

13-1116

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IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA 18 SEP 2013

AARON BROWNING,  
Plaintiff,

v.

Civil Action No. 12-C-47

DAVID HICKMAN,  
Defendant.

**ORDER DENYING  
PLAINTIFF AARON BROWNING'S MOTION FOR NEW TRIAL**

This matter came for trial on March 18, 2013. The jury returned a verdict in favor of Defendant David Hickman on March 19, 2013, finding he was not negligent.

Plaintiff served his Motion for New Trial, pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, on April 8, 2013. Defendant served his Response on April 22, 2013.

Plaintiff served a Reply on May 13, 2013. The matter came for hearing on June 24, 2013.

Plaintiff was present in person and by co-counsel Harry M. Hatfield of Hatfield & Hatfield PLLC, along with co-counsel W. Douglas Witten of Avis, Witten & Wandling, LC. Defendant was present by counsel Benjamin M. Mishoe of Shaffer & Shaffer, PLLC. Also present was Jessica Y. Whitmore of Kesner & Kesner, PLLC on behalf of Allstate Ins. Co.

Upon consideration of the parties' filings, oral arguments, and a review of applicable law, this Court hereby **DENIES** Plaintiff's Motion for New Trial, as set forth in detail below.

**Findings of Fact and Procedural History**

This auto accident occurred just before 6:15a.m. on the morning of October 24, 2011 in the town of Logan, West Virginia. Defendant was traveling straight through an intersection. Plaintiff was traveling in the opposite direction of Defendant and was attempting to make a left turn across the Defendant's lane of traffic. Both parties claimed to have had right of way.

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Immediately after the accident, a call was made to 911 in which the caller described the accident, stating, "it was the red truck, it pulled out in front of the vehicle." The "red truck" was driven by the Plaintiff and the "vehicle" was driven by the Defendant.

The caller identified herself as "Toni" and said she was "not from around here." During discovery, the Logan County 911 Center provided the parties with a recording of the call and multiple data summaries, none of which included the caller's last name or phone number.

Both parties filed pre-trial motions regarding the admissibility of the 911 call at trial. Defendant argued the 911 call satisfied the present sense impression exception – among others – to the hearsay rule and was therefore admissible. Plaintiff argued the 911 call was not relevant and should be excluded. Specifically, Plaintiff argued to the Court in his motion *in limine* that the issue at trial was who had the green light, and the 911 call was not probative on that issue:

"the issue is not whether or not plaintiff Browning pulled in front of defendant Hickman – he did, but rather whether or not plaintiff Browning, by virtue of the green arrow light, had the lawful right of way."

Plaintiff's First Motion in limine, p. 3.

This Court agreed and ruled prior to trial that the 911 call was inadmissible because it was not probative on the issue of which driver had the green light at the time of the accident.

It quickly became clear during trial that Plaintiff's proffer of the issue was not entirely accurate. Instead, Plaintiff argued four different theories of liability against the Defendant. Three of those theories – failing to keep a proper lookout, exceeding a safe speed, and failure to yield right of way after Plaintiff had entered the intersection – all revolved around the parties' proximity to the intersection at the time of the accident regardless of the green light.

Furthermore, Plaintiff testified that Defendant was far off in the distance when he began to make his turn, but Defendant collided with Plaintiff due to his speed and failure to yield.

Defendant, on the other hand, testified that he approached the intersection and the Plaintiff pulled out directly in front of him. The statement on the 911 call supported the Defendant's version of events and refuted the Plaintiff's, so it was also probative on the issue of witness credibility.

At the close of the Plaintiff's case in chief, counsel for Defendant renewed his motion to admit the 911 call under several exceptions to the hearsay rule. This Court concluded that its prior ruling was based on a limited view of the issues at trial, that evidence taken during trial made clear that proximity to the intersection was an issue, that credibility of witnesses is always an issue, and that the 911 call was probative on those issues and should be admitted. This Court therefore modified its prior *in limine* ruling and allowed recorded 911 call to be played. This is the first issue raised by Plaintiff in his Motion for New Trial.

The second issue raised by the Plaintiff is the Court's decision to prohibit Deputy Jacob Miller from offering expert opinion testimony regarding which driver was at fault. Deputy Miller (formerly Patrolman Miller) was the officer who created the police report herein, and who testified at trial regarding his investigation of this accident. Deputy Miller was not present when the accident occurred, had only been a police officer for six months prior to the accident, was not an expert in accident reconstruction, and had no knowledge of which party had the green light or right of way when the accident occurred. (*See Miller Transcript*, pp. 5, 42, 53-57, attached to Defendant's Motion in Limine to Exclude Deputy Miller's Opinion Testimony).

Nonetheless, on page 6 of the Police Report, Deputy Miller opined the Defendant, David Hickman, failed to yield the right of way, and that this failure was a proximate cause of the accident. (*See Police Report*). He further opined on page ten of the police report that Plaintiff, Aaron Browning, did not fail to yield the right of way. *Id.*

However, during his deposition, Deputy Miller confirmed multiple times he did not know who had the green light, did not know who had the right of way, and it was just as likely the Plaintiff failed to yield the right of way as it is Defendant. (*See Miller Transcript*, p. 53-57).

Q: If Mr. Browning was turning left on a solid green without a green arrow . . . that would also mean Mr. Hickman had a solid green light coming out of Logan, is that correct?

A: Yes, sir.

Q: And you don't know whether he had a green or not?

A: I cannot, you know, for which one had the arrow.

*Miller Transcript*, p. 53:20 to 54:12.

Q: So your basis – so then your opinion on page six that Mr. Hickman failed to yield the right of way, that is not an indication that he did not have a green light, is that correct?

A: No, sir. I cannot confirm who had the light.

*Miller Transcript*, p. 56:1 to 56:7.

Q: So it's just [as] possible if [Plaintiff] Mr. Browning had the – did not have the green arrow that he in fact failed to yield the right of way?

A: Yes, sir. Yes, sir, if he would not have had the arrow.

*Miller Transcript*, p. 56:16 to 57:2.

Based on his deposition testimony, Defendant moved to preclude Deputy Miller from offering expert opinion testimony regarding who had the right-of-way in the accident because he admitted he did not know who had the right-of-way, he was not qualified to offer expert testimony, and any expert testimony regarding who had the right of way at the time of the accident would not have been supported by his limited investigation. This Court granted the Defendant's motion and ruled the officer could not offer expert opinion testimony regarding who had the right of way.

## **Conclusions of Law**

### **1. Standard of Review**

Plaintiff seeks a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure. *See Plaintiff's Motion*, p. 1. The West Virginia Supreme Court has repeatedly cautioned, "the power to grant a new trial should be used with care, and a circuit judge should rarely grant a new trial." *Gerver v. Benavides*, 207 W. Va. 228, 231 (1999)(citing *In re State Public Bldg. Asbestos Litigation*, 193 W. Va. 119, 124, 454 S.E.2d 413, 418 (1994)).

Our Supreme Court noted similarly in another case, "a trial judge should rarely grant a new trial. Indeed, a new trial should not be granted unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done." *Morrison v. Sharma*, 200 W. Va. 192, 194; 488 S.E.2d 467, 469 (1997)(internal citations omitted).

### **2. Modifying the *in limine* Ruling Concerning the 911 Call.**

The Plaintiff's first allegation of error is that this Court erred in modifying its previous *in limine* ruling that the 911 call was not admissible. However, both the West Virginia Supreme Court of Appeals and the United State Supreme Court have made clear that a trial judge has discretion to modify *in limine* rulings during the course of a trial.

"Once a trial judge rules on a motion *in limine*, that ruling becomes the law of the case *unless modified by a subsequent ruling of the court.*" Syl. pt. 2, in part, *Adams v. Consol. Rail Corp.*, 214 W. Va. 711, 591 S.E.2d 269 (2003)(quoting Syl. pt. 4, *Tennant v. Marion Health Care Foundation*, 194 W.Va. 97, 459 S.E.2d 374 (1995))(emphasis added).

"If the trial court permits such a modification [to a motion *in limine*], the modified order becomes the law of the case and the parties are required to act accordingly." *Tennant, supra*, at 113, 390 (1995).

Thus, “[a] trial court is vested with the exclusive authority to determine when and to what extent an *in limine* order is to be modified.” Syl. pt. 2, in part, *Adams, supra* (quoting *Tennant v. Marion, supra*)(emphasis added).

In *Adams*, our Supreme Court noted the Court’s discretionary ability to revisit prior evidentiary rulings when the trial itself reveals the necessity to do so:

“The role and importance of the disputed evidence, its fit with the other evidence in the case, and even the precise nature of the evidence may all be affected by the context of the trial itself. Judges in ongoing proceedings normally have some latitude to revisit their own earlier rulings.

*Adams, supra*, at 715, 273 (quoting *Tennant v. Marion, supra*).

The United States Supreme Court has also held that a court is free within its sound discretion to alter previous *in limine* rulings without violating due process:

“The ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the [party’s] proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling.

*Luce v. United States*, 469 U.S. 38, 41-42 (U.S. 1984).

Furthermore, “[a] judgment will not be reversed for any error in the record introduced or invited by the party seeking reversal.” Syl. pt. 2, *Young v. Young*, 194 W.Va. 405, 460 S.E.2d 651 (1995)(per curiam).

Rule 803 of the West Virginia Rules of Evidence sets forth a variety of exceptions when hearsay is nonetheless admissible, regardless of whether the declarant is available or not.

Defendant argued the recording of the 911 call was admissible pursuant to several of these exceptions: 803(1) – present sense impression; 803(2) – excited utterance; 803(6) – records of regularly conducted activity; 803(8) – public records and reports; 803(24) – other exceptions.

Relevant law pertaining to the 911 call’s admissibility under the present sense impression

exception to hearsay, Rule 803(1), can be found at syllabus point 4 of *State v. Phillips*, 194 W.

Va. 569 (1995):

It is within a trial court's discretion to admit an out-of-court statement under Rule 803(1), the present sense impression exception, of the West Virginia Rules of Evidence if: (1) The statement was made at the time or shortly after an event; (2) the statement describes the event; and (3) the event giving rise to the statement was within a declarant's personal knowledge.

Syl. pt. 4, *Id.*

The United States Supreme Court affirmed the admissibility of a 911 call even when the caller did not appear as a witness at trial in the case of *Davis v. Washington*, 547 U.S. 813 (2006). That case involved a criminal case rather than a civil case. Even in the criminal case, where the hearsay standards are even stricter due to the confrontation clause of the Sixth Amendment, the Court held the recorded 911 call was admissible as a present sense impression.

In this case, the Court exercised its discretion regarding the admission of the 911 call. This Court did so only after determining the 911 call was probative on several issues at trial and that it fell within applicable hearsay exceptions. The Court originally ruled the 911 call was inadmissible because it was not probative on the issue of who had the green light. This ruling was based upon the Plaintiff's pre-trial representation that the green light was the only issue regarding liability. Quite clearly, this representation was inaccurate, as Plaintiff proceeded at trial with four different theories of liability, only one of which was dependent on the green light.

Had the Plaintiff proceeded to trial on the sole issue of who had the green light, then this Court's pre-trial ruling would not have been modified and the 911 call would not have been played. Thus, any harm allegedly suffered by the Plaintiff as a result of this Court initially ruling to exclude the 911 call is the result of the Plaintiff's own misrepresentation of the issues it intended to present at trial.

Our law is clear: “A judgment will not be reversed for any error in the record introduced or invited by the party seeking reversal.” Syl. pt. 2, *Young v. Young*, 194 W.Va. 405, 460 S.E.2d 651 (1995)(per curiam).

As testimony unfolded it was clear the 911 call was probative on several issues, and was admissible pursuant to the present sense impression exception to the hearsay rule, among others.

Accordingly, the Court’s decision to revisit and modify its *in limine* ruling was wholly proper, permissible, and within the Court’s sound discretion. Because the decision was properly within the Court’s discretion, Plaintiff’s motion for new trial on this ground is **DENIED**.

### **3. Exclusion of Officer’s Opinion Testimony**

“Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused.” Syl. pt. 2, *Billiter v. Melton Truck Lines*, 187 W. Va. 526, 420 S.E.2d 286 (1992)(external citations omitted).

The Supreme Court has also held, “[a]lthough a witness may be qualified as an expert by practical experience in a field of activity conferring special knowledge not shared by mankind in general, the question of whether a witness qualifies as an expert rests in the sound discretion of the trial court, whose decision will not be disturbed unless it is clearly wrong.” *State v. Hose*, 187 W. Va. 429, 433-434 (1992)(quoting *State v. Baker*, 180 W.Va. 233, 376 S.E.2d 127 (1988).

In *Billiter*, *supra*, the West Virginia Supreme Court upheld the trial court’s decision to preclude an officer from offering opinion testimony regarding who was at fault in an automobile accident. *Id.* at 531, 291. The Supreme Court held the trial court was correct to exclude the officer’s opinion testimony based in part on the deputy’s “lack of sufficient testimony regarding

his training of accident reconstruction in general.” *Id.* The Court also held the officer had not “investigated the particular accident to a sufficient extent to offer an opinion regarding fault.” *Id.*

In *Hose, supra*, the West Virginia Supreme Court held an officer was permitted to offer expert opinion testimony regarding fault in an automobile accident. However, the officer in *Hose* offered the following testimony in support of being qualified as an expert:

“[The officer] had forty hours in basic accident investigation at the West Virginia State Police Academy, that he had had eighty hours of advanced accident investigation at the University of North Florida, that he had had eighty hours of technical accident investigation at Northwestern University, that he had had an eighty-hour accident reconstruction class at the University of North Florida, that he had taken forty hours of accident photography at the West Virginia State Police Academy, and that, in effect, he had had some 320 hours of instruction in areas related to accident investigation. He also testified that he was a member of the Society of Accident Reconstructionists, that he had personally handled over 600 accidents, and that he had worked with the National Transportation Safety Board on accident investigation. He further stated that he had investigated a number of tractor trailer accidents.”

*State v. Hose*, 187 W. Va. 429, 434 (1992). Based on that experience, the Supreme Court held that the trial court was correct to allow the officer to offer expert opinion testimony regarding the happening of the subject accident.

In this case, Deputy Miller admitted in his deposition he did not know who had the right of way, did not know who had the green light, and it was just as likely the Plaintiff failed to yield the right of way as it was the Defendant. Despite this admission, Plaintiff sought to allow Deputy Miller to opine to the jury that Defendant failed to yield the right of way.

In light of his clarification in his deposition, Deputy Miller’s assessment of fault among the parties in the police report was unreliable, erroneous, prejudicial, and not probative on the issue. Thus, it was proper and within this Court’s discretion to exclude the testimony.

Furthermore, Deputy Miller was admittedly not an expert on the issue of accident reconstruction. Because he did not witness the accident itself, it would have been erroneous to allow him – a non-expert – to offer opinion testimony regarding how the accident happened or which party caused the accident. This is particularly true when that non-expert had admitted in his deposition it could have just as likely been either party who failed to yield the right-of-way.

In addition to his lack of expertise, he admitted that it just as easily could have been Plaintiff who failed to yield the right of way as it could have been Defendant. Thus, even assuming *arguendo* that Deputy Miller would qualify as an expert witness, he still should not have been permitted to offer an opinion of who was at fault because such an opinion would have been speculation, unreliable, and more prejudicial than probative.

This Court's decision to preclude Deputy Miller from offering expert opinion testimony was within its discretion and was supported by the clear admissions of Deputy Miller himself, who was not a reconstructionist and had very limited in-field experience. Accordingly, this ground for a new trial is unfounded and is hereby **DENIED**.

4. **Although not explicitly stated in his Motion or his Reply, Plaintiff is actually seeking a new trial based on newly discovered evidence and has not satisfied the legal requirements for granting such a motion.**

In the present case, the identity and phone number of the 911 caller were unknown by either party until just over one week before trial. At that point, the Logan County 911 Center explained it had new technology that allowed it to recreate and/or trace past calls. Utilizing the new technology, the 911 Center was able to provide the phone number from which the 911 call was made. One week before trial, during a telephonic status conference with all parties and the Court present, counsel for the Defendant explained that he had retained an investigator who was attempting to track down the caller. Counsel for Defendant requested permission to arm the

investigator with a subpoena so that he could secure the caller's attendance at the upcoming trial. Counsel for the Plaintiff objected to the 911 caller being subpoenaed as a witness if he did not first have the opportunity to depose her. Based on the Plaintiff's objection, the Court ruled that the Defendant had until Thursday, March 14 at noon to locate and present the caller for deposition or she would not be permitted to testify at trial.

In his *Reply to Defendant's Response*, Plaintiff states that sometime after trial he was able to identify the caller in the 911 recording as a Toni Meadows and make contact with her via Facebook. In support of his Motion for New Trial, Plaintiff attached to his Reply a copy of a Facebook message received from Toni Meadows.

However, during oral argument on Plaintiff's motion, Benny Adkins, the investigator who obtained the Facebook message, testified that he had never met Toni Meadows or spoke to her by phone, and the only contact he has had with her is through Facebook. He did not provide their entire conversations, only Ms. Meadows' Facebook response to his messages.

Plaintiff argues the Facebook message obtained several weeks after the trial concluded implies Defendant was at fault, and that the Facebook message warrants the granting of a new trial. Keep in mind, Plaintiff previously objected to the caller being subpoenaed as a witness when requested by Defendant during the pre-trial conference call.

In order to grant a new trial based on newly discovered evidence, the West Virginia Supreme Court requires certain procedure to be followed:

A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and

material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.

Syl. pt. 3, *Lawrence v. Cue Paging Corp.*, 194 W. Va. 638, 461 S.E.2d 144 (1995)(internal citations omitted).

The Supreme Court has also stated, “[a] motion for a new trial based on after-discovered evidence is seldom granted and the circumstances must be unusual or special to warrant a grant.” *Fuharty v. Wimbush*, 172 W. Va. 134, 304 S.E.2d 39 (1983)(quoting Syl. pt. 9, *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1976)).

It appears Plaintiff’s request for a new trial is based on the newly discovered identity of the 911 caller, and on a message apparently received from her via Facebook.

West Virginia case law sets forth clear requirements Plaintiff must meet before this Court can grant a new trial based on newly discovered evidence.

First, “[t]he evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained.” *See Lawrence, supra*. In support of his Motion for New Trial, Plaintiff has not presented any affidavits from any new witnesses, including Toni Meadows.

The ever-changing world of social media will undoubtedly present a wide variety of new theories, problems, and innovations for the courts of this Country. However, this Court can foresee no instance where a single Facebook message purporting to be from a new witness many weeks after trial will be sufficient to overturn a jury’s verdict and award a new trial. Likewise, this Court can foresee no instance where a Facebook message will qualify to take the place of a sworn and notarized affidavit.

To that end, Plaintiff's investigator testified that he has never met Toni Meadows in person, never spoken to her by any means other than Facebook, and has never obtained a sworn statement or affidavit. It appears such an affidavit is a mandatory prerequisite for the granting of a new trial based on newly discovered evidence. It is admitted by Plaintiff that no such affidavit exists. Plaintiff's reliance on a Facebook message is insufficient to satisfy the first requirement and certainly insufficient to overturn a jury verdict and award a new trial.

Second, "[i]t must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict." See *Lawrence, supra*.

In this instance, again Plaintiff has presented no affidavit stating what efforts he took prior to trial to locate the new witness. To the contrary, when the phone number of the caller was discovered by Logan 911 just before trial, *Defendant* retained an investigator in an effort to track down the caller. *Defendant* requested permission to arm the investigator with a subpoena to secure the caller's attendance at trial. Plaintiff objected to this proposal. Thus, even without the benefit of an affidavit, it is clear to this Court that Plaintiff made no effort to secure the testimony of Toni Meadows prior to trial. In fact, Plaintiff objected to Defendant's efforts to do so. Accordingly, Plaintiff has also not satisfied the second requirement for this Court to grant a new trial based on newly discovered evidence.

While it is not necessary for this Court to examine in detail the remaining three factors because it is clear the first two requirements have not been satisfied by the Plaintiff, the Court is of the opinion that the Plaintiff cannot satisfy the third and fourth elements of the standard set forth in *Lawrence, supra*. All of this paired with our Supreme Court's caution that new trials based on after-discovered evidence should be "seldom granted," and new trials in general should

be "rarely granted," is enough to satisfy this Court that its evidentiary rulings were proper, that Plaintiff is not entitled to a new trial, and that his Motion on this ground is therefore **DENIED**.

**Conclusion**

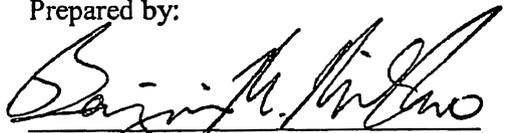
For all of the reasons set forth herein, Plaintiff's Motion for New Trial is hereby **DENIED**, and it is hereby **ORDERED** that the Judgment Order entered in this matter shall remain intact and become final. The Plaintiff's objections to the Court's rulings are preserved.

This is a **FINAL ORDER**. This matter is ordered to be removed from this Court's active docket. The Clerk of this Court is directed to forward copies of this Order to counsel of record.

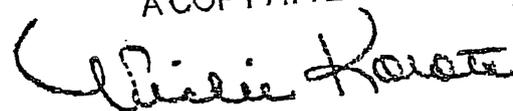
**ENTERED** this 16th day of September, 2013.

  
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Honorable Roger L. Perry, Judge

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