



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AARON BROWNING,

Petitioner,

v.

No. 13-1116

DAVID HICKMAN,

Respondent.

BRIEF ON BEHALF OF THE PETITIONER

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BRIEF ON BEHALF OF PETITIONER AARON BROWNING

I. ASSIGNMENTS OF ERROR

- A. The Circuit Court erred in denying Petitioner Aaron Browning's Motion for a New Trial.
- B. The Circuit Court erred in denying Petitioner Aaron Browning's Motion for a Mistrial or, in the alternative, a Recess.

II. STATEMENT OF THE CASE

On February 23, 2012, Petitioner Aaron Browning brought this lawsuit in the Circuit Court of Logan County to recover for injuries he sustained in a motor vehicle accident. *App. Record: Vol. 1 at 1-3, Plaintiff's Compl.* ¶¶ 1-2. The accident occurred when, at approximately 6:15 a.m. on October 24, 2011, Respondent David Hickman's vehicle struck the back side of the Petitioner's truck at the intersection of the Boulevard and the State Police Bridge in Logan, West Virginia. *App. Record: Vol. 2 at 77, Tr. Trans. Day 1*. After a two-day trial the jury returned a verdict in favor of the Respondent on March 19, 2013. *App. Record: Vol. 3 at 90-91, Tr. Trans. Day 2*.

At 6:15:38 a.m. an anonymous person only identified as "Toni" called the Logan County 911 dispatcher to report the accident. *App. Record: Vol. 3 at 21, Tr. Trans. Day 2*. She stated, in relevant part, "the older guy looks like he is a little loopy. It was the red truck, pulled out in front of the vehicle." *App. Record: Vol. 1 at 33, Defendant's PreTrial Memorandum and 911 Transcription*. The caller's reference to the "older guy" was understood by counsel to mean Petitioner Browning, as he was 72 years of age at the time of the accident was driving a red

truck. *App. Record: Vol. 2 at 98, 163, Tr. Trans. Day 1.* “Toni” was not located, further identified, or deposed. The Petitioner timely filed a motion in limine wherein he sought to exclude the recorded 911 call and accompanying statement transcription from being admitted into evidence at trial. *App. Record: Vol. 1 at 34-40, Plaintiff’s First Motion in Limine.* The Logan County Circuit Court granted the Petitioner’s motion to exclude the recorded 911 call on March 11, 2013¹.

On the first morning of trial, the Circuit Court set forth its reasoning for granting the Petitioner’s motion to exclude the 911 call on the record, finding that the 911 call “is some degree prejudicial,” while also noting that the “inability to cross-exam[ine] whoever this person was was pretty significant in that case.” *App. Record: Vol. 2 at 25, Tr. Trans. Day 1.*

Respondent argued that the Circuit Court’s reasoning for excluding the call was that the only issue in this case was which party had the green light: “If that’s the case, the only jury instructions should be decide on who had the green light and rule in that person’s favor.” The Circuit Court disagreed, responding “[t]here’s more than that,” implying that its ruling was not based on the argument that the only issue in question is who had the green light. *Id. at 34.*

The Petitioner relied upon the Circuit Court’s ruling and prepared his case accordingly. Specifically, the Petitioner did not subpoena any witnesses who were present at the accident scene in an effort to refute or explain the statement made by the 911 caller, nor did he question the investigating officer about the caller. The Petitioner did not mention the caller in his opening statement or at any point in his case-in-chief. *Id. at 43-210.*

¹ The parties stipulate that the Circuit Court held a Pretrial Conference on March 4, 2013. At said hearing the Respondent informed the Circuit Court that he intended to use a 911 recording at trial. The Petitioner orally moved to exclude the recording as evidence. The Circuit Court ordered each side to file written motions relating to the 911 call and stated that the Circuit Court would announce his ruling on the motions in a telephone conference on March 11, 2013.

A separate issue is that, prior to trial, the responding police officer, Patrolman Jacob Miller, investigated the accident and prepared a police report which concluded that the Respondent did not have the right of way and was, accordingly, at fault for the accident. *App. Record: Vol. 1 at 46-47, Defendant's Motion in Limine to Preclude Expert Opinion Testimony of Deputy Jacob Miller and to Redact Police Report*. The Respondent filed a motion in limine to preclude Patrolman Miller from giving expert opinion testimony and to redact the police report. In support of this motion, the Respondent argued that Patrolman Miller did not witness the accident and that Patrolman Miller admitted that he was not an expert in accident reconstruction. *Id. at 41-43*. The Petitioner received this motion on Friday, March 15, 2013. The trial began on Monday, March 18, 2013. The Petitioner did not have an opportunity to respond to the Respondent's motion in writing due to its late filing.

On the morning of the first day of trial, the Circuit Court heard oral argument on the Respondent's motion in limine. The Petitioner argued that Patrolman Miller should be allowed to testify as an expert witness and to state his opinion as to which party failed to yield. The Petitioner relied on Jones v. Garnes, 183 W. Va. 304, 395 S.E.2d 548 (1990) to argue that Patrolman Miller met the minimum standard required to testify as an expert in accident investigation, not accident reconstruction. Further, the Petitioner argued that the police report should be admitted despite the fact that Patrolman Miller did not witness the accident as this Court held in Jones. *App. Record: Vol. 2 at 25-28, Tr. Trans. Day 1*. The Circuit Court granted the Respondent's motion, reasoning that whatever opinion Patrolman Miller gave in his report was contradicted by his deposition testimony. *Id. at 29*.

By the end of the first day of trial, the Petitioner had completed the introduction of his evidence and was prepared to rest. At that point, the Circuit Court met with counsel and advised

them that it had changed its mind about the 911 recording. It retracted its prior ruling on Petitioner's motion in limine, finding that the recording was now "minimally probative" and allowing its introduction as evidence. *Id. at 214.*

The Petitioner was unprepared for this sudden about-face. The next morning, he moved for a mistrial or even, a recess so that he could attempt to locate and subpoena the appropriate witnesses in an effort to respond to this evidence that had been previously held inadmissible. The Circuit Court denied the Petitioner's requests. *App. Record: Vol. 3 at 9-12, Tr. Trans. Day 2.* The Petitioner then rested his case. *Id. at 12-13.*

The Respondent then presented his case-in-chief, which consisted solely of laying the evidentiary foundation for the 911 recording and admitting the recording into evidence. *Id. at 19-31.* During their deliberations, the jury requested to again hear the 911 recording. The Court granted the jury's request, and the recording could be heard in the courtroom at least twice while being replayed in the jury room. Shortly thereafter the jury returned a verdict in favor of the Respondent. *App. Record: Vol. 4 at 4, Trans. from the hearing regarding Plaintiff's Motion for a New Trial; App. Record: Vol. 3 at 90-91, Tr. Trans. Day 2.*

The Circuit Court entered a Judgment Order on March 28, 2013. *App. Record: Vol. 1 at 61-62, Judgment Order.* The Petitioner filed a motion for a new trial on April 8, 2013. *Id. at 63-69, Plaintiff's Motion for a New Trial.* The Circuit Court denied the motion on September 16, 2013. *Id. at 109-122, Order Denying Plaintiff's Motion for a New Trial.* The Petitioner now appeals from that Order.

III. SUMMARY OF ARGUMENT

The Circuit Court erred by abruptly reversing its prior decision to exclude the 911 call into evidence. The Circuit Court misapplied the West Virginia Rules of Evidence to this issue.

The 911 call should have been excluded under West Virginia Rule of Evidence 403 because its probative value was substantially outweighed by the danger of unfair prejudice. Since it was undisputed that the Respondent struck the Petitioner's vehicle, the 911 recording suggesting otherwise was more prejudicial than probative. *Id. at 33, Defendant's PreTrial Memorandum and 911 Transcription.* The Circuit Court's denial of Petitioner's motion for a new trial was erroneous.

Further, the 911 call should have been excluded from evidence because it is inadmissible hearsay and because the caller lacked the competency to testify concerning the accident since the call does not demonstrate that the caller had personal knowledge of the accident. Likewise, the 911 call does not meet any of the exceptions to hearsay because it is unclear from the 911 call whether the caller has personal knowledge of the accident by actually witnessing it happen or if she merely saw the placement of the vehicles after the accident occurred.

However, even if the 911 call were admissible under one of the applicable hearsay exceptions, the Circuit Court prevented the Petitioner from receiving a fair trial by allowing the Petitioner to proceed with his case-in-chief in reliance on the Court's prior ruling that the recording was inadmissible. The Circuit Court granted the Petitioner's motion in limine prior to the beginning of the trial based on the fact that the call was more prejudicial than probative because it was not clear that the witness had the personal knowledge necessary to testify regarding the accident in question. Additionally, the Circuit Court had held, prior to trial, that the 911 call would not be introduced as evidence unless the witness could be located and deposed by the Petitioner prior to trial. The witness was never identified, let alone deposed before trial.

The Petitioner relied on the Circuit Court's ruling and presented his case without reference to the 911 call. He forewent the opportunity to subpoena any witnesses who were present at the accident scene to refute or explain the statement made by the 911 caller, and he did not question the investigating officer about the mysterious caller. After the 911 recording was suddenly found to be admissible after the presentation of the Petitioner's evidence, however that recording became the complete focus of the Respondent's case.

The Circuit Court effectively changed the rules of the game halfway through trial. The introduction of the 911 call undoubtedly influenced the jury to find in favor of the Respondent as evidenced by the facts that the 911 call was the only focus of the Respondent's case, and the jury requested to hear the recording during its deliberations and did so, twice, before returning a verdict in favor of the Respondent. The Circuit Court's ruling was entirely prejudicial to Plaintiff because he was deprived of the means to respond to this evidence.

The Circuit Court also erred by not allowing Patrolman Miller to testify as an expert witness and by redacting portions of the police report. Patrolman Miller's qualifications are more than sufficient to allow him to give an expert opinion as to the fault of the accident. Further, the police report should have been admitted in its original state without any redactions regarding which party failed to yield.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that the Circuit Court's orders erred in the application of settled law and, as such, this matter is appropriate to be scheduled for oral argument and consideration under Rule 19 of the West Virginia Rules of Appellate Procedure.

V. ARGUMENT

A. The Circuit Court erred in denying Petitioner Aaron Browning's Motion for a New Trial.

This appeal first challenges the Circuit Court's denial of a motion for a new trial under Rule 59 of the West Virginia Rules of Civil Procedure. "We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard...." Tennant v. Marion Health Care Found., Inc., 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995). This Court has also held that "[a]lthough the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence." Sanders v. Georgia-Pac. Corp., 159 W. Va. 621, 225 S.E.2d 218, 219 (1976).

This Court has further held that there are limitations to an abuse of discretion standard: "Ordinarily, when a circuit court is afforded discretion in making a decision, this Court accords great deference to the lower court's determination. However, when we find that the lower court has abused its discretion, we will not hesitate to right the wrong that has been committed." Rollyson v. Jordan, 205 W.Va. 368, 379, 518 S.E.2d 372, 383 (1999).

It is well settled that trial court judges are granted "wide latitude in conducting the business of their courts. However, this authority does not go unchecked, and a judge may not abuse the discretion granted him or her under our law." Lipscomb v. Tucker County Com'n., 206 W.Va. 627, 630, 527 S.E.2d 171, 174 (1999). This Court has also stated that under the abuse of discretion standard, it "will not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances." Gribben v. Kirk, 195 W. Va. 488, 500, 466 S.E.2d 147, 159 (1995).

The Circuit Court erred in denying the Petitioner's Motion for a New Trial because the Circuit Court erred in modifying its prior ruling on the Petitioner's first motion in limine to exclude the recorded 911 call from being admitted into evidence at trial.

By allowing the 911 call to be played for the jury, the Circuit Court misapplied the West Virginia Rules of Evidence to this matter. West Virginia Rule of Evidence 401 defines relevant evidence as evidence "having any tendency to make the existence of any fact or consequence to the determination of the action more probable or less probable than it would be without the evidence." W. Va. R. Evid. 401. The 911 call recording is not relevant evidence because it is undisputed that the Petitioner pulled in front of the Respondent. Further, the declarant's testimony from the 911 call is not relevant evidence "having any tendency to make the existence of any fact or consequence to the determination of the action more probable or less probable than it would be without the evidence" without providing any context for the statement given. W. Va. R. Evid. 401. This statement fails to illustrate any facts by which a jury could legally find the Petitioner liable since it was undisputed that he had pulled out in front of the Respondent. The 911 call simply adds no helpful or disputed facts.

However, even if the 911 call were relevant, it would still be precluded from evidence under the West Virginia Rules of Evidence. West Virginia Rule of Evidence 403 states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...." W. Va. R. Evid. 403. The 911 call was more prejudicial than probative. When the Circuit Court initially held, at the beginning of trial, that the introduction of the 911 call was prohibited, its reasoning was that the recording was more prejudicial than probative because it was uncontested that the Petitioner had pulled in front of the Respondent:

So I guess I had said the motion with respect to the 911 tape, I can put that on the record the basis for excluding that. Pulling across is not a contested issue. It's irrelevant as to whether he had the arrow. I think it's probative. And it is some degree prejudicial.

I wish there more to this case than there is. And also I think the inability to cross exam[ine] whoever this person was was pretty significant in that case.

App. Record: Vol. 2 at 25, Tr. Trans. Day 1.

The Petitioner argued the prejudicial nature of the 911 call in the hearing on the Petitioner's motion for a new trial. "[T]he way the witness 911 call reads, it looks like the car had the right-of-way and the truck just pulled right in front of him." *App. Record: Vol. 4 at 18, Trans. from the hearing regarding Plaintiff's Motion for a New Trial.* The call does not mention who had the right of way, but a jury could easily and wrongfully infer that the Respondent did. The fact that the Petitioner pulled out in front of the Respondent is undisputed. Therefore, it has no probative value. Consequently, the danger of unfair prejudice resulting from the jury hearing the 911 call substantially outweighs the probative value of the 911 call.

In the Petitioner's motion in limine regarding the 911 call, the Petitioner argued that "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." *App. Record: Vol. 1 at 36, Plaintiff's First Motion in Limine.* Throughout the two-day trial and again during the hearing regarding the Petitioner's motion for a new trial, the Respondent argued that this statement by Petitioner limits the only issue in the case to which party had the green light. *App. Record: Vol. 4 at 17, Transcript from the hearing regarding Plaintiff's Motion for a New Trial.* That is simply not true. The Petitioner argued that

[w]ell, that was one of the theories. The other one was excessive speed and then the other one was who was in the intersection first. And all of those things have always applied. You can have more than one theory that you go to trial on and

you give them instructions on all of the theories and if the jury finds any of them, then you prevail.

Id. at 18.

Whether the Petitioner had a green arrow was one way of showing that the Petitioner was not liable simply because he had pulled in front of the Respondent. It is not the only issue in this case. As the Circuit Court described, “[e]ven if you run the light, you can’t plow somebody.” *Id.* The Respondent still had a duty to drive safely.

The Circuit Court erred by wrongfully concluding that fault for the subject collision hinged totally upon which party proceeded through the green light. The Circuit Court instructed the jury that the Petitioner could prevail if the Respondent: 1) failed to keep a proper look out; 2) exceeded a safe speed under the conditions existing at the time of the accident; 3) failed to yield the right of way to the Petitioner who had already committed to making a left hand turn; and/or 4) failed to yield the right of way by proceeding through a red traffic light. *App. Record: Vol. 3 at 47-50, Tr. Trans. Day 2.*

It is furthermore unclear from the 911 call itself whether the caller even saw the accident take place. As the Petitioner argued at the end of the first day of trial, “[t]here’s nothing in the 911 tape that would indicate without making assumptions of some kind or another that the 911 caller even saw the accident. You can tell by looking at the vehicles that the plaintiff got hit in the side and that the defendant was going straight.” *App. Record: Vol. 2 at 216, Tr. Trans. Day 1.*

West Virginia Rule of Evidence 601 requires that “every person is competent to be a witness except as otherwise provided for by statute or these rules.” W. Va. R. Evid. 601. West Virginia Rule of Evidence 602 states that “[a] witness may not testify to a matter unless evidence

is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” W. Va. R. Evid. 602.

In modifying its prior ruling to exclude the recorded 911 call from being admitted into evidence at trial, the Circuit Court allowed testimony of a witness that the Circuit Court had no way of determining was competent to testify. Likewise, the Circuit Court and parties could not determine whether the witness’s testimony was based on personal knowledge of the accident.

According to the 911 transcription, the caller can only state that there has been an accident, that both drivers are out of the vehicles, and that the red truck pulled out in front of the vehicle. *App. Record: Vol. 1 at 32-33, Defendant’s PreTrial Memorandum and 911 Transcription*. Nowhere in the transcription does the caller state that she actually witnessed the accident. She could have just as easily stated that the red truck pulled out in front of the other vehicle based on the location of the vehicles after the collision occurred.

Without personal knowledge of the accident, the caller’s testimony from the 911 call would not be relevant under West Virginia Rule of Evidence 403, nor would it be admissible under West Virginia Rules of Evidence 601 and 602 as the Petitioner argued before the Circuit Court on the morning of the second day of trial. *App. Record: Vol. 3 at 10, Tr. Trans. Day 2*.

Furthermore, the evidence from the 911 call is inadmissible hearsay under West Virginia Rule of Evidence 801. West Virginia Rule of Evidence 801(c) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” W. Va. R. Evid. 801(c). The statement from the 911 call was certainly a “statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” W. Va. R. Evid. 801(c). Here, the declarant was not present at the trial to testify because her identity and

whereabouts were unknown at that time. For these reasons, allowing the declarant's hearsay statement to be played for the jury constitutes an error of the Circuit Court. As such, the Circuit Court erred in modifying its prior ruling on Petitioner's First Motion in Limine to exclude the recorded 911 call and accompanying statement transcription from being admitted into evidence at trial.

"Hearsay is presumptively untrustworthy because the out-of-court declarant cannot be cross-examined immediately as to any inaccuracy or ambiguity in his or her statement." Glen Weissenberger, *Hearsay Puzzles: An Essay on Federal Evidence Rule 803(3)*, 64 Temple L. Rev. 145 (1991)." State v. Phillips, 194 W. Va. 569, 575, 461 S.E.2d 75, 81 (1995) (overruled on other grounds by State v. Sutherland, 231 W. Va. 410, 745 S.E.2d 448 (2013)).

The 911 call does not meet any of the requirements of any of the exceptions to hearsay under West Virginia Rule of Evidence 803. The Respondent argued in his motion in limine to allow the statement of the 911 call that the call applies to the following exceptions to hearsay: present sense impression, excited utterance, public records and reports, and other exceptions. *App. Record: Vol. 1 at 49-57, Defendant's Motion in Limine to Allow the Statement on the 911 Call.*

West Virginia Rule of Evidence 803 identifies the exceptions to hearsay that are "not excluded by the hearsay rule." W. Va. R. Evid. 803(1). West Virginia Rule of Evidence 803(1) defines the present sense impression exception as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." W. Va. R. Evid. 803(1). This Court has held that

[i]t 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, Phillips, 194 W. Va. at 572, 461 S.E.2d at 78.

Because the caller was unable to testify live, it is unknown from the 911 call alone whether the caller had personal knowledge of the event giving rise to her statement. It is unclear based on the declarant's statement alone whether she made the statement while perceiving the accident or after the accident had already occurred. There is simply no evidence from the 911 call proving that the caller actually witnessed the accident as opposed to simply observing the placement of the two vehicles after the wreck.

West Virginia Rule of Evidence 803(2) defines the excited utterance exception as “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” W. Va. R. Evid. 803(2). Similarly, the excited utterance exception is not applicable to the 911 call because it is unclear whether the declarant made the statement while under the stress of excitement caused by the event since it is unknown whether the caller actually witnessed the accident as opposed to simply observing the placement of the two vehicles after the wreck.

West Virginia Rule of Evidence 803(8) defines the public records and reports exception
as

[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

W. Va. R. Evid. 803(8).

The public records exception is also not applicable in this case because the caller's statement was not sought or recorded "pursuant to duty imposed by law as to which matters there was a duty to report." W. Va. R. Evid. 803(8).

West Virginia Rule of Evidence 803(24) defines other exception as

statement[s] not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines 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. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

W. Va. R. Evid. 803(24) (emphasis added).

The catch-all exception of West Virginia Rule of Evidence 803(24) is clearly not applicable to the 911 call because the Respondent never provided the Petitioner with the name and address of the declarant as explicitly required by the rule. This information was not provided to the Petitioner because it was unknown to the Respondent.

Because the 911 call is irrelevant, unfairly prejudicial, and inadmissible hearsay that does not meet any of the exceptions for hearsay, the Circuit Court erred in allowing the 911 call to be played for the jury.

The Circuit Court also erred by redacting certain portions of the Police Report and not allowing Patrolman Miller to testify as an expert witness. The Petitioner received the Respondent's motion to preclude Patrolman Miller from testifying as an expert witness on

Friday, March 15, 2013. *App. Record: Vol. 1 at 41-48, Defendant's Motion in Limine to Preclude Expert Opinion Testimony of Deputy Jacob Miller and to Redact Police Report.* Trial commenced the following Monday, March 18, 2013. As a result of the late filing, the Respondent did not have an opportunity to respond to the motion in writing.

The Respondent argued that Patrolman Miller should not be permitted to testify as to who was at fault since he did not witness which driver had the green light. *Id.* The Circuit Court ruled that Patrolman Miller could “testify to his investigation, not the opinion. You can’t put together an opinion from nothing....” *App. Record: Vol. 2 at 29, Trial Transcript Day 1.* This ruling is not in line with West Virginia law.

Rule 702 of the West Virginia Rules of Evidence states, in part, that “a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” W. Va. R. Evid. 702. Further, this Court has held that “Rule 702 permits a circuit court to qualify an expert by virtue of education or experience or by some combination of these attributes.” Gentry v. Magnum, 466 S.E.2d 171, 195 W.Va. 512 (1995).

In Gentry, this Court held that the circuit court should conduct a two-step inquiry when determining whether a witness testify as an expert witness:

First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify.

Syl. pt. 5, Gentry v. Mangum, 195 W. Va. 512, 515, 466 S.E.2d 171, 174 (1995).

Patrolman Miller had completed the four-month requisite training at the West Virginia State Police Academy in early 2011. *App. Record: Vol. 2 at 146-148, Tr. Trans. Day 1.* During that training, Patrolman Miller complete training in motor vehicle accident investigations. *Id.*

He is also a certified police officer in this State. Moreover, he had conducted motor vehicle collision investigations as part of his duties as a police officer and had other “on-the-job” training. *Id.* Pursuant to the standard set forth in Gentry he qualifies as an expert witness in the subject area based on his education and experience.

Additionally, this Court has held the test in determining whether a witness can testify as an expert is “whether the witness has specialized knowledge that will assist the trier of fact.” Jones v. Garnes, 183 W. Va. 304, 306, 395 S.E.2d 548, 550 (1990) (citing Ventura v. Winegardner, 178 W.Va. 82, 357 S.E.2d 764 (1987)). In Jones, this Court reversed a Circuit Court’s decision to not permit the opinion testimony of the investigating officer in an automobile collision. This Court held that the officer in Jones possessed specialized knowledge which would have assisted the jury. *Id.* at 306, 550. The officer in Jones received remarkably similar training to Patrolman Miller. “He had been employed as a deputy sheriff in Kanawha County ... and had completed a three-month training course at the West Virginia State Police Academy in 1982. He testified that accident investigation was one of his duties.” *Id.* Patrolman Miller’s education and experience provided him with the necessary specialized knowledge that would have assisted the jury. Therefore, based on this Court’s opinion in Jones, the Circuit Court erred in not allowing Patrolman Miller to testify as an expert witness.

The Circuit Court also erred by not allowing the Petitioner to elicit opinions from Patrolman Miller regarding whether the Respondent: 1) failed to keep a proper look out; 2) exceeded a safe speed under the conditions existing at the time of the accident; 3) failed to yield the right of way to the Petitioner who had already committed to making a left hand turn; and/or 4) failed to yield the right of way by proceeding through a red traffic light. *App. Record: Vol. 3 at 47-50, Tr. Trans. Day 2.*

Alternatively, the Circuit Court should have afforded the Petitioner an opportunity to respond to the Respondent's motion. The Circuit Court's failure to do so violated the Petitioner's right to a fair trial under Tennant.

B. The Circuit Court erred in denying Petitioner Aaron Browning's Motion for a Mistrial or, in the alternative, a Recess.

The standard of appellate review for a circuit court's denial of a motion for a mistrial is similar to that of a denial of a new trial. Further, "[w]hether a motion for a mistrial should be sustained or overruled is a matter which rests within the trial court's discretion and the action of the trial court in ruling on such a motion will not be cause for reversal on appeal unless it clearly appears that such discretion has been abused." Syllabus Point 4, Moore, Kelly & Reddish, Inc. v. Shannondale, Inc., 152 W.Va. 549, 165 S.E.2d 113 (1968)." Syl. pt. 9, Bd. of Educ. of McDowell Cnty. v. Zando, Martin & Milstead, Inc., 182 W. Va. 597, 600, 390 S.E.2d 796, 799 (1990).

The Circuit Court erred in denying the Petitioner's Motion for a Mistrial or, in the alternative, a Recess because the Circuit Court's ruling allowing the Respondent to introduce the recorded 911 call after the Petitioner finished putting on his evidence prevented the Petitioner from receiving a fair trial.

A litigant in a civil proceeding is entitled to a fair trial. In an opinion by Justice Cleckley, this Court held that "the right to a fair trial is fundamental" in civil cases as well as criminal cases. Tennant, 194 W. Va. at 118, 459 S.E.2d at 395 n. 28. By allowing the Respondent to introduce the 911 call after the Petitioner finished putting on his evidence, the Circuit Court committed error that affected the outcome of the trial. *Id.*

“Trial judges have discretion to make purportedly final advance rulings to admit or exclude evidence.” *Id.* at 113, 390. The intended purpose of a motion in limine is “to settle evidentiary disputes in advance without interrupting an ongoing trial to entertain arguments (even briefs) on complicated points and without the inevitable risk that objecting and deciding evidence questions will themselves convey to the jury the substance of the matter in question.” *Id.* (citing Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* § 1.6 at 23 (1995)).

The Circuit Court evaluated written and oral arguments from both sides regarding this issue and granted the Petitioner’s motion prior to trial. *App. Record: Vol. 2 at 25, Tr. Trans. Day 1*. The Circuit Court’s ruling obviously controlled how the Petitioner prepared his case. By finding the 911 call inadmissible before trial, the Circuit Court directly affected how the Petitioner structured his case. Specifically, the Petitioner did not subpoena any witnesses who were present at the accident scene in an effort to refute or explain the statement made by the 911 caller. The Petitioner did not refer to the 911 call in his opening statement nor in his case-in-chief. He did not question the investigating officer about the caller. The Petitioner relied completely and appropriately on the Circuit Court’s prior ruling.

The Circuit Court made this ruling at approximately 5:30 p.m. at the end of the first day of trial. *App. Record: Vol. 4 at 3, Trans. from the hearing regarding Plaintiff’s Motion for a New Trial*. This did not allow the Petitioner’s a reasonable amount of time to attempt to contact potential witnesses to discuss the 911 call. Moreover, the Respondent’s entire case-in-chief consisted of laying the foundation for the introduction of the 911 call and the playing of the 911 call. The Respondent called no other witnesses and put on no other evidence. Therefore, this issue surrounds the entirety of the Respondent’s case, and was certainly a factor considered by the jury since it requested to hear the 911 call again during jury deliberations:

T]he [defendant's] whole case consisted of the 911 call. And then they rested. When the jury went out, they requested a way to hear the 911 call, and you could hear them playing it in the jury room when you were sitting out in the courtroom. They played it two or three times - - I know at least twice and I think it was three. And then shortly after they played it, they came out and returned a defense verdict.

App. Record: Vol. 4 at 4, Trans. from the hearing regarding Plaintiff's Motion for a New Trial.

The morning following the Circuit Court's decision to modify its ruling on Petitioner's First Motion in Limine, the Petitioner moved for a mistrial or, in the alternative, a recess so that he could attempt to locate and subpoena the appropriate witnesses in an effort to rebut or otherwise explain the 911 recording. *App. Record: Vol. 3 at 9-11, Tr. Trans. Day 2.* Once the Circuit Court determined that it was going to allow the 911 call to be admitted into evidence after the Petitioner had finished putting on his evidence, the Circuit Court should have granted the Petitioner's motion for a mistrial or, in the alternative, a recess to allow the Petitioner a reasonable opportunity to find the appropriate witnesses to testify regarding the 911 call.

Instead, the Circuit Court ruled that the 911 call would now be admissible:

Proximity is important. How close was Mr. Hickman and Mr. Browning even if Mr. Browning was in the intersection wrongfully. The 911 tape, is it probative as to proximity of the red truck to the Hickman car and to a medium hazard? If so, I think it is minimally probative. You must read into what was said, what was meant. And we're doing this without cross examination. And the question is should the jury be allowed to examine this? There's such a little in this case except for the two parties there.

Is this enough to allow the jury to consider this? Josh and I, we listened to this and thought it was rather bland. You know, you could have envisioned something that was not bland. "Oh, crap, he pulled out," something like that. It's clearly not bland. I'm going to let the jury decide. Maybe a jury will listen to this and their collective perceptions may get more meaning out of it than what I did.

As I said, I think this has some probative value as to proximity and if I struggle over something like this, to that extent, I think that's where you let a jury hear it and decide it.

App. Record Vol. 2 at 214, Tr. Trans. Day 1.

The Circuit Court's reasoning for allowing the call at this point in the trial seemed to be based in part on the fact that "[t]here's such a little in this case except for the two parties there" and that the Circuit Court struggled with this decision. *Id.* By not granting the Petitioner's motion for a mistrial, or in the alternative, a recess, the Court erred, preventing the Petitioner from receiving a fair trial.

Because the Circuit Court allowed the 911 call to be admitted into evidence, the Circuit Court erred in allowing a witness to testify without the chance for the Petitioner to cross-examine the witness and without the opportunity for the jury to evaluate said witness's demeanor. Prior to trial the Circuit Court ruled that the witness would not be permitted to testify at trial, unless the Respondent could present the witness for deposition four days prior to the start of trial. *Appendix Record: Vol. 4 at 15-16, Transcript from the hearing regarding Plaintiff's Motion for a New Trial.* The Respondent was unable to locate the caller. Naturally, the Petitioner never deposed the caller from the 911 recording, and the Circuit Court ruled that the caller from the 911 call was not permitted to testify due to the fact that the Petitioner did not have an opportunity to depose her before trial.

However, at the end of the first day of trial, after the Petitioner had finished putting on his evidence, the Circuit Court modified its ruling and allowed the 911 call to be played for the jury despite the fact that the witness was never deposed and was not available to be cross-examined by the Petitioner. As such, this Court should clarify that it was improper for the Circuit Court to allow the 911 call to be played since the witness was not available for deposition prior to trial and was not available for cross-examination at trial.

Within a day or two after the conclusion of the trial, a private investigator of the Petitioner was able to contact the 911 caller, “Toni” through Facebook. The Circuit Court sworn in the Petitioner’s private investigator at the hearing regarding the Petitioner’s motion for a new trial and allowed him to read the correspondence he received from the 911 caller. The correspondence read,

I’ve already talked to someone. I don’t remember two years ago. I work 10/12 hours a day. The truck turned left going fast without hitting the brakes. Slammed him. That’s why I called, I knew someone was hurt. That’s all I remember. I said the same thing like ten times.

App. Record: Vol. 4 at 8, Trans. from the hearing regarding Plaintiff’s Motion for a New Trial.

Had the Circuit Court at least granted the Petitioner a recess to attempt to contact the caller, it is likely that he would have been able to do so, based on how quickly she was contacted after the trial. Granting the Petitioner a recess would have been particularly appropriate since the Circuit Court modified its ruling on the Petitioner’s motion in limine at approximately 5:30 p.m. after the first day of trial, giving the Petitioner only that evening to try to contact witnesses to testify regarding the 911 call. Additionally, her live testimony would certainly be beneficial to a jury.

VI. CONCLUSION

For the reasons set forth herein, the Petitioner, Aaron Browning, prays that the Court reverse and vacate the Order of the Circuit Court of Logan County, West Virginia denying Petitioner’s Motion for a New Trial, grant the Petitioner a new trial, and grant the Petitioner such other and further relief as the Court deems appropriate.

AARON BROWNING,

By Counsel



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CERTIFICATE OF SERVICE

I, John-Mark Atkinson, counsel for Plaintiffs/Petitioners, do hereby certify that service of the “**BRIEF ON BEHALF OF PETITIONER AARON BROWNING**” was made upon the parties listed below by mailing a true and exact copy thereof to:

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in a properly stamped and addressed envelope, postage prepaid, and deposited in the United States mail on this 17th day of January, 2014.



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