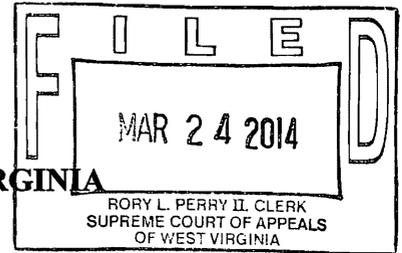


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



AARON BROWNING,

Petitioner,

v.

No. 13-1116

DAVID HICKMAN,

Respondent.

REPLY BRIEF ON BEHALF OF THE PETITIONER

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TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Table of Authorities	ii
I. The 911 Recording Should Not Have Been Admitted Into Evidence	1
II. The Petitioner’s Motion For A Mistrial Or, In The Alternative, A Recess Was Appropriate	7
III. Patrolman Miller Is Qualified To Offer Expert Testimony	9
IV. Conclusion	10

TABLE OF AUTHORITIES

West Virginia Supreme Court Cases

Billiter v. Melton Truck Lines,
187 W. Va. 526, 420 S.E.2d 286 (1992).....10

Jones v. Garnes, 183 W. Va. 304,
395 S.E.2d 548 (1990).....10

State v. Phillips, 194 W. Va. 569, 575,
461 S.E.2d 75, 81 (1995).....1

State v. Sutherland,
231 W. Va. 410, 745 S.E.2d 448 (2013).....1

Tennant v. Marion Health Care Found.,
Inc., 194 W. Va. 97, 104, 459 S.E.2d
374, 381 (1995).....7

Other Authorities

Rule 401 of the West Virginia Rules of Evidence.....8

REPLY BRIEF ON BEHALF OF PETITIONER AARON BROWNING

Pursuant to Rule 10(g) of the West Virginia Rules of Appellate Procedure, Petitioner Aaron Browning, by counsel, submits this reply brief to the brief of Respondent David Hickman and in further support of his appeal.

The Petitioner reiterates that this appeal involves the consideration of the Circuit Court's decision to deny the Petitioner's Motion for a Mistrial or, in the alternative, a Recess, and the Petitioner's Motion for a New Trial.

I. The 911 Recording Should Not Have Been Admitted Into Evidence

1. The 911 call statement does not satisfy the present sense impression exception to hearsay because it is unclear whether the declarant actually witnessed the accident.

The Respondent's brief argues that the 911 call statement satisfies the present sense impression hearsay exception. However, the 911 call statement is not clear regarding whether the declarant had personal knowledge of the accident itself.

This Court has held that in order for an out-of-court statement to be admitted as a present sense impression, "the event giving rise to the statement was within a declarant's personal knowledge." Syl. pt. 4, 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)).

Because the Respondent could not locate the 911 caller prior to trial the caller was unable to testify live. Therefore, 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. Therefore, the 911 call statement is hearsay and should not have been admitted.

2. The 911 call statement is not relevant because it is undisputed that the Petitioner had pulled out in front of the Respondent.

The Respondent's brief also argues that the 911 call was relevant and probative as to the proximity of the intersection at the time of the accident and witness credibility. The 911 call stated "[i]t was the red truck, pulled out in front of the vehicle." *App. Record: Vol. 1 at 33, Defendant's PreTrial Memorandum and 911 Transcription*. It is further undisputed that at the time of the accident the Petitioner was driving a red truck. *App. Record: Vol. 2 at 98, 163, Tr. Trans. Day 1*.

However, the 911 call recording is not relevant evidence because it is undisputed that the Respondent's vehicle struck the back side of the Petitioner's vehicle. The Petitioner was pulled out in front of the Respondent at the time of the accident. The Circuit Court acknowledged on the first day of trial that "[p]ulling across is not a contested issue." *Id. at 25*.

The declarant's testimony from the 911 call statement 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 additional 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 statement simply adds no helpful or disputed facts.

The Respondent's brief cites the Circuit Court's Order Denying the Petitioner's Motion for a New Trial to argue that 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."

App. Record: Vol. 1 at 111, Order Denying Plaintiff's Motion for a New Trial. Though, this is simply not true.

The fact that the Petitioner “pulled out in front of the vehicle” as the 911 call statement claims does not mean that the Respondent did not 1) fail to keep a proper look out; 2) exceed a safe speed under the conditions existing at the time of the accident; 3) fail to yield the right of way to the Petitioner who had already committed to making a left hand turn; and/or 4) fail to yield the right of way by proceeding through a red traffic light as alleged by the Petitioner. *App. Record: Vol. 3 at 47-50, Tr. Trans. Day 2.* Therefore, introduction of the 911 call statement certainly does not refute the Petitioner’s version of events, nor does not it strengthen the credibility of the Respondent’s version of events.

The 911 call statement is therefore irrelevant and should not have been admitted into evidence.

3. The Circuit Court knew the Petitioner was going to argue multiple theories of liability prior to trial.

The Respondent’s brief repeatedly argues that prior to trial the Petitioner represented to the Circuit Court that the only theory of liability it was pursuing against Respondent was that Petitioner had the green light and that once the Petitioner argued other theories of liability that opened the door to the introduction of the 911 recording. The Respondent’s claim that the Petitioner represented that he would only pursue a theory regarding the green light is presumably based on the fact that in the Petitioner’s motion in limine regarding the 911 call, one of the Petitioner’s arguments was 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. This argument is not a representation that the Petitioner would not seek other theories of liability against the Respondent.

In fact, the Petitioner unmistakably represented to the Court that it was pursuing multiple theories of liability against the Respondent prior to trial: “The failure to keep a lookout is in every accident. And whether there’s a failure to yield the right-of-way because somebody else is already in the intersection is a separate question.” *App. Record: Vol. 2 at 32, Tr. Trans. Day 1.*

The Circuit Court clearly understood the Petitioner was going to argue multiple theories of liability in this case because it clarified the Petitioner’s position prior to the beginning of trial:

THE COURT: “You’re saying you can’t just plow somebody if they’re in the wrong.”

MR. WITTEN: “You know, if you see somebody and they’re in front of you, it doesn’t matter if you’ve got the right-of-way or not.”

Id. at 33.

Further, the Petitioner argued prior to trial that it would “elicit testimony on where you [the Respondent] were when you first saw the vehicle and how fast were you [the Respondent] going. We would be fools not to do that.” *Id.* To which, the Respondent sought the Circuit Court’s clarification on whether who had the green light was the only issue in this case:

MR. MISHOE: I understand the Court’s ruling that the green light is the only issue. If that’s the case, the only jury instruction should decide who had the green light and rule in that person’s favor.

THE COURT: There’s more than that.

Id.

The Petitioner also obviously proposed its jury instructions to the Circuit Court prior to trial, and the Circuit Court ultimately 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.*

The Circuit Court clearly understood that the Petitioner was going to argue multiple theories of liability prior to trial when it ruled that the 911 recording was inadmissible.

Even, post-trial the Petitioner clarified that who had the green light was only one of his theories of liability:

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.

App. Record: Vol. 4 at 18, Transcript from the hearing regarding Plaintiff's Motion for a New Trial.

Whether the Petitioner had a green arrow was merely 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. The Respondent still plainly had a duty to drive safely.

Therefore, the Circuit Court erred by wrongfully concluding that fault for the subject collision hinged totally upon which party proceeded through the green light and reversing its prior decision to exclude the 911 recording.

4. Allowing the introduction of the 911 call statement denied the Petitioner his right to a fair trial.

Interestingly, the Respondent's brief does not mention the central argument of the Petitioner's appeal – that even if the 911 call statement were admissible under one of the

applicable hearsay exceptions and relevant, the Circuit Court nevertheless erred by preventing the Petitioner from receiving a fair trial.

The Circuit Court granted the Petitioner's motion in limine prior to the beginning of the trial based on the fact that the 911 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 neither identified nor deposed before trial.

The Petitioner then proceeded with his opening statement and case-in-chief in reliance on the Court's prior ruling that the 911 recording was inadmissible and made no reference to the 911 call. As mentioned in the Petitioner's appeal, the Petitioner 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.

When the Circuit Court suddenly ruled that the 911 recording was admissible after the presentation of the Petitioner's evidence, the Respondent focused his entire case on the 911 recording.

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 Petitioner has a fundamental right to a fair trial. Tennant v. Marion Health Care Found., Inc., 194 W. Va. 97 118 459 S.E.2d 374, 395 n.28 (1995). 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.*

When the Circuit Court deemed the 911 call admissible it should have granted the Petitioner's Motion for a New Trial so that the Petitioner could address the call in its opening statement and case-in-chief. By denying the Petitioner's Motion for a New Trial, the Circuit Court denied the Petitioner his right to a fair trial.

II. The Petitioner's Motion For A Mistrial Or, In The Alternative, A Recess Was Appropriate.

The Respondent's brief argues that the Circuit Court was correct in denying the Petitioner's motion for a recess because "no other witnesses existed" and because "[t]he Court's decision to allow the 911 call had absolutely zero effect on Petitioner's ability to identify or call witnesses." *Respondent's Brief at 12-13.* These arguments are flawed because the 911 caller certainly existed and because the Petitioner relied on the Circuit Court's prior ruling that the 911 caller would not be allowed to testify unless the Respondent could produce her for a deposition prior to trial.

As the Petitioner made clear in his appeal, prior to trial the Circuit Court ruled that the 911 caller 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 911 caller. Consequently, 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.

The Petitioner made no attempt prior to trial to find the 911 caller because he relied on the Circuit Court's ruling that the 911 call would not be played for the jury. It is not until after the Petitioner completed putting on his evidence that the Circuit Court ruled to allow the 911 call to be played. It was after the Circuit Court abruptly changed its ruling that the Petitioner moved for a mistrial or, in the alternative, a recess to find the 911 caller.

The Circuit Court should have granted the Petitioner's motion for a mistrial. However, if unwilling to do so, the Circuit Court should have at least allowed the Petitioner a recess to attempt to locate the 911 caller. The Petitioner was not seeking a recess to search for some new, unknown witnesses to the accident in question as implied by the Respondent's brief, but rather to track down the 911 caller so she could provide live testimony and be cross-examined regarding her testimony. Had the Circuit Court granted the Petitioner a recess, he very likely would have been able to contact the 911 caller considering a private investigator of the Petitioner contacted the 911 caller within a day or two of the conclusion of the trial in this matter. *Id. at 4-12.*

By not allowing the Petitioner an opportunity to locate the 911 caller after the Circuit Court changed its prior ruling, the Circuit Court denied the Petitioner a fair trial by permitting the 911 caller's testimony to be played without the benefit of the caller's cross-examination. As mentioned above, it is unclear from the 911 call whether the 911 caller saw the accident occur, what her condition was at the time of the accident, and how far away the witness was from the accident. Therefore, it was fundamentally unfair for the Circuit Court to allow the 911 call to be played without the 911 caller being cross-examined on the witness stand.

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 "inability to cross-exam[in]e] whoever this person was was pretty significant in that case." *App. Record: Vol. 2 at*

25, *Tr. Trans. Day 1*. Nothing occurred to eliminate the prejudice of allowing the 911 call to be played without the ability to cross examine the caller, yet the Circuit Court changed its prior ruling that the 911 call could not be played unless the caller was available to be deposed.

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. This prevented the Petitioner from receiving a fair trial.

III. Patrolman Miller Is Qualified To Offer Expert Testimony

The Respondent's brief argues that Patrolman Miller should not have been allowed to testify as an expert because he stated in his deposition that he did not know which driver had the green light. The Circuit Court ruled that Patrolman Miller could not offer an expert opinion because "whatever opinion he expressed he took it back in his deposition." *App. Record: Vol. 2 at 29, Tr. Trans. Day 1*. The "expressed opinion" that Patrolman Miller "took back" was that he did not know which party had the green light. *App. Record: Vol. 1 at 111-112, Order Denying Plaintiff's Motion for a New Trial*.

However, the Petitioner argued multiple theories of liability against the Respondent. 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*.

Patrolman Miller should have been allowed to offer expert opinion as to 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; and 3) failed to yield the right of way to the Petitioner who had already committed to making a left hand turn. Patrolman Miller did not need to know which party had the green light to offer testimony as to these three theories of liability.

The Respondent's brief also argues that Patrolman Miller should not have been allowed to provide an expert opinion because he is not an accident reconstructionist. The Respondent cited Billiter v. Melton Truck Lines, 187 W. Va. 526, 420 S.E.2d 286 (1992) to show that the Circuit Court was correct in exclude Patrolman Miller's opinion testimony because he was not trained in accident reconstruction.

Patrolman Miller did not form an opinion based on any accident *reconstruction*. Patrolman Miller is qualified to offer an opinion and formed an opinion based on accident *investigation*. As stated in the Petitioner's appeal, this Court has previously held that a police officer who had completed "a three-month training course at the West Virginia State Police Academy" and had "testified that accident investigation was one of his duties" was qualified to offer an expert opinion regarding an automobile collision. Jones v. Garnes, 183 W. Va. 304, 306 395 S.E.2d 548, 550 (1990). Patrolman Miller had similar training and experience as the officer in Jones. The Respondent's brief fails to even reference or distinguish this Court's opinion in Jones.

Therefore, based on this Court's opinion in Jones, Patrolman Miller met the minimum standard required to testify as an expert in accident *investigation* and should have been permitted to offer his expert opinion as to the three theories of liability previously mentioned.

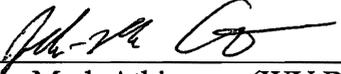
IV. Conclusion

For the reasons set forth herein and as previously set forth in his initial brief, 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.

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CERTIFICATE OF SERVICE

I, John-Mark Atkinson, counsel for Plaintiffs/Petitioners, do hereby certify that service of the “**REPLY 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 24th day of March, 2014.



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