

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

MUTUAL SERVICE CASUALTY  
INSURANCE CO., INC. as Subrogee of  
Land O' Lakes, Inc.,

Plaintiff,

vs.

PAUL J. ARMBRECHT, D.V.M.,

Defendant.

No. C99-3099-MWB

**ORDER REGARDING PLAINTIFF'S  
MOTION TO RECONSIDER  
PORTION OF COURT'S RULING ON  
PLAINTIFF'S MOTION IN LIMINE**

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On August 3, 2001, this court denied the plaintiff's Motion *In Limine* regarding statements made by Dr. Birchmeier to Philip Dorff on the ground Mr. Dorff's recollection of those statement qualifies as a business record under Federal Rule of Evidence 803(6) (#68). On August 15, 2001, the plaintiff, Mutual Service Casualty Insurance Co., Inc. ("MSI") requested the court to reconsider this ruling. The memorandum in question was prepared during the pendency of the Hoag trial by LOL's attorney, Philip Dorff. Mr. Dorff had a conversation with Dr. Lawrence Birchmeier, who was with the State Veterinarian's office, regarding the propriety of the movement of the pigs. During this conversation, Dr. Birchmeier allegedly stated that movement of the pigs was proper. After this conversation, Mr. Dorff prepared a memorandum of the conversation, which contains Dr. Birchmeier's statement. It is this statement that the plaintiff argues is hearsay and does not fall within the business records exception.

MSI argues that Mr. Dorff's memorandum containing Dr. Birchmeier's statement is hearsay within hearsay and that, while the memorandum itself may qualify as a business

record under FRE 803(6),<sup>1</sup> Dr. Birchmeier's statement fails to conform with an exception to the hearsay rule and, therefore, must be excluded. In the court's original ruling, the court overlooked the double hearsay aspect of the plaintiff's motion. In the advisory committee notes accompanying Paragraph (6) of FRE 803, the drafters note that prior to the amplification of the kinds of activities that produce admissible business records within the exception, "[s]ources of information presented no substantial problem. . . . All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result. . . ." FED. R. EVID. 803(6) advisory committee's note. The indicia of reliability that underlies the business records exception is "supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." *Id.* "If, however, the supplier of the information does not act in the regular course [of business], an essential link is broken; the assurance of the accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail." *Id.* The rule, therefore, requires that the informant supplying the information contained in the business record be "an informant with knowledge acting in the course of the regularly conducted activity." *Id.*

The leading case on this issue is *Johnson v. Lutz*, 170 N.E. 517 (N.Y. 1930). The New York Court of Appeals held that to be admissible, records must be made on information supplied by persons under a duty to accurately impart information. *Id.* at 518. In the *Lutz* case, a police officer's report contained information from "third persons who

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<sup>1</sup>No party has questioned whether Mr. Dorff's notes of his conversation with Dr. Birchmeier qualify as a business record within the meaning of Rule 803(6). On reconsideration, the court wonders whether Mr. Dorff was under a duty to record accurately and, thus, whether the memorandum qualifies as a business record at all.

happened to be present at the scene of [an automobile] accident when [the officer] arrived.”  
*Id.* The report did not indicate whether these people witnessed the accident and reported to the officer their first-hand observations or whether they were repeating what others had told them. *Id.* The court held:

“It is a proper qualification of the rule admitting such evidence that the account must have been made in the ordinary course of business, and that it should not be extended so as to admit a mere private memorandum, not made in pursuance of any duty owing by the person making it, or when made upon information derived from another who made the communication casually and voluntarily, and not under the sanction of duty or other obligation.”

*Id.* (quoting *Mayor of New York City v. Second Ave. R. Co.*, 7 N.E. 905, 909 (N.Y. 1886)). In *Lutz*, the police report itself qualified as a business record within the meaning of the hearsay exception because the officer was acting within the regular course of business and was under a duty to report information accurately, but the informants whose information the officer recorded were under no such similar duty; therefore, the report was excluded. *See id.*

If the source of information contained in a business record is not an employee and is under no duty to accurately impart information, “double hearsay” exists. *See, e.g., Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 271 (5th Cir. 1991) (hospital record that contained statements made by the plaintiff’s sister, who was also a social worker, was double hearsay not falling within independent exception and, therefore, was properly excluded). If both the source of information and its recorder are acting in the regular course of business, multiple hearsay is excused by the business records exception. *Id.* (citing *United States v. Davis*, 571 F.2d 1354, 1360 (5th Cir.1978)); *see also Grogg v. Missouri Pacific R. Co.*, 841 F.2d 210, 214 (8th Cir. 1988) (“If the source of the information [contained in the record] . . . was an outsider to the chain producing [the defendant’s]

business record, rule 803(6) by itself does not permit admission of the information provided by the outsider.”); *Johnson v. Herman*, 132 F. Supp. 2d 1130, 1133 (N.D. Ind. 2001) (“[The business record] exception does not encompass statements contained within the business record that are made by third parties.”) (citing *Woods v. City of Chicago*, 234 F.3d 979, 986 (7th Cir.2000), which held that statements made by third parties in a police report are inadmissible under the business record exception). Further, Federal Rule of Evidence 805 provides that “[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.” FED. R. EVID. 805. Because Dr. Birchmeier was not acting in the regular course of business, his out-of-court statement is hearsay and, in order to be admissible, must have an independent basis of admissibility. *Cf. United States v. De Peri*, 778 F.2d 963, 976-77 (3d Cir. 1985) (“This is a classic ‘hearsay within hearsay’ problem. While [the public records exception] would permit . . . introduction of the reports themselves, which would ordinarily be considered hearsay, . . . out-of-court statements contained in the records require a separate hearsay exception before they can be admitted.”).

In the defendant’s brief in resistance to MSI’s motion to reconsider, the defendant argues that Dr. Birchmeier’s statement was trustworthy because he was “the state veterinarian commenting on matters particularly within his regulatory purview and expertise.” Def.’s Br. at 1 (#71). It appears, therefore, that the defendant is asserting that if an independent basis of admissibility is required, then Dr. Birchmeier’s statement satisfies Rule 807 (the “residual exception”), formerly Rules 803(24) and 804(b)(5). Rule 807 provides for the admission of statements that do not meet the requirements of a specific hearsay exception but nonetheless have “equivalent circumstantial guarantees of trustworthiness.” FED. R. EVID. 807. The residual exception to the hearsay rule should be used sparingly; Congress intended it to be used only in “rare and exceptional

circumstances.” See, e.g., *Stokes v. City of Omaha*, 23 F.3d 1362, 1366 (8th Cir. 1994); *United States v. Love*, 592 F.2d 1022, 1027 (8th Cir. 1979). At the same time, however, district courts have considerable discretion in applying this exception. See, e.g., *Page v. Barko Hydrolics*, 673 F.2d 134, 140 (5th Cir. 1982) (citing *Huff v. White Motor Corp.*, 609 F.2d 286, 292 (7th Cir. 1979)); *United States v. Van Lufkins*, 676 F.2d 1189, 1192 (8th Cir. 1982). To be admissible, the court must determine that:

(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

FED. R. EVID. 807.

In response to the defendant’s argument that Dr. Birchmeier’s statement is sufficiently trustworthy to fall within the residual exception to the hearsay rule, MSI contends that the memorandum does not evidence “equivalent circumstantial guarantees of trustworthiness” because nothing in the memorandum indicates the basis of Dr. Birchmeier’s opinion. Further, MSI points out that the defendant could call Dr. Birchmeier to testify at trial. Thus, MSI argues that Mr. Dorff’s memorandum is not “more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.” See *id.*

The court agrees with this argument. The memorandum might be more probative of the propriety of moving the pigs than any other available evidence if, for example, it were shown that Dr. Birchmeier refused to testify or was otherwise unavailable, even though unavailability is not a prerequisite to admissibility under Rule 807. Cf. *Elizararras v. Bank of El Paso*, 631 F.2d 366 (5th Cir. 1980) (absent a showing that bank officials could not be procured to testify about certain actions taken with respect to an account, testimony of the

account holder concerning those actions was not admissible under the residual exceptions to the hearsay rule). The defendant does not contend that Dr. Birchmeier is unavailable. Furthermore, other than stating that Dr. Birchmeier is a state veterinarian and was commenting on matters within his regulatory purview and expertise, the defendant has not addressed MSI's, and the court's, concern regarding the basis of Dr. Birchmeier's opinion.

Thus, although the court does not question Dr. Birchmeier's veracity, the very accuracy of his statement is questionable, absent a showing of the basis of his opinion. To admit an out-of-court statement under Rule 807, the court must be satisfied that admission of the statement will comport with the general purposes of the Federal Rules of Evidence, and the primary purpose is to "secure fairness . . . to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102. It is the court's opinion that admission of Dr. Birchmeier's statement that movement of the pigs was proper would not further this goal in the absence of a showing of the context of the statement and the basis for the opinion. Although Dr. Birchmeier's opinion may help the defendant prove and defend his case, the statement would be much more probative on the issue of the propriety of the movement of the pigs if Dr. Birchmeier were called to testify at trial, and both the context of his opinion and the basis for it were established.

Therefore, the court **grants** the plaintiff's Motion To Reconsider its ruling on the plaintiff's Motion *In Limine* concerning Dr. Birchmeier's statement. Dr. Birchmeier's statement shall not be admitted for the truth of the matter asserted. However, in the event the statement is offered for a purpose other than for the truth of the matter asserted, for example, to show reliance by Dr. Ambrecht, then the statement may not be hearsay at all, and the court will, at the appropriate time, consider admissibility on that ground.

**IT IS SO ORDERED.**

**DATED** this 4th day of September, 2001.

*Mark W. Bennett*

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MARK W. BENNETT  
CHIEF JUDGE, U. S. DISTRICT COURT  
NORTHERN DISTRICT OF IOWA