IN THE COUNTY COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2014-001360-SP-25
SECTION: CG01
JUDGE: Linda Diaz

Manuel V Feijoo (md)
Plaintiff(s) / Petitioner(s)

vs.

Bristol West Ins Co
Defendant(s) / Respondent(s)

_____/

ORDER ON PLAINTIFF'S MOTION IN LIMINE AND/OR TO STRIKE HEARSAY AFFIDAVITS

This matter having come before the Court on January 23, 2020 at 2:00 p.m. on Plaintiff's Motion in Limine and/or Motion to Strike the Affidavits of Geraldine Burroughs, Rachel Leutjes, and Brian Bower, and the Court having reviewed Plaintiff's motion; having reviewed the legal authorities referenced therein; having heard the arguments of counsel, and noting that Defendant did not file a response to Plaintiff's motion, and the Court being otherwise fully advised therein, this Court finds as follows:

On December 15, 2009, Defendant issued a policy of automobile insurance to Francisco Gonzalez as its named insured. The policy term ran for a period of 6 months and expired on June 15, 2010. On March 9, 2010, during the policy term, Gonzalez was apparently injured in a motor vehicle accident and sought medical treatment from the Plaintiff for his accident-related injuries. Plaintiff submitted its bills to Defendant, but Defendant refused to remit any payment on the basis of an alleged material misrepresentation.

When Defendant refused to remit payment, Plaintiff filed this action. In response to the lawsuit, Defendant asserted an affirmative defense indicating that Plaintiff's claim was barred based on an alleged material misrepresentation on the insurance policy application.

Defendant contends that on December 15, 2009, the named insured, Gonzalez, completed an insurance policy application and when asked to identify the members of his household over

the age of 15, Gonzalez listed his wife but failed to list his son. Defendant contends that Gonzalez lived with both his wife and his son at the time of policy inception and that the failure to list his son was a material misrepresentation.

On April 17, 2019, Defendant filed a Motion for Summary Judgment based on its material misrepresentation defense. On December 27, 2019, Defendant filed an Amended Motion for Summary Judgment. In support of its motions for summary judgment, Defendant attached affidavits of various claims representatives and records custodians including Mr. Brian Bower (Defendant's Med/PIP claims representative), Ms. Rachel Leutjes (Defendant's personal lines account underwriting specialist) and Ms. Geraldine Burroughs (Defendant's Med/PIP claims specialist).

Each of the affidavits referenced above relies heavily on a pre-suit statement obtained by Defendant from the insured Gonzalez, which was unsworn, unsigned and taken via telephone. Defendant incorporated the unsworn, unsigned telephonic statement into the affidavits of its claim adjusters referenced above in the hope of using the statement to establish its material misrepresentation defense. Defendant claims it is entitled to use the unsworn, unsigned telephonic statement as summary judgment evidence because it qualifies as a business record under the business records exception to the hearsay rule, F. S. 90.803(6). Defendant contends that the statement supports its position that the insured resided with his wife and his son at the time of policy inception.

To the contrary, Plaintiff contends that Defendant should not be permitted to rely on the unsworn, unsigned telephonic statement because is not proper summary judgment evidence; that it is hearsay upon hearsay; that it is untrustworthy, unreliable and created solely for use in this lawsuit; that it does not qualify as a business record under F. S. 90.803(6); and that the statement and the affidavits which rely on the statement must also be stricken and their use prohibited for any purpose.

The issue for the Court to decide is whether or not the unsworn, unsigned telephonic statement qualifies as a business record under the business records exception to the hearsay rule, F. S. 90.803(6), thereby making it admissible as summary judgment evidence.

Pursuant to FRCP 1.510, affidavits / statements in support of a motion for summary judgment must be made on personal knowledge. "The purpose of the personal knowledge requirement is to prevent the trial court from relying on hearsay when ruling on a motion for

summary judgment... and to ensure that there is an admissible evidentiary basis for the case rather than mere supposition or belief." *Fl. Dept. of Financial Services v. Associated Industries Ins. Co., Inc.*, 868 So.2d 600 (Fla. 1st DCA, 2004). Citing, *Pawlik v. Barnett Bank of Columbia County*, 528 So.2d 965, 966 (Fla. 1st DCA 1988).

An affidavit in support of summary judgment may not be based on factual conclusions or conclusions of law. *Fl. Dept. of Financial Services v. Associated Industries Ins. Co., Inc.*, 868 So.2d 600 (Fla 1st DCA, 2004). Citing, *Jones Constr. Co. of Cent. Fla., Inc. v. Fla. Workers' Comp. JUA, Inc.,* 793 So.2d 978, 979 (Fla. 2d DCA 2001).

To determine if the statement satisfies the business records exception of the hearsay rule, we must look at Florida Statute 90.803(6), which provides:

90.803 Hearsay exceptions; availability of declarant immaterial:

> **(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, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), 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) Evidence in the form of an opinion or diagnosis is inadmissible under paragraph (a) unless such opinion or diagnosis would be admissible under ss. 90.701-90.705 if the person whose opinion is recorded were to testify to the opinion directly.
>
> (c) A party intending to offer evidence under paragraph (a) by means of a certification or declaration shall serve reasonable written notice of that intention upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer in evidence to provide to any other party a fair

> opportunity to challenge the admissibility of the evidence. If the evidence is maintained in a foreign country, the party intending to offer the evidence must provide written notice of that intention at the arraignment or as soon after the arraignment as is practicable or, in a civil case, 60 days before the trial. A motion opposing the admissibility of such evidence must be made by the opposing party and determined by the court before trial. A party's failure to file such a motion before trial constitutes a waiver of objection to the evidence, but the court for good cause shown may grant relief from the waiver.

As indicated above, the statement allegedly taken by Defendant of the insured declarant was unsworn, unsigned, and telephonic (taken in the absence of a notary public or other person capable of administering an oath and/or confirming the identity of the declarant). The statement was originally taken in Spanish. Then, nine (9) years after the statement was obtained by Defendant, and five (5) years into this litigation, Defendant had the statement translated into English and transcribed solely for use in this case.

The deposition testimony of Defendant's corporate representative establishes that the statement proffered by Defendant was created solely for purposes of this litigation and, but for the pending lawsuit, Defendant would not have created the proffered statement.

It is undisputed that the content of the statement did not come from anyone within Defendant's business organization, and no one within Defendant's business organization has any personal knowledge regarding the accuracy of the information contained within the statement. Furthermore, the proffered statement was not made at or near the time of the event, nor was it made by a person within Defendant's business organization with information or knowledge of the facts contained in the statement.

As an initial matter, this Court has previously held that a transcript of a sworn in-person examination under oath is unreliable and cannot be used as summary judgment evidence. See, Order dated October 22, 2018 in the matter of *Gables MRA a/a/o Jose Villarroel v. State Farm*, 2012-25944 SP (25); 26 FLW Supp 766a (J. Diaz; Miami-Dade Oct 22, 2018). If an in-person sworn EUO transcript does not rise to the level of admissible summary judgment evidence, then it follows that an unsworn, unsigned telephonic statement of an unidentified non-party witness is equally inadmissible as summary judgment evidence.

The unsworn, unsigned telephonic statement of the insured in this case is not admissible under Fla. Stat. 90.803(6) because it was allegedly taken pre-suit pursuant to an insurance contract; it was not a deposition; there was no opportunity for anyone to cross-examine the witness nor to object; and it was not obtained in the course of a judicial proceeding. The statement was also never signed or acknowledged by the declarant and the declarant never saw a transcribed copy of the statement nor had the opportunity to listen to the audio recording. The declarant was never given an opportunity to acknowledge, confirm or deny whether the transcript accurately reflected his words. Finally, the non-party witness will not testify at trial because it is believed he has passed away.

In contrast, a witness in a deposition taken pursuant to the civil procedural rules is always given an opportunity to read his or her testimony to confirm the accuracy of the transcribed testimony and he or she can even submit an errata sheet to correct any errors in the transcribed testimony. See, Rule 1.310(e), 'Witness Review.' The 'witness review' safeguards are not available in a pre-suit unsigned, unsworn telephonic statement making it inherently untrustworthy. It is worth noting that the subject insurance policy contained a provision requiring Defendant to secure the insured's signature on a statement, which it failed to accomplish rendering the statement suspect and violative of Defendant's policy requirements.

"The chief reasons for the exclusion of hearsay evidence are the want of the sanction of an oath and of any opportunity to cross-examine the witness. But where the testimony was given under oath in a judicial proceeding, in which the adverse litigant was a party and where he had the power to cross-examine, and was legally called upon to do so, the great weight and ordinary test of truth being no longer wanting, the testimony so given is admitted after the decease of the witness, in any subsequent suit between the same parties." *Putnal v. State*, 56 Fla. 86, 47 So. 864 (1908).

A. STATEMENT IS NOT ADMISSIBLE AS FORMER TESTIMONY

Florida Statute 90.804(2) reads: Hearsay Exceptions – The following are not excluded under section 90.802, provided that the declarant is unavailable as a witness:

a. *Former testimony*.--Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an

opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The "former testimony" rule found in section 90.804(2)(a) is the counterpart of Federal Rule of Evidence 804(b)(1) and it basically codifies the common law rule of evidence previously recognized. Florida has long permitted the use of former testimony. *Putnal v. State*, 56 Fla. 86, 47 So. 864 (1908); *Habig v. Bastian*, 117 Fla. 864, 1S8 So. 508 (1935).

However, the rule only applies if the following requirements are met: (a) the former testimony was taken in the course of a judicial proceeding in a competent tribunal; (b) the party against whom the evidence is offered, or his privy, was a party to the former trial; (c) the issues are substantially the same in both cases; (d) a substantial reason is shown why the original witness is not available; (e) the witness who proposes to testify to the former evidence is able to state it with satisfactory correctness. See, *Johns-Manville Sales Com. v. Janssens*, 463 So.2d 242 (Fla. 1st DCA 1984).

In the instant case, the Gonzalez statement was allegedly taken as part of the requirements of an insurance policy; it was taken prior to this lawsuit being filed; it was not taken in connection with a judicial proceeding; there was no opportunity for cross examination or objection; and, it was not a deposition. See, *Goldman v. State Farm,* 660 So. 2d 300 (Fla 4th DCA 1995) (EUO's and Depositions are not the same and they serve vastly different purposes). Defendant's proffered statement does not even rise to the level of testimony because it is not sworn.

Accordingly, Fla. Stat. 90.804(2) excludes the non-party pre-suit statement of the insured as summary judgment evidence.

B. STATEMENT IS NOT ADMISSIBLE AS A BUSINESS RECORD

In order to qualify for the business record exception to the hearsay rule, a 'business record' must satisfy these criteria: (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record. See F. S. 90.803(6) and See also, *M.S. v. Dept. of Children and Families,* 6 So. 3d 102 (Fla. 4th DCA 2009) citing to *See Quinn v. State,* 662

So.2d 947, 953 (Fla. 5th DCA 1995); § 90.803(6)(a), Fla. Stat. (2002).

In the instant case, the unsworn, unsigned telephonic statement was not created by Defendant and it is not Defendant's record and therefore it cannot be deemed its business record, as a matter of law. A record is not a business record simply because it appears in the proponent's file. It must be generated by the business. The proffered statement in this case was not created by Defendant nor by anyone within Defendant's business organization. See, *Reichenberg v. Davis* 846 So. 2d 1233 (Fla 5th DCA 2033), (father in a paternity action sought to introduce investigative reports from the Dep't of Children and Families over the mother's hearsay objections and the court found that reports of DCF investigators which contained witness interviews were not admissible under the business or public records exception to the hearsay rule because the statements in the reports were not based upon the personal knowledge of an agent of DCF). See, *Van Zant v. State,* 372 So.2d 502 (Fla. 1st DCA 1979) and *Harris v. Game & Fresh Water Fish Comm'n,* 495 So.2d 806, 809 (Fla. 1st DCA 1986) (quoting Charles Ehrhardt, Florida Evidence § 90.805, (2d ed. 1984) "For example, if a business record includes a statement of a bystander to an accident, the bystander's statement is hearsay and not included within the business records exception because the statement was not made by a person with knowledge who was acting within the regular course of the business activity.").

The problem in *Reichenberg* was that the author of the reports simply related the substance of what the witnesses had told the author. Those witness statements, even though contained within the business records of DCF, do not fall within the exception, because they were not based upon the personal knowledge of an agent of the "business" (DCF). The *Reichenberg* court went on to hold that to be admissible under these circumstances, the hearsay statements made to the authors must themselves fall within an exception to the hearsay rule." § 90.803, Fla. Stat. (2002); *Harris,* 495 So.2d at 809. Here, no such exceptions apply.

In order to be admissible under the business record exception, the record must be regularly kept by the business. See, *Yisrael v. State*, 993 So. 2d 952, 957 (Fla. 2008) (Letter written by Department of Corrections employee to prosecutor concerning prisoner's release date was not written as a part of a regularly conducted business activity but was drafted at prosecutor's request). See also, *Simmons v. State*, 697 So. 2d 985, 986 (Fla. 4th DCA 1997) (Error to admit list of items stolen from truck by business employees under section 90.803(6) because the testimony of company president did not establish "that the itemized list was kept in the course of its regularly conducted business activity or that it was the regular practice of the business to keep such a list").

Section 90.803(6) requires that the record of an act or event be kept in the course of a regularly conducted business activity. It further requires that the making of the report be a regular practice of that business activity. If it is not in the regular course of the business to make a particular type of record, then the record is not admissible under this exception. Conversely, not all records regularly made by a business are admissible. See, *Clark Well Drilling, Inc. v. North-South Supply, Inc.*, 44 So. 3d 149, 152 (Fla. 4th DCA 2010). The 'business record which Defendant seeks to use in this case was created 9+ years after the fact; created solely for use in this litigation; and would not have been created but for the existence of this litigation.

In *Eichholz v. Pepo Petroleum Co.,* 465 So. 2d 1244 (Fla 1st DCA 1985), the court reiterated that Section 90.803(6), Florida Statutes (1983), allows admission of records kept in the course of regularly conducted business activity when it is the regular practice of the business to make such a record. The information in the report must be from a person with knowledge who was acting within the course of the business activity. If the initial supplier of the information is not acting within the course of the business, the record cannot qualify for admission. See also, Ehrhardt, Florida Evidence 2d ed., § 803.6, p. 491, citing *Van Zant v. State,* 372 So.2d 502, 503–4 (Fla. 1st DCA 1979). The initial supplier of the information in *Van Zant* was not acting in the course of the business whose record the document purportedly was, but was an unidentified employee of a different business altogether. Therefore, the court found that it was error to admit the document as a business record. In the instant case, the initial supplier of the information was Gonzalez, who is not a part of Defendant's business organization.

To the extent the individual making the record does not have personal knowledge of the information contained therein, the second prong of the predicate requires the information to have been supplied by an individual who does have personal knowledge of the information and who was acting in the course of a regularly conducted business activity. *See Quinn,* 662 So.2d at 953; *Van Zant v. State,* 372 So.2d 502, 503 (Fla. 1st DCA 1979). If this predicate is not satisfied, then the information contained in the record is inadmissible hearsay, unless it falls within another exception to the hearsay rule. *See Quinn,* 662 So.2d at 953–54; *see also Hill v. State,* 549 So.2d 179, 181 (Fla.1989); *Johnson v. Dep't of Health & Rehab. Servs.,* 546 So.2d 741, 743 (Fla. 1st DCA 1989); *Harris v. Game & Fresh Water Fish Comm'n,* 495 So.2d 806, 809 (Fla. 1st DCA 1986) ("The general rule is that a hearsay statement which includes another hearsay statement is admissible only when both statements conform to the requirements of a hearsay exception."); *Van Zant,* 372 So.2d at 503. The information in the statement proffered by Defendant was not supplied by someone within Defendant's business organization who had knowledge of the facts & data contained in the statement.

A requirement of minimum reliability of a record is contained in section 90.803(6) which states that when the "sources of information or other circumstances show lack of trustworthiness" business records are not admissible. Whenever a record is made for the purpose of preparing for litigation, its trustworthiness is suspect and should be closely scrutinized. On January 16, 2020, Defendant's corporate designee testified that the proffered statement was created solely for purposes of this litigation, making it inherently untrustworthy. See, *Coates v. State*, 217 So. 3d 1048 (Fla. 4th DCA 2017). See also, *Masci Corp. v. Fortiline, Inc.*, 202 So. 3d 434, 435 (Fla. 5th DCA 2016) (Document created for use in litigation is untrustworthy and inadmissible). See, *Stambor v. One Hundred Seventy-Second Collins Corp.*, 465 So 2d 1296, 1298 (Fla. 3d DCA 1985) (Accident report prepared by defendant after slip and fall is inadmissible). See also, *Rae v. State*, 638 So. 2d 597, 598 (Fla. 4th DCA 194) (notes made in anticipation of litigation are not made in the ordinary course of business and are therefore inadmissible). *Beckerman v. Greenbaum*, 439 So. 2d 233 (Fla. 2d DCA 1983) (records prepared in anticipation of trial are inadmissible under 90.803(6)). *Chadwell v. Koch Refining Co., L.P.*, 251 F.3d 727, 732 (8th Cir. 2001) ("[R]ecords kept in anticipation of a lawsuit. . . do not qualify for the Rule 803(6) [business records] hearsay exception."); *Timberlake Const. Co. v. U.S. Fidelity and Guar. Co.*, 71 F.3d 335, 342 (10th Cir. 1995) ("It is well established that one who prepares a document in anticipation of litigation is not acting in the regular course of business."); *Campos v. State*, 317 S.W.3d 768, 778 (Tex. App. Houston 1st Dist. 2010) ("Records prepared in anticipation of litigation are excluded under the trustworthiness criterion of Rule 803(6)."). *McElroy v. Perry*, 753 So. 2d 121, 125 (Fla. 2d DCA 2000) (Reports of IME physicians were "more properly characterized as forensic or advocacy reports. Thus, even if they fall within the literal definition of a business record, they also fall within the provision of the rule that excludes those records in which 'the sources of information or other circumstances show lack of trustworthiness.'").

The entry on a business record must be made at or near the time of an act or event. *Yisrael*, supra. That did not happen in the instant case. The requirement of contemporaneity ensures that the entry was made while the matter was fresh in the mind of the participant. If the record is made at a more remote time, the reliability of the entry decreases. See *Maslak v. Wells Fargo Bank, N.A.*, 190 So. 3d 656, 660 (Fla. 4th DCA 2016).

Not every document that appears in Defendant's claim file can be deemed a business record. For example, the Plaintiff's medical records, which are contained in Defendant's claim file, were not created by Defendant and Defendant would not be able to authenticate those records. The information contained within the medical records did not come from anyone within

Defendant's business organization, and there is no one within Defendant's business organization that would be able to attest to the accuracy of those records. Similarly, surveillance reports, surveillance videos or photographs obtained by Defendant's investigator (if any) cannot be authenticated by Defendant's claim adjuster as a business record. Those records could only become admissible through the testimony of the investigator upon proper predicate and foundation.

The statement proffered by Defendant fails to satisfy the 803(6) contemporaneity test because it was created 9 years after the underlying statement was allegedly obtained by Defendant, and it cannot be deemed a business record because it was created solely for the instant litigation and but for the instant litigation, Defendant would not have any reason to advance the proffered statement.

The same is not true for depositions because depositions can serve as summary judgment evidence as a matter of law. In the instant case, the proffered statement does not even rise to the level of an affidavit because it is not signed, sworn nor acknowledged by the declarant. And the proffered statement is not an EUO because it was not contemporaneously and stenographically recorded by a court reporter via a certified translator, nor was it taken under oath. Even if the statement rose to the level of an EUO, it would nevertheless still be inadmissible for the reasons expressed in *Villarroel*, supra.

For the reasons set forth above, the proffered statement of Francisco Gonzalez is not admissible as summary judgment evidence under Fla. Stat. 90.803(6) because it is not Defendant's business record; it was not made in the course of Defendant's regularly conducted business activity; it was created solely for purposes of the instant litigation; it was not created at or near the time of the occurrence of the event; it is inherently untrustworthy; it is unsigned; it is unsworn; it is not a deposition taken during the course of this action; it was created in a manner that violates Defendant's own policy terms; there was no opportunity for cross examination; no one within Defendant's business organization has any knowledge regarding the content of that statement; no one inside Defendant's business organization or outside Defendant's organization can confirm the identity of the declarant; the proffered statement is hearsay upon hearsay; and Defendant's claims adjusters cannot authenticate a hearsay document which was neither created nor generated by the Defendant simply by signing an affidavit containing the 'magic words' to create a business record exception to the hearsay rule.

The Court acknowledges that at the outset of the hearing on January 23, 2020, Defendant

agreed to withdraw the affidavit of Geraldine Burroughs, and indicated that it may amend and/or replace it. Notwithstanding, to the extent that the affidavits of Geraldine Burroughs, Rachel Luetjes and Brian Bowers rely on or quote from the Gonzalez statement, these statements are inadmissible hearsay and are stricken from the record. Defendant is prohibited from using the hearsay statement of Gonzalez for any purpose at trial or summary judgment.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 20th day of February, 2020.

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2014-001360-SP-25 02-20-2020 2:42 PM
Hon. Linda Diaz

COUNTY COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

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