OA 11-4-93

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SID J. WHITE
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IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 81,478

DOUGLAS J. LOVE,

Petitioner,

vs.

LUZ MARIA GARCIA,

Respondent.

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**RESPONDENT'S BRIEF ON THE MERITS**

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TABLE OF CONTENTS

## TABLE OF CITATIONS

TABLE OF CITATIONS cont'd.

## PREFACE

The petitioner was the defendant/appellant in the lower courts and the respondent was the plaintiff/appellee. They are referred to herein as plaintiff and defendant.

The following symbols are used:

R - Record on Appeal

SR - Supplemental Record on Appeal

A - Petitioner's Appendix

## STATEMENT OF THE CASE AND FACTS

The plaintiff accepts the defendant's statement of the case, but cannot accept the defendant's statement of the facts as it is argumentative and incomplete. The plaintiff provides the following:

Sunrise Police Officer Collins was patrolling west on Sunset Strip when he saw plaintiff, a pedestrian, gesturing for him to pull over (R 811-812, 815). He turned around and drove over to her (R 15). She asked Officer Collins if he would take her to a Mobil station, indicating a westerly direction, so she could make a phone call (R 816, 818). Officer Collins said plaintiff seemed upset and looked like she had been crying (R 817). He asked her what was wrong and she explained that her sister had brought two men home, one for her (R 777, 818). When plaintiff said she was

not interested, her sister's husband told her she had to leave, which she did (R 777, 818).

Officer Collins took the plaintiff to a Mobil station on the corner of University and Sunset (R 819). When they arrived, the plaintiff explained that this was not the station she wanted, she wanted the Mobil station with the waterfall (R 820). Officer Collins said he knew the station she meant, but it was about a mile away and out of his jurisdiction (R 820). The plaintiff was calmer and had stopped crying when he dropped her off (R 825). She did not appear unsafe or unable to care for herself (R 825). She was walking and talking normally and was neither disoriented nor confused (R 825, 829). Officer Collins had no concern for her safety whatsoever (R 825).

Around this time, Chris Caviness and a friend were walking north on the north side of University Drive (R 273, 276). They saw plaintiff walking across the intersection in the pedestrian crosswalk (R 273, 276). She looked upset or like she had a lot on her mind (R 276). When the plaintiff was a little south of the median, Mr. Caviness saw her stumble (R 304, 313). As she stumbled, he looked and saw headlights approaching (R 304). Mr. Caviness saw a Cadillac heading north, a little south of the intersection (R 277). The car slowed as it approached the intersection, but then sped up (R 277-278). Mr. Caviness estimated the Cadillac's speed at 55 to 60 miles per hour (R 278).

When he saw the car approaching, he yelled to the plaintiff (R 306). The plaintiff looked over, but kept walking (R 309, 318). The driver braked and honked his horn (R 282). He then let up and hit the brakes again, locking them (R 282).

The Cadillac hit the plaintiff, who was still in the crosswalk, with the right front passenger side of the car in front of the headlight (R 285, 557, 839). She came up onto the hood of the car, rolled into the windshield, onto the roof, and then off the roof (R 285, 559, 839). The defendant, an orthopedic surgeon, got out of his car and looked at her, but offered no help (R 561, 841). Mr. Caviness got close to the plaintiff after the accident and smelled no alcohol (R 319).

The plaintiff was severely injured and required hospitalization for seven weeks, two weeks in intensive care. She had six surgeries requiring general anesthesia to repair her liver, bladder, and broken bones in her leg and hip. She was in a cast for her right leg for almost two years. She had a fractured skull and subdural hematoma, resulting in permanent brain damage in the right frontal lobe of her brain and lost sense of taste and smell. She has endured memory problems, headaches, and inability to concentrate. She fractured her right eye socket, right arm and left hip. She also had a comminuted fracture of the tibia and fibula and the right leg. She fractured her left fibula on the

left leg. She fractured her liver and ruptured her bladder. She also had a huge laceration on the right side of her head.

The plaintiff filed a motion in limine to exclude certain evidence including the results of two blood alcohol tests and testimony that the plaintiff was intoxicated or affected by alcohol at the time of the accident (R 1300-1300A). The plaintiff challenged the accuracy, reliability, and/or trustworthiness of the blood alcohol test reports at the hearing on the motion in limine:

> 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.
>
> Our client was - right before the accident took place, she was picked up by a Sunrise Police Officer named William L. Collins. She was trying to find a Mobil Station. And he drove her to the Mobil Station. And during the time that he was with her, he did not think that she was intoxicated or impaired at all.
>
> And as far as he could see, she talked normally, walked normally, and he let her out of the police car at the Mobil Station which is right at the intersection where the accident took place.
>
> Nevertheless, when 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 tests were

performed (Emphasis added) (R 7-8; A, B 7-8).

Plaintiff's counsel's objections to the blood alcohol test reports included the fact that there was no evidence, except for the two inconsistent and highly questionable lab reports, to indicate the plaintiff had been drinking (R 7-8). The defendant had failed to list any witness who could lay the proper predicate for admission of the test results (R 7-8). There was no independent testimony about what kind of tests were performed, how the tests were conducted, who performed them, who drew the samples, or whether the samples used were those of the plaintiff, all of which the plaintiff questioned (R 8).

The record is replete with evidence of the blood alcohol test reports' untrustworthiness. The first blood test, done at Smith-Kline, 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. Love v. Garcia, 611 So. 2d 1270, 1275 (Fla. 4th DCA 1992). There was no suggestion that any life or death medical decision was made or influenced by the test. Id.

The first blood sample was drawn on April 4, 1986, at 12:25 p.m. and showed a blood alcohol level of .23 (SR 56-88, pp. 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 a.m. (SR 56-88, p. 19). The defendant's expert, Dr. Bednarczyk, speculated that the time shown on the Smith-Kline report for drawing the sample was wrong and should have been 12:25 a.m. (SR 56-88, pp. 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 considered the blood alcohol in treating the plaintiff for her injuries. Love v. Garcia, supra, 1275. Nor was there evidence that by the time the results of either test became available, they were relevant in any way to her treatment. Id.

The defendant's expert, Dr. Bednarczyk, never worked for either Smith-Kline Bioscience Laboratory or the Florida Medical Center (SR 56-88, p. 17). He had no idea which test was used to quantify the amount of alcohol in the plaintiff's blood at either institution and acknowledged there is more than one method (SR 56-88, p. 17). He had no idea who drew the two different blood samples from the plaintiff (SR 56-88, p. 18).

Dr. Bednarczyk described a person with a .23 blood alcohol as "markedly impaired" (SR 56-88, p. 12). The individual would be disoriented, confused and dizzy (SR 56-88, p. 13). There would be marked muscular incoordination and difficulty in standing and

walking (SR 56-88, p. 13). The individual would experience disturbances in vision and decreased perception of color, form, motion and dimension (SR 56-88, p. 13). The individual would also exhibit obvious emotional instability, staggering gait and slurred speech (SR 56-88, p. 13).

Plaintiff objected to the inherent untrustworthiness of these tests (R 7-8). Because of the lack of any testimony authenticating and laying the competency predicates for these lab reports and the inconsistencies in the reports themselves which could not be reconciled, the trial court properly exercised its discretion in refusing to admit these blood alcohol test reports merely because they happened to be in the hospital records.

## 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. As the Fourth District recognized, there are good reasons for treating blood alcohol readings differently than other business records entries. 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 and carries serious ramifications.

The Fourth District's en banc opinion does not discard the business records exception to the hearsay rule. The Fourth

District's opinion is consistent with prior case law interpreting the business records exception and Section 90.803(6)(b) as requiring a predicate that relates to the accuracy, reliability and trustworthiness of the entry. Proper predicate for a blood alcohol test contained in a medical record means evidence as to the drawing of the blood, chain of custody, the administration of the test, and the interpretation and reporting of the test results.

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, and the possibility that inherent prejudice may outweigh probative value. The Fourth District's opinion did not shift the burden of proving trustworthiness to the proponent. The burden remains on the opponent to "properly challenge" the reliability, accuracy or trustworthiness of the medical entry and shifts to the proponent once the reliability, accuracy or trustworthiness is properly challenged.

The plaintiff challenged the accuracy, reliability and trustworthiness of the two lab reports showing blood alcohol. The lab reports were uncorroborated, unreliable and unauthenticated. The defendant produced no evidence to connect the plaintiff to the test. The defendant never proffered the records custodians' testimony or the testimony of the other witnesses he allegedly intended to call to establish the "chain of custody". The

defendant did not list the technicians who performed the tests to explain what they did, how they did it, or the results. In fact, the technicians' identities were unknown and the test reports themselves were highly suspect.

Because of the lack of any testimony authenticating and laying the competency predicates for these lab reports and the irreconcilable inconsistencies in the reports themselves, the trial court properly exercised its discretion in refusing to admit these blood alcohol test reports into evidence merely because they happened to be in the hospital records.

## ARGUMENT

### ISSUE (Restated)

WHETHER THE TRIAL COURT PROPERLY REFUSED TO ADMIT LAB TESTS CONTAINED IN HOSPITAL RECORDS SHOWING BLOOD ALCOHOL INTO EVIDENCE WHERE THE DEFENDANT FAILED TO LAY THE PROPER PREDICATE.

The Fourth District applied the correct standard of review in determining that the trial court properly exercised its discretion in excluding the blood alcohol test reports because the defendant failed to lay the proper predicate. It is undisputed that evidence of uncorroborated and unauthenticated test results are generally inadmissible. Kurynka v. Tamarac Hosp. Corp., Inc., 542 So. 2d 412, 413 (Fla. 4th DCA), rev. denied, 551 So. 2d 462, 463 (Fla. 1989). Medical records, like any other type of business records,

cannot be admitted without a predicate demonstrating their authenticity and trustworthiness. Love v. Garcia, 611 So. 2d 1270, 1274 (Fla. 4th DCA 1992); Kurynka v. Tamarac Hosp. Corp., Inc., supra, 413, and cases cited therein. There are good reasons for treating blood alcohol test reports differently than other information contained in medical records. 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.

The trial judge has "broad discretion in determining if the evidence adduced laid the proper foundation for reception under Section 92.36, Florida Statutes, F.S.A. [Business Records Exception]." Specialty Linings, Inc. v. B.F. Goodrich Co., 532 So. 2d 1121, 1122 (Fla. 2d DCA 1988); Forester v. Norman Roger Jewell & Brooks Intern., Inc., 610 So. 2d 1369, 1372 (Fla. 1st DCA 1992). As the Fourth District noted in Gavin v. Promo Brands USA, Inc., 578 So. 2d 518, 519 (Fla. 4th DCA 1991), in analyzing whether the trial court erred when it admitted the results of a serum blood alcohol test done by an outside lab into evidence, the "chain of custody presents a mixed question of law and fact in which the court determines whether a sufficient showing has been made of the item's genuineness". In the absence of a clear showing of error, the trial court's determination on the admissibility of evidence should not be disturbed on review. Buchman v. Seaboard Coastline R. Co., 381 So. 2d 229 (Fla. 1980).

The Fourth District on page 1276 of its opinion below set forth the appropriate predicate and elements a court should consider when deciding whether medical entry records showing blood alcohol should be admitted under the business records exception to the hearsay rule:

> ...we 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. Furthermore, even if the requirements for business record admission under FEC section 90.803(6) are shown, or if the proper predicate is established, the trial judge must still assess the evidence for admissibility from the standpoints of relevance, materiality, competency, expert opinion, or the possibility that inherent prejudice may outweigh probative value. In short, all of the other provisions of the FEC remain in play. (Emphasis added)

The Fourth District did not shift the burden of proving trustworthiness from the opponent of the evidence to the proponent. The opponent must "properly challenge" the medical record entry as it relates to reliability, accuracy or trustworthiness. Love v. Garcia, supra, 1275, 1276. Once the opponent challenges admission of the record on the basis of reliability, accuracy or trustworthiness, the trial court must exercise its discretion to

determine whether the proponent of the evidence has laid the proper predicate for its entry.

Plaintiff's counsel challenged the accuracy, reliability and trustworthiness of the two laboratory reports showing blood alcohol at the hearing on the plaintiff's motion in limine (R 7-8). Plaintiff's counsel moved to exclude the evidence because the defendant had failed to list any witness who could lay a proper predicate for admission of the blood alcohol test results:

> 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 o the accident.
>
> Our client was - right before the accident took place, she was picked up by a Sunrise Police Officer named William L. Collins. She was trying to find a Mobil Station. And he drove her to the Mobil Station. And during the time that he was with her, he did not think that she was intoxicated or impaired at all.
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> Nevertheless, when 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.
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> We have filed a motion in limine to preclude any reference to those test 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 tests were performed (R 7-8; A, B 7-8).

Plaintiff's counsel cited Grant v. Brown, 429 So. 2d 1229 (Fla. 5th DCA), pet. for rev. denied, 438 So. 2d 832 (Fla. 1983), to the trial court, where the Fifth District affirmed the trial court's ruling to allow blood alcohol reports into evidence because "they had called the director of the laboratory who testified how the tests were performed; that they were reliable; that there was a scientific basis..." (R 11). Conversely, as plaintiff's counsel argued, the defendant listed no witness who could lay the predicate to get these lab reports into evidence.

The first blood test, done at Smith-Kline, 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. As the Fourth District stated on page 1275 of its opinion:

> There is no suggestion possible, therefore, that any life or death medical decision was made or influenced by that test. Hence the historical basis for trustworthiness of a medical record is entirely absent for the initial test.
>
> ...[T]here is no suggestion in this record that any health care provider at the hospital ever considered blood alcohol in treating the pedestrian for her injuries from the motor vehicle accident. There is no evidence that, by the time the results from either of these tests became available (one or two days later?), they were relevant in any way to her treatment. Indeed, the trial judge said:

> But the key is are you going to let medical records into evidence despite a charge to the jury or an instruction to the jury that they shan't be considered for any purpose- I mean any other purpose other than what they're put into evidence for when you know darned well that what you're doing is letting in an unqualified piece of evidence that the jury is going to consider 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 on the strength of that, but rather that the test is there? It's in the medical records; therefore she must have been drunk. [e.s.] R. 15-16.

Love v. Garcia, supra, 1275. Thus, the predicate and historical basis for trustworthiness of a medical record are absent from the blood tests here. Compare Andres v. Gilberti, 592 So. 2d 1250 (Fla. 4th DCA 1992), where the test and the results were used for medical treatment.

The plaintiff demonstrated the inaccuracy, unreliability and untrustworthiness of the reports. 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, pp. 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 Smith-Kline report for drawing the blood sample was wrong and should have

been 12:25 a.m. (SR 56-88, pp. 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. Love v. Garcia, supra, 1275.

The Florida Evidence Code is different from the Federal Rule in that it contains the following subsection in Section 90.803(6):

> (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 § 90.701-90.705 if the person whose opinion was recorded would testify to the opinion directly.

As the defendant recognized on page 19 of his brief, subsection (b) addresses "hearsay within hearsay", so that "if the record contains an opinion, the opinion itself must be admissible...". A hearsay statement contained in hearsay is admissible only when both statements conform to the requirements of a hearsay exception. See Harris v. Game and Fresh Water Fish Com'n., 495 So. 2d 806, 809 (Fla. 1st DCA 1986).

The amount of alcohol in a person's blood is an opinion. A laboratory technician, based on education and training, performs a test and arrives at a conclusion. If it were not an opinion, a lay person could testify as to blood alcohol, which the law clearly does not permit. Thus, any medical record or entry in a record or chart is inadmissible as a business record if it would not be

admissible as an opinion if the entrant of the record was present in court and testifying. Love v. Garcia, supra, 1274.

Under Section 90.803(6)(b) it is necessary, at the very least, to know the qualifications of the individual rendering the opinion or diagnosis to determine the admissibility of the evidence. In this case, not only were the qualifications of the lab technicians never presented, his or her identity was unknown. The defendant neither listed nor presented any witness to qualify the lab report as admissible evidence under Section 90.803 (6)(b) and, therefore, the trial court properly excluded it.

In addition, the defendant never proffered the records custodians' testimony; therefore, it is impossible for this Court to determine whether the records custodians could have laid the proper predicate under the business records exception. Further, the defendant never proffered the testimony of the other witnesses he intended to call to establish the "chain of custody".

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. Strong, 504 So. 2d 758 (Fla.

1987), the driver of a vehicle involved in a collision was taken to a hospital where a non-certified lab technician removed his blood for testing for medical as opposed to criminal or accident investigation purposes. In discussing the procedures necessary for blood tests to be admissible as evidence, this Court held as follows on page 760 of the opinion:

> [E]ither the state or the defendant may have the blood test evidence admitted on establishing the traditional predicates for admissibility, including test reliability, the technician's qualifications, and the test result's meanings. (Emphasis added)

Similarly, this Court in Smith v. Mott, 100 So. 2d 173 (Fla. 1957), analyzed whether a witness could testify concerning the results of a blood alcohol analysis which he did not perform. This Court held that the testimony of the medical examiner as to a report his office received from the public health service on the alcohol content of the decedent's blood sample was admissible under the "public records" exception to the hearsay rule, not applicable to this case. This court's reasoning in Smith v. Mott, supra, on page 175 of the opinion, however, is pertinent:

> McCormick summarizes the requirements which some courts have made for introduction of the results of the tests as follows:
>
> > "The party offering the results of any of these chemical tests must first lay a foundation by producing expert witnesses who will explain the way in which the test is conducted; attest its scientific reliability, and vouch for its correct administration in the particular case."

> An examining doctor may need to send such elements as blood to adequately equipped laboratories to best accomplish his examination, and "When properly made the results of such examination or analysis shall be admissible at the trial as evidence in this cause." Depfer v. Walker (on rehearing), 1936, 125 Fla. 189, 194, 169 So. 660, 663. Such results, however, must be introduced in evidence through competent witnesses:
>
> > "Because of the rule against hearsay, the report of a chemist, bacteriologist, or laboratory technician as to the result of an examination made by him under the statute is not competent evidence in a case of this kind, but the chemist or bacteriologist who made the examination or the analysis, if shown to be competent to speak as an expert, may testify as to what it showed". Depfer v. Walker, supra. (Emphasis added).

Smith v. Mott, distinguished blood alcohol test reports prepared by a recognized public agency in the performance of its duties and blood alcohol test reports, like here, prepared by a private analyst for the use of private interests. Id., at 176. In the latter case, McCormick's rule applies, requiring the traditional predicate to establish the reliability of the test, the qualifications of the operator, and the meaning of the test results by expert testimony. See also State v. Bender, 382 So. 2d 697 (Fla. 1980).

Other appellate courts which have considered the issue hold 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), reversed the trial court's admission of a lab report of a blood alcohol test as a business record where "[n]either the medical examiner nor the lab technician who performed the alcohol test was available to testify at trial."

In City of Tampa v. Green, 390 So. 2d 1220 (Fla. 1st DCA 1980), a blood alcohol test was administered in a hospital following an accident. The First District held that even though the report was in the hospital records, it was not admissible because the "... laboratory technician who performed the test could not be located." Id. Medical tests and examinations, contained in hospital reports, qualify as business records "if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify [their] admission", and the trial court "retains much discretion as to the admissibility of particular entries of papers...". Id., at 1220.

Grant v. Brown, supra, 1231, held that results of a blood alcohol test taken in the hospital during the medical treatment of an injured party, were admissible as part of the injured party's hospital records, where the defendant established the proper predicate by demonstrating that "the test was scientific, reliable, done by qualified technicians with proper equipment, and interpreted by an expert."

Dutilly v. Dept. 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 90.701-90.705. (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.

In addition to determining whether the proponent has laid the proper predicate, a trial court must determine, as it does in all evidentiary rulings, whether introduction of evidence regarding blood alcohol may create prejudice to the point that it outweighs the evidence's relevancy or probative value. Love v. Garcia, supra, 1276. As the Fourth District stated on page 1276 of the opinion:

> To remove any possible prejudice from bare testing data in a hospital chart the judge is empowered, under subsection (b) of FEC section 90.803(6), to conclude that the test result or chart entry requires the additional circumstances of testimony from a qualified expert to establish its use in the case. The court is allowed, in short, to weigh any possible misunderstanding or prejudice from such evidence against its diagnostic implications.

The trial court obviously was concerned that any probative value from these entries might be overcome by prejudice to the plaintiff (See quote pp. 13-14 infra). (R 15-16). Id., at 1276.

The defendant further contends the trial court abused its discretion in refusing to allow him to call unlisted witnesses to establish the "chain of custody". Contrary to the representations in the defendant's brief, the defendant knew at the pretrial conference that the plaintiff was objecting to admission of the blood alcohol test reports contained in the medical records (R 1224-1252a, p. 19). The defendant did not list and did not intend to call anyone with firsthand knowledge as to how the tests were administered, who drew the blood, what kind of tests were performed, or what procedures were followed. On the morning trial was scheduled to begin, the defendant's counsel first announced that he wanted to bring in personnel from the lab to testify regarding the lab procedures (R 17). Plaintiff's counsel objected, stating that he had no idea who the defendant was referring to, as the defendant had neither listed nor named anyone at the lab (R 18). Plaintiff also objected to the defendant's enlarging the witness list because trial was scheduled to begin that day (R 20).

The plaintiff was prepared to try the case based upon the defendant's calling records custodians, not lab personnel. The plaintiff suffered prejudice by not knowing who the defendant

intended to call or which tests were performed (R 21-22). The trial court agreed and refused to admit the reports into evidence or allow the defendant to continue or postpone the trial (R 20-22). The trial court's rulings were amply supported since, even at that late date, the defendant had no idea who he intended to call or what their testimony would be. The defendant's request was untimely and unwarranted.

The blood alcohol test reports here were uncorroborated, unreliable and unauthenticated. The defendant's own expert, Dr. Bednarczyk, acknowledged his unfamiliarity with the tests. In addition, Officer Collins' and Mr. Caviness' observations of the plaintiff contradicted Dr. Bednarczyk's testimony that, assuming the blood levels were the plaintiff's, she would have been markedly impaired. These contradictory observations, coupled with Dr. Bednarczyk's assumption necessary to his opinion that the time sequences were wrong, rendered the reports untrustworthy, unreliable and inadmissible. To reverse this case for a new trial, where the defendant presented no evidence that the plaintiff had a high alcohol reading except two pieces of paper inserted into the hospital records, does not comport with logic and reason.

## CONCLUSION

The Fourth District's opinion is consistent with established law on the issue. The final judgment should be affirmed.

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By _____
JANE KREUSLER-WALSH
Florida Bar #272371

## CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, this 30th day of September, 1993, to JOHN R. HARGROVE of HEINRICH GORDON BATCHELDER HARGROVE & WEIHE, Broward Financial Centre, 10th Floor, 500 East Broward Boulevard, Ft. Lauderdale, FL 33301.

By _____
JANE KREUSLER-WALSH
Florida Bar #272371