

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CIVIL DIVISION: "AA"
CASE NO.: 2015CA007601XXXXMB

MARC RENE,
Plaintiff,

v.

PAT SALMON & SONS OF FLORIDA, INC.
and PATRICK CHANCEY,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR NEW TRIAL

THIS MATTER came before the court for a hearing on October 23, 2017, on Defendants, PAT SALMON & SONS OF FLORIDA, INC. ("Salmon") and PATRICK CHANCEY's ("Chancey") Motion for New Trial (the "Motion"). Defendants raise a number of alleged errors regarding the admissibility and presentation of evidence that they claim resulted in their not receiving a fair trial, only one of which has merit, to wit: the court's exclusion of Plaintiff's blood alcohol test and other evidence of intoxication following the subject accident in this personal injury case.

Background and Procedural History

1. Plaintiff, MARC RENE, filed this personal injury action based on an accident that occurred during the early morning hours of October 11, 2014, in which a tractor trailer owned by Salmon and driven by Chancey collided with Rene's Honda Accord. Defendants admitted that Chancey was negligent and that his actions contributed to causing some of Rene's damages but have contended that Rene was also negligent, resulting in or contributing to his damages.

2. On October 18, 2016, Plaintiff filed a Motion in Limine to exclude evidence pertaining to the results of a blood alcohol test performed at Wellington Regional Medical Center that indicated that Plaintiff's blood alcohol test was .12, in excess of the legal limit. Following a hearing the court granted Plaintiff's Motion, finding that any such evidence was unreliable and inadmissible.¹

3. The basis of the court's ruling was grounded in testimony and evidence that investigators on the scene did not detect any sign of alcohol use on the part of Rene, such as the smell of alcohol, slurred speech, or disorientation. As a result, they did not conduct a field sobriety test or order forensic blood tests when Rene was transported to the hospital for medical treatment. Once at the hospital, the medical staff performed blood tests for the purpose of medical diagnosis. It is admitted that these test were not in accord with the standards mandated by Section 316.1932, F.S. or related administrative regulations. More specifically, the blood was collected by using an alcohol wipe contrary to Fla. Admin. Code rule 11D-8.012. Using an alcohol wipe on the skin at the collection site may contaminate the sample resulting in an inaccurate measure of the amount of alcohol in the blood. Other irregularities in the blood collection and testing cast further doubt on the reliability of the test. Finally, Rene was given the narcotic drug Dilaudid at the hospital, which according to Plaintiff's expert, is contraindicated in cases where a patient is deemed to have consumed or been under the influence of alcohol, as it can cause respiratory depression or death. The totality of these factors led the court to the conclusion that the results were not trustworthy and could not be relied upon.

4. Trial was held over a period of several days resulting in a jury verdict on July 7, 2017. The jury found that Defendant Chancey was 70% negligent and the Plaintiff 30% negligent. Total damages were assessed against the Defendants in the amount of \$3,001,000.00. Throughout the

¹ By order dated March 27, 2017, the court clarified its previous order to further exclude from evidence the Plaintiff's testimony regarding his previous consumption of alcohol.

trial, Defendants argued that despite Chancey's own negligence in improperly turning into the Plaintiff's lane of traffic, Plaintiff had the opportunity to avoid the subject accident, but failed to do so. Pursuant to the court's pretrial rulings, the Defendants were unable to elicit any testimony that his failure to react in the moments before the accident was due to his intoxication and prior consumption of alcohol.

Legal Analysis

5. In support of their position that the court erred in excluding any alcohol related testing or evidence, the Defendants direct the court to two Florida district court of appeal decisions, one old and one new. The older case, *Grant v. Brown*, 429 So.2d 1229 (Fla. 5th DCA 1983), is factually and legally very much akin to this case.² In *Grant*, the Fifth DCA directly addressed the very issue faced by this court, that is "whether in a personal injury case, the results of a blood test taken in a medical treatment situation showing a person's blood alcohol level should have been admitted to establish comparative negligence on his part when the test was not made in compliance with any of the requirements of [Florida Statutes]." *Id.* at 1230.

The plaintiff, Samuel Grant, was injured when he was struck by the defendant, Jacob Brown, after Brown had failed to stop at a stop sign. Grant said he saw Brown's headlights through the trees as he was approaching, but did not see Brown's vehicle until an instant before the accident. Investigating officers at the scene found no reason to believe Grant was intoxicated and did not request a blood alcohol test be taken. At the emergency room, blood samples were taken for the purpose of medical treatment and Grant was found to have a blood alcohol level of .064. The trial judge permitted evidence of Grant's blood test for the purpose of establishing that Grant

² It is surprising, therefore, that the *Grant* case was never cited by the Defendants in their response to the Motion in Limine. Had Plaintiffs done so, the court's ruling may well have been different.

was contributorily negligent as a result of Grant's diminished reactions and perceptions which prevented him from avoiding or minimizing the accident.

Noting that the rule for admissibility of a motor vehicle driver's intoxication is different in a civil proceeding involving a suit for personal injuries as opposed to a criminal proceeding, the appellate court stated that where comparative negligence is the issue, "[d]river impairment because of alcoholic consumption is a factor the jury was entitled to weigh and consider." As a result, the trial judge's admission of Grant's hospital blood test records was found to be "unquestionably admissible." *Id.* at 1231.³

Defendants also refer the court to the recently decided case of *Stewart v. Draleaus*, 42 Fla. L. Weekly D1666 (Fla. 4th DCA, July 28, 2017). This case does not involve the issue of hospital alcohol test records, but rather whether testimony of the plaintiffs regarding their consumption of alcohol prior to a motorcycle accident was admissible. The Fourth District found evidence that at "least some of the plaintiffs were drinking prior to the accident and therefore properly raised the issue as to whether the alcohol consumption was a contributing factor in the accident, and thus whether plaintiffs were under the influence to the extent that their faculties were impaired." This, the court said, "is a question of fact for the jury to consider". *Id.* at *13.

Relying on *Stewart*, the Defendants argue that Rene's own testimony that he consumed three to four beers and two to three shots of whiskey hours before the accident should be admissible. Plaintiff attempts to distinguish *Stewart*, noting that Rene's testimony was that he stopped drinking alcohol approximately five hours before the accident as compared to the plaintiff

³ Admittedly, Grant does not involve allegations of Administrative Code violations, including the use of alcohol swipes during the blood draw process. However, the Defendants' toxicology expert opined that the serum blood test results were not substantially affected by the use of an alcohol wipe on Plaintiff's arm for a blood draw. This court is now persuaded that these and other issues involving disparate and conflicting opinions of the experts are factual matters best resolved by the jury.

in *Stewart*, whose last drink was arguably less than an hour prior to the accident. In addition, unlike in the instant case, medical personnel and witnesses testified that they could smell alcohol on plaintiffs' breath. Nonetheless, the likely effects, if any, on Rene at the time of the accident due to his prior alcohol consumption are the subject of wildly varying opinions from the parties' chosen toxicology experts. This is an issue for the jury's consideration.

Conclusion

Based on the foregoing, the court concludes that it improperly excluded evidence of Plaintiff's blood alcohol test and his alcohol consumption preceding the accident. The exclusion of such evidence cannot be said to be harmless error. Accordingly, it is hereby ORDERED and ADJUDGED that Defendants' Motion for New Trial is GRANTED.

DONE AND SIGNED in Chambers at West Palm Beach, Palm Beach County, Florida, on this 16th day of November, 2017.



RICHARD L. OFTEDAL
Circuit Judge

COPIES FURNISHED:

Cole, Scott & Kissane, P.A., 222 Lakeview Avenue, Suite 120, West Palm Beach, Florida 33401
lee.cohen@csklegal.com david.kirsch@csklegal.com angelia.contessa@csklegal.com

Domnick, Cunningham & Whalen, 2401 PGA Blvd., Suite 140, Palm Beach Gardens, Florida 33410
jw@dcwlaw.com Cdl@dcwlaw.com MaureenW@dcwlaw.com eservice@dcwlaw.com

Burlington & Rockenbach, P.A., 444 West Railroad Avenue, Courthouse Commons, Suite 350, West Palm Beach, Florida 33401
bdr@FLAppellateLaw.com fa@FLAppellateLaw.com

Kreusler-Walsh, Compiani & Vargas, P.A., 501 South Flagler Drive, Suite 503, West Palm Beach, Florida 33401
janewalsh@kwcvpa.com eservice@kwcvpa.com sserafin@kwcvpa.com
rvargas@kwcvpa.com