94-4102

IN THE SUPREME COURT OF FLORIDA

DOMINO'S PIZZA, et al.

Petitioners,

vs.

RICHARD E. GIBSON,

Respondent.

CASE NO. 85,803

District Court of Appeal
1st District - No. 93-2526

WAUSAU INSURANCE COMPANIES' BRIEF AS AMICUS CURIAE

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SUMMARY OF ARGUMENT

Wausau Insurance Companies (Wausau) respectfully argues that this Honorable Court should answer the certified question in the negative and allow expert testimony converting blood alcohol content from a percentage of blood serum to a percentage of whole blood in order to demonstrate whether a claimant's accident was occasioned primarily by his own intoxication. Serum blood test results are admissible under both the Frye standard and the relevancy standard of section 90.403, Florida Statutes. Florida courts have routinely utilized serum blood test results, converted into their whole blood equivalents, to deprive defendants of their civil liberties. Michie v. State, 632 So. 2d 1106 (Fla. 2d DCA 1994). Additionally, other states have allowed blood serum test results to bar claimants from recovering workers' compensation benefits due to intoxication and to convict defendants of DUI due to intoxication.

Moreover, the First District Court of Appeal erroneously questioned the reliability of serum blood alcohol test results in Florida Tile Industries v. Dozier, 561 So. 2d 654 (Fla. 1st DCA), rev. denied, 576 So. 2d 286 (Fla. 1990). Expert scientific testimony has established the reliability of a serum blood test result and the scientific acceptance of a conversion, within a narrow range, to its corresponding whole blood level.

Finally, the legislature's amendments to section 440.09 specifically allow the use of blood serum for testing purposes under this section. While an additional step must be met before one is entitled to the statutory intoxication presumption using a serum blood

test result, nothing within section 440.09(3) disallows the use of a serum blood test result as "non-presumptive" evidence of intoxication.

Therefore, Wausau respectfully argues this Honorable Court should answer the certified question in the negative.

LEGAL ARGUMENT

I. DOES SECTION 440.09(3), FLORIDA STATUTES, PRECLUDE EXPERT TESTIMONY CONVERTING BLOOD ALCOHOL CONTENT FROM A PERCENTAGE OF BLOOD SERUM TO A PERCENTAGE OF WHOLE BLOOD?

Wausau Insurance Companies (Wausau), agrees with the concerns expressed by the First District Court of Appeal in the instant case, and respectfully argues this Honorable Court should answer the above certified question in the negative.

Section 90.702, Florida Statutes, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

The test for admissibility of novel scientific evidence has long been the Frye standard, as stated in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The admissibility of a scientific test is based on whether the scientific test has "gained general acceptance in the particular field in which it belongs." Id. at 1015. The First District Court of Appeal questioned the Frye standard in favor of the relevancy approach as outlined in section 90.403, Florida Statutes, but the First District did not decide the issue.[1] Brown v. State, 426 So. 2d 76, 85-89 (Fla. 1st DCA 1983). Under either test, the admissibility

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[1]Section 90.403 provides, in pertinent part:
Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

of a serum blood alcohol test result, and the conversion to its whole blood equivalent, has been accepted by Florida courts.

In Michie v. State, 632 So. 2d 1106 (Fla. 2d DCA 1994), the defendant was found guilty of two counts of DUI and two counts of driving with a suspended license following an automobile accident. The defendant was taken to Tampa General Hospital, where blood was taken at 3:10 a.m. for medical purposes, and again at 6:00 a.m. at the request of law enforcement personnel. Id. at 1107. The medical sample showed the defendant with a 0.196 blood alcohol level and the legal sample showed the defendant with a 0.110 blood alcohol level. Id. The court held that the state was not entitled to the section 316.1934(2)(c), Florida Statutes, presumption of intoxication because the legal test did not sufficiently comply with HRS regulations as required by statute. Id. at 1107-08. The court affirmed the convictions, however, because the 0.196 medical blood test result, based on a blood serum test, was equivalent to a whole blood result between 0.145 and 0.178, both well above the legal intoxication limit. The court stated:

> [the medical serum blood] sample was tested by a medical lab technician licensed to conduct and interpret "serum blood tests," which, according to the testimony of experts in the field of toxicology, accurately measure the concentration of alcohol in a person's blood serum. As explained by the experts, although "[s]erum alcohol concentration is not the same as a blood alcohol concentration and serums are typically in the range of about 20 percent higher than a corresponding whole blood measurement," a serum measurement of .196 still represents a blood alcohol level well above .10, falling somewhere between .145 and .178.

Id. at 1108. The court held that while the medical blood serum test result did not give rise to the statutory presumption, the test result

was evidence of intoxication, which was sufficient evidence for a jury to find the defendant guilty of DUI. Id. at 1108.

In Gavin v. Promo Brands, U.S.A., Inc., 578 So. 2d 518 (Fla. 4th DCA 1991), the court held that a blood serum test result was sufficiently authenticated to be "prima facie admissible." Id. at 519. In Gavin, the plaintiff slipped and fell as she left a liquor store but while still on the premises. The plaintiff was taken to Plantation General Hospital, where, as part of a routine surgical workup, hospital personnel performed a serum blood alcohol test. The defendant sought to admit the result of this test into evidence. The trial court admitted the evidence, and the appellate court affirmed, holding that the testimony of a laboratory technician demonstrated the hospital's routine emergency procedures in performing such serum blood test, and thus, the trial court did not err in allowing the results into evidence. Id.

In Bush v. State, 543 So. 2d 283 (Fla. 2d DCA 1989), the court reversed a trial court's exclusion of testimony that the victim's blood alcohol level was above the legal limit, utilizing a serum blood test and conversion to its whole blood equivalent. In Bush, the defendant and the victim were both driving their automobiles recklessly, trying to drive each other off the road. The victim ran a red light and hit a third car, killing himself and a passenger in the third car. Id. at 284. The defendant was charged with two counts of second degree murder. At trial, the defendant sought to introduce the testimony of a medical technologist. The trial court excluded this evidence because there was a break in the chain of custody. Id. The defendant

proffered the testimony of the medical technologist, who stated that the victim's serum blood result, converted into whole blood, showed the victim was legally intoxicated. Id. The court held that this evidence was crucial to the defense and the error in not admitting the testimony was not harmless error. Id. at 284-85. The court specifically did not hold that the serum blood test results were per se inadmissible.

Additionally, other states have accepted serum blood test results to bar claimants from recovering workers' compensation benefits due to intoxication and to convict defendants of DUI due to intoxication. In Cantrell v. W.& C. Contracting Co., 817 P.2d 1251 (N.M. App. 1991), the court affirmed a workers' compensation judge's decision denying benefits to a claimant because the work related injury resulted from the claimant's own intoxication. The claimant was a truck driver who was involved in an automobile accident. The claimant was taken to the hospital where a blood alcohol test was performed. The test utilized the claimant's blood serum and showed a level of 0.42 percent. Expert testimony indicated that this would be equivalent to a blood alcohol concentration of approximately 0.35 percent. The court held that this serum blood alcohol level and its equivalent blood alcohol concentration, along with the claimant's acknowledgement that he was an alcoholic, was substantial evidence to support the trial judge's determination that the claimant was intoxicated at the time of the accident and that the claimant's intoxication was the proximate cause of his injuries. Id. at 1257.

In Commonwealth v. Sargent, 512 N.E.2d 285 (Mass. App. Ct. 1987), the court affirmed the defendant's conviction for driving while

under the influence of intoxication, where the defendant had a serum blood alcohol reading of 0.149 percent and a blood alcohol conversion level between 0.12 and 0.13 percent. The Massachusetts statute in question provided that "if the percentage by weight of alcohol in a defendant's blood is 0.10 percent or more, there is a presumption that such defendant was under the influence of intoxicating liquor." Id. at 286, n.1. In Sargent, the court utilized a blood alcohol analysis of the defendant's blood serum. Expert testimony was elicited in order to convert the blood serum level to the appropriate whole blood level. The court specifically held that the hearsay evidence in question was admissible because it was reliable as a hospital record for the purpose of assisting medical personnel in diagnosis and treatment. See Commonwealth v. Russo, 567 N.E.2d 1255 (Mass. App. Ct. 1991) (Appellate court affirmed defendant's driving while intoxicated conviction where a serum blood analysis was converted to a whole blood amount of 0.198); see also Commonwealth v. Dagnon, 605 A.2d 360 (Pa. Super. 1992) (Results of alcohol tests need not be conducted on whole blood in order to be admissible; tests may be conducted on blood serum); Shuman v. State, 489 N.E.2d 126 (Ind. App. 3 Dist. 1986) (Evidence of result of serum alcohol content test was properly admissible with evidence of conversion procedure to blood alcohol content in prosecution for driving while intoxicated resulting in death).

Wausau respectfully argues that this Honorable Court should likewise accept serum blood test results and the conversion of the test results to whole blood equivalents to deny workers' compensation to Florida claimants whose blood alcohol level, when converted from blood

serum and extrapolated back to the time of the accident, clearly show the claimant's blood alcohol level was greater than 0.10 percent at the time of the accident.

The First District Court of Appeal erroneously questioned the reliability of serum blood alcohol test results in Florida Tile Industries v. Dozier, 561 So. 2d 654 (Fla. 1st DCA), rev. denied, 576 So. 2d 286 (Fla. 1990). In Dozier, the court, based on the testimony before it, found that because of the absence of red blood cells in serum, blood serum results can produce a false high reading. In addition, it found that a false high reading can occur due to the interaction of an intravenous resuscitation fluid and an enzyme in blood. Id. at 656. Neither of these findings is supported by the case law or expert testimony. See Michie.

In a case currently pending before the First District Court of Appeal, styled McCullough v. Mechanical Insulation and Wausau Insurance Companies, Case Number 94-03972, Wausau introduced the testimony of F. Thomas Carroll, the chief forensic toxicologist for the Palm Beach County Sheriff's Office and the Palm Beach County Medical Examiner's Office. (A.Exh B-94). Mr. Carroll was accepted by the court as an expert in the fields of toxicology and forensic pathology. (A.Exh A-11). Mr. Carroll testified that while serum blood has an absence of red blood cells, "blood is blood" and the alcohol content is not changed in the process of separating blood serum from whole blood. (A.Exh B-108,109). Mr. Carroll also testified that the primary difference between whole blood and serum blood is their water content. Within a narrow range, a scientific and reliable conversion from serum

blood to whole blood can be performed, and it is generally accepted in the scientific community. (A.Exh B-109,110). Moreover, Mr. Carroll specifically disputed the notion that the intravenous resuscitation fluid, lactated ringer solution, interacts with blood enzymes to create a false high reading. In fact, according to Mr. Carroll, the intravenous resuscitation fluid may result in a false low reading due to dilution of the blood. (A.Exh B-129).

As can be discerned from the testimony of Mr. Carroll, and as the Second District acknowledged in Michie, a serum blood test result is accurate, and it can be converted within a narrow, scientifically accepted range, to a whole blood level. Therefore, Wausau respectfully argues that this Honorable Court should answer the certified question in the negative and allow expert testimony converting blood alcohol content from a percentage of blood serum to a percentage of whole blood in order to demonstrate whether a claimant's accident was occasioned primarily by his own intoxication.

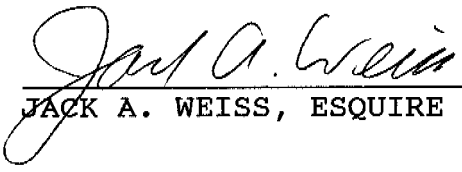
Finally, the legislature's amendments to section 440.09, effective January 1, 1994, specifically allow the use of blood serum for testing purposes under this section. § 440.09(7)(b), Fla. Stat. (1994). While the use of blood serum test results does not give rise to the statutory intoxication presumption unless the "blood alcohol level is proved to be medically and scientifically equivalent to or greater than the comparable blood alcohol level" as a whole blood test, the legislature's clear intent was to allow the use of serum blood test results as "non-presumptive" evidence that a claimant's injury was occasioned primarily by his own intoxication. § 440.09(3), Fla. Stat.

Therefore, Wausau respectfully asserts that if this Honorable Court answers the certified question in the affirmative, thereby precluding expert testimony converting serum blood results to whole blood results, then this Honorable Court is acknowledging that the Dozier court's concerns with the reliability of serum blood test results was correct, and that the legislature and the Michie court (along with all the other courts that routinely accept blood serum alcohol test results as evidence of intoxication), are wrong. Wausau respectfully argues that the Dozier court's concerns about the reliability of serum blood alcohol test results were misplaced, and that nothing within section 440.09(3) prohibits a court from utilizing a serum blood test result, even without applying the statutory intoxication presumption, to bar compensability because a claimant's injury was occasioned primarily by his own intoxication.

CONCLUSION

Wausau respectfully argues this Honorable Court should answer the certified question in the negative and allow expert testimony converting blood alcohol content from a percentage of blood serum to a percentage of whole blood in order to demonstrate whether a claimant's accident was occasioned primarily by his own intoxication.

Respectfully submitted,



JACK A. WEISS, ESQUIRE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed/hand-delivered this 3rd day of July, 1995 to: MILLARD L. FRETLAND, ESQUIRE, Clark, Partington, Hart, et al., Attorneys for Petitioners, P.O. Box 13010, Pensacola, FL 32591-3010; and LOUIS K. ROSENBLOUM, ESQUIRE, Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, Attorneys for Respondent, P.O. Box 12308, Pensacola, FL 32581; and THOMAS F. CONDON, ESQUIRE, 130 East Government Street, Pensacola, FL 32501.

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