IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC05-134
LOWER TRIBUNAL CASE NO. 1D03-4152

BETH LINN and ANTHONY LINN,

Petitioners,

vs.

BASIL D. FOSSUM, M.D. and DENNIS M. LEWIS, M.D.,

Respondents.

BRIEF ON MERITS OF RESPONDENT, BASIL D. FOSSUM, M.D.

ON DISCRETIONARY REVIEW FROM A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

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STATEMENT OF THE FACTS

A diagnostic laparoscopy was performed on Beth Linn on October 16, 1998. R. 398. When Ms. Linn suffered pain a few days after the surgery, the surgeon consulted with Basil Fossum, M.D., a urologist, regarding the possibility that a ureter was cut during the procedure, causing urine to leak into the abdomen. R. 398. A renal scan and a renal ultrasound revealed that fluid was present in the abdomen, but these tests did not indicate what that fluid was. T. 102-03. A test called a "retrograde pyelogram" is required to determine if fluid comes from a leak in the urinary system. T. 104. Dr. Fossum performed this test, in which dye is injected into the ureter through orifices in the bladder. T. 140. The physician views the progress of the dye through the ureters toward the kidneys through a fluoroscopy (a real-time x-ray). T. 141. If dye appears outside the ureters, a leak is indicated. The experts for both sides agreed that the retrograde pyelogram is the most reliable test for ureteral leaks. T. 101, 105, 144.

The retrograde pyelogram performed by Dr. Fossum did not indicate a leak. T. 101. Dr. Fossum accordingly decided to observe Ms. Linn and to order more tests. T. 173. The leak was discovered four days later by a doctor at Emory University. T. 149. A ureteral catheter was put in and the ureter repaired itself within two weeks. T. 147. The failure to diagnose the leak exacerbated Ms.

Linn's pre-existing interstitial cystitis and caused her additional pain, but did not result in a permanent injury. T. 98-100, 150, 153.

Linn's expert urologist, Carlos Santa Cruz, opined that Dr. Fossum breached the standard of care in three ways. The "big omission", in his mind, was the failure of Dr. Fossum to print a hard copy of what he saw on the fluoroscope, which would have provided greater detail and allowed review by other doctors. T. 78, 88. He also testified that Dr. Fossum should have injected more than 5 cc's of dye into each ureter. T. 79-80. Finally, Dr. Santa Cruz stated that Dr. Fossum should have performed a test such as a CAT scan after the retrograde pyelogram came back negative. T. 78-79. However, he admitted that it is rare to have a false negative on a retrograde pyelogram because it is such a reliable test. T. 112.

Dr. Fossum's expert urologist, Dana Weaver-Osterholtz, was on the teaching staff at a university hospital and had been in that position for over 17 years. T. 128-29. She defined what "standard of care" meant to her as a physician.

> A "Standard of care" means that if the patient is seeing what is rational, thoughtful, reasonable and what the most – the bulk of the urologists at hand to evaluate the case would consider to be a reasonable approach, so most of it is not – usually it's a fairly broad set of possibilities, and if you poll ten urologists, it's like polling ten –
>
> Q Lawyers?
>
> A – lawyers, or anything else and you're going to get ten different opinions. And the same thing in urology, and we present conferences all the time. And the debate is usually fairly hot and heavy about approaches.

> So one single approach is usually not -- it may filter out in a group of ten that five or six will think one particular approach is the best approach. And usually that's what will be followed, but there's usually a breakdown in dissent. It's very seldom uniform.

T. 134-35. Dr. Weaver-Osterholtz testified that she considered the depositions and medical records in reaching her opinion on the standard of care.

> 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 And a lot of depositions.
> Q Okay. And in that review, I had asked you to render some opinions regarding the "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?

T. 135. Linn's attorney objected that her answer would serve as a conduit for hearsay from other physicians, as asserted in Linn's pretrial motion in limine. *Ibid*. The court overruled this objection, and Dr. Weaver-Osterholtz stated:

> A . . . 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 vary from having experience of three years to – well, three years to 25 years 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 the standard of care?

> [PLAINTIFF'S COUNSEL]: Same objection, Your Honor, to the extent that the basis for the standard is whatever communication she had these other doctors. It's just the same objection was made against me. It is necessarily based on hearsay and, therefore, is objectionable.
>
> THE COURT: Overruled.
>
> A Can you state question again?
>
> 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 that standard of care?
>
> A Yes, I do, and he met the standard.

T. 136-37. At no point on direct examination did Dr. Weaver-Osterholtz state what the opinions of the other doctors were.

Dr. Weaver-Osterholtz testified that the proper amount of dye to use in a retrograde pyelogram depends upon the size of the patient. T. 141. In a petite patient such as Ms. Linn, three to five cc's is an appropriate amount. T. 142. Dr. Weaver-Osterholtz also stated that the failure to make a hard copy of the retrograde pyelogram did not breach the standard of care. T. 151. Such copies are usually made in cases where the test is positive, not where the test is negative. T. 152. She also stated that the hard copies do not provide better definition. T. 190. The fact that the leak was discovered four days later did not mean that Dr. Fossum breached the standard of care; "the ureteral leak is notoriously hard to diagnose . . . ." T. 149. These opinions were based upon her own experience (she had

performed "thousands" of retrograde pyelograms, T. 133) and her knowledge of studies and literature. *See* T. 156.

As to the third breach proposed by Dr. Santa-Cruz, the failure to order a CT scan, Dr. Weaver-Osterholtz testified, based on her experience and her knowledge of medical literature, that a CT scan was only about 33% accurate, as compared to an accuracy rate of almost 100% for a retrograde pyelogram.[1] T. 143-45. It is not unreasonable, upon receiving a negative retrograde test, for a urologist "to sit back and say, 'Let's wait. Let's see. Let's see what happens,' because it may be that the leak is small and it actually sealed on its own." T. 148. The plan of Dr. Fossum to watch the patient, to see what happened, and to obtain a consult from an internist was, in her opinion, appropriate. T. 157.

On cross-examination, Dr. Weaver-Osterholtz rejected the suggestion that this was a "wait-and-see" approach.

> It's an observing of the patient and ordering of more tests would be a more accurate way to describe the course of action. You can describe it either way, but it's more accurate, I think, to describe it as a way to observe, order more tests to see what is happening.

---

[1] In her opinion, the retrograde pyelogram did not pick up this leak because it was a slow leak – it simply may not have been leaking at the time of test. T. 146, 148, 196.

T. 173. It was this opinion regarding the propriety Dr. Fossum's approach after receiving the negative retrograde pyelogram that was the subject of her presentation of the case to the ten other doctors on three different occasions. *Ibid*.

It was only on cross examination that the opinions of the other doctors came out. Linn's counsel inquired into the nature of Dr. Weaver-Osterholtz' consultations with the other doctors. Dr. Weaver-Osterholtz described her consultations as consisting of her two to three minute presentation of the case, an examination and discussion of the x-rays, questions from the other doctors and discussion, followed by their opinion as to the proper course of action. T. 174-75. Aside from the x-rays, she did not show the other doctors any medical records or any depositions. T. 175.

Dr. Weaver-Osterholtz denied that these consultations were the sole basis of her opinion on the standard of care; her opinion was also based on the literature and on her training and experience. When asked by Linn's counsel about the consultations she described in her deposition, Dr. Weaver-Osterholtz stated:

> A I expanded that now and presented it at an academic setting with another five doctors and with another – and with another practicing urologist and all of them would have done as Dr. Fossum did.
> Q Did they tell you that?
> A Yes.
> Q That's the basis of your opinions today?
> A It's one of the basis of the opinions.
> Q The only basis for your opinion today is what other doctors have told you, right, through these presentations?

*   *   *

A It's one of the basis.

Q What are the other basis?

A The literature.

*   *   *

Q The literature, would that be part of your knowledge?

A Yes.

Q Would that be part of your training?

A Yes.

Q Would that be part of your –

A Research, literature research.

Q And part of your experience?

A Right.

Q Now, do you remember telling me – and let me ask you another question, prior to this deposition that I took back in February of 2002, you reviewed the records for ten hours, didn't you?

A Right.

Q And the depositions?

A Right.

Q Have you reviewed them more since then?

A Oh, yes. It's been a year.

T. 176-78. Linn's counsel did not move to strike the testimony regarding the opinions of the other doctors.

Over objection, Linn's counsel then inquired into Dr. Weaver-Osterholtz' personal standard of care. T. 179. She personally would have put up two stents and a catheter to drain the fluid, although that was not what any of the other doctors she consulted at the University of Missouri would have done. T. 180, 183. She did not disagree with these other doctors, because "there are innumerable ways that are appropriate care", but would have handled it differently herself. T. 181.

On redirect, Dr. Weaver-Osterholtz explained that, as a tertiary care physician, she frequently treats the sickest patients. T. 219. Accordingly, her standard practice differed from that of other urologists.

> A It probably has to do with my history and the patients that I'll see. I see an odd subset of patients. I see a lot of bladders and I see a lot of incontinence, and I see in, what is referred to me are not frequently because it doesn't happen very often, but ureteral injuries. So I've been burned a couple of times, and so I'm very cautious and very conservative about it.
>
> One of the things that medicine, medicine is very much an art form. And there's not a defined bullet of appropriate treatment in most cases.
>
> * * *
>
> Q Could you define for us, ma'am, what you mean when you say "medicine and the standard of care is not a bullet"?
>
> A There's a – there's a spectrum of what is appropriate care for a given patient. And my spectrum – I'm off the bell-shaped curve here. If I put in two stints the bulk of everybody that I poll would do exactly what Dr. Fossum did. And as Dr. Bruce is here, and then I'm here on the bell-shaped curve, and I think it's simply because I've seen these patient [sic] more frequently than any of these other doctors have.

T. 217-18. Linn's counsel did not object to or move to strike this testimony. Dr. Weaver-Osterholtz testified that the standard of care was not different in a primary setting as opposed to a tertiary care setting, and used as an example the fact that "the five people that I polled that were my partners at the academic center would have handled the case just like Dr. Fossum did." T. 220. Linn's counsel did not move to strike this testimony.

STATEMENT OF THE CASE

Linn appealed the defense verdict to the First District, arguing that Dr. Weaver-Osterholtz' opinions should not have been admitted because they were based solely on the hearsay opinions of other doctors. The First District affirmed. *Linn v. Fossum*, 894 So. 2d 974 (Fla. 1st DCA 2004). The majority held that an expert may base her opinion in part on hearsay statements under section 90.704, Florida Statutes. *Id*. at 977. When the standard of care is involved, the court noted that an expert would have to communicate with similar healthcare professionals to gain an understanding of what other experts in the field considered appropriate. *Ibid*. The First District rejected the contention that Dr. Weaver-Osterholtz' testimony was based solely on the hearsay statements of the other urologists, citing her stated reliance on medical records and deposition testimony, and on her own medical education, training and experience. *Id.* at 978. The majority also held that Dr. Weaver-Osterholtz' personal standard of care was not relevant since the standard was what reasonably prudent doctors in the community would do. *Id*. at 978-79. The majority distinguished *Schwarz v. State*, 695 So. 2d 452 (Fla. 4th DCA 1997), cited by the dissenting judge, on the grounds that *Schwarz* involved bolstering (an objection that was not raised by Linn), not an objection based on hearsay, and that Dr. Weaver-Osterholtz did not testify on direct that other experts agreed with her opinion.

This court granted review based on conflict with *Schwarz*.

SUMMARY OF THE ARGUMENT

Because *Schwarz v. State* involved an objection on the basis that the expert improperly bolstered his testimony by referring to the opinions of other experts, it fails to create a conflict with the decision of the First District in this case because Linn made no objection based upon improper bolstering.

The objection that was made, that Dr. Weaver-Osterholtz' opinions were based solely on hearsay, is not supported by the record. Dr. Weaver-Osterholtz did not convey inadmissible evidence to the jury because she did not state the substance of the other urologists' opinions on direct. She also testified that she relied on other sources and upon her own knowledge, training and experience in reaching her opinions, and her testimony demonstrates that fact. Her testimony was therefore not a conduit for hearsay.

Dr. Weaver-Osterholtz was also properly allowed to state that she relied on her consultations with experts in the same specialty. The distinction made in *Schwarz* between reliance on opinions of experts in other specialties and on opinions of experts in the same specialty is contrary to the purpose of section 90.704, Florida Statutes and to the cases interpreting that statute. Reliance on the opinions of other doctors in the same specialty is in fact necessary when the standard of care is at issue. By definition, the standard of care requires a physician

to tell the jury what he or she has learned or observed from or discussed with similar physicians as the acceptable and appropriate practice.

Dr. Weaver-Osterholtz could also not be a conduit for hearsay because her statement that she relied upon consultations as one basis for her opinion, without stating what the opinions of the consulting physicians were, is not hearsay. No other court has followed *Schwarz* in holding that hearsay may be inferred from the mere fact that an expert names out-of-court sources as the basis for his or her opinion, and in fact the cases are to the contrary.

If this court reverses, the proper remedy is to remand for a new trial on liability. Even without the opinion based on consultations with other urologists, Dr. Weaver Osterholtz' testimony was sufficient to create a jury question regarding the standard of care. Even if her testimony were excluded entirely, expert testimony is not necessary to sustain a defense verdict where, as here, the testimony of the plaintiff's expert is called into question on cross-examination and by other evidence in the case.

ARGUMENT

FIRST ISSUE

AN EXPERT MAY PROPERLY STATE THAT SHE RELIED ON THE OPINIONS OF OTHER EXPERTS, AND THE FACT THAT SHE RELIED ON OTHER EXPERTS DOES NOT MAKE HER TESTIMONY A CONDUIT FOR INADMISSIBLE HEARSAY.

Although Linn has cited *Schwarz v. State*, 695 So. 2d 452 (Fla. 4h DCA 1997), as the basis for conflict, Linn's position in the trial court and on appeal was and is essentially that Dr. Weaver-Osterholtz should not have been permitted to testify at all because her opinions were based solely on the hearsay statements of the other doctors. In *Schwarz*, to the contrary, the court recognized that the expert could give his opinions, even though he relied on the opinions of other experts. The limited question addressed in *Schwarz* was whether the expert could say that he relied on those opinions.

Schwarz was a murder case. The expert, a pathologist, testified on direct examination that he had consulted with two pathologists on his staff and three other pathologists about the cause of death. The defendant objected on the basis that this testimony improperly bolstered the expert's opinion, and raised the same issue on appeal. *Id*. at 454-55. The Fourth District noted that section 90.704, Florida Statutes, allows experts to rely on the opinions of other experts in forming their own opinions, and that the rule allows experts to testify that they did so. *Id.*

at 454-55. However, the court distinguished cases where the experts were permitted to testify that they relied on the opinions of other experts on the ground that the expert in *Schwarz* consulted with other experts <u>in his same specialty</u>. *Id*. at 455. The Fourth District, finding no precedent on this issue, determined that the cases prohibiting experts from bolstering their opinions with the opinions of other experts applied, even though the expert did not state what the opinions of the other experts were.

> The precise issue before us is not whether Dr. Burton could testify that other experts in his field agreed with him, but rather whether he could testify that he had consulted other experts in his same field. In the absence of any persuasive authority to the contrary, we conclude that Dr. Burton should not have been permitted to do so. There is too much of a possibility of an inference being drawn that these experts agreed with Dr. Burton. Any probative value would be "substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury . . ."§ 90.403, Fla. Stat. Accordingly, while there was nothing improper about Dr. Burton consulting with other experts in his field, he should not have been allowed to testify that he did so on direct examination.

Id. at 455. "Such testimony improperly permits one expert to become a conduit for the opinion of another expert who is not subject to cross-examination." *Ibid*.

Although *Schwarz* refers to the expert as a "conduit for hearsay", it is not really a "conduit for hearsay" case, but rather an improper bolstering case. *Schwarz* acknowledged that the opinion of the expert based on consultations with other experts was not hearsay, and held only that disclosing the fact of those

consultations was error. As the majority in the First District noted, Linn never raised an "improper bolstering" objection below or on appeal; her only objection was that Dr. Weaver-Osterholtz' opinion was based entirely on hearsay and should not be admitted. Linn has accordingly waived any bolstering objection. *See Schwarz* (objection that expert's comment was "self-serving" did not preserve error based on rule prohibiting experts from commenting on credibility of other experts). The dissenting judge failed to recognize, in relying on *Schwarz*, that such an objection was not preserved for appeal.

There is therefore no conflict between this decision and *Schwarz*. Nevertheless, because of this court's citation of *Schwarz* as a conflicting decision, Appellee will address both the propriety of Dr. Weaver-Osterholtz' reference to her consultations as one basis for her opinion and whether her testimony on the standard of care was solely a conduit for hearsay.

A. Standard of Review

"The standard of review for trial court decisions concerning the qualifications of expert witnesses and the scope of their testimony is abuse of discretion." *County of Volusia v. Kemp*, 764 So. 2d 770, 773 (Fla. 5th DCA 2000). Florida courts have consistently applied the abuse of discretion standard when determining the proper scope of an expert's testimony under section 90.704, Florida Statutes. *See Carratelli v. State*, 832 So. 2d 850 (Fla. 4th DCA 2003) (trial

court did not abuse its discretion in admitting expert testimony based on inadmissible evidence); *Maklakiewicz v. Berton*, 652 So. 2d 1208 (Fla. 3d DCA 1995) (trial court abused its discretion in admitting expert testimony based solely on inadmissible hearsay). The abuse of discretion standard is appropriate because the trial court in applying section 90.704 must determine the factual question of whether the inadmissible evidence is "of a type reasonably relied upon by experts in the subject to support the opinion expressed . . . ."

The case cited by Appellant, *Berry v. CSX Transportation., Inc.*, 709 So. 2d 552, 557 (Fla. 1st DCA 1998), holds that the appropriate standard of review of a *Frye* issue is *de novo.* Admissibility of novel scientific evidence under *Frye* is an exception to the abuse of discretion rule applicable to other types of expert testimony. *See Williams v. State*, 710 So. 2d 24, 32 n. 13 (Fla. 3d DCA 1998) ("if it is determined that *Frye* does not apply, the admissibility of expert testimony lies within the broad discretion of the trial court which will not be reversed on appeal absent a showing of abuse."). No *Frye* issue is involved in this case.

B. Dr. Weaver-Osterholtz' opinions were not based solely on hearsay.

The dispute between the majority and dissenting opinions in the First District was not over whether Dr. Weaver-Osterholtz could state that she relied on the opinions of other doctors, or indeed whether she could state what those opinions were (since that testimony was brought out by Linn on cross, who thereby

waived any objection to the admissibility of the opinions themselves) – the only disagreement was on whether she relied solely on those opinions as the basis for her testimony.

This dispute centers on a line of cases holding that an expert may not render an opinion based exclusively on inadmissible evidence. *See, e.g., Maklakiewicz v. Berton*, 652 So. 2d 1208 (Fla. 3d DCA 1995) (police investigator served solely as a conduit for inadmissible hearsay where his conclusion was based entirely on the observations of a person who did not testify at trial); *Riggins v. Mariner Boat Works, Inc.*, 545 So. 2d 430 (Fla. 2d DCA 1989) (chemist's recitation of the blood-alcohol level stated in an inadmissible laboratory report only served to help the jury understand the inadmissible document rather than the evidence at trial where the expert merely multiplied the level by a standard conversion factor in reaching his opinion); *Smithson v. V.M.S. Realty, Inc.*, 536 So. 2d 260 (Fla. 3d DCA 1989) (expert who merely recited the perpetrators' out-of-court explanations of their scheme in committing the crime when questioned about the adequacy of defendant's security served merely as a conduit for the presentation of inadmissible evidence).

This line of cases is distinguishable because the experts in these cases conveyed the inadmissible evidence to the jury. Dr. Weaver-Osterholtz, to the

contrary, did not state the substance of the other urologists' opinions on direct. Those opinions were only brought out by Linn's counsel on cross and on redirect.

These cases also do not apply where the expert relies on sources other than the inadmissible evidence in reaching his or her opinions. In *Capehart v. State*, 583 So. 2d 1009 (Fla. 1991), for instance, the defendant argued that the trial court erred in permitting a medical examiner to testify regarding the cause of death and the condition of the victim's body because she did not perform the autopsy and based her testimony on an autopsy report prepared by another examiner. This court held that her testimony was proper because she was qualified as an expert without objection (as in this case[2]) and because she formed her opinion by relying not only upon the autopsy report, but also upon a toxicology report, evidence receipts, photographs of the body, and all other paperwork filed in the case. *Id.* at 1012-13. *See Carratelli v. State*, 832 So. 2d 850, 861-62 (Fla. 4th DCA 2003) (distinguishing *Riggins* and *Maklakiewicz* because the expert's opinion "was not based *exclusively* on inadmissible data."); *Sikes v. Seaboard Coastline Railroad Co.*, 429 So. 2d 1216, 1222-23 (Fla. 1st DCA 1983) (where expert accident reconstructionologist relied on depositions, surveys, visits to the site and pictures of the site in addition to the hearsay statements of witnesses, his opinion did not

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2 Linn made no objection based on Dr. Weaver-Osterholtz' qualifications under section 90.702, Florida Statutes, and in fact conceded that she was qualified. T. 134.

parallel that of an outside witness, and was not a conduit for hearsay, because it was founded upon more than conversations with a witness).

Dr. Weaver-Osterholtz reviewed the medical records and "a lot of depositions" in forming her opinions on the standard of care. T. 135. Linn and the dissenting judge focus on the form of the question posed to Dr. Weaver-Osterholtz on direct that prompted her opinion on the standard of care: "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 the standard of care?" T. 136-37 (emphasis added); *see* Initial Brief at 22-23. This question is taken out of context. Although this question immediately followed Dr. Weaver-Osterholtz' statement that she relied on the consultations, it also followed her testimony that she considered the depositions and medical records in reaching her opinion on the standard of care.

> 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 And a lot of depositions.
> Q Okay. And in that review, I had asked you to render some opinions regarding the "standard of care"; did I not?
> A Correct.

T. 135 (emphasis added). Read in the context of all of the preceding testimony, her "determination" was also based on the records and depositions (and obviously on the training and experience that she applied in analyzing these documents).

Indeed, as demonstrated below, much of her testimony on the standard of care was in fact based on the records and on her training and experience.

On cross-examination, Dr. Weaver-Osterholtz again explained that she relied on the records and the depositions in forming her opinion.

> Q The only basis for your opinion today is what other doctors have told you, right, through these presentations?
>
> * * *
>
> A It's one of the basis.

T. 176. The other bases were the literature, her knowledge, her experience and training, and the medical records and depositions. T. 177-78 (quoted at length in the Statement of Facts). She relied on medical literature on the effectiveness of CT exams, for example. T. 145. Based on the results of the tests contained in the records, Dr. Weaver-Osterholtz concluded that Linn's leak was a small leak. T. 146, 208. She also relied on literature for the fact one-third to two-thirds of the diagnoses of ureteral leaks are delayed, showing that such leaks are hard to diagnose. T. 151.

Because Dr. Weaver-Osterholtz relied on other sources in conjunction with her consultations with other urologists in forming her opinions, the "conduit" cases do not apply.

The "conduit" cases also do not apply where the expert uses his or her own knowledge, training and experience in interpreting or applying the inadmissible evidence. *See Kloster Cruise, Ltd. v. Rentz*, 733 So. 2d 1102, 1103 (Fla. 3d DCA

1999) (trial court acted within its discretion in allowing the expert on direct examination to present inadmissible data as the basis for his expert opinion where the underlying data was the beginning point for analysis, but some further analysis was required by the expert in order to apply the data); *Thunderbird, Ltd. v. Great American Ins. Co.*, 566 So. 2d 1296, 1304-05 (Fla. 1st DCA 1990) (distinguishing *Smithson* because the expert in that case testified to hearsay statements "without any refinement on his part, thereby essentially serving as a conduit for the inadmissible hearsay."); *Hungerford v. Mathews*, 511 So. 2d 1127, 1129 (Fla. 4th DCA 1987) (physician did not serve merely as a conduit for hearsay when physician was not called merely for the purpose of disclosing the details of the boating accident but rather as an independent examining physician).

In medical cases, an expert physician may properly base his opinion on his training and experience and on consultations with other doctors. *See Patey v. Lainhart*, 977 P.2d 1193, 1197 (Utah 1999) (consultation with other experts in the same field did not disqualify expert who also applied his own knowledge and training to testify about dental diagnosis); *State v. Lundstrom*, 776 P.2d 1067 (Ariz. 1989) (expert properly relied on consultation with expert in same field as part of his opinion); *McClellan v. Morrison*, 434 A.2d 28 (Me. 1981) (physician could base opinion on cause of injury on conversation with neurologist where that was but one of the deliberative steps he took in forming opinion); *Conway v. Bayhealth*

Medical Center, Inc., No. Civ.A. 99C-060038 WLW, 2001 WL 337228 (Del. Super. Mar. 26, 2001) (physician could base testimony on the standard of care on conversations with other doctors about their practice, in addition to his own experience). *Cf. Kim v. Nazarian*, 576 N.E.2d 427 (Ill. App. 1991) (expert may base his opinion on consultations with other doctors in the same specialty, in addition to his own review, but may not state that those experts agreed with his opinion).

Dr. Weaver-Osterholtz denied on cross-examination that the consultations with other urologists were the sole basis for her opinion; she stated (and confirmed on redirect) that she also relied on medical literature and on her knowledge, training, and experience. T. 176-78, 221-22. It is difficult to understand how a medical doctor could engage in such consultations in the first place without applying his or her own training and experience. Only a trained urologist would be qualified to conduct the consultations with other urologists. Linn argues that anyone could have taken a poll of urologists. Initial Brief at 25. That is not the case. As described in Dr. Weaver-Osterholtz' deposition (attached to Linn's motion in limine), the consultations she undertook were formal presentations and discussions which are commonly used as a diagnostic tool among urologists; it is an internal review process known as an "M and M" (for mortality and morbidity). R. 435. The process involves a short two-to-three minute presentation followed by

a longer discussion. "That's how medicine presents cases." *Ibid*. A non-urologist could not have presented the case nor engaged in the subsequent discussion regarding the proper course of action.

Furthermore, a review of her testimony shows clearly that Dr. Weaver-Osterholtz applied her specialized knowledge and experience, in addition to the consultations, in reaching her opinion that Dr. Fossum did not breach the standard of care in failing to order a CAT scan after the negative retrograde pyelogram.[3] As the majority opinion notes, Dr. Weaver-Osterholtz relied for her opinion on her knowledge that ureteral leaks are hard to diagnose and have vague symptoms, that the tests used to diagnose such leaks are inaccurate resulting in delayed diagnoses, and that Linn's history of pre-existing abdominal pain complicated the diagnosis. 894 So. 2d at 978. The record contains further examples of the specialized knowledge and experience Dr. Weaver-Osterholtz applied to formulate her opinion on this issue, including:

? Ureteral leaks are "notoriously hard to diagnose." T. 149. They come and go and may leak only a small amount of urine, which is what happened in Linn's case and may have accounted for the negative result on the retrograde pyelogram. T. 145, 223.

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[3] Her opinions on whether Dr. Fossum correctly performed the retrograde pyelogram and whether he erred in failing to make a hard copy were based solely

? In urology, the standard of care consists of a fairly broad set of possibilities and there are many differences of opinion on the correct approach to a given situation. T. 135. The spectrum of appropriate care for a given patient is a bell-shaped curve, and her personal standard of care is on the far end of that curve. T. 218.

? A retrograde pyelogram can have an accuracy rate of almost 100%, while a CT scan is only about 33% accurate. T. 143. Because of this knowledge, she opined that it was reasonable for Dr. Fossum to rely on the negative finding from the retrograde pyelogram. T. 147.

? Urologists rely on retrogrades rather than renal scans, and the positive results of the renal scans did not make it unreasonable for Dr. Fossum to wait and see what happened. T. 147-48.

? Because of the accuracy of retrograde pyelograms, Dr. Fossum could conclude that the leak had sealed off. T. 148, 207-08.

? Oftentimes, urologists will wait and see what happens to help them define what is going on. T. 157-58.

? A urine leak into the abdomen does not constitute a "horrific problem" for the patient. T. 186.

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on her knowledge and experience and not upon the consultations with other urologists.

Linn asserts that Dr. Weaver-Osterholtz must have relied solely on the opinions of other doctors because she "disagreed" with their approach. Initial Brief at 24. Dr. Weaver-Osterholtz did not "disagree" with her colleagues. Although she personally would have acted differently, "there are innumerable ways that are appropriate care." T. 181.[4] Dr. Weaver-Osterholtz recognized that the standard of care is a bell-shaped curve. Just because her personal standard is on the far end of the curve, that does not negate her testimony that other approaches toward the middle of the curve are also appropriate. Dr. Weaver-Osterholtz' personal standard of care, brought out by Linn on cross, is indeed irrelevant since the standard is not what a particular doctor would have done, but rather whether the acts of the defendant comported with "the skill and diligence of the average practitioner in the same or a similar community." *Schwab v. Tolley*, 345 So. 2d 747, 754 (Fla. 4th DCA 1977).

The record demonstrates that, although Dr. Weaver-Osterholtz relied in part on consultations with other doctors, her opinion was also formed on the basis of her own knowledge, training, and experience and on other sources of information. She did not merely convey the opinions of the other doctors, but obtained and

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[4] Dr. Weaver-Osterholtz would have put stents in both ureters regardless of the negative retrograde pyelogram to drain the system. T. 183. Linn erroneously states that this is exactly what Dr. Santa-Cruz testified should have been done. *See* Initial Brief at 10. Dr. Santa-Cruz only faulted Dr. Fossum for failing to do a CT

refined those opinions through her independent knowledge and experience and her analysis of the records and depositions in this case. Linn had the opportunity to, and did, cross-examine Dr. Weaver-Osterholtz on the foundations for her opinion, and in fact elicited the actual opinions of those doctors. Dr. Weaver-Osterholtz therefore did not serve merely as a conduit for the inadmissible opinions of the other doctors.

If reasonable persons could differ as to the propriety of the action taken, there can be no finding of an abuse of discretion. *Commonwealth Fed. Sav. & Loan v. Tubero*, 569 So. 2d 1271 (Fla. 1990). Based on the record, reasonable persons could differ on whether Dr. Weaver-Osterholtz relied solely on the opinions of other doctors to give her opinions on the standard of care, and the First District properly affirmed the judgment in favor of Dr. Fossum.

C. Dr. Weaver-Osterholtz could state that she relied on the opinions of other doctors in the same specialty.

The Fourth District in *Schwarz* recognized that an expert may disclose his or her reliance on the opinions of experts in other specialties, but could not do so when the expert relied on opinions of experts in the same specialty. This distinction is contrary to the purpose and text of section 90.704 and to the cases interpreting that statute. No other case has made this distinction, and several cases

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scan. Linn never claimed, and Dr. Santa-Cruz never testified, that Dr. Fossum was negligent in failing to insert stents.

from other jurisdictions hold that an expert may indeed state that she relied on the opinions of other experts in the same specialty.

The cornerstone of admissibility under section 90.704 is whether an expert in the same field reasonably relies upon the same type of inadmissible facts or data in forming an opinion. Section 90.704 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 the 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.

Under this section, doctors may rely on the records of other doctors even though those records are inadmissible hearsay. *See Flores v. Miami-Dade County*, 787 So. 2d 955, 959 (Fla. 3d DCA 2001) (trial court properly overruled hearsay objection to testimony by expert regarding the contents of another doctor's office records).

The Law Revision Council Note to this section emphasizes that expert physicians are permitted to rely on the opinions of other doctors as well.

> Facts or data upon which expert opinion are based may be derived from three possible sources: (1) Firsthand observation of the witness, (2) presentation of evidence at the trial, and (3) presentation of data to the expert outside of court and other than by his own perception. The first two sources reflect existing practice. Inclusion of the third source is designed to broaden the basis of expert opinion beyond that currently allowed and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus, a physician in his own practice bases his diagnosis on information from numerous sources and of considerable

> variety, including statements by patients and relatives, reports and opinions of nurses, technicians, and other doctors, hospital records, and X-rays. The reasonableness of experts' reliance on this data may be questioned on cross-examination.

Law Revision Council Note – 1976 to § 90.704, West's Florida Statutes Annotated (1999) (emphasis added).

Relying on this comment, Florida courts have held that doctors may rely on the hearsay opinions of other doctors. *See G.V. v. Dept. of Children and Families*, 795 So. 2d 1043 (Fla. 3d DCA 2001) (trial court properly overruled hearsay objection to expert pediatrician's testimony that was based on inadmissible x-ray reports submitted by another doctor); *Bender v. State*, 472 So. 2d 1370 (Fla. 3d DCA 1985) (trial court erred in precluding expert psychiatrist from testifying about the opinion of a radiologist interpreting a CAT scan). In *Alston v. State*, 723 So. 2d 148, 158 (Fla. 1998), for example, this court held that the trial court did not abuse its discretion in allowing an expert in forensic pathology to testify that his conclusion as to the identification of the victim was reached in conjunction with a forensic odontologist.

There is no question that urologists rely on consultations with other urologists in the normal course of their practice. Dr. Weaver-Osterholtz testified in her deposition that the consultations she conducted with other urologists were commonly relied on in her specialty. R. 435. Linn's counsel did not object to the reliability of the consultations, just that they were hearsay. Such an objection

would have been improper because the sufficiency of the data or opinions on which an expert relies must normally be decided by the expert himself. *Easley v. State*, 629 So. 2d 1046, 1049 (Fla. 2d DCA 1993).

The text of section 90.704 and the Law Revision Council Note do not support a distinction between the opinions of experts in other specialties and the opinions of experts in the same specialty. Under section 90.704, if the expert relies on the opinions of other experts in the same specialty in the normal course of her practice, then she may rely on such opinions in forming her in-court opinion.

In *State v. Lundstrom*, 776 P.2d 1067 (Ariz. 1989), for instance, the expert psychologist relied on a conversation with a psychiatrist in evaluating the defendant. The court held that this reliance was reasonable, since the expert stated that his practice was to consult with physicians and other psychologists, and that the expert could testify not only that he relied on the opinion, but could state what the opinion was and that it was consistent with his own. "Thus, if another doctor's concurring opinion is a fact or datum within the meaning of the expert opinion rules, the trial court erred by limiting [the expert's] testimony to the bare fact of his consultation with [the psychiatrist]." *Id*. at 1073. *See also Primavera v. Celotex Corp.*, 608 A.2d 515, 522 (Pa. Super. 1992) (expert pulmonologist was properly permitted to refer to the findings of another pulmonary specialist, even though those findings confirmed his conclusions).

Reliance on the opinions of other doctors in the same specialty is in fact necessary when the standard of care is at issue. "The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers." § 766.102(1), Fla. Stat. Under this definition, a physician cannot base an opinion on the standard of care on his or her <u>own</u> practice, training and experience. By opining on the standard of care, a doctor necessarily tells the jury what he or she has learned or observed from or discussed with similar physicians as acceptable and appropriate practice. In other words, an opinion on the standard of care requires the expert to be a conduit for the hearsay opinions of other doctors; a party would otherwise be required to subpoena a majority of physicians in the community to testify. The jury knows that this opinion concerns the practice of other doctors – they are instructed on section 766.102's definition of the standard of care in Standard Jury Instruction 4.2.

The Oregon supreme court in *Jefferis v. Marzano*, 696 P.2d 1087 (Or. 1985), rejected a hearsay objection to standard of care testimony that specifically referred to the practices of other physicians. The issue was whether the defendant gynecologist breached the standard of care by allowing a non-medical employee to review lab reports on Pap smears. The trial court allowed the defendant to testify,

over a hearsay objection, that many other doctors in the community followed the same procedure. The supreme court held that this testimony was proper under a rule of evidence identical to section 90.704.

> It is clear that there can be no valid objection to the fact that a witness's opinion rests upon hearsay in the sense that the information he relies upon to know the appropriate medical practice is derived in part from extrajudicial statements of others. Such statements may include lectures in medical school, writings of various kinds and conversations with colleagues. It is by assimilation of hearsay of this sort that expert opinions are in fact, for the most part, made, and to demand education independent of the statement of others is to demand what does not exist and will not be forthcoming. *See* Weinstein, Mansfield, Abrams and Berger, Cases and Materials on Evidence 399 (7th ed 1983).
>
> None of these objections was well taken. The appropriate medical practice is most commonly proven by learning what other specialists in the field do in the area. The appropriate medical practice in this case could have been observed by the physician at a hospital or in any other clinical setting; learned at a staff meeting at a hospital or at an educational seminar; ascertained from reading medical literature; and, finally, the appropriate medical practice could be ascertained by discussing the proper method for sorting out Pap smear reports with other doctors in the community as to what they do.

Id. at 1092 (emphasis added). The court theorized that the defendant could have called all the other practitioners to testify, but that this tactic would still not have solved the hearsay problem.

> Testimony of this nature not only would be time-con-suming, but of more importance, would be unnecessary. Each of these specialists in testifying about the appropriate medical practice would necessarily have to resort to the same sources of information as relied upon by the witness in this case. In effect

> each would testify, "I do it this way because I learned to do it this way. I learned to do it this way by talking to other doctors, attending staff meetings, observing other specialists' practices, reading literature, etc." The same objection could be raised and the solution no different.

Id. at 1093. *See also Moyer v. Reynolds*, 780 So. 2d 205 (Fla. 5th DCA 2001) (expert's testimony on the practices and procedures at the hospital and that defendant deviated from those procedures was relevant and admissible as evidence of the standard of care).

The trial court therefore did not abuse its discretion in permitting Dr. Weaver-Osterholtz to state that she relied on consultations with other urologists in forming her opinion on the standard of care.

D. Dr. Weaver-Osterholtz' statement that she relied on the opinions of other doctors is not hearsay.

Neither section 90.704 nor section 90.705 provide any guidance on whether or to what extent an expert may testify about the facts, data and opinions on which the expert relies. As the court recognized in *Schwarz*, caselaw authorizes an expert to testify about the basis of his opinion. Indeed, an expert must be allowed to state the basis of his or her opinion, even when the expert indicates reliance on hearsay, in order for the jury to give proper weight to the opinion. *See Arkansas State Highway Com'n v. Schell*, 683 S.W.2d 618, 621 (Ark. App. 1985) ("an expert must be allowed to disclose to the trier of fact the basis facts for his opinion, as otherwise the opinion is left unsupported in midair with little if any means for

evaluating its correctness."); *Patey v. Lainhart*, 977 P.2d at 1200 ("experts are called into court to give their expert opinions, and they must be allowed to explain the foundation for that opinion.", and "experts may recite hearsay evidence in order to lay a foundation for the opinions they give to the jury."); *Primavera v. Celotex Corp.*, 608 A.2d at 521 ("the crucial point is that the fact-finder be made aware of the bases for the expert's ultimate conclusions, including his partial reliance on indirect sources."); *State v. Lundstrom*, 776 P.2d at 1073-74 (triers of fact must have foundational information to assess adequately the weight to be given an expert opinion, including the substance of another expert's opinion if the testifying expert reasonably relied on it); *State v. Jones*, 368 S.E.2d 844, 847 (N.C. 1988) (disclosure of basis of an expert's opinion is essential to the factfinder's assessment of the credibility and weight to be given to it; a statement of opinion without its basis would impart a meaningless conclusion to the jury).

Florida courts have permitted an expert to state the type of data on which the expert relied, and in some cases to relay the substance of that data, even though such statements would otherwise be inadmissible hearsay. In *Bender v. State*, the court held that a psychiatrist should have been permitted to testify as to the results of a CAT scan performed by a radiologist on which he relied in reaching his diagnosis that the defendant suffered from cerebral atrophy and organic brain syndrome. Citing section 90.704, the court concluded that "the hearsay rule poses

no obstacle to expert testimony premised, in part, as here, on tests, records, data, or opinions of another, where such information is of a type reasonably relied upon by experts in the field." 472 So. 2d at 1371. *See Flores v. Miami-Dade County*, 787 So. 2d 955, 959 (Fla. 3d DCA 2001) (trial court properly overruled hearsay objection to testimony of expert physician regarding the contents of the office records of another doctor which were not introduced into evidence because the expert relied on them in the formation of his opinion); *Houghton v. Bond*, 680 So. 2d 514, 521 (Fla. 1st DCA 1996) (expert's testimony that he relied upon information contained in government crash-test studies, and citing figures from the studies, was properly admitted to explain the basis for expert's opinion, and the expert was not thereby a conduit for inadmissible hearsay); *Barber v. State*, 576 So. 2d 825, 831-32 (Fla. 1st DCA 1991) (expert should not have been precluded from relating what defendant told him concerning the amount of liquor defendant had consumed the night before the murder where the expert relied on this information); *Robinson v. Hunter*, 506 So. 2d 1106 (Fla. 4th DCA 1987) (doctor could testify that he relied on thermogram report of another expert even though it was not admitted into evidence). *See also Lewis v. Rego Co.*, 757 F.2d 66, 74 (3d Cir. 1985) (the bases of an expert's opinion may be testified to on direct examination).

Appellant cites three cases on page 17 of her initial brief for the proposition that experts may not relay conversations with other doctors even if they relied on those conversations in forming their opinions: *Ross Dress For Less, Inc. v. Radcliff*, 751 So. 2d 126 (Fla. 2d DCA 2000); *Gerber v. Iyengar*, 725 So. 2d. 1181 (Fla. 3d DCA 1998); and *Bunyak v. Clyde J. Yancey and Sons Dairy, Inc.*, 438 So. 2d 891 (Fla. 2d DCA 1983). These cases are most obviously distinguishable from this case because the experts relayed the substance of the hearsay information.[5] In this case, Dr. Weaver-Osterholtz only testified on direct that she presented the case to other urologists, but did not relay the substance of the other urologists' responses. The content of the other doctors' opinions was brought out on cross examination by Linn's attorney and then again on re-direct, to which no objection was made by Linn.

Dr. Weaver-Osterholtz' disclosure on direct of the mere fact of her consultations as a basis for her opinion is not hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. A

[5] They are also distinguishable from the foregoing cases because the experts did not "reasonably rely" on the out-of-court statements. In *Ross*, the statements were contained in a medical report, but there is no indication that the expert relied on that report. In *Gerber*, the expert relayed a conversation with the author of a treatise on re-direct in response to cross-examination on the treatise; there is no indication that the expert relied on this conversation in forming his opinions

"statement" is "[a]n oral or written assertion." § 90.801(1)(a)1, Fla. Stat. The direct testimony of Dr. Weaver-Osterholtz does not convey any out-of-court "statements" by the other urologists, and was not offered to prove the truth of those statements. The only way to construe such testimony as a "conduit for hearsay" is to reason, as the court did in *Schwarz*, that the jury must necessarily infer that the other urologists agreed that Dr. Fossum's actions were within the standard of care.

No other case has held that hearsay may be inferred from the mere fact that an expert names out-of-court sources as the basis for his or her opinion. In fact, they recognize that the identification of sources on which an expert relies is not hearsay.

In *Department of Corrections v. Williams*, 549 So. 2d 1071 (Fla. 5th DCA 1989), the defendant contended that the trial court should have permitted its expert witness to reveal the contents of an affidavit on which the expert relied in formulating his opinion as to how the accident occurred. The court held that it was proper for the expert to consider the affidavit <u>and to testify that he relied on the information contained in the affidavit</u>, but that the trial court did not abuse its discretion in rejecting the affidavit itself as inadmissible hearsay. *Id*. at 1072-73. The court interpreted *Bender v. State* as holding that an expert should be permitted to reveal the sources that he relied on despite the fact that the information from that

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expressed on direct. In *Bunyak*, the hearsay opinion of a geologist does not appear

source itself cannot be admitted. *Ibid*. (In fact, it appears that the expert in *Bender* was also allowed to relay the substance of the information as well.) Likewise, in *Sikes v. Seaboard Coast Line Railroad Co.*, 429 So. 2d 1216 (Fla. 1st DCA 1983), the expert revealed that he relied on depositions and statements of witnesses, surveys of the accident site, two visits to the site, pictures of the site and a homicide report in preparing a model for the jury demonstrating how he believed the accident may have occurred. The court held that this testimony was admissible under section 90.704, even though the statements relied upon were themselves inadmissible hearsay. *See also Robinson v. Hunter*, 506 So. 2d at 1106-07 (expert testified that he relied on a thermogram that was not admitted in evidence).

In all of these cases, the jury could have inferred that the statements made to or the reports considered by the experts supported the experts' opinions. The courts nevertheless found that the mere statement that the expert relied on these hearsay sources was admissible. None of these courts considered the fact of reliance to improperly imply the content of the inadmissible statements. Indeed, if the rationale of *Schwarz* is extended to its logical extreme, no expert would ever be able to state the sources on which the expert relied because any identification of a source would imply that the source supported the expert's opinion. This result would be clearly contrary to the cases interpreting section 90.704.

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relevant to the opinion formed by the hydrologist who testified.

SECOND ISSUE

THE APPROPRIATE REMEDY, IF THE DECISION IS REVERSED, IS TO REMAND FOR A NEW TRIAL ON ALL ISSUES.

Linn asks this court to remand with directions to enter judgment in her favor on liability. This proposed remedy is constructed upon her assumption that, if Dr. Weaver-Osterholtz' opinion based on her consultations with other urologists is found to be improper, Dr. Fossum would have no expert to refute the testimony of Dr. Santa-Cruz.

This assumption is based on a myopic view of Dr. Weaver-Osterholtz' testimony. Most of her testimony was not based upon her consultations with the other doctors. For instance, her opinions that Dr. Fossum used the correct amount of dye in the retrograde pyelogram and that he was not negligent in failing to make hard copies of that test are based upon her own knowledge and experience. These issues were the primary reasons for Dr. Santa-Cruz's opinion that Dr. Fossum breached the standard of care. The only issue relevant to the consultations with other urologists is whether Dr. Fossum should have performed a CT scan, as Dr. Santa-Cruz suggested. Contrary to Dr. Santa-Cruz, Dr. Weaver-Osterholtz testified that CT scan has only a 33% accuracy rate compared to nearly 100% for retrograde pyelograms, that ureteral leaks are notoriously hard to diagnose, and that this leak may not have been leaking at the time of the test. This testimony was

based upon her knowledge and experience, and on medical literature, and not on the opinions of other urologists. This testimony was properly admitted, even if the court agrees with Linn's position on appeal, and constitutes sufficient expert evidence to refute the contention of Dr. Santa-Cruz that a CT scan would have revealed the leak.

Linn also erroneously assumes that expert evidence is necessary to sustain a defense verdict. The case cited by Linn, *Schindler Elevator Corp. v. Carvalho*, 895 So. 2d 1103 (Fla. 4th DCA 2005), involved the reversal of a verdict in favor of a <u>plaintiff</u>. A plaintiff has the burden to prove a breach of the standard of care by expert testimony. A defendant, on the contrary, does not need to adduce expert evidence in order to prevail. Linn has cited no case for proposition that a directed verdict must be entered against a <u>defendant</u> who fails to offer expert testimony to rebut the plaintiff's case.

> A jury is free, in the ordinary negligence case, to accept or reject the testimony of a medical expert just as it may accept or reject the testimony of any other expert. *See Easkold v. Rhodes,* 614 So.2d 495, 497 (Fla.1993)(quoting *Shaw v. Puleo,* 159 So. 2d 641 (Fla. 1964)). "This does not mean that a jury is at liberty to disregard completely testimony which is not open to doubt from any reasonable point of view." *Chomont v. Ward,* 103 So. 2d 635, 637 (Fla. 1958). It is clear, however, that expert medical testimony may be rejected by the jury based upon, among other things, the reasons given by the witness for the opinion expressed as well as all the other evidence in the case.

Reid v. Medical & Professional Management Consultants, Inc., 744 So. 2d 1116, 1118 (Fla. 1st DCA 1999) (emphasis and some citations omitted). *See also Frank v. Wyatt*, 869 So. 2d 763, 765 (Fla. 1st DCA 2004) ("a jury is free to weigh the credibility of an expert witness just as it does any other witness, and to reject such testimony, even if uncontradicted.").

The cross-examination of Dr. Santa-Cruz gave the jury sufficient reason to doubt his opinion, even without the testimony of Dr. Weaver-Osterholtz. Dr. Santa-Cruz admitted that the retrograde pyelogram is the best test and that it was negative in this case. T. 101, 105. He admitted that it was rare to have a false negative retrograde pyelogram. T. 112. Dr. Santa-Cruz did not say that a CT scan would have revealed the leak.

Other evidence in the case may also have cast doubt upon Dr. Santa-Cruz's opinions. However, Linn has failed to provide a complete transcript of the trial. Without such a transcript, there is no way to determine if the jury could have disregarded Dr. Santa-Cruz's opinions based on such other evidence. *See Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979) (noting that appellant has burden to provide record of trial proceedings in order to demonstrate reversible error).

The proper remedy for the Appellant is to remand this case for a new trial on liability, which is the remedy afforded by the court in *Maklakiewicz v. Berton*, 652

So. 2d 1208 (Fla. 3d DCA 1995), where a judgment for the defendant was reversed upon a ruling that the defense expert acted as a conduit for inadmissible hearsay.

CONCLUSION

Appellee, Basil Fossum, M.D., requests that this court affirm the decision of the First District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this **24th** day of **August**, to all counsel listed below:

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CERTIFICATE OF COMPLIANCE

This brief complies with the font requirements. It is typed in Times New Roman 14 point, proportionately spaced type.

BY: s/ Richard A. Warren
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