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SUPREME COURT OF FLORIDA

CASE NO. 81,~~746~~ 478

DOUGLAS J. LOVE,

Petitioner,

vs.

LUZ MARIA GARCIA,

Respondent.

_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

JOHN R. HARGROVE, ESQUIRE
PAULA REVENE, ESQUIRE
HEINRICH GORDON BATCHELDER
HARGROVE & WEIHE
Attorneys for Petitioner
Broward Financial Centre, 10th Floor
500 East Broward Boulevard
Fort Lauderdale, Florida 33301
Telephone: (305) 527-2800

LAW OFFICES OF HEINRICH GORDON BATCHELDER HARGROVE & WEIHE, FORT LAUDERDALE, FLORIDA 33394-3092

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INTRODUCTORY STATEMENT

Petitioner wishes to reply briefly to the arguments raised in respondent's answer brief in order to bring the issues back into proper perspective and to distinguish respondent's authorities.

The issue is whether business records, namely blood alcohol test results contained in respondent's hospital records, were properly excluded from evidence at trial for lack of trustworthiness. This case must be considered in the context of the policy underlying all hearsay exceptions, namely, that the "circumstantial guarantees of trustworthiness" of such documents justify their exception to the hearsay rule. McCormick, Evidence § 253 (4th ed. 1992), quoting 5 Wigmore, Evidence § 1422 (Chadbourn re. 1974); See also McCormick, Evidence § 286 (4th ed. 1992). The presumptive trustworthiness conferred on business records in general is particularly applicable to hospital records based upon the uniform practice of recording facts concerning the patient, and the use of those recorded facts for making life and death decisions for the patient's care. McCormick, Evidence § 293 (4th ed. 1992) In that regard, the admissibility of ordinary diagnostic findings based on objective data (such as the blood alcohol tests at issue here) is presumed and therefore normally conceded. Id. In this regard, petitioner's assumption that the records would be admissible was not only reasonable, but was standard trial procedure.

ARGUMENT

I

RECORDS CUSTODIANS SATISFIED "TRUSTWORTHINESS" BURDEN

A. The Required Showing to Challenge Trustworthiness.

Respondent's brief presents the law applicable to the admission of business records when the reliability of the records has been sufficiently challenged. When a sufficient challenge is raised to the reliability of business records, the presumption of correctness of those records under section 90.803(6), Florida Statutes, is eliminated and the burden shifts to the proponent of the records to present additional proof of their accuracy of those records. In this case, however, respondent's so-called "challenge" to the trustworthiness of the business records was not sufficient to shift the burden of proof to petitioner. In fact, it amounted to little more than procedural criticism. Thus, respondent's argument, premised upon the erroneous assumption that the burden of proof properly shifted to petitioner to prove the reliability of the blood alcohol test results, does not support the trial court's exclusion of business records.

In order to eliminate the presumption of trustworthiness which § 90.803(6) confers on the business records at issue here, the party opposing the admission must "seriously challenge" their trustworthiness. Cf. United States v. Licavoli, 604 F.2d 613 (9th Cir. 1979). That challenge must be made by a preponderance of the

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evidence. Section 90.105(1), Florida Statutes (1989). [1] To prove lack of trustworthiness, a party must object to the evidence because it is (a) irrelevant, (b) based upon inadequate sources of information, (c) self-serving, or (d) it exceeds the bounds of legitimate expert opinion. Brevard County v. Jacks, 238 So. 2d 156, 158 n.1 (Fla. 4th DCA 1970). Neither objection nor evidentiary showing was made in this case. Accordingly, the records should have been admitted.

In Southern Bakeries, Inc. v. Florida Unemployment Appeals Commission, 545 So. 2d 898, 900 (Fla. 2nd DCA 1989), the trial court's exclusion of urine test results because no witnesses had been offered to authenticate the chain of custody was described by the appellate court as "a grand misperception of the manner in which section 90.803(6) is to be applied." Finding that there was no evidence in the record to permit impeachment of the laboratory finding, the court reversed the order excluding the test results. Likewise, in Grant v. Brown, 429 So. 2d 1229, 1231 (Fla. 5th DCA 1983), the court held that blood alcohol test results were "unquestionably admissible" as part of plaintiff's hospital records under §90.803(6) where plaintiff "was unable to show any reason why the tests and results should not qualify as part of his hospital records," the remainder of which had been put into evidence by plaintiff's attorney. Similarly, in Thunderbird Drive-In Theatre,

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[1] The 1979 Sponsors' Note to §90.105(1) provides that "to the extent that [inquiries as to the admissibility of evidence] are factual, the judge acts as a trier of fact. Of necessity, he will receive evidence, both pro and con, on the issue in dispute."

Inc. v. Reed, 571 So. 2d 1341 (Fla. 4th DCA 1990), rev. denied, 577 So. 2d 1328 (Fla. 1991), the fourth district reversed an order excluding blood test results which defendant had sought to admit through a records custodian after noting its inability to discern why the court had refused to allow the records custodian to lay the necessary foundation to admit that evidence. The situation here is no different, yet in reversing itself en banc, the fourth district has turned a relatively simple matter under the evidence code into a complex and nearly incomprehensible precedent.

B. Respondent's Contention.

As the fourth district recognized in its initial panel opinion, and as Judge Warner noted in her dissent to the en banc opinion, there was absolutely no evidentiary challenge to the presumptively reliable and trustworthy evidence. Instead, respondent's counsel objected based solely because no witnesses were listed as to how the tests were administered (R. 7-8) (App. B)[2] Unfortunately, the trial court agreed.

On pages 4 through 6 of her brief, respondent attempts to cure her trial counsel's failure to provide an evidentiary challenge to the trustworthiness of the blood alcohol tests by setting out what, in her view, constituted a sufficient "showing" of unreliability to justify the trial court's exclusion of that evidence. As set forth on pages six through eleven of petitioner's initial brief on the merits, however, respondent's so-called "showing" at trial was

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[2] See petitioner's initial brief on the merits, pages 6 through 11.

comprised solely of the in limine argument filed on the first day of trial. (R. 1300-1300A)(R. 7-8)

1. "Argument" is not "evidence".

To the extent that counsel's "argument" is relied upon, respondent's approach necessarily fails since trial courts are not to consider "arguments" as "fact". Leon Shaffer Golnick Advertising, Inc. v. Cedar, 423 So. 2d 1015 (Fla. 4th DCA 1986). In reaching its decision here, however, the fourth district apparently chose to "ignore" its own precedent:

> The practice we wish to see terminated is that of attorneys making unsworn statements of fact at hearing which trial courts may consider as establishing facts. It is essential that attorneys conduct themselves as officers of the court; but their unsworn statements do not establish facts in the absence of stipulation. Trial judges cannot rely upon these unsworn statements as the basis for making factual determinations; and this court cannot so consider them on review of the record. If the advocate wishes to establish a fact, he must provide sworn testimony through witnesses other than himself or a stipulation to which his opponent agrees.

423 So. 2d at 1016-17. Accord Chrysler Corporation v. Miller, 450 So. 2d 330 (Fla. 4th DCA 1984); Westinghouse Elevator Company v. DFS Construction Company, 438 So. 2d 125 (Fla. 2nd DCA 1983).

2. Implication of "sobriety" is not a challenge to "trustworthiness".

Respondent claims that the testimony of Officer Collins and Chris Caviness undermined the trustworthiness of the blood alcohol test results which indicated that respondent was intoxicated. In respondent's view, the trial court could have found the blood alcohol tests to be unreliable based upon the failure of Collins

and Caviness to testify that respondent "appeared" to be intoxicated at the scene. While at best an afterthought, that "challenge" did not attack any of the criteria set forth in Brevard County v. Jacks (see page 2, supra) for excluding evidence as untrustworthy. At best, the testimony of Collins and Caviness, to the extent that it was inconsistent with the blood test results, would go to the weight of the evidence, not to its admissibility. [3]

3. **Identity of party requesting blood test is not relevant.**

In a continuing series of "red herring" arguments imaginatively raised to justify the fourth district's error, respondent again relies on "argument" during hearing on the motion in limine that the first blood alcohol test performed by SmithKline Laboratories was "highly questionable" because it was requested by a policeman rather than by a health care provider, and that the second blood test (performed at the hospital) was also questionable without any showing of who requested it. Once again, counsel's argument was not supported by any evidence that blood tests contained in hospital records which are requested by police officers or by unidentified persons were any less reliable or were

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[3] That is especially true here, since the test results were not necessarily inconsistent with Caviness' testimony that respondent crossed University Drive (a main thoroughfare) after 11:00 p.m. with her head down "like she was really upset or something," (R 276) stumble before reaching the median, (R 304-5), ignore Caviness' warning shout (R 310-11), and walk directly into the path of petitioner's car (R 311-312) which had already entered the intersection at a speed of at least 50 miles per hour, blown its horn, and slammed on its brakes. (R 278, 282-83, 309) Moreover, in deposition testimony which was stricken at trial (R 261), Caviness testified that respondent's actions just before the accident made it look to him "like she might have been drinking." (Supp. R. 44-45; R 258-59)

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performed differently than those requested by doctors, nurses, or other identified hospital personnel. In fact, it is difficult to understand what respondent is saying in her "last ditch" effort to justify the en banc ruling.

4. "Time" factor not preserved on appeal.

Respondent suggests on pages 5-6 of her brief that the blood test results are unreliable because the independent laboratory report indicates that the blood was collected at 12:25 p.m. on April 4, 1986 and the result was obtained at 8:51 a.m. on the same day. As the fourth district's panel opinion recognized, respondent never objected to the admissibility of that report on those grounds at trial, notwithstanding that she had attended petitioner's expert's deposition nine months earlier during which Dr. Benardzyk had opined that the 12:25 p.m. appeared to be a typographical error and should have read 12:25 a.m., which time would have been consistent both with respondent's arrival at the hospital and with the 8:25 a.m. reporting of the test results. (Supp. R. 64-66)

5. Toxicologist not required to "authenticate" tests.

Finally, respondent's contention that petitioner's expert, Dr. Benardzyk, was unable to authenticate the blood alcohol test results, although perhaps correct, is irrelevant. Dr. Benardzyk was not called as a witness to "authenticate" test results. He was retained and offered solely as a forensic toxicologist to review test results, determine whether they reflected the presence of alcohol, (Supp. R. 64), and render an opinion as to the degree of impairment from which respondent would have been suffering at the

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time of the accident. (Supp. R. 66-71) Had the trial court properly admitted the test results, Dr. Benardzyk would have been asked for an interpretation -- nothing else.[4]

C. Proffer of Evidence Not Necessary.

Respondent's contention that petitioner's failure to proffer the testimony of the records custodians is fatal to this appeal is without merit. Petitioner's attempts to call records custodians to lay the appropriate foundation and to enlarge the witness list to include chain of custody witnesses were thwarted by the trial court. Thunderbird Drive-In Theatre v. Reed, supra at 1345. Moreover, since the testimony that would have been presented by the records custodians can be gleaned from petitioner's counsel's argument at R. 11-16, a proffer was not necessary. In Re Estate of Lockhead, 443 So. 2d 283 (Fla. 4th DCA 1983).

D. Respondent's Authority Distinguished.

Respondent's reliance on the line of cases typified by Kurynka v. Tamarac Hospital Corporation, Inc., 542 So. 2d 412 (Fla. 4th DCA), rev. denied, 551 So. 2d 462 (Fla. 1989) to argue that the trial court was correct in excluding the blood alcohol test results misses the mark since no sufficient record challenge was ever made to the reliability of the evidence at issue. Kurynka's statement that "medical records, just as any other type of business records, cannot be admitted without a predicate demonstrating the

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[4] If anything, Dr. Benardzyk's testimony impliedly supported trustworthiness since he confirmed that the two tests were consistent with each other as to alcohol "burn-off" rates. (Supp. R. 65-66)

authenticity of the records," Kurynka, at 413, referred to an evidentiary situation completely distinguishable from this case. In Kurynka, plaintiff had raised numerous challenges to the substantive accuracy of the laboratory report, as well as procedural objections to its admission. In addition, the lab report in Kurynka (which indicated the presence of cocaine in plaintiff's urine) was uncorroborated by any evidence that plaintiff used cocaine. Most importantly, no records custodian was called to authenticate the evidence. Thus, not even an initial trustworthiness showing was made.

In contrast to the Kurynka scenario, respondent offered no evidence to challenge the reliability or trustworthiness of the blood alcohol test results contained in the hospital records. Instead, respondent's sole challenge was raised by argument of counsel. While in Kurynka the challenged lab test was uncorroborated by other evidence, this case involved two separate lab reports, each indicating intoxication, each independently substantiating the other, each having consistent "burn-off" rate results, and each being consistent with Officer Caviness' testimony focusing on respondent's peculiar conduct leading up to the accident reasonably attributable to intoxication. And, unlike Kurynka, petitioner was prepared to admit the evidence through the proper records custodians but was never given the chance to do so.

Specialty Linings, Inc. v. B.F. Goodrich Co., 532 So. 2d 1121, 1122 (Fla. 2nd DCA 1988), Forester v. Norman Roger Jewell & Brooks Int., Inc., 610 So. 2d 1369 (Fla. 1st DCA 1992), National Car

Rental System, Inc. v. Holland, 269 So. 2d 407 (Fla. 4th DCA 1972), cert. denied, 273 So. 2d 768 (Fla. 1973), and Riggins v. Mariner Boat Works, Inc., 545 So. 2d 430 (Fla. 2nd DCA 1989), are likewise of no help to respondent. Each case affirmed the exclusion of business records sought to be admitted without records custodians who could lay the requisite predicate that the records were made at or near the time of the incident, in the normal course of business, by or from information transmitted by a person with personal knowledge. Misapplying authorities in virtually every instance, respondent's reliance on Smith v. Mott, 100 So. 2d 173 (Fla. 1957) (quoted on pages 17-18 of respondent's brief) is also off the mark. Smith v. Mott does not support respondent's contention that admissibility of blood test results requires a foundation as to the way in which the test was conducted or its scientific reliability. First, the case predates the evidence code. Second, the case was decided at a time when blood testing and hospital records had not yet earned presumptive reliability. Plain and simple, today diagnostic statements are admissible as business records except where their trustworthiness is properly challenged. McCormick, Evidence (4th Edition) §293.

II

RESPONDENT'S "DIRTY TRICKS" PREJUDICED PETITIONER

The records custodian and the hospital records of Florida Medical Center (which included the blood alcohol tests) were listed in the pre-trial catalogues filed by both parties in March of 1988. (R. 1210-1211, 1213-1223) The records custodian for SmithKline

Laboratories was listed in petitioner's pretrial catalogue. (R. 1210-1211) In the two pre-trial conferences held on March 7, 1988 (R. 1224-1252a) and September 18, 1988 (R. 1260-1275), respondent did not specifically object to the trustworthiness of the test results, nor did she ever undertake discovery on that issue. Instead, on the opening day of trial, respondent served her motion in limine, attempting for the first time to challenge the trustworthiness of the blood tests and the appropriateness of admitting them into evidence through records custodians. (R. 4-21) After the trial court improperly granted the motion in limine under the guise of "fairness", petitioner immediately sought leave to enlarge his witness list in order to call additional witnesses from Florida Medical Center and SmithKline Laboratories to rebut respondent's alleged challenge to the trustworthiness of their blood test results. (R. 16) Respondent objected to the timeliness of that action and the trial court sustained the objection. (R. 21) As a result of those rulings, petitioner was forced to proceed with the trial and the jury never heard what would have been compelling evidence suggesting that respondent was intoxicated when she walked into the path of petitioner's car. Instead, they imposed damages on petitioner in an incredibly high amount. [5]

In Binger v. King Pest Control, 401 So. 2d 1310 (Fla. 1981) this court held that a trial court has discretion to exclude the

[5] The exclusion of a witness for failure to list the witness on the pretrial catalogue is a drastic remedy which should be invoked only under the most compelling circumstances. Conde v. Marlu Navigation Co., Ltd., 495 So. 2d 847 (Fla. 3d DCA 1986). See also, Haines v. Haines, 417 So. 2d 819 (Fla. 4th DCA 1982).

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testimony of a witness whose name has not been disclosed in accordance with a pretrial order so long as that discretion is "guided largely by a determination as to whether use of the undisclosed witness will prejudice the objecting party." 401 So. 2d at 1314. (emphasis added) "Prejudice" is defined as "the surprise in fact of the objecting party, and it is not dependent on the adverse nature of the testimony." Id. The additional factors to be considered by the trial court include: (i) the objecting party's ability to cure the prejudice, or, his independent knowledge of the existence of the witness; (ii) the calling party's possible bad faith, noncompliance with the pretrial order; and (iii) the possible disruption of the orderly and efficient trial of the case (or other cases). Id.

Applying Binger to this case, it is undisputable that the trial court's refusal to allow petitioner to enlarge his witness list was an abuse of his discretion. First, there is no record evidence that respondent would suffer "prejudice," as Binger defines that term. Respondent knew that petitioner's primary defense was comparative negligence and that the blood alcohol test results would constitute prime evidence of that defense. When on the opening day of trial respondent filed a motion in limine asserting that the blood alcohol test results could not be admitted into evidence through records custodians without additional witnesses to testify to their trustworthiness, respondent was not surprised at all that petitioner would respond to that motion by seeking to enlarge his witness list to include the necessary chain

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of custody witnesses to obtain the admission of those records into evidence. Pimental v. Alamo, 555 So. 2d 895 (Fla. 3d DCA 1990). On the contrary, respondent's "eleventh hour" motion was clearly designed as a tactic by experienced trial lawyers who knew exactly when to strike. They knew petitioner would need to enlarge his witness list and knew that this tactic would be their only chance to exclude the tests from evidence. As a practical matter, any prejudice to respondent could have been easily cured by a continuance to allow the deposition of the additional witnesses, Gray Truck Line Co. v. Robbins, 476 So. 2d 1378 (Fla. 1st DCA 1985). However, that is not what respondent's counsel wanted. There is no evidence whatsoever that petitioner's failure to list "chain of custody" witnesses was done in bad faith. On the contrary, the record shows that petitioner reasonably believed that under the business records exception he needed only to call records custodians to authenticate the blood alcohol test results in order to admit them into evidence. [6] (R. 13-15) Petitioner could hardly have foreseen that respondent's motion in limine would be filed and served on the day of trial, much less that it would be granted. Neither the antecedents nor the progeny of the ruling to exclude

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[6] That petitioner's assumption was reasonable and that the trial court's ruling and the fourth district's en banc approval of that ruling depart from the law on the business records exception is supported by the fact that the en banc opinion in this case is footnoted by Professor Charles Ehrhardt in his discussion of section 90.803(6) as being anomalous to the cases construing the business records exception. Ehrhardt, Florida Evidence, §803.6, note 7 (1993 edition).

the evidence support what occurred. At best, the ruling was an aberration.

Finally, there is no evidence in the record to suggest that the temporary adjournment of trial to allow respondent to depose the necessary "chain of custody" witnesses would have disrupted the trial. Accordingly, trial counsel's claim of prejudice based solely upon his statement that he was only prepared to try the case on the basis of records custodian's testimony (R. 20) is both disingenuous and insufficient under Binger to justify the trial court's refusal to allow petitioner to add the necessary chain of custody witnesses.

Respondent's motion in limine to exclude petitioner's key evidence on the day of trial is precisely the sort of "ambush" tactic condemned by this court in Binger. The en banc opinion has greatly exacerbated the situation by approving the trial court's endorsement of that tactic without regard to the prejudice suffered by petitioner who deserved a fair trial just as much as respondent did.

CONCLUSION

The Fourth District's opinion ignores respondent's failure to raise an adequate challenge to the trustworthiness of the blood alcohol test results which, under §90.803(6), carry a presumption of trustworthiness. In allowing the trial court to shift the burden of proving the trustworthiness of those records to petitioner without record evidence that such trustworthiness was questionable, the en banc opinion misconstrues the business records

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exception to the hearsay rule and encourages anyone objecting to the admission of damaging records to assert a last minute "no notice" objection.

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 25 day of October, 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.

HEINRICH GORDON BATCHELDER
HARGROVE & WEIHE
Attorneys for Petitioner
Broward Financial Center, #1000
500 East Broward Boulevard
Fort Lauderdale, FL 33394
Telephone: (305)527-2800

By: _____
JOHN R. HARGROVE
Fla. Bar No. 173745

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