Evidence

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Evidence: 1993 Leading Cases and Significant Developments in Florida Law

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TABLE OF CONTENTS

I. INTRODUCTION ........................................... 530

II. THE EROSION OF THE BUSINESS RECORDS
    EXCEPTION: LOVE V. GARCIA .......................... 530
    A. Erosion of the Business Records Exception in
       Medical Records Cases ............................. 532
    B. Love's Impact on the Trial Lawyer ............. 535

III. MEETING THE THRESHOLD REQUIREMENT IN
     AUTOMOBILE NEGLIGENCE CASES: THE EASKOLD
     DECISION ............................................ 535

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I. INTRODUCTION

While the Florida Legislature has made no significant or earth shattering modification to the Florida Evidence Code in 1993, there have been at least two recent evidentiary cases which the trial practitioner should find important. This article will review these two cases and examine their impact upon the trial lawyer.

II. THE EROSION OF THE BUSINESS RECORDS EXCEPTION: LOVE V. GARCIA

On April 3, 1986, sometime after 11:00 p.m., a woman was walking along Sunset Strip in Fort Lauderdale, Florida. The woman, who was wearing dark clothing, was spotted by a City of Sunrise Police Officer who, after being flagged down by the woman, drove up along side of her. The woman, who was noticeably upset and appeared to have been crying, requested that the police officer give her a ride to a local gas station from where she could make a telephone call. The police officer obliged and dropped her off at the station.

Shortly after being dropped off at the gas station, the woman was seen walking in the median strip near the intersection of University Drive and Sunset Strip by another pedestrian. The pedestrian noted that the woman had hesitated in the median and then began to cross the intersection against the red light.

At the same time, an orthopedic surgeon was travelling along University Drive on his way home from the hospital. Upon seeing the doctor's vehicle approaching, the pedestrian shouted to the woman in an attempt to warn her of the oncoming vehicle. When he yelled to her, the

1. 611 So. 2d 1270 (Fla. 4th Dist. Ct. App.), review granted, 623 So. 2d 494 (Fla. 1993).
2. Initial Brief of Appellant at 3, Love (No. 89-3259).
3. Id.
4. Id. at 4.
woman looked at him, put her head down, and continued walking into the intersection.\footnote{5} Needless to say, the woman was struck by the doctor’s vehicle and suffered significant and extensive injuries.\footnote{6} She required more than seven weeks of hospitalization, including more than two weeks of intensive care, as well as several surgeries.\footnote{7}

On September 23, 1986, the woman, Luz Maria Garcia Rennes, filed a complaint against the doctor, Douglas J. Love. Rennes claimed the doctor negligently operated his automobile causing it to strike her, resulting in her injuries and damages.\footnote{8} The doctor’s key defense was that the woman was intoxicated at the time of the accident, and that her intoxication caused or contributed to her injuries.\footnote{9}

To support his defense, the doctor sought to introduce the results of two blood alcohol tests which suggested the woman was intoxicated.\footnote{10} The first blood alcohol test was taken at the request of the police officer who accompanied the woman to the hospital; it was taken shortly after the accident and was analyzed by SmithKline Laboratory.\footnote{11} The blood test revealed that the woman had a blood alcohol level of .23, more than twice the legal limit.\footnote{12} The second blood test was taken a couple of hours after the woman was admitted to Florida Medical Center.\footnote{13} That blood sample was evaluated by the hospital’s laboratory and revealed that the woman had a blood alcohol level of .14.\footnote{14}

The driver properly disclosed his intentions to introduce these blood alcohol tests in his pretrial exhibit list.\footnote{15} The doctor also disclosed his intention to call the records custodians from the SmithKline Laboratory and the Florida Medical Center to authenticate these documents under the business records exception to the hearsay rule.\footnote{16} Through a pretrial motion in limine, the plaintiff sought to exclude this evidence on the grounds that the doctor had failed to disclose any witnesses who could “lay a proper predicate” to establish a chain of custody from the collection of the blood

\footnotesize{5. Id. 
6. Appellee’s Answer Brief at 4, Love (No. 89-3259). 
7. Id. 
8. Initial Brief of Appellant at 1, Love (No. 89-3259). 
9. Id. 
10. Id. 
11. Id. at 5. 
12. Id. 
13. Initial Brief of Appellant at 5, Love (No. 89-3259). 
14. Id. 
15. Id. at 1. 
16. Id. at 6; see also Fla. Stat. § 90.803(6) (1991).}
sample through the testing procedure and creation of the document.\(^{17}\) Apparently, the trial court granted the motion in limine, excluding the test results because the driver did not disclose witnesses who could establish this chain of custody.\(^{18}\)

The case proceeded to trial and resulted in a jury verdict for the plaintiff for two million dollars in damages, which was reduced to one million dollars after finding each party to be fifty percent (50\%) at fault.\(^{19}\) The doctor appealed the exclusion of the blood alcohol tests to the Fourth District Court of Appeal, which affirmed the exclusion.\(^{20}\) The case is presently on appeal to the Florida Supreme Court.\(^{21}\)

A. *Erosion of the Business Records Exception in Medical Records Cases*

The Florida Business Records Exception to the hearsay rule states:

\(90.803\) Hearsay Exceptions; availability of declarant immaterial. - The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

\(\ldots\)

(6) RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY.—

(a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness. The term “business” as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(b) No evidence in the form of an opinion or diagnosis is admissible under paragraph (a) unless such opinion or diagnosis would be

\(^{17}\) *Love*, 611 So. 2d at 1272.

\(^{18}\) *Id.* at 1271.

\(^{19}\) Appellee's Answer Brief at 1, *Love* (No. 89-3259).

\(^{20}\) *Love*, 611 So. 2d at 1270.

\(^{21}\) See infra notes 38-39 and accompanying text.
admissible under ss. 90.701-90.705 if the person whose opinion is recorded were to testify to the opinion directly. 22

When seeking to introduce documents pursuant to the Business Records Exception, one typically solicits the testimony of the records custodian to authenticate the document pursuant to the requirements of section 90.803(6). However, the Love decision places a severe restraint upon a practitioner seeking to introduce medical records through a records custodian.

The Love majority explained that the rationale behind the Business Records Exception is the inherent trustworthiness of such documents. 23 However, with regard to medical records, the court stated that such records are inherently trustworthy only if the records were actually used by a physician to aid in diagnosis or treatment of the patient. 24 Thus, a party seeking to introduce a particular medical document would necessarily have to provide testimony of the treating physician, who would state that he relied on the particular document sought to be introduced in his treatment of the patient. Of course, there may be numerous routine documents in a patient’s medical file that are not directly relevant to the patient’s particular ailment and that may not necessarily be relied upon in the treatment of that patient. Under Love, it would seem impossible to introduce routinely prepared documents that were not relied upon for a patient’s treatment since they would not be inherently trustworthy. As the court stated, “[i]n a medical records case, the trustworthiness element—the only basis for business records admissibility—relates to whether the health care providers relied on the test result in the course of treatment.” 25

In Love, the plaintiff’s two blood tests indicated a blood alcohol level in excess of the legal limit. 26 The first blood test was ordered by the police officer who accompanied the woman to the hospital, and that test was examined by a laboratory outside of the hospital. 27 The second blood test was taken after the woman was admitted to the Florida Medical Center and that test was evaluated by the hospital’s laboratory several hours later. 28 However, after being hit by the doctor’s car, the woman had massive injuries requiring seven weeks of hospitalization, had six surgeries requiring

23. Love, 611 So. 2d at 1272.
24. Id. at 1275.
25. Id.
26. See Initial Brief of Appellant at 5, Love (No. 89-3259).
27. Love, 611 So. 2d at 1275.
28. Id.
general anesthesia, and was required to wear a cast on her right leg for almost two years. When this woman was admitted to the hospital, it may not have been the emergency room physician’s most immediate concern as to whether the patient had an elevated blood alcohol level. Therefore, the physician may not have relied upon that elevated blood alcohol level in forming his or her diagnosis when rendering emergency treatment. The fact that the doctor may not have relied upon that particular blood test should not prohibit its introduction pursuant to section 90.803(6), but rather that reliance or lack of reliance should be admissible on cross-examination to attack the credibility of the report.

In Love, there was apparently no physician to testify regarding his reliance on the blood alcohol tests and, in the absence of such testimony, the plaintiff’s objection was that the defendant did not list any witnesses who could document the chain of custody of the blood samples, the testing procedures, and the test results. There was apparently no other grounds for objection established or set forth during the trial. Again, and as the court noted, “gaps in the chain of custody or other uncertain circumstances in the administration or interpretation of a test result are ordinarily thought to go to the weight and credibility of the evidence, not its admissibility.” However, for blood alcohol tests, the court makes an exception to the business records rule set forth in section 90.803(6) of the Florida Statutes. Keeping in mind that the objection in this case was to the “chain of custody,” the court rendered the following ruling:

[We] now hold that when medical record entries are sought to be admitted under FEC [Florida Evidence Code] section 90.803(6), if properly challenged by the opponent with a sufficient showing that relates to the accuracy, reliability or trustworthiness of the entry, the trial court may in its discretion decline to admit them unless the proponent of the evidence lays the proper predicate for the entry. By a proper predicate, we mean evidence as to the drawing of the blood,

29. See Appellee’s Answer Brief at 4, Love (No. 89-3259).
31. See Love, 611 So. 2d at 1276 (citing Thomas v. Hogan, 308 F.2d 355, 361 (4th Cir. 1962)).
32. Id. at 1272.
33. Id.
34. Id. at 1276 (citing Thomas, 308 F.2d at 361).
35. Id.
the chain of custody, the administration of the test, and the interpretation and reporting of the test result.\textsuperscript{36}

Pursuant to this holding, in the absence of expert medical testimony, when challenging the trustworthiness of the document, an opponent of the medical record need only object to "chain of custody," or question the testing procedure, or any other aspect of the method of formulating the document sought to be introduced to place a severe hurdle in the path of the proponent of the document. Thereafter, the proponent would be required to produce the testimony of each person involved in the test procedure, from the nurse or technician who drew the blood, to the person interpreting the test. This is quite a heavy burden in light of the fact that section 90.803(6) of the Florida Statutes merely requires the testimony of a records custodian.\textsuperscript{37} Thus, at least in the Fourth District Court of Appeal, the business records exception has been severely limited in its application to the introduction of medical record evidence.

B. \textit{Love's Impact on the Trial Lawyer}

A trial lawyer who anticipates the entry of certain medical records must prepare his or her pre-trial case adequately, and must list properly each person involved in the "chain of custody" in the pretrial witness list if the attorney intends to introduce such documents. Of course, this will increase the time and costs of preparation of a case involving medical records. If the case is a contingency fee case, and if it is document-intensive, these added requirements may affect an attorney's decision to take the case.

The case is currently on appeal to the Florida Supreme Court.\textsuperscript{38} As of the date of this article, the Appellant's Initial Brief has been filed with the Supreme Court of Florida.\textsuperscript{39}

III. \textbf{MEETING THE THRESHOLD REQUIREMENT IN AUTOMOBILE NEGLIGENCE CASES: THE EASKOLD DECISION}

A. \textit{The Threshold Requirement}

To recover damages for pain, suffering, or mental anguish arising from

\textsuperscript{36} Love, 611 So. 2d at 1276.
\textsuperscript{38} See Love v. Garcia, 623 So. 2d 494 (Fla. 1993).
\textsuperscript{39} Love v. Garcia, No. 81478 (Fla. filed June 29, 1993).
the negligent operation of an automobile, section 627.737(2) of the Florida Statutes requires the plaintiff to prove that his or her pain, suffering, and mental anguish is the result of permanent injury. More specifically, section 627.737(2) states that such damages are appropriate only in the event that the injury or disease consists in whole or in part of:

(a) Significant and **permanent** loss of an important bodily function;
(b) **Permanent injury** within a reasonable degree of medical probability, other than scarring or disfigurement;
(c) Significant and **permanent** scarring or disfigurement;
(d) Death.

The most common and controverted cases involve subsection (b), which concerns permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement. A determination of whether a party has sustained permanent injury within a reasonable degree of medical probability requires a medical diagnosis and, therefore, medical expert testimony in order to establish that such permanent injury does exist. Under these circumstances, parties typically present a battle of the experts. In such cases, it is no stretch of the imagination to understand that the jury is free to render its verdict upon the expert testimony that it deems the most credible. However, where the plaintiff establishes permanent injury within a reasonable degree of medical probability through uncontradicted expert testimony, may the jury disregard the expert testimony and find that the plaintiff has failed to meet the threshold requirement? Surprisingly, the answer may be yes.

**B. The Easkold Decision**

The Florida Supreme Court recently had an opportunity to consider this issue in the case of *Easkold v. Rhodes*. Following an automobile accident that occurred in July, 1988, the Rhodes' filed suit against Donna Easkold seeking damages as a result of Easkold's negligent operation of her automobile. The case was tried before a jury in 1990. To establish that she sustained a permanent injury as defined in section 627.737(2) of the

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40. FLA. STAT. § 627.737(2) (Supp. 1992).
41. Id. (emphasis added).
42. 614 So. 2d 495 (Fla. 1993).
43. Id. at 495.
44. Id. at 496.
Florida Statutes, the plaintiff presented the depositions of three medical experts.45

The first expert, an orthopedic surgeon, examined the plaintiff shortly after the accident.46 He testified that the plaintiff had sustained permanent injuries to her left knee, back, and neck and that such injuries were related to the automobile accident, since the plaintiff denied having any pre-existing injuries.47

The second medical expert performed an independent medical examination ("IME") of the plaintiff.48 After taking a history from the plaintiff, wherein she essentially denied any prior injuries, the doctor performed an IME on Rhodes and testified that the plaintiff had sustained permanent injuries to her neck, lower back, and left knee as a result of the July, 1988, automobile accident.49

The third and final physician was the plaintiff’s “regular physician.”50 This doctor’s medical chart revealed that on several occasions between 1975 and 1986, prior to the July, 1988 automobile accident, the plaintiff had been examined by him for “various conditions, including numbness in her left leg and toes, pain in her back, numbness and pain on the left side of her head and neck, left leg pain, and pain in the ears and back.”51

The supreme court’s opinion also indicates that the plaintiff had admitted to being injured prior to the accident after being “hit in the leg with a buffer,” in the course of her employment.52 The defendant, Easkold, presented no medical testimony to contradict that which was presented by the plaintiff.53 Furthermore, the defendant did not establish that the information concerning the plaintiff’s pre-existing injuries would have affected the physicians’ medical opinions regarding the permanency of the plaintiff’s injuries.54

Following a jury trial, a verdict was rendered finding the defendant, Easkold, negligent and awarding the plaintiff, Rhodes, $37,000 for medical expenses, both past and future, and for loss of earning ability.55 The jury,

45. Id.
46. Id.
47. Easkold, 614 So. 2d at 496.
48. Id.
49. Id.
50. Id.
51. Id.
52. Easkold, 614 So. 2d at 496.
53. Id. at 497.
54. Id.
55. Id. at 496.
however, found that the plaintiff did not sustain permanent injuries as a result of the July, 1988 accident and, therefore, awarded no damages for pain and suffering. The verdict was reversed by the First District Court of Appeal upon the authority of Morey v. Harper.

In Morey, the First District Court of Appeal considered a similar factual situation. There, the plaintiff failed to disclose preexisting injuries to her medical experts, who testified at trial that the plaintiff sustained permanent injuries as a result of the accident. The defendant presented no expert medical testimony to contradict or rebut the plaintiff's evidence. Further, neither of the plaintiff's experts testified that the undisclosed information concerning preexisting injuries would have affected their opinion concerning the plaintiff's permanent injuries. Thus, the court found that the expert's opinions were materially uncontradicted. The court, in reversing the jury's verdict that the plaintiff did not sustain permanent injuries, reasoned that since the determination as to what constitutes a permanent injury necessarily requires expert medical testimony, the jury cannot disregard the uncontradicted medical evidence.

Without expressly overruling Morey, the Florida Supreme Court in Easkold concluded that "the jury is free to 'accept or reject the testimony of a medical expert just as it may accept or reject that of any other expert.'" However, the Easkold court also recognized that a jury's discretion in disregarding uncontroverted expert testimony is limited, as some basis for disregarding the evidence must appear in the record. The court stated:

As we explained in Shaw, "even though the facts testified to by [the medical expert] were not within the ordinary experience of the members of the jury, the jury was still free to determine their credibility and to

56. Id.
57. 541 So. 2d 1285 (Fla. 1st Dist. Ct. App.), review denied, 551 So. 2d 461 (Fla. 1989).
58. See id. at 1286.
59. Id. at 1286-87.
60. Id. at 1288.
61. Id.
62. Morey, 541 So. 2d at 1288.
63. Id.
64. Easkold, 614 So. 2d at 497 (quoting Shaw v. Puelo, 159 So. 2d 641, 644 (Fla. 1964)).
65. Id.
decide the weight to be ascribed to them in the face of conflicting lay evidence. 66

Thus, even though a plaintiff presents uncontradicted medical expert testimony establishing the threshold required by section 627.737 of the Florida Statutes, that testimony may not satisfy a jury that the plaintiff has sustained a permanent injury.

In Easkold, the court held that the jury was "justified in determining that the opinion testimony was flawed by reason of the materially untruthful history given [to the doctors] by the claimant." 67 The court reached this conclusion even though none of the medical experts testified that the information they had not been provided would have affected their opinion. 68 Thus, the medical expert testimony was uncontroverted in this case. 69

While the Florida Supreme Court’s ruling in Easkold may have provided a just result, one can only ponder the potential effects that this ruling may have on other cases in which a plaintiff fails to provide his doctor with information concerning prior injuries thought to be unconnected with the damages sought through the lawsuit. Under a strict interpretation of the Easkold decision, it may be that a jury can disregard uncontroverted medical testimony that the plaintiff’s injury is permanent based solely upon an omission in the plaintiff’s history of injuries unconnected with those at issue and without the defendant having to present medical testimony in rebuttal.

C. Easkold’s Impact Upon the Trial Lawyer

Pursuant to the Florida Supreme Court decision in Easkold, it appears that while it is not within the province of a lay person to determine whether a party has sustained permanent injuries to a reasonable degree of medical probability, a jury has considerable discretion in either accepting or rejecting the required medical expert testimony. 70 Therefore, apparently, it is no longer necessary in all automobile negligence cases to have a “battle of experts.” If the defendant can establish some grounds from which a lay person could conclude that the jury should not accept the expert testimony

66. Id. (quoting Shaw, 159 So. 2d at 644).
67. Id. at 498 (citing Rhodes v. Easkold, 588 So. 2d 267, 269 (Fla. 1st Dist. Ct. App. 1991) (Wolf, J., dissenting)).
68. Id.
69. Easkold, 614 So. 2d at 497.
70. Id. at 498.
of a physician, whether or not those grounds would affect the physician’s opinion, then a jury verdict finding that the plaintiff failed to meet the threshold requirement will be permitted to stand, notwithstanding the lack of contradictory medical testimony.

In deciding whether to accept an automobile negligence case, in light of the *Easkold* decision, the attorney should consider a review of the potential client’s medical records and should discuss those records with the plaintiff’s physicians prior to accepting the case.

**IV. CONCLUSION**

While 1993 has seen no significant modification to the Florida Evidence Code, it as been a year of significant cases in the evidence arena. In *Love v. Garcia*, the Fourth District Court of Appeal rendered an opinion that significantly erodes the business records exception to the hearsay rule, at least in cases which are medical records intensive. The *Love* decision is one which both the plaintiff’s lawyer, as well as the defense attorney, will want to keep an eye on as it is currently on appeal to the Florida Supreme Court.

In *Easkold v. Rhodes*, the Florida Supreme Court has given greater deference to the jury in an auto negligence case in determining whether a plaintiff has met the threshold requirement of permanent injury or scaring. *Easkold* apparently stands for the proposition that a jury may accept or reject the testimony of an expert witness, even though that expert’s testimony is uncontradicted and unrebutted, just as the jury may do with any other witness.

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71. 611 So. 2d 1270 (Fla. 4th Dist. Ct. App.), *review granted*, 623 So. 2d 494 (Fla. 1993).
72. 614 So. 2d at 495.