

COÖS, SS.

SUPERIOR COURT

State of New Hampshire

v.

Volodymyr Zhukovskyy

214-2019-CR-078

Objection to State's Motion in Limine to Exclude Evidence of NMS Reporting Policy

Change at Trial

The Defendant Volodymyr Zhukovskyy, by and through counsel, Jay Duguay and Steve Mirkin, Esq., objects to the State's Motion in Limine to exclude evidence of NMS reporting policy change at trial.

In support of this Objection the Defendant States the following:

1. On June 21, 2019, Albert Mazza caused a motor vehicle collision when he lost control of his motorcycle while under the influence of alcohol and slid into an oncoming truck operated by Mr. Zhukovskyy. The collision resulted in the deaths of seven motorcyclists, including Mr. Mazza, and the serious injury to another.
2. Mr. Zhukovskyy voluntarily provided blood samples for analysis on the evening of the accident. Those samples were tested first at the NH State Forensic Lab and then aliquots were sent to NMS Labs in Pennsylvania for further testing.
3. The State Police Forensic Lab reported a negative finding for 6-monoacetylmorphine (6-MAM). Aliquots were prepared and sent to NMS Labs for additional testing for 6-MAM because NMS Labs supposedly has a more sensitive testing protocol which would be able to detect smaller amounts of 6-MAM in the blood samples.
4. On June 29, 2019, NMS produced a report that showed no 6-MAM detected. NMS Toxicologist Donna Papsun then conducted a manual override of that negative result and

issued an amended report on July 11, 2019 which indicated a positive finding for 6-MAM below NMS Labs' reporting limit for 6-MAM.

5. On January 15, 2021, NMS labs issued a memo to all toxicologists outlining a change in policy which prohibited case reviewers like Donna Papsun from executing a manual override of analytical finding as she did in this case.
6. Dr. Labay explained in her deposition that the basis for the change was two-fold. The first issue is to standardize reporting procedures by removing discretion from the reviewers to make changes to the reports. This is because one reviewer could look at a report and not make changes and another reviewer looking at the same report could decide to change the report to show a positive finding. NMS Labs decided that the case reviewers such as Donna Papsun should not have that discretion.
7. The second reason as provided by Dr. Labay during her deposition was based on the analytical protocol used by NMS labs. According to Dr. Labay, when the lab runs a patient sample it also runs several calibration standards with every sample run. Those calibration standards are used to ensure that the test run was performed properly by matching the result achieved during the test run on the standard to their known concentrations. Accurate results on the calibration standards ensure that the test results for the patient sample are accurate.
8. Dr. Labay further explained that NMS does not run a calibration standard below the reporting limit on a case-by-case basis like is done for quantities above the reporting limit. That means there is no standard to compare to achieved results to ensure accuracy below the reporting limit. She further noted that no quality control samples were being

run below the reporting limit either. As a result, the lab decided to no longer allow case reviewers to add a “less than” notation to a report for a sample below the reporting limit.

9. Dr. Labay noted that the limit of detection is the lowest amount that the testing protocol can reliably detect. That limit of detection is generated during the validation study for the testing protocol. For 6-MAM testing at NMS Labs, that validation study occurred in 2015. There has been no further validation of the limit of detection. Dr. Labay stated that the limit of detection can change on a run-by-run basis due to changes in equipment, maintenance of equipment, or sensitivity of equipment. Because no calibration standard is run at below the reporting limit is impossible to know what the true limit of detection is for each run.
10. For those reasons, NMS Labs decided that it was a better practice to remove discretion from reviewers and no longer allow them to manually add a “less than” result as Donna Papsun did in this case.
11. The fact that NMS labs was allowing, at best, less than optimal practices at the time Donna Papsun issued her amended report is absolutely relevant to credibility of the lab and its procedures, and the findings of Donna Papsun. It is also clearly relevant that NMS Labs has taken steps to fix those practices because it is an implicit admission that at the time the analysis in the case was being done they were employing substandard practices.
12. Despite the claim of the state, the reason for the change in policy was not purely ministerial. As evidenced by the memo itself attached hereto, no mention is made of an attempt to standardize reporting procedure, but rather focuses entirely on the fact the limit of detection was not being verified on a run-by-run basis.

13. There is no chance that this evidence will “sow confusion” as claimed by the State, rather it will allow the jury to put Donna Papsun’s testimony in the proper context and analyze her work done on this case with a fuller understanding of what her own lab now acknowledges is a better practice. Additionally, evidence is not unfairly prejudicial simply because it is detrimental to the opposing party’s case. State v. Addison, 165 N.H. 381, 469 (2013).

Wherefore, Mr. Zhukovskyy Respectfully requests this Honorable Court:

- A. Deny the State’s Motion; and,
- B. All other relief deemed just.

Respectfully submitted,

/s/Jay Duguay
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded this 22nd day of July, 2022, to John G. McCormack, Esq., Coös County Attorney, and Scott Chase, Esq. and Josh Speicher, Esq., Assistant Attorneys General.

/s/Jay Duguay _____
Jay Duguay

EXHIBIT A



Memo

To: Case Reviewers, Quality Assurance, Sales, Client Support Services

From: Laura M. Labay, PhD

Cc: Barry K. Logan, PhD and Robert A. Middleberg, PhD

Date: January 15, 2021

Re: Reporting "less than" results for Toxicology tests

A Reporting Limit (RL) is the Limit of Quantification (LOQ) for a target analyte in a specific sample after any adjustments have been made for dilutions. The LOQ is verified for quantitative assays by testing a series of calibration standards and quality control samples. In contrast, the Limit of Detection (LOD) is lower than the LOQ and is not determined or verified on a run-by-run basis. Since "less than" results are below the RL, an analytical finding that is "less than" the RL will not be manually applied to any toxicology result on clinical, forensic, or alternate clinical reports. This is effective January 16, 2021.

Laura M. Labay, PhD
 Director of Toxicological Services
 Forensic Toxicologist

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