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Article 8

Admissibility of Hospital Records Under Section 327.25 Wisconsin Statutes

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RECENT DECISIONS

Admissibility of Hospital Records Under Section 327.25, Wisconsin Statutes: Prior to 1963, the controlling law in Wisconsin with respect to the admission into evidence of records made in the regular course of business and particularly hospital records was that stated in *Bielke v. Knaack.*[1] In construing section 327.25, Wisconsin Statutes, as it then existed,[2] the court in the *Bielke*[3] case held that it was error to admit hospital records in evidence without the testimony of the entrants or a showing that the entrants were beyond the jurisdiction of the court, dead or insane. This construction of section 327.25 was not contested for nearly 30 years.[4]

The *Bielke* decision was put in issue in *Rupp v. Travelers Indemnity Co.*[5] This case involved a trial to the court solely on the issue of damages relating to medical expenses, pain and suffering and disability arising out of an automobile accident. The plaintiff offered in evidence certain hospital records as entries made in the usual course of business under section 327.25 but did not call any doctor, nurse, intern or employee to identify or verify the records or offer to show that such persons were beyond the jurisdiction of the court, dead or insane. The trial court refused to admit the records on the ground that the proper foundation required by section 327.25 was not made and cited the *Bielke* case as controlling.[6] On appeal the supreme court held that under the existing statute it had no alternative but to affirm the trial court's decision.[7] The court noted that the equivalent federal rule em-

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[1] 207 Wis. 490, 242 N.W. 176 (1932).

[2] WIS. STAT. §327.25 (1931): "Entries on cards, sales slips, loose leaf sheets or in a book or other permanent form (other than those mentioned in sections 327.24 and 328.24), in the usual course of business, contemporaneous with the transactions to which they relate and as part of or connected with such transactions, made by persons authorized to make the same, may be received in evidence when shown to have been so made upon the testimony either of the person who made the same, or if he be beyond the jurisdiction of the court or insane, of any person having custody of the entries, and testifying that the same were made by a person authorized to make them in whose handwriting they are, and that they are true and correct to the best of his knowledge and belief."

[3] Bielke, *supra* note 1.

[4] See Stella Cheese Co. v. Chicago, St. P., M. & O. R. Co., 248 Wis. 196, 21 N.W. 2d 655 (1946) wherein the court noted that the statute should receive a liberal interpretation to carry out its purpose.

[5] 17 Wis. 2d 16, 115 N.W. 2d 612 (1961).

[6] At page 23 of the official report the court also held that an additional ground for inadmissibility existed due to the fact that some of the doctor's entries were illegible and the trial court and the attorneys were in dispute as to their meaning.

[7] At page 22 of the official report the court said: "While we recognize the force of the plaintiff's argument we cannot either construe or modify sec. 327.25, Stats., as urged. We cannot interpret the section, no matter how liberally, so as to excise from the statute the express requirement that entries must be identified by the testimony of the entrants if it is not shown they are beyond the jurisdiction or insane."

bodied in 28 U.S.C. section 1732[8] has generally been interpreted to admit in evidence hospital records.[9] However, although the Wisconsin statute did recognize modern business practices by excusing the necessity of producing *all* the entrants, the court noted that this exception does not apply to hospital records. The court further noted that a "practical-necessity" argument could be made that the statute logically should extend to hospital records where there are multiple entrants but that this could not be done under the statute as it then existed without calling the entrants or showing that they were beyond the jurisdiction of the court, dead or insane and that the statute could not be modified on appeal but only in compliance with section 251.18 of the Wisconsin Statutes.[10]

In compliance with section 251.18 and upon the recommendation of the Wisconsin Judicial Council, the supreme court did modify section 327.25 by promulgation of Court Rules in 17 Wis. 2d xxiii. The Court Rules repealed sections 327.24 and 327.25 and recreated section 327.25 in essentially the same form as it is now found in the 1963 Wisconsin Statutes.[11] Mowever, the Court Rules also created a second subsection for section 327.25:

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[8] 28 U.S.C. §1732: "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business' as used in this section, includes business, profession, occupation, and calling of every kind."

[9] At page 21 of the official report the court stated:

"It is true, the federal rule has generally been interpreted to admit into the record the hospital records. See cases in the annotation, 28 U.S.C., p. 480, sec. 1732, note 18. The policy basis for considering hospital records as an exception to the hearsay rule is well stated in 6 Wigmore, Evidence (3d ed.), p. 36, sec. 1707. In summary, Wigmore states that the medical records of patients in a modern hospital contain a circumstantial guaranty of trustworthiness because of the manner and purpose for which they are kept and the reliance placed upon them by the doctors and nurses in the affairs of life and death, and also there is a practical necessity for the admission of such records because the requirements of calling on individual doctors, nurses, and attendants who have co-operated in making the record, would seriously interfere with the hospital administration."

[10] WIS. STAT. §251.18 (1963), provides that a statute relating to pleading, practice, and procedure may be modified or suspended by rules promulgated after the court had held a public hearing with reference thereto upon notice by publication for three successive weeks in the official state paper. The court in the Rupp case noted that the court customarily submitted problems of this nature initially to the judicial council of Wisconsin for study and report of the merits of the proposed change and that this matter would be called to the attention of the juricial council.

[11] WIS. STAT. §327.25 (1963): "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of such act,

327.25 ENTRIES IN THE USUAL COURSE OF BUSINESS; MEDICAL RECORDS: (1) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, or occurrence or event, is admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "business" includes businesses, professions, occupations and callings of every kind.

(2) Subsection (1) applies to entries made in medical or hospital records if entries relate to treatment given or examination conducted within this state. No such entry or portion thereof which constitutes a medical opinion or diagnosis may be admitted in evidence under this subsection except by stipulation of the parties or except when offered against the interest of a party by whom or under whose supervision such entry or portion thereof was made.

Section 327.25(2), as promulgated by the supreme court, excluded medical entries relative to treatment given outside the state and, more important, entries which constituted medical opinion or diagnosis unless they were offered by stipulation or as admissions by the entrant. The new section 327.25 as promulgated by the supreme court became effective July 15, 1963.

Shortly after this action was taken by the supreme court, the Wisconsin legislature created a new section 327.25.[12] This legislative enactment became effective August 23, 1963. Section 327.25, as enacted by the legislature, eliminated subsection (2) of the supreme court's statute and reenacted subsection (1) in substance despite the fact that the existence and content of subsection (2) was undoubtedly made known to the legislature during the hearings on the proposed bill. Thus, the current section 327.25 is essentially the same as the federal rule and logically should be interpreted similarly.

Under the current section 327.25, for an entry to be admissible, the following criteria must be met:

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transaction, occurrence or event, if the custodian or other qualified witness testifies to its identity and mode of preparation, and if made in regular course of any business and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility. The term 'business,' as used in this section, includes businesses, profession, occupation and calling of every kind."

[12] L. 1963 C. 256, amended by L. 1963 C. 459 sec. 59.

1. It must have been made in the regular course of business as a memorandum or record of any act performed in the regular course of the business.
2. It must have been made at the time of the act or within a reasonable time thereafter.
3. A foundation must be layed by the custodian of the records or other qualified witness by testifying to its identity and mode of preparation and that it was made in the regular course of business.

Thus, section 327.25 no longer requires authentication of the record by the entrant or a showing that the entrant is dead, insane or beyond the jurisdiction of the court, as was required under the statute as it originally existed.

IMPORTANT FEDERAL DECISIONS RELATING TO ADMISSION OF DIAGNOSTIC HOSPITAL RECORDS

It was noted by the court in the *Rupp* case that the federal equivalent[13] of the current section 327.25 has *generally* been interpreted so as to allow the admission into evidence hospital records without the authentication of the record by the entrant or the showing that he be dead, insane or beyond the jurisdiction of the court. This admissibility of hospital records, in a majority of federal circuits, extends also to records containing a doctor's diagnosis or opinion.[14]

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[13] Note 8, *supra.*

[14] Federal courts *not* allowing admission of hospital records containing diagnosis and opinion under the federal shop-book rule.
Court of Appeals for the District of Columbia: New York Life v. Taylor, 79 U.S. App. D.C. 66, 147 F. 2d 297, 300 (1964): "A literal reading of the [federal shop-book rule] would make the records in this case admissible on the theory that the business of operating a hospital requires records of the histories of patients, reports of unusual conduct and also diagnosis by physicians. But the Supreme Court in Palmer v. Hoffman ((1943) 318 U.S. 109, 63 S.Ct. 477, 87 L. Ed. 645, 144 A.L.R. 719) has, we believe, limited the admission of records under the Federal Shop Book Rule statute to those which are trustworthy because they represent routine reflections of the day-to-day operations. The opinion in that case held that the statute is not one 'which opens wide the door to avoidance of cross-examination.' . . .The Supreme Court has stated that the test of admissibility must be 'the character of the records and their earmarks of reliability . . . acquired from their source and origin and the nature of their compilation.' To admit a narrative report to an event, or a conversation, or a diagnosis as a substitute for oral testimony, is to give any large organization the right to use self-serving statements without the important test of cross-examination. Cross-examination is unimportant in a case of systematic routine entries made by a large organization where skill of observation and judgment is not a factor. We believe that Palmer v. Hoffman restricts the application of the Federal Shop Book Rule Statute to that type of business entry."; Polisnik v. U.S., 104 U.S. App. DC 136, 259 F. 2d 951 (1958); Lyles v. U.S., 103 U.S. App. DC 22, 254 F 2d 725 (1954); Washington Coca Cola Bottling Works, Inc. v. Tawney, 98 U.S. App. DC 151, 233 F. 2d 353 (1956); Wheeler v. U.S., 93 U.S. App. DC 159, 211 F. 2d 19 (1953).
COURT OF APPEALS, 5TH CIRCUIT: Mulligan v. U.S., 252 F. 2d 398, 404 (1958) (diagnosis of patient's mental condition held properly excluded); England v. U.S., 174 F. 2d 466 (1949) (opinions as to sanity based on hearsay held properly excluded); Missouri Pacific R.R. Co. v. Soileau, 265 F. 2d 90 (1959).
COURT OF APPEALS, 6TH CIRCUIT: Baltimore & Ohio v. Oneill, 211 F. 2d 190 (1954) (recorded statement as to interpretation of x-ray held not admissible).

In *Kissinger v. Frankhousen*[15] the court held that a U.S. Naval Hospital record, including an entry by a doctor evaluating the results of a Bogen's test for intoxication, was admissible under the federal shop-book rule without testimony by the doctor or a showing that he was dead, insane or beyond the jurisdiction of the court where the test was performed in the regular course of the hospital's business and recorded according to the regular routine of the institution. And, although the issue was not raised on appeal, the court noted that the doctor's initial impression made before the Bogen's test was administered and entered on the clinical record ("Simple Drunkenness") was also admissible under the rule. In the companion case of *Thomas v. Hogan*[16] it was held that for the hospital record to be admissible under the federal rule it was not necessary to state the qualifications of the entrant or the steps taken in the procedure recorded because the rule supplies a presumption that the diagnosis or tests were properly made by qualified personnel if the recorded information reflects the usual routine of the hospital and if it is the normal practice to record such data contemporaneously or within a reasonable time. And, if the entry is made under the requisite conditions of the federal shop-book rule, it makes no difference whether the record reflects expressions of medical opinion or observations of objective fact:

However, in the 6th Circuit hospital records may be admissible to show administrative matters—Ranger v. Equitable Life Insurance Society of United States, 196 F. 2d 968 (1952). Federal courts allowing admission of hospital records containing diagnosis and opinion under the federal shop-book rule.
COURT OF APPEALS, 2ND CIRCUIT: White v. Zutell, 263 F. 2d 613 (1959); (detailed report of doctor's medical findings held admissible); Terrasi v. South Atlantic Lines, 226 F. 2d 823 (1955) (diagnosis of "fairly pronounced shock" held admissible); Buchminister's Estate v. Com'r., 147 F. 2d 331 (1944) (diagnosis of cerebral hemorrhage held admissible); Reed v. Order of United Commercial Travelers, 123 F. 2d 252 (1941) (diagnosis that patient "still apparently well under the influence of alcohol" held admissible); Korte v. N.Y., N.H. & A.R. Co., 191 F. 2d 86 (1951); U.S. v. N.Y. Foreign Trade Zone Operators, Inc., 304 F. 2d 792 (1962).
COURT OF APPEALS, 3RD CIRCUIT: Bartowski v. Pittsburg & Lake Erie R.R. Co., 172 F. 2d 1007 (1949) (hospital record showing condition of patient admissible); Norwood v. Great American Indemnity Co., 146 F. 2d 797 (1944) (autopsy report admissible as business record).
COURT OF APPEALS, 4TH CIRCUIT: Thomas v. Hogan, 308 F. 2d 355 (1962) (evaluation of Bogen's test made for determination of alcoholic content of blood held admissible); Kissinger v. Frankhousen, 308 F. 2d 348 (1962) (evaluation of Bogen's test held admissible).
COURT OF APPEAL., 7TH CIRCUIT: U.S. v. Ware, 247 F. 2d 698 (1957) (record of analysis by government chemist held admissible as business record); Brucher v. Order of United Commercial Travelers, 217 F. 2d 876 (1954).
COURT OF APPEALS, 8TH CIRCUIT: Glawe v. Rulton, 284 F. 2d 495 (1960) (medical opinion held admissible); Missouri-Kansas-Texas R.R. Co. of Texas v. Ridgway, 191 F. 2d 363 (1951) (hospital record noting extent of injuries held admissible.
COURT OF APPEALS, 9TH CIRCUIT: Lew Moon Cheung v. Rogers, 272 F. 2d 354 (1959) (blood test admissible as business record); Medina v. Erickson, 226 F. 2d 475 (1955) (diagnosis of "bronchogenic carcinoma" and "melostosis of the liver" held admissible).

[15] 308 F. 2d 348 (1962).
[16] 308 F. 2d 355 (1962).

> Consistently, hospital records have been held to be admissible under the statute, for, as Dean McCormick explains, "the safeguard for trustworthiness . . . of the records of a modern hospital are at least as substantial as the guaranties of reliability of the records of business establishments." McCORMICK, *Evidence* 609 (1954).[17]

The opinion further comments that in some circuits the shop-book rule is not extended to a record entry of a diagnostic opinion of a doctor as to the results of a scientific test which requires expertise to conduct or interpret but that it has been held in other circuits that records routinely made of diagnostic or scientific tests which are done in the regular course of a hospital's business are entitled to admission under a presumption of trustworthiness without testimony by the entrant or a showing that he is dead, insane or beyond the jurisdiction of the court.[18] The court noted that under this interpretation the opposing party would lose his right of cross-examination of the doctor who made the entry but that this is the case in nearly all exceptions to the hearsay rule and that they are deemed justified because the circumstances assure the probable verity of the evidence. However, counsel may still attack the regularity of the procedure and the competence of the entrant[19] but this goes to the weight and not the admissibility of the evidence.

In *Medina v. Erickson*[20] the federal shop-book rule was held to admit, without the testimony of the doctor or a showing that he was dead, insane or beyond the jurisdiction of the court, consultation reports made by doctors who examined the plaintiff upon a showing that the records were made in accordance with hospital regulations even though the reports contained hearsay and denied the defendants the right of cross-examination of the entrants.

And, in the recent case of *Horton v. Moore-McCormack Lines, Inc.*,[21] the rule that hospital records are admissible as records made in the regular course of business was affirmed.

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[17] *Id.* at 359.

[18] Note 14, *supra.*

[19] These problems inherent in the federal rule were noted in the *Rupp* case wherein at page 22 of the official report the court stated: "The effect of the contended rule would shift the issue from admissibility to credibility and place a greater burden on the party attacking the trustworthiness of the entries. . . ." For a discussion of these problems see Arnold, Medical Evidence in Wisconsin, 39 Marq. L. Rev. 289 (1956), and Swietlik, Hearsay Rule in Wisconsin, Vol. II, No. 2, Wisconsin Continuing Legal Education, p. 1 (April, 1962). Also, see Skogstad and Kappa, Admissibility of Business Entries, 1958 Wis. L. Rev. 245. It should be noted that in Dean Swietlik's article the author advocated the repeal of the then existing section 327.24 and the amendment of the then existing section 327.25 so as to conform more closely with modern statutes. The author noted that hospital records insofar as they contain a physician's diagnosis were not admissible under the then existing statutes even though the physician be dead, insane or otherwise unavailable.

[20] 226 F. 2d 475 (1955).

[21] 326 F. 2d 104 (1964).

STATUS OF THE CURRENT WISCONSIN STATUTE

The current section 327.25 has not been construed by the Wisconsin Supreme Court as to whether it will allow the admission in evidence of hospital records containing diagnosis or opinion under the regular entries exception to the hearsay rule without the testimony of the entrants or the showing that they are dead, insane or beyond the jurisdiction of the court. As heretofore noted, the Wisconsin statute is essentially the same as the federal code section and should thus be similiarly construed. However, the history of section 327.25 is such as to indicate that the Wisconsin Supreme Court may be inclined to hold otherwise, at least to the extent that the records contain diagnostic opinions. This is, of course, due to the fact that the prior statute as promulgated by the court contained a section which expressly excluded medical diagnosis and opinion from the rule. Although the legislature repealed this section, it is possible that the failure of the legislature to specifically state that records containing diagnosis and opinion are admissible under the statute may be viewed by the court as an opening for holding that such records are still not within the scope of the statute. The recent case of *Zweiffel v. Milwaukee Automobile Mutual Insurance Co.*[22] does indirectly give some credence to such a speculation. In this appeal the appellant contended, as one of a number of alleged errors, that it was error for the trial court not to allow the jury to consider hospital records which contained the notation "old healed fract of nose with septal deviation" under the heading of "Diagnosis."[23] The supreme court cited section 327.25(2), which is the now repealed subsection which had been created by the supreme court, and noted that this subsection permits introduction of hospital records except to the extent that they contain "medical opinion and diagnosis." The court held that it was thus in the discretion of the trial court as to whether these records should have been submitted to the jury or not but that in any event it was not prejudicial to reject the evidence because the facts relating to the injury in question were fully brought out in other testimony. It is interesting to note that nowhere in the opinion did the court recognize that subsection (2) of section 327.25, as created by the supreme court, has been repealed by the legislature. Perhaps this is indicative of the attitude the court will take towards hospital records which contain diagnostic information the next time the issue is before the court. In any event, the failure of the court to at least note that their court rule exempting medical opinion and diagnosis from the shop-book rule is no longer in effect is difficult to understand.

CONCLUSION

The Wisconsin statutes, prior to July 15, 1963, regulating the ad-

[22] 28 Wis. 2d 249, 137 N.W. 2d 6 (1965).
[23] *Id.* at 260 of official report.

mission of records made in the regular course of business, including hospital records, required a foundation of testimony by the entrant or a showing that the entrant was dead, insane or beyond the jurisdiction of the court. In 1963 the Wisconsin Supreme Court, under its court rules power, promulgated a new statute similar to the federal shop-book rule whch does not require such a foundation or showing for regular entries. But, the court qualified the federal rule by exempting hospital records containing medical diagnosis or opinion from the rule. Shortly thereafter the legislature repealed the statute as created by the supreme court and enacted the currently existing section 327.25 which is in substance the same as the federal shop-book rule. Under the federal rule, in the majority of circuits, hospital records made in the regular course of business and containing medical diagnosis and opinion are admissible without testimony by the entrant. Under the reenactment rule of construction the Wisconsin statute should now be similarly construed. However, the recent *Zweiffel*[24] case indicates that the Wisconsin Supreme Court has not forgotten the restriction they originally placed upon the shop-book rule in re medical diagnosis and opinion. It is concluded that any future decision recognizing the force of this now repealed exception to the shop-book rule will clearly be contrary to the existing section 327.25 and the applicable rule governing its construction. However, this conclusion is not intended to reflect the author's opinion to the relative merit of either the court's or the legislature's version of the statute.

It might further be noted that even if the court should hold that medical records containing diagnosis and opinion do not fall within the purview of the regular entry exception to the hearsay rule as embodied in the shop-book rule, this would not preclude a doctor other that the original entrant from forming and testifying as to an opinion based on the records even though the records were not admissible in evidence.[25]

LEE J. GERONIME

Unauthorized Practice of Law: Necessity of Executor to Appear by Attorney in Probate Proceeding—Petitioner J. Gordon Baker's mother died testate, naming him executor in her will. Petitioner, also a residuary legatee of a one-fourth share of the estate, retained attorneys, who appeared for him at the beginning of the probate proceedings. A petition to probate the will was filed, the will was admitted, and petitioner was appointed executor. An inventory was filed, disclosing personal property of $167,863.14 and real estate worth $4,000.

[24] Zweiffel, *supra* note 22.
[25] See Sundquist v. Madison Railways C. (1928) 197 Wis. 83, 221 N.W. 392, followed in Chapnitsky v. McClove (1962) 20 Wis. 2d 453, 122 N.W. 2d 400.