SUPREME COURT OF FLORIDA

BETH LINN and ANTHONY LINN,

Appellants,

v.

SC Case No. SC05-134
DCA Case No. 1D03-4152

BASIL D. FOSSUM, M.D.,

Appellee.

APPELLANTS' INITIAL BRIEF ON THE MERITS

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INTRODUCTION

This is a medical malpractice case involving the failure to diagnose a urine leak. The leak began when a doctor cut Beth Linn's ureter during the course of a routine exploratory surgery in 1998. The infection resulting from the extended presence of urine in Beth's abdomen caused enormous pain and other complications. Ms. Linn and her husband initiated this litigation on March 1, 2000, more than five years ago. They sued two defendants, the surgeon who cut the ureter and Dr. Basil Fossum, with whom the surgeon consulted to diagnose the cause of Beth's pain following the procedure. After three years, the Linns were finally able to get to trial in March, 2003.

At trial, plaintiff presented expert testimony that Dr. Fossum failed to comply with the standard of care. However, Dr. Fossum failed to offer admissible expert testimony to rebut this prima facie case. Not a single expert testified that, based upon his or her education, training and experience, Dr. Fossum met the standard of care. Dr. Fossum's ***only*** expert -- a doctor from Colorado -- testified that Dr. Fossum was insufficiently proactive in attempting to diagnose the problem. Nevertheless, the circuit court permitted this Colorado doctor to testify, over plaintiffs' objection, that Dr. Fossum met the standard of care based upon a "curbside consult" with several unidentified colleagues. The jury entered a verdict in favor of Dr. Fossum. The Linns appealed and the First District Court of Appeal affirmed over a dissent by the Honorable Charles J. Kahn.

This Court accepted jurisdiction based upon a conflict between the First District's decision and the decision of the Fourth District in Schwarz v. State, 695 So.2d 452 (Fla. 4th DCA 1997). In Schwarz, the court held that, notwithstanding the provisions of Section 90.704, Fla. Stat., an expert cannot "become a conduit for the opinion of another expert who is not subject to cross-examination." Schwarz, 695 So.2d at 455. Of course, that is precisely what happened in this case.

The First District's decision raises important legal issues and has the potential to change drastically the way trials are conducted in this State. In particular, the decision paves the way for wholesale introduction of hearsay evidence under the guise of "data reasonably relied upon" by experts. The case also arises during a time of intense legislative and public scrutiny of medical malpractice cases.

Notwithstanding the foregoing, imposition of the correct remedy is as important as resolution of the underlying evidentiary issue. As discussed in Part II, Dr. Fossum made a tactical decision to present only the Colorado expert's testimony. Because that testimony was inadmissible, Dr. Fossum failed to offer any evidence to rebut the prima facie case made by the Linns. Under settled precedent, the Linns are entitled to reversal with instructions that a judgment be entered in their favor on the issue of liability, and a new trial conducted solely on the issue of damages.

STATEMENT OF THE CASE AND FACTS

In August, 1998, Beth Linn sought medical treatment from Dr. Dennis Lewis, a general surgeon, for pain in her abdomen. (R. III/512/513).[1] On October 16, 1998, Dr. Lewis performed a diagnostic laparoscopy, e.g., a surgical operation in which a lighted scope is inserted into the pelvis in order to explore for abnormalities in the abdomen. (R. III/574). During the course of the laparoscopy, Dr. Lewis cut Ms. Linn's ureter, causing urine to begin leaking into Ms. Linn's abdomen. (R. III/901/942). The surgeon was unaware of the incident at the time of the procedure.

On October 23, 1998, Ms. Linn returned to Dr. Lewis' office to have her sutures removed. (R. III/512/566). During the visit, she complained of pain and nausea. (R. III/512/566). On the way home, Ms. Linn collapsed onto the floorboard of the vehicle. (R. I/1/2). The Linns proceeded immediately to the emergency room at Twin Cities Hospital in Niceville, Florida. (R. I/1/2). Ms. Linn was admitted to the hospital and Dr. Lewis ordered several radiological tests. (R. III/576). The radiological tests included a renal ultrasound and a nuclear medicine renal scan. (R. III/586 & 587). These tests revealed "extensive fluid present above the bladder." (R. III/587).

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[1] Citations to the circuit court record will refer to the volume, first page of the document and, as applicable, the pertinent page of the document. E.g., "(R. II/13/26)" refers to page 26 of the document that begins at page 13 of Volume II. The Linns also filed a 227-page appendix in the District Court. Citations to that appendix will be in the form "(A. ____)."

Based upon this fluid collection, the radiologist specifically raised the possibility of a "cut ureter." (R. III/586 & 587).

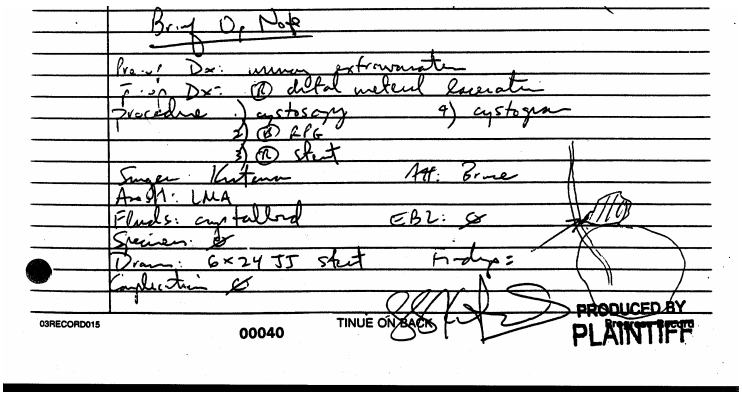
Dr. Lewis requested a consultation from Dr. Fossum, a urologist. (R. III/576/578). Dr. Fossum visited Ms. Linn for the first time on October 25, 1998. (R. III/588). Dr. Fossum performed a "bilateral retrograde pyelogram." (R. III/588). Though the leak certainly existed, Dr. Fossum failed to diagnose it. (R. III/588). Both Dr. Lewis and Dr. Fossum regarded the retrograde pyelogram as conclusive and performed no further tests to resolve the inconsistency between the initial radiological studies and Dr. Fossum's negative result.

Following the procedures on October 25, 1998, Ms. Linn spent two more days at Twin Cities Hospital. During that time, neither Dr. Lewis nor Dr. Fossum performed any significant examinations or tests, or made any other efforts to ascertain the nature of her injuries. (R. I/1/3).[2] The Linns became increasingly frustrated and finally, on October 27, 1998, requested that Ms. Linn be permitted to undergo further tests on an outpatient basis. (R. IV/740/745). Dr. Lewis did not advise against this request and discharged Ms. Linn. (R. IV/740/745).

The following day the Linns drove approximately six hours to Emory University Hospital in Atlanta, Georgia. (R. IV/591/596). There, the emergency room physician ordered a CT scan. (R. IV/591/605). This test showed a large fluid

[2] At one point, Dr. Lewis requested a consultation from an internal medicine specialist and suggested that Ms. Linn's problems were due to anorexia or bulimia. (R. III/589/590).

collection in the low abdomen/pelvis that was highly suggestive of a right ureter leak/injury. (R. IV/591/614). On the evening of October 29, 1998, Dr. Bruce performed a bilateral retrograde pyelogram – the same test performed by Dr. Fossum. (R. IV/591/614). Unlike Dr. Fossum, Dr. Bruce was able to diagnose the injury to Ms. Linn's ureter. (R. IV/591/614). Indeed, in his chart Dr. Bruce drew a picture of the image he saw, which plainly reveals the leak in the lower right-hand corner:



(R. IV/591/630).[3] Dr. Bruce inserted a stent into Ms. Linn's ureter.[4] (R. IV/591/614). Plans were made to remove the stent within four to six weeks, followed by an IVP two to four weeks later. (R. IV/591/594).

Ms. Linn's symptoms worsened on November 3, 2003, and she went to the emergency room at Gulf Coast Medical Center in Panama City, Florida. (R. V/901/925). She was subsequently readmitted to the hospital and diagnosed with significant infection of the urine in her abdomen. (R. V/901/954). She

[3] Dr. Bruce testified at trial on behalf of plaintiffs.

[4] A stent is a small piece of rubber inserted inside the ureter that acts as an internal bandage covering the damaged area.

underwent treatment for several more months. (R. IX/1246/1942-1963).

Pre-Trial Proceedings

The Linns filed suit against Drs. Lewis and Fossum on March 1, 2000. (R. I/1). They alleged that Dr. Fossum breached the standard of care and was negligent in several respects. (R. I/1/7). The Linns retained two experts to testify on their behalf at trial. (R. I/39/Ex. B).

Dr. Fossum designated a single expert, Dr. Dana Weaver-Osterholtz, to testify on his behalf at trial. Dr. Fossum's expert disclosure stated that she would testify that Dr. Fossum "performed all the tests that are normally performed by a urologist under the circumstances." (R. III/397/411).

Plaintiffs deposed Dr. Weaver-Osterholtz on February 7, 2002. (R. III/397/414). Dr. Weaver-Osterholtz testified that she reviewed Ms. Linn's medical records for approximately ten hours. (R. III/397/420-21). Based upon that review, Dr. Weaver-Osterholtz testified that the leak was "apparent" and that she would not have adopted the "watch and wait" approach of Dr. Fossum. (R. III/397/417-419, 428-430). Her standard of care would be to insert a stent to drain the fluid based upon the initial radiological tests. (R. III/397/431, 438).

Nevertheless, she proposed to testify at trial that Dr. Fossum did not deviate from the standard of care. (R. III/397/436). This proposed testimony was based solely upon a "curbside consult" with four unnamed colleagues. (R. III/397/425-26, 437). These colleagues were given a short, two-

minute hypothetical of Ms. Linn's case. (R. III/397/435). None of the doctors reviewed Ms. Linn's medical records. (R. III/397/435). No memorialization of this "mini-poll" existed. (R. III/397/425-26). The unnamed colleagues allegedly opined that Dr. Fossum complied with the standard of care. (R. III/397/425-26). Dr. Weaver-Osterholtz candidly admitted in deposition testimony that she personally disagreed with this conclusion. (R. III/397/430, 439). However, based exclusively on this "mini-poll," she stated that she proposed to testify that Dr. Fossum's approach is "normal."

Plaintiffs moved in limine to exclude the testimony of Dr. Weaver-Osterholtz. (R. III/397). The motion asserted that her proposed testimony was a conduit for inadmissible hearsay evidence. (R. III/397/397-403). The trial court denied the motion on the morning of the first day of trial. (A. 26). Had the court granted the motion, Dr. Fossum would not have had an expert and the trial court would have had no choice but to direct a verdict in favor of plaintiffs.

Trial Testimony of Dr. Carlos Santa-Cruz

At trial, the Linns introduced the expert testimony of Dr. Carlos Santa-Cruz. (A. 73). Dr. Santa-Cruz is a board certified urologist. (A. 75). He graduated from the University of Miami Medical School and served his residency at Jackson Memorial Hospital. (A. 74). He is currently in private practice. (A. 75). He specializes in adult urology and spends approximately two days a week performing surgery. (A. 75-76).

The trial court qualified Dr. Santa-Cruz as an expert in the field of urology and urological surgery. (A. 77).

Dr. Santa-Cruz testified that Dr. Fossum deviated from the standard of care. (A. 77-78). Specifically, Dr. Santa-Cruz testified that Dr. Fossum committed three crucial omissions. First, Dr. Fossum failed to obtain a film of the retrograde pyelogram. (A. 78). Dr. Santa-Cruz explained that a retrograde pyelogram is performed by injecting dye into the ureter. The doctor views the procedure "live" on a television monitor. Most equipment, including the machine used in this case, permits the doctor to "freeze" the image on the screen and make a hard-copy x-ray. (A. 83, 86-87). Dr. Santa-Cruz explained that the hard copy often provides a clearer picture than the more "grainy" fluoroscopy. (A. 87-89). Dr. Santa-Cruz testified that, had Dr. Fossum obtained a hard copy, he would have diagnosed the leak. (A. 90).

Second, Dr. Santa-Cruz testified that Dr. Fossum performed the procedure improperly. Specifically, Dr. Fossum's injection of five CCs of iodine contrast was inadequate to detect the urine leak. (A. 80). Dr. Santa-Cruz explained that 5 CCs is the appropriate amount for other types of pathologies. (A. 80). However, when a leak is suspected, the proper procedure is to inject additional dye in order to create "pressure" and thus increase the ability to spot the leak. (A. 80).

Finally, the third omission was Dr. Fossum's failure to order additional tests after obtaining inconsistent test results -- a negative retrograde pyelogram and a positive nuclear renal

scan. (A. 78, 79). On this issue, Dr. Santa-Cruz made clear that Dr. Fossum's exclusive reliance on the negative retrograde pyelogram deviated from the standard of care:

> Okay. I will tell you what would be, in my opinion, the correct thing to do. You have the two prior positive tests. We're talking about the ultrasound and the renal scan that showed a leakage of urine. . . . You have those two positive tests. They're clearly positive tests. You have a problem there. And then you do a retrograde pyelogram and the pyelogram is negative. It doesn't jive. It doesn't go with what you would expect. Therefore, when that was done, you would get some other kind of test in order to plan your next step. And that would be if there is a suspected allergy to contrast and iodine, you would get a CT scan without contrast. ... And if the person is not truly allergic or if the allergy is minor in your mind, then you can pretreat with the Cortisone. That would have been the next – that would be the next step.

(A. 94).

Dr. Santa-Cruz further testified that Ms. Linn suffered a "spike" of severe symptoms following diagnosis of the leak. (A. 95). By the time Ms. Linn arrived at Gulf Coast Medical Center, the urine in her abdomen had become infected. (R. IV/668). Dr. Santa-Cruz testified that the spike was caused by the urine leak and that prompt diagnosis of the leak would have eased the severity of the symptoms. (A. 95). In particular, Dr. Santa-Cruz explained:

> The bigger the collection, the more irritation you're going to get from the urine, the worse the symptoms are going to be and for a more prolonged period of time.

> If you catch something sooner rather than later, it's less symptoms, less side effects from the findings.

(A. 96).

Trial Testimony of Dr. Dana Weaver-Osterholtz

As previously noted, the trial court denied the Linns' motion in limine and permitted Dr. Weaver-Osterholtz to testify at trial. (A. 128). Dr. Weaver-Osterholtz testified as Dr. Fossum's ***only*** expert witness. Dr. Weaver-Osterholtz again admitted that, based upon her education, training and experience, she would have handled the case different than Dr. Fossum. (A. 181). Dr. Weaver-Osterholtz testified that she would have immediately stented the leak and drained the urinary system. (A. 180). Specifically, Dr. Weaver-Osterholtz testified:

> I would have looked at the renal scan and said, "I think she probably has a ureteral leak." I would have then done a retrograde pyelogram. If it was negative, which it was in Dr. Fossum's case, I personally would have put up two stints. . . .

(A. 180). That is exactly what Dr. Santa-Cruz testified should have been done.

Nevertheless, Dr. Weaver-Osterholtz testified that Dr. Fossum did not deviate from the standard of care. She did so based on the "curbside consult" discussed above. (A. 136). She explained that the consultation consisted of a two-minute verbal summary of the case with no opportunity for her colleagues to review medical records or deposition transcripts of other expert

testimony. (A. 175). She testified that during this consult, which was never put in writing, her colleagues opined that they would have done the same thing Dr. Fossum did. (A. 137). The Linns renewed their objections to this hearsay testimony at trial, but the trial court overruled the objection. (A. 136).

Plaintiffs' Post Trial Motion

The jury rendered a verdict against plaintiffs and found that neither defendant was negligent. (R. XII/2300). The Linns filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial based upon the admission of Dr. Weaver-Osterholtz's testimony. (R. XII/2302-2310). The Linns asked the court to strike Dr. Weaver-Osterholtz's testimony and, in the absence of any expert testimony that Dr. Fossum complied with the standard of care, enter judgment in favor of the plaintiffs and against Dr. Fossum on the issue of liability. (R. XII/2302/2304). Alternatively, plaintiffs requested a new trial against Dr. Fossum. (R. XII/2302/2304). The trial court denied both motions. (R. XII/2419). The appeal to the First District followed.

SUMMARY OF ARGUMENT

Dr. Fossum did not introduce any admissible expert testimony that he complied with the standard of care. His only expert, Dr. Weaver-Osterholtz, admitted that, based upon her education, training and experience, she would ***not*** have employed Dr. Fossum's "wait and see" approach. Rather, she agreed with Dr. Santa-Cruz that the proper approach would be to immediately stent the ureter to stop the urine leak. Dr. Santa-Cruz

testified that immediately stenting the leak more likely than not would have avoided the severe "spike" of symptoms suffered by Ms. Linn.

In affirming, the First District permitted a defense expert to present "standard of care" testimony based upon hearsay evidence of a "curbside consult" with several unidentified colleagues. The First District's decision conflicts with the decision of the Fourth District Court of Appeal in Schwarz v. State, 695 So.2d 452 (Fla. 4th DCA 1997). In Schwarz, the court held under materially identical circumstances that "such testimony improperly permits one expert to become a conduit for the opinion of another expert who is not subject to cross-examination." Id. at 455.

The trial court erred in denying plaintiffs' motion in limine and permitting Dr. Weaver-Osterholtz to testify. Florida law is clear that an expert may not serve as a conduit for hearsay testimony. That is exactly what the trial court permitted. The Linns were not permitted to cross-examine the unnamed doctors as to the extent of their review of the case, the basis for their alleged opinions, or as to their education, training and experience in such matters. The circuit court's admission of this hearsay is plain error and requires reversal.

The appropriate remedy on remand is the entry of judgment in favor of the Linns on the issue of liability. Where, as here, the plaintiff establishes a prima facie case of liability, Florida law requires the defendant in a professional malpractice case to present expert testimony of compliance with the standard

of care. Dr. Fossum failed to introduce any such testimony. Dr. Fossum chose to rely on a single expert and assumed the risk that, if Dr. Weaver-Osterholtz's testimony was declared inadmissible, he would lose the case. This Court should remand for the entry of judgment in favor of the Linns on the issue of liability, and a new trial solely on the issue of damages.

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING THE HEARSAY TESTIMONY OF DR. WEAVER-OSTERHOLTZ AS THE SOLE BASIS FOR HER OPINION THAT DR. FOSSUM COMPLIED WITH THE STANDARD OF CARE.

The trial court committed plain error in admitting the testimony of Dr. Weaver-Osterholtz. Her testimony was nothing more than a conduit for inadmissible hearsay evidence. The trial court should have granted plaintiffs' motion in limine to exclude this testimony. The trial court compounded its error by overruling plaintiffs' renewed objections to the testimony at trial. The result was a fundamentally unfair trial.

Standard of Review

The facts or data upon which an expert may rely in rendering an opinion are prescribed in Section 90.704, Fla. Stat. The Linns assert that the trial court improperly applied Section 90.704 and improperly admitted the testimony of Dr. Weaver-Osterholtz. The application of Section 90.704 and the decision to admit inadmissible hearsay testimony is a matter of law. As such, the standard of review is de novo. Gilliam v. Smart, 809 So.2d 905 (Fla. 1st DCA 2002) (appellate court

reviews de novo a trial court's erroneous interpretation and application of state law); Berry v. CSX Transp., Inc., 709 So. 2d 552 (Fla. 1st DCA 1998) (appellate court reviewed trial court's ruling on the admissibility of expert opinion testimony as a matter of law).

Regardless of the standard, the trial court's decision to admit the hearsay testimony of Dr. Weaver-Osterholtz, whose opinion was based solely on an alleged conversation with four unnamed colleagues, was clear error and the First District's decision should be reversed.

Standard for Expert Testimony

This Court has identified four requirements for admission of expert testimony: (1) the opinion must help the trier of fact; (2) the witness must be qualified as an expert; (3) the opinion must be capable of being applied to evidence at trial; and (4) the probative value of the opinion must not be substantially outweighed by the danger of unfair prejudice. Glendening v. State, 536 So.2d 212, 220 (Fla. 1988), citing Sections 90.702, 90.703, 90.403, Fla. Stat.

A corollary principle is that an expert must testify based upon his or her education, training and experience. See Section 90.702, Fla. Stat. (witness qualified by knowledge, skill, experience, training or education may testify in the form of an opinion). This standard has been a bedrock principle of civil trials in this country for over one hundred years. See, e.g. Manufacturers' Acc. Indem. Co. v. Dorgan, 58 F. 945, 22 L.R.A. 620 (6th Cir. 1893) (expert opinion may not be based upon the

opinion of others). Applied in the context of a medical malpractice case, the principle requires a defense expert to testify that a doctor complied with the standard of care based upon the expert's education, training and experience. That did not occur in this case.

Here, Dr. Weaver-Osterholtz reviewed the medical records for ten hours. (R. III/397/418-419). Based upon that review, she concluded that she would have handled the case much differently than Dr. Fossum. (A. 180). She would not have relied on the negative pyelogram as conclusive because this test often does not identify a "slow leak." (A. 180). Her standard of care would be to stent and drain the fluid based upon the positive radiological test. (A. 180).

Nevertheless, the trial court permitted Dr. Weaver-Osterholtz to testify that Dr. Fossum did not violate the standard of care based solely upon the conclusions of four unnamed colleagues. (A. 176). These colleagues allegedly told Dr. Weaver-Osterholtz that they would have done exactly what Dr. Fossum did. (A. 176). However, the Linns had no opportunity to cross-examine them. None of the physicians reviewed the medical records. (A. 175). Their knowledge of the case consisted entirely of a two-minute summary by Dr. Weaver-Osterholtz. (A. 174). The unfairness is palpable. There is no legitimate argument to support the admission of this testimony.

Section 90.704, Fla. Stat.

The District Court based its affirmance largely on Section 90.704, Fla. Stat., which provides:

> The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.

§ 90.704, Fla. Stat.

"The purpose behind the adoption of this statute as part of the Florida Evidence Code was to allow experts to use information when rendering an opinion in court, just as they would rely on opinions of, for example, nurses, technicians, other physicians, and hospital records, when they are rendering opinions out of court." Schwarz v. State, 695 So.2d 452, 454 (Fla. 4th DCA 1997), citing Law Revision Council Note (1976), 6C Fla. Stat. Ann. § 90.704, at 216 (1979); see also Erwin v. Todd, 699 So.2d 275, 277 (Fla. 5th DCA 1997) (Section 90.704 is frequently used to permit doctors to base their medical opinions upon tests and laboratory reports that are not admitted into evidence).

Both the circuit court and the First District incorrectly seized on Section 90.704 to justify the admission of Dr. Weaver-Osterholtz's testimony. In doing so, they ignored a well-established body of law addressing the interaction between the statute and the hearsay rule. See Section 90.801, Fla. Stat. These decisions recognize that the statute does not repeal the hearsay rule in the context of experts. Rather, the rule in this State is that:

> [a]lthough an expert witness is entitled to render an opinion premised on inadmissible evidence when the facts and data are the type reasonably relied on by experts on the subject, the witness may not serve merely as a conduit for the presentation of inadmissible evidence.

Maklakiewicz v. Berton, 652 So.2d 1208, 1209 (Fla. 3d DCA 1995), quoting Smithson v. V.M.S. Realty, Inc., 536 So.2d 260, 261-62 (Fla. 3d DCA 1988). Accord Kelly v. State Farm Mut. Automobile Ins. Co., 720 So.2d 1145, 1146 (Fla. 5th DCA 1998); Schwarz v. State, 695 So.2d 452, 455 (Fla. 4th DCA 1997); Riggins v. Mariner Boat Works, Inc., 545 So.2d 430, 431-32 (Fla. 2d DCA 1989).

Based upon this rule, Florida courts have repeatedly deemed inadmissible attempts by expert doctors to relay conversations with other doctors. See Ross Dress For Less, Inc. v. Radcliff, 751 So.2d 126 (Fla. 2d DCA 2000) (trial court erred in permitting expert doctor to testify regarding hearsay statements from other doctors which he relied upon in forming his opinion); Gerber v. Iyengar, 725 So.2d 1181 (Fla. 3d DCA 1998) (circuit court erred in permitting expert to testify about conversation with author of textbook that purportedly supported his opinions); Bunyak v. Clyde J. Yancey and Sons Dairy, Inc., 438 So.2d 891 (Fla. 2d DCA 1983) (trial court erred in permitting expert hydrologist to testify regarding test results obtained by a geologist).

Florida courts have articulated many policy reasons for excluding testimony by experts regarding conversations with other experts. First, such evidence violates the rule that the

experts' opinion must be capable of being applied to evidence at trial. See Glendening, 536 So.2d at 220; Riggins, 545 So.2d at 432 (testimony by chemical toxicologist that plaintiff was intoxicated based upon inadmissible laboratory report "only helped the jury to understand the inadmissible document rather than the evidence at trial"). Second, permitting an expert to repeat hearsay evidence unfairly prejudices the opposing party and misleads the jury by "giving the inadmissible evidence the expert's imprimatur of approval and reliability." Maklakiewicz, 652 So.2d at 1209. Finally, such evidence also unfairly permits the introduction of evidence not subject to the rigors of cross-examination. Gerber, 725 So.2d at 1185. Accord Kim v. Nazarian, 576 N.E.2d 427, 434 (Ill. App. 1991) ("The fact that a colleague agreed with the testifying expert's opinion is of dubious value in explaining the basis of an opinion. The party who is unable to cross-examine the corroborative opinion of the expert's colleague, on the other hand, will likely be prejudiced.").

Thus, there is clearly a point at which an expert's testimony crosses the line from describing information reasonably relied upon by others in the field, and instead becomes an impermissible conduit for otherwise unreliable and inadmissible hearsay. The testimony by Dr. Weaver-Osterholtz in this case clearly crossed that line and should have been excluded.

The *Schwarz* Decision

As Judge Kahn recognized in his dissenting opinion, and this Court recognized in accepting jurisdiction, the First District's decision directly conflicts with the decision of the Fourth District in Schwarz v. State, 695 So.2d 452 (Fla. 4th DCA 1997).[5] Schwarz was a criminal case in which the defendant was charged with second-degree murder following the death of her stepson in a swimming pool. The defendant asserted that the boy's death was the result of suicide or an accident. The prosecution offered a forensic pathologist to present expert testimony that the cause of death was homicide. Over the defendant's objection, the trial court permitted the expert to testify that he regularly consulted with other pathologists and had consulted with five pathologists in forming his opinion.

The Fourth District held that the trial court erred in permitting the expert to testify that he had consulted with other pathologists. Id. at 455. The court relied on the established rule that experts cannot, on direct examination, bolster their testimony by testifying that a treatise agrees with their opinion. Id., citing Tallahassee Memorial Regional Medical Center v. Mitchell, 407 So.2d 601 (Fla. 1st DCA 1981). The court also relied on decisions from other jurisdictions holding that experts cannot bolster or corroborate their

[5] In his dissenting opinion, Judge Kahn noted that, in addition to the conflict with Schwarz, the majority's decision is also in direct conflict with Gerber, Maklakiewicz, and Riggins. (See Slip. Op., p. 24).

opinions with the opinions of other experts who do not testify. Schwarz, 695 So.2d at 455 (collecting cases).

The court recognized the existence of Section 90.704, Fla. Stat. However, the court distinguished the typical situation in which a doctor relies on tests performed by another doctor of a different specialty, e.g., a psychiatrist relying on the results of a C.A.T. scan in diagnosing organic brain syndrome. Id. at 455. The court held that "[t]he present case, however, differs [from those situations] in that the expert in the present case consulted with other experts ***in his same specialty***." Id. (emphasis added). The court held that this fact brought the case within the rules forbidding bolstering by reference to treatises and non-testifying experts. Id. The court concluded that any probative value of the testimony was substantially outweighed by the danger of unfair prejudice because "[s]uch testimony improperly permits one expert to become a conduit for the opinion of another expert who is not subject to cross-examination." Id.

Schwarz is directly on point and should have resulted in the First District reversing this case. Like Schwarz, this case does not involve the typical situation when an expert relies upon tests generated by other doctors. Rather, Dr. Weaver-Osterholtz was permitted to testify that several unnamed colleagues ***of the same specialty*** believed that Dr. Fossum met the standard of care. None of these purported colleagues was subjected to the rigors of cross-examination. None of them reviewed Ms. Linn's medical records. (A. 175). The unfairness

is palpable. Schwarz, 695 So.2d at 455. See also Smithson, 536 So.2d at 262 ("Where the expert's actual opinion parallels that of the outside witness, ***then the outside witness should be produced to testify directly***.") (emphasis added), quoting Sikes v. Seaboard Coast Line R.R., 429 So.2d 1216, 1223 (Fla. 1st DCA), review denied, 440 So.2d 353 (Fla. 1983).

Courts addressing this issue have held that the prejudice is particularly severe where the hearsay is the ***sole*** basis for the expert's testimony. See Maklakiewicz, 652 So.2d at 1209 (circuit court erred in permitting police officer to give opinion based solely upon inadmissible hearsay); Riggins, 545 So.2d at 432 (distinguishing usual situation where opinion is "buttressed by additional facts which are in evidence or by an examination of a patient whom the jury has also observed"); Carratelli v. State, 832 So.2d 850 (Fla. 4th DCA 2002), 862 (distinguishing Riggins and Maklakiewicz as cases where the expert relied exclusively on inadmissible data).

Here, Dr. Fossum will argue that Dr. Weaver-Osterholtz extensively reviewed the medical records and depositions, and thus her opinion was not based "exclusively" on the "curbside consult." This is sophistry. There is a big difference between "reviewing" medical records and "relying" on them as a basis for an opinion. To the extent Dr. Weaver-Osterholtz relied on the medical records in this case, they caused her to reach the conclusion that Dr. Fossum did ***not*** comply with the standard of care. The sole basis for her testimony on behalf of Dr. Fossum was the "curbside consult."

Indeed, in his dissent, Judge Kahn painstakingly reviewed the trial record and clearly demonstrated that the "curbside consult" was the sole basis for Dr. Weaver-Osterholtz's testimony that Dr. Fossum complied with the standard of care. In particular, Judge Kahn highlighted the following exchange during Dr. Weaver-Osterholtz's direct examination:

> Q. At my request, have you reviewed some records in this case involving a patient by the name of Beth Linn?
>
> A. Yes. I've reviewed a lot of records.
>
> Q. And a lot of depositions?
>
> A. A lot of depositions.
>
> Q. Okay. And in that review, I had asked you to render some opinions regarding "standard of care"; did I not?
>
> A. Correct.
>
> Q. And in order to give those opinions about the "standard of care" in this particular case, what, if anything, did you do to try to determine the appropriate standard of care for this case as it applies to my client, Dr. Fossum?
>
> [Plaintiffs' objection to "any hearsay and use of this witness as a conduit for hearsay from other physicians."]
>
> By Mr. Fuller:
>
> Q. Do you understand my question?
>
> A. Yes. What I did was I presented the case in a several - in a couple of different forums. One is to five private practice urologists, and they varied from having experience of three years to - well, three years to 25 years of experience. And then I also presented it at the University of Missouri that has five staff and their

> experience varies from a couple of years to as many as 40 years.
>
> Q. And based upon that determination of what the appropriate standard of care is for this case, did you come to an opinion as to whether Dr. Fossum met that standard of care?
>
> [Plaintiffs' renewed objection]
>
> A. Can you state the question again?
>
> By Mr. Fuller:
>
> Q. Yes. Based on your determination of what the appropriate standard of care is for this case, do you have an opinion, within a reasonable medical probability, as to whether what Dr. Fossum did met the standard of care?
>
> A. Yes, I do, and he met the standard.

(A. 135-37) (emphasis by Judge Kahn).

While Dr. Weaver-Osterholtz certainly reviewed the records, it is clear from this testimony that the sole basis for her testimony that Dr. Fossum met the standard of care was her conversations with the unknown doctors. The fact that she also happened to review the medical records and depositions is, or should be, irrelevant. If an expert can relay the hearsay statements of unnamed colleagues so long as she can truthfully testify that she also looked at records, then no such testimony will ever be excluded. Obviously this should not be the law.

Section 90.704 simply does not contemplate the admission of the hearsay under these circumstances. As Judge Kahn explains in his dissent:

> Dr. Weaver-Osterholtz certainly could have utilized otherwise inadmissible medical records to support her opinion concerning

> standard of care. Such is not really subject to controversy. The rule, however, is not broad enough to encompass a situation, as occurred here, where the expert merely quotes the findings of other physicians, which would be hearsay if they were offered for their truth.

(Slip. Op., p. 21). Unlike cases in which an expert seeks to bolster his or her opinion with testimony that a non-testifying colleague "agrees," Dr. Weaver-Osterholtz ***disagreed*** with her unnamed colleagues, and thus their opinions formed the ***sole*** basis for her testimony that Dr. Fossum complied with the standard of care.

The First District's Decision

The First District offered several arguments why Schwarz is distinguishable, none of which are convincing. First, the majority asserts that Schwarz is inapplicable because it involved "bolstering," whereas in this case Dr. Weaver-Osterholz admitted that "she did not personally share the views of the doctors she consulted." (Slip. Op., pp. 10-11). The fact that the sole defense expert in this case disagreed with the alleged consultants ***heightens*** the prejudice. At least in Schwarz the defense was able to cross-examine the testifying expert as to the basis for ***his*** opinion that the cause of death was homicide. Here, ***nobody*** testified at trial that, based upon his or her education, training and experience, Dr. Fossum followed the standard of care. Thus, the Linns were precluded from cross-examining anybody who purportedly held that view. All they could do was attempt to deal with the paradox that, while Dr. Fossum's own expert agreed that he handled the case improperly,

an informal poll indicated that some other doctors would handle it differently.[6]

The majority's second attempt to distinguish Schwarz is the assertion that "Dr. Weaver-Osterholz did not testify on direct examination that other experts agreed with the opinion she was about to give." (Slip. Op., p. 11). This rationale is incorrect for two reasons. First, Dr. Weaver-Osterholz ***did*** testify on direct examination about the "curbside consult." (Slip. Op., p. 4). Second, the expert in Schwarz ***did not*** testify that the other pathologists agreed with his opinion, only that he had consulted with them. Schwarz, 695 So.2d at 454-55. Again, to the extent there exists any material difference, the scenario in this case is ***more*** unfair and prejudicial than in Schwarz.[7]

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[6] One of the many questions created by the First District's opinion is whether it is even necessary to retain an expert to relay the results of such a "mini-poll." After all, anyone could have relayed the results of the mini-poll just as easily as Dr. Weaver-Osterholz.

[7] As discussed in the Linns' jurisdictional brief, the First District also asserted that Schwarz does not "even arguably" present a conflict because both this case and Schwarz "were affirmances." (Slip. Op., p. 11). This interpretation of conflict jurisdiction itself conflicts with decisions of the Florida Supreme Court and also presents an issue of great public importance warranting certification for Supreme Court review. See Seaboard Air Line Railroad Co. v. Branham, 104 So.2d 356, 358 (Fla. 1958) (conflict jurisdiction is concerned with "*decisions* as precedents as opposed to adjudications of the rights of particular litigants") (emphasis in original); N & L Auto Parts Co. v. Doman, 117 So.2d 410 (Fla. 1960) (for purposes of conflict jurisdiction, the term "decision" comprehends ***both*** the opinion and the judgment. The District Court's decision, if

II. THE APPROPRIATE REMEDY IS TO ENTER JUDGMENT IN FAVOR OF PLAINTIFFS ON THE ISSUE OF LIABILITY AND GRANT PLAINTIFFS A NEW TRIAL ON THE ISSUE OF DAMAGES ONLY.

If the Court determines that the circuit court erred in permitting Dr. Weaver-Osterholtz's testimony, the appropriate remedy is to reverse the decision of the First District and remand with instructions that the circuit court enter judgment in favor of the plaintiffs on the issue of liability, and conduct a new trial on the issue of damages only.

In medical malpractice cases, "expert testimony is required to ascertain what skills and means and methods are recognized as necessary and customarily followed in the community." O'Grady v. Wickman, 213 So.2d 321, 324 (Fla. 4th DCA 1968), citing Brooks v. Serrando, 209 So.2d 279 (Fla. 4th DCA 1968) (expert testimony is required to show that a physician complied with the pertinent standard of care). Accord Williams v. McNeil, 442 So.2d 269, 270-71 (Fla. 1st DCA 1983); Pierce v. Smith, 301 So.2d 805, 806 (Fla. 2d DCA 1974).

If the plaintiff establishes a *prima facie* case of medical negligence, the doctor must rebut that evidence with admissible expert testimony of compliance with the standard of care. North Broward Hosp. Dist. v. Royster, 544 So.2d 1131 (Fla. 4th DCA 1989) (in a medical malpractice action, defense expert's conclusory affidavit that the hospital "acted well within accepted standards of care" was insufficient to rebut specific

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not reversed, would significantly change the law of conflict jurisdiction and is bad policy.

allegations of medical negligence, and plaintiffs were entitled to summary judgment). See also Sims v. Helms, 345 So.2d 721 (Fla. 1977) (trial judge properly entered summary judgment for the defendant based on an affirmative showing that the plaintiff was without ability to produce expert medical testimony in support of her allegations).

Here, the testimony of Dr. Weaver-Osterholtz was the only expert evidence Dr. Fossum presented at trial concerning the standard of care. As set forth above, the trial court should never have allowed Dr. Weaver-Osterholtz to testify. Absent Dr. Weaver-Osterholtz's testimony, judgment against Dr. Fossum on liability would have been required because he failed to present any admissible expert to rebut the Linns' *prima facie* case, as established by Dr. Santa Cruz and plaintiffs' other experts.

It would not be appropriate to remand this case for a new trial on liability. Florida appellate courts apply a "conclusive presumption that the litigants have presented all available, competent, and material evidence supporting their case; and failure to do so is at their election and risk." Bardin v. State, Dept. of Revenue, 720 So.2d 609, 613 (Fla. 1st DCA 1998), quoting Apalachicola N. R.R. Co. v. Tyus, 114 So.2d 33, 38 (Fla. 1st DCA 1959), quashed on other grounds, 130 So.2d 580 (Fla. 1961). This rule is consistent with "the desire of courts to bring an end to litigation at the earliest possible date, in so far as this can be accomplished under established principles of law." Cason v. Baskin, 30 So.2d 635, 640 (Fla. 1947) (reversing judgment in favor of defendant and, where case

had been pending for almost four and one-half years, remanding with instructions for new trial as to plaintiff's damages and costs).

The Fourth District recently applied these principles in a similar situation. In Schindler Elevator Corp. v. Carvalho, 895 So.2d 1103 (Fla. 4th DCA 2005), the court overturned a jury verdict in favor of the plaintiff because the testimony of her sole expert was deemed inadmissible. The court did ***not*** remand for a new trial. Rather, the court held that because "[the expert's] testimony was inadmissible, and [plaintiff] failed to offer a prima facie case of negligence against [the defendant], we reverse for entry of judgment in favor of [the defendant]." Id. at 1108.

As in Schindler, the trial court in this case erred in admitting the testimony of Dr. Fossum's expert. If the court had granted plaintiffs' motion in limine (as it should have), Dr. Fossum would not have had any expert testimony of compliance with the standard of care. Florida law requires expert testimony to rebut plaintiffs' prima facie case of failure to follow the standard of care, as established by the testimony of Dr. Santa-Cruz. Dr. Fossum's failure to offer admissible, expert evidence on that issue entitled the Linns' to a directed verdict in their favor.

This litigation has now been pending for more than five years. The Linns filed a motion to exclude Dr. Weaver-Osterholtz's testimony prior to trial. Dr. Fossum proceeded at his own risk in electing not to present any additional expert

testimony. A conclusive presumption exists that she was the only expert witness available to Dr. Fossum. Accordingly, it would be unfair and prejudicial to the Linns to remand for a new trial on liability. This Court should reverse the District Court's decision and remand for entry of judgment in favor of plaintiffs on the issue of liability, and a new trial solely on the issue of damages.

CONCLUSION

Plaintiffs/Appellants respectfully request the Court to quash the decision of the First District Court of Appeal and remand with instructions that the First District remand to the circuit court for entry of a judgment in favor of Appellants and against Dr. Fossum on the issue of liability, and for a trial solely on the issue of damages.

Respectfully submitted,

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