the *en banc* ruling of the Fourth District has, in essence, ruled that as to business records, practicality is not a factor. It is submitted that the *en banc* decision is wrong and must be reversed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits was furnished by U.S. mail this 16th day of August, 1993, to SCOTT P. SCHLESINGER, ESQUIRE, Sheldon J. Schlesinger, P.A., 1212 S.E. Third Avenue, Fort Lauderdale, Florida 33316 and JANE KREUSLER-WALSH, ESQUIRE, Klein & Walsh, 501 South Flagler Drive, Suite 503, West Palm Beach, Florida 33401.

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