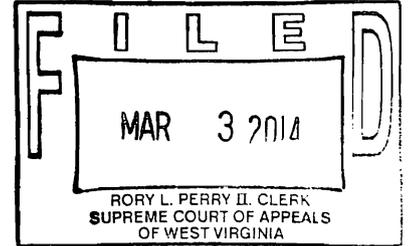


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**AARON BROWNING**  
Petitioner

v.

**DAVID HICKMAN,**  
Respondent



**DOCKET No. 13-1116**

Appeal from a final order of the  
Circuit Court of Logan County (12-C-47)

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**Respondent's Brief**

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## **Introduction**

This matter came for trial on March 18, 2013, resulting in a jury verdict in favor of Respondent David Hickman on March 19, 2013. Petitioner's Motion for a New Trial was denied by Order dated September 16, 2013. This appeal followed, challenging the lower court's decision to allow a 911 recording to be admitted into evidence and its decision to disallow patrolman Jacob Miller from offering expert opinion testimony.

## **Statement of the Case**

This case arises from an auto accident that occurred just before 6:15a.m. on October 24, 2011 in the town of Logan, West Virginia. (Appendix Record, Volume 1, page 1). Respondent David Hickman was traveling straight through an intersection. (A.R. Vol. 1, p. 35). Petitioner Aaron Browning was driving in the opposite direction of Mr. Hickman and was attempting to make a left turn in front of Mr. Hickman's vehicle. (A.R. Vol. 1, p. 35). Mr. Hickman was unable to avoid colliding with the passenger side of Mr. Browning's truck. (A.R. Vol. 2, p. 74).

Immediately after the accident a call was made to 911 in which the caller stated "it was the red truck, it pulled out in front of the vehicle." (A.R. Vol. 1, p. 32-33). It is undisputed the "red truck" was driven by the Petitioner and the "vehicle" was driven by the Respondent. The caller only identified herself as "Toni" and said she was "not from around here." (A.R. Vol. 1, pp. 32-33). 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. (A.R. Vol. 3, pp. 21, 26).

The admissibility of the 911 call was raised at a pretrial hearing on March 4, 2013 (apparently no transcript of that hearing exists). The Court requested each side to prepare a motion on the issue. (*See* footnote 1, *Brief on Behalf of Petitioner*).

Respondent's motion argued the 911 call satisfied the present sense impression exception – among others – to the hearsay rule and was therefore admissible. (A.R. Vol. 1, pp. 49-58).

Petitioner's motion argued the 911 call was not relevant – among other things – because it was not probative on who had the green light and, therefore, should be excluded. (A.R. Vol. 1, pp. 34-40). Petitioner proffered in its motion to the Court:

[T]he 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.

(A.R. Vol. 1, p. 36)(emphasis added).

The Court held a telephonic conference call on March 11, 2013 and ruled the 911 call was not probative on the issue of which driver had the green light at the time of the accident and was therefore irrelevant and inadmissible. (*See* footnote 1, *Brief on Behalf of Petitioner*).

The Court also explained its ruling on the record: “[s]o I guess I had said the motion with respect to the 911 tape, I can put on the record the basis for excluding that. Pulling across is not a contested issue. It's [the 911 tape] irrelevant as to whether he had the arrow.” (A.R. Vol. 2, p. 25). Importantly, the Court *never* ruled the 911 call was inadmissible hearsay, but merely ruled it was not relevant on the issue of who had the green light. (A.R. Vol. 1, p. 36).

However, after the Court's ruling but before trial even started, Petitioner made clear through proposed jury instructions and other discussions he intended to argue several issues beyond simply who had the green light. (A.R. Vol. 2, p. 32). Counsel for Respondent – before trial began – brought this to the Court's attention and reiterated the 911 call was, in fact, relevant on several of the issues Petitioner was now raising. Petitioner explained he would renew his motion to admit the 911 call if Petitioner opened the door to its relevance by forwarding other theories of liability beyond who had the green light:

MR. MISHOE: I want to make sure that it's clear that they might open the door for the admissibility of the 911 [call], even though preliminarily the court has ruled that it is not admissible. I think the Court made it clear that [its] ruling was based on that it's not probative on the issue of who had the green light. And essentially the Court is ruling that the one issue is who had the green light. And that was what was represented by the plaintiffs in their motion to exclude the evidence. . . . And based on that argument that the plaintiffs made, this Court said the 911 tape is not probative on who had the arrow. Since then, plaintiffs have provided jury instructions that I think they intend to argue beyond who had the green light. Specifically, this jury instruction that they've proposed gets into my client having a duty to keep a reasonable and proper lookout for people entering a highway, and there's another one that says that once their client enters the intersection, my client then has the duty to yield the right-of-way[.]

MR. WITTEN: Those are both correct statements of law.

MR. MISHOE: Which comes down to my whole entire point, the green light is not the only issue in this case. (A.R. Vol. 2, p. 32).

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MR. MISHOE: What it comes down to, Your Honor, is West Virginia Code 17C-9-2, which is in this jury instruction that gets into when a person is making a left-hand turn they must first yield the right-of-way to oncoming traffic. And they cannot make the left-hand turn if the oncoming traffic is already in the intersection or is so close to being an immediate hazard and they cannot make the left-hand turn unless it is reasonably safe to do so. And they're [the Petitioner] asking for a similar jury instruction[.] . . .

And the 911 call, if they the get into evidence regarding how close my client was to the intersection, how fast he was traveling at the time of the accident, then they've opened the door to make it probative, the 911 call probative on the issue of did the person have sufficient time to make a left-hand turn or did they pull out in front of a car. (A.R. Vol. 2, p. 33).

THE COURT: Let's see how things go. (A.R. Vol. 2, p. 33).

As shown above, Respondent argued the possibility of the 911 call becoming relevant depending on the evidence at trial, and the Court *before the trial began* put the parties on notice it may revisit the issue depending on how things go during trial.

Trial began and, as the Court stated in its *Order Denying Plaintiff Aaron Browning's Motion for New Trial*, several issues beyond the green light came into play:

It quickly became clear during trial that Plaintiff's representation of the [trial] issue was not entirely accurate. Instead, Plaintiff argued four different theories of liability against the Defendant rather than just running a red light. The other three theories – failing to keep a proper lookout, exceeding a safe speed, 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.

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.

(A.R. Vol. 1, pp. 110-111).

Respondent renewed his motion to admit the 911 call at the close of the Petitioner's case in chief. (A.R. Vol. 2, p. 210). The Court determined the 911 call was relevant and admissible, explaining that its understanding of the case pre-trial changed as evidence came in, and that he now understood the 911 call to be relevant:

THE COURT: As this case has developed, it's like making decisions pretrial. Such as do you get an instruction for punitive damages. Sometimes you don't know exactly where you [are] until everything plays itself out. You know, I had a conception of this case at the start that was more limited than what I see it is now, and it's in light of all that [that the 911 call is relevant and admissible].

(A.R. Vol. 2, p. 216).

Trial concluded on March 19, 2013 with a verdict in favor of Respondent David Browning. (A.R. Vol. 1, pp. 59-62). Petitioner filed a Motion for New Trial (A.R. Vol. 1, pp. 63-69), which was denied by Order dated September 16, 2013. (A.R. Vol. 1, pp. 109-122).

In its *Order Denying Plaintiff Aaron Browning's Motion for New Trail*, the Court set forth applicable legal support for modifying its prior *in limine* ruling and in finding the 911 call to be relevant and admissible under applicable hearsay exceptions, primarily the “present sense impression” exception found at W.Va. R. Civ. P. 803(1). (A.R. Vol. 1, pp. 109-122).

In the same Order, the Court also addressed its decision to preclude patrolman Jacob Miller from offering expert opinion testimony on who was at fault in the subject accident. (A.R. Vol. 1, pp. 111-118). This decision was based on the patrolman’s limited training and on his admission during his deposition that he could not say which driver had the right of way and it was just as likely Respondent had the right-of-way as it was Petitioner. (A.R. Vol. 1, p. 112).

In this appeal, Petitioner challenges the Court’s decision to allow the 911 recording to be admitted into evidence and to disallow expert opinion testimony of patrolman Jacob Miller.

### **Summary of Argument**

The recording of the 911 call immediately following the accident was properly admissible under the “present sense impression” exception to the hearsay rule found at W. Va. R. Civ. P. 803(1) because **(1)** the statement was made at the time or shortly after the 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, *State v. Phillips*, 194 W. Va. 569 (1995).

The lower Court’s decision to modify its prior *in limine* ruling regarding the admissibility of the 911 call was within its discretion. This Court has held, “[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 v. Consol. Rail Corp.*, 214 W. Va. 711, 591 S.E.2d 269 (2003). The United States Supreme Court has held similarly:

The [*in limine*] 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)(emphasis added).

The Court's *in limine* ruling to exclude the 911 recording was based on Petitioner's proffer that the issue at trial was who had the green light. Petitioner then advanced four separate theories of liability. Thus, it was particularly appropriate for the Court to modify its *in limine* ruling regarding the 911 call.

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 curium). Even assuming *arguendo* error occurred, it was introduced or invited by Petitioner's erroneous proffer and therefore reversal would be improper and unjust.

Petitioner's complaint that the Court should have granted a mistrial or recess to allow him time to locate additional witnesses is nothing more than a red herring. Roughly 17 months passed between the accident and the start of trial. If other witnesses existed who supported Petitioner's version of events and refuted Respondent's and the 911 caller's version of events, undoubtedly these witnesses would have already been identified and located. If other witnesses existed who had not yet been identified or located, that is not the Respondent's fault or the Court's fault. Petitioner is not entitled to call a mid-trial timeout in order to commence a witness search it could have commenced 17 months prior. Simply put, there were no other known witnesses to this accident beyond the parties and the 911 caller.

Finally, the Court properly excluded the expert opinion testimony of patrolman Jacob Miller because he did not qualify as an expert and because his own deposition testimony made clear that he could not be sure who had the right-of-way and who failed to yield the right-of-way. Thus, even if patrolman Miller would qualify as an expert, his opinion as to who was at fault – by his own admission – would have been speculative and improper.

### **Statement Regarding Oral Argument**

Respondent believes the record in this matter clearly supports the rulings made in this case, that this case presents no substantial questions of law, that no prejudicial error occurred, and that affirmance by memorandum decision is therefore appropriate pursuant to Rule 21(c) of the West Virginia Rules of Appellate Procedure.

### **Argument**

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

Petitioner's Brief complains of the lower Court's decision to allow the recorded 911 call into evidence and its decision to exclude expert testimony by patrolman Jacob Miller. Both of these are evidentiary decisions within the lower Court's discretion.

The West Virginia Rules of Evidence . . . allocate significant discretion to the trial court in making evidentiary . . . rulings. Thus, rulings on the admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary . . . rulings of the circuit court under an abuse of discretion standard.”

Syl. Pt. 2, *T & R Trucking, Inc. v. Maynard*, 221 W.Va. 447, 655 S.E.2d 193 (2007)(citing Syl. pt. 1, in part, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995)).

As to patrolman Miller's expert opinion testimony, this Court has stated, “[w]hether 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).

This Court has also held, “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)).

**2. The admission into evidence of the recorded 911 call was appropriate, permissible, and within the lower Court’s discretion.**

The appropriateness of the lower court’s decision to admit the 911 recording into evidence hinges on several issues: first, did the statement on the call satisfy applicable hearsay exceptions; second, was the statement on the call relevant; and third, was the lower Court permitted to modify its *in limine* ruling during the course of trial. The answer to each of these questions is yes, as set forth below and as adequately explained in the lower court’s *Order Denying Petitioner’s Motion for New Trial*.

**a. The statement on the 911 call satisfied the present sense impression hearsay exception, among others.**

Hearsay is defined 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.V.R.E. 801(c). “Hearsay is not admissible *except as provided by these rules*.” W.V.R.E. 802 (emphasis added)(*See also* Syl. pt. 1, *State v. Phillips*, 194 W.Va. 569, 461 S.E.2d 75 (1995)(hearsay is admissible if it “falls within an exception provided for in the rules)).

The hearsay exceptions are set forth in Rules 803 and 804 of the West Virginia Rules of Evidence. The exceptions in Rule 803 apply to all out of court statements, regardless of whether

the declarant is available as a witness or not – as the title of the Rule makes clear, the “availability of the declarant [is] immaterial.” W.V.R.E. 803.

The “present sense expression” exception to hearsay is found at Rule 803(1), and is defined as, “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.” W.V.R.E. 803(1). This Court has established a three-part test to determine when an out of court statement is admissible pursuant to this exception:

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, *State v. Phillips, supra*.

In the present case, it is clear the statement on the 911 recording satisfies all three of these factors. First, it is clear and undisputed the call to 911 occurred at 6:15:38a.m on October 24, 2011, immediately after the accident. This is evident by the context of the statement itself, the parties’ testimony that the accident occurred around 6:15a.m. to 6:18a.m., the police officer’s testimony, and the testimony of the Logan County 911 director, who provided a time-stamped printout of what time the call was received. (A.R. Vol. 1, pp. 32-33; A.R. Vol. 2, pp. 61, 100, 150; A.R. Vol. 3, p. 21).

Second, it is clear the call describes the event, as evident by the content of the call itself. (A.R. Vol. 2, pp. 32-33). The caller stated there had been an accident, described that it was a two vehicle accident, described that both drivers were out of their cars, described that they were saying they were alright, and described how the accident happened: “It was the red truck, pulled out in front of the vehicle.” Thus, the second factor is also satisfied in favor of admitting the call.

Third, it is also clear from the context and content of the statement that the accident was within the caller's personal knowledge. The caller was quite obviously providing a description to 911 of what she had just seen and was currently seeing. This supports the inference that the caller had personal knowledge of the accident.

As the lower Court's pointed out in its *Order Denying Plaintiff's Motion for New Trial*, the United States Supreme Court has addressed the admissibility of 911 calls in the criminal context and ruled them admissible:

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.**

(A.R. Vol. 1, p. 115) (Emphasis added).

Again, the statement on the 911 call clearly satisfies all three of the *Phillips* factors, thus making it within the lower Court's discretion to allow the 911 call into evidence. If the United States Supreme Court allows 911 calls to be played without the caller present as a witness in criminal cases that afford the additional scrutiny of the Sixth Amendment confrontation clause, surely it was appropriate in the present case for the lower Court to allow the same.

- b. The statement on the 911 call was relevant and probative on the issues of proximity to the intersection at the time of the accident and on the issue of witness credibility.**

The lower Court's ruling on this issue adequately states the basis for allowing the 911 call into evidence:

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.

(A.R. Vol. 1, p. 115).

Based on this assessment, the Court held, “[a]s testimony unfolded it was clear the 911 call was probative on several issues, and therefore was admissible pursuant to the present sense impression exception to the hearsay rule.” (A.R. Vol. 1, p. 116).

In addition to being probative and relevant on the issue of proximity of the vehicles to the intersection, the Court also pointed out, “[t]he 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.” (A.R. Vol. 1, p. 111).

The evidentiary decisions of the lower Court on the relevancy and admissibility of the recorded 911 call was within the “significant discretion” afforded it by this Court and by the West Virginia Rules of Evidence. *See T & R Trucking, supra*. This discretion was not abused whatsoever; it was exercised properly after careful consideration of all factors. Thus, the ruling should not be disturbed.

**c. The lower Court’s decision to modify its prior *in limine* ruling regarding the admissibility of the 911 call was proper and within its discretion.**

West Virginia and United States law are both clear that a trial court is free to modify *in limine* rulings as trial unfolds. Respondent cited applicable case law in his *Response to Plaintiff’s Motion for New Trial*, which the lower Court adopted in support of its rulings in the *Order Denying Plaintiff’s Motion for New Trial*. (A.R. Vol. 1, pp. 70-82, 109-122):

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))

(A.R. Vol. 1, p. 115)(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*).

(A.R. Vol. 1, pp. 115-116)(emphasis added).

The lower Court also cited to a ruling by the United State Supreme Court allowing modification of *in limine* decisions:

The [*in limine*] 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).

(A.R. Vol. 1, p. 116)(emphasis added)

In sum, there is abundant case law allowing a trial Court discretion to modify *in limine* rulings, all of which was identified and relied upon by the lower Court in denying the Petitioner a new trial. As pointed out above, such discretion to modify prior rulings is particularly important and proper in situations such as the present case, where the testimony at trial was different than what was proffered to the Court. For these reasons, it was proper and within the lower Court’s discretion to modify its prior ruling and to allow the 911 call to be admitted into evidence.

**d. The lower Court correctly denied Petitioner’s request for a recess to locate additional witnesses because no other witnesses existed.**

Petitioner argues the lower Court should have allowed a recess of trial so he could locate additional witnesses to refute the statement on the 911 call. This argument is disingenuous

because, quite frankly, no other witnesses existed. After 17 months of fact finding and discovery leading up to the trial Petitioner identified his trial witnesses in his Pretrial Memorandum, which consisted entirely of medical providers, the parties themselves, and patrolman Jcaob Miller. (A.R. Vol 1., pp. 22-23). Petitioner's disclosure of witnesses contained the exact witnesses he called at trial and the list was made *before the lower Court ever ruled on the admissibility of the 911 recording*.

The Court's decision to allow the 911 call had absolutely zero effect on Petitioner's ability to identify or call witnesses because, as evident by his own pretrial memorandum, it is clear that 17 months of effort were fruitless in identifying or locating any other possible witnesses to this accident. Petitioner's request for a recess was correctly denied. Petitioner's current argument that the lower Court prevented him from locating witnesses to refute the statement on the 911 call is inaccurate; there were no other witnesses. Even assuming *arguendo* other witnesses might exist, Petitioner should have identified and located such witnesses long before trial began. Therefore, it was correct for the lower Court to refuse the mid-trial request for time to identify additional witnesses.

**3. The Circuit Court was within its discretion to preclude patrolman Jacob Miller from offering expert opinion testimony regarding the causation of this accident.**

Patrolman Jacob Miller was the officer who created the police report in this case and testified at trial. Initially in his police report he opined Respondent failed to yield the right of way. However, during his deposition he backtracked from this position. As set forth in the lower Court's Order, patrolman Miller admitted in his deposition he was not present when the accident occurred, had no knowledge of which party had the right of way, was not an expert in accident reconstruction, had only been a city of Logan police officer for six months before this

accident, and admitted it was just as likely the Petitioner failed to yield the right of way as it was Respondent. (A.R. Vol. 1, pp. 111-112).

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 [Petitioner] 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.

(A.R. Vol. 1, p. 112).

Based on this deposition testimony, the lower Court precluded patrolman Miller from offering expert opinion testimony on who was at fault in the subject accident:

THE COURT: He [patrolman Miller] can testify to his investigation, not the opinion. You can't put together an opinion from nothing and whatever opinion he expressed he took it back in his deposition. He basically denied it and took it back. . . . [E]ven if he has some degree of expert[ise], he has to have something and I don't think there is anything there.

(A.R. Vol. 2, p. 29).

“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).

As cited by the lower Court, this Court in *Billiter, supra*, held the trial court was correct to exclude a police officer’s opinion testimony regarding who was at fault in an automobile accident based in part on the officer’s “lack of sufficient testimony regarding his training of accident reconstruction in general” and because he had not “investigated the particular accident to a sufficient extent to offer an opinion regarding fault.” *Id.*

Certainly there is precedent to preclude an officer from offering expert opinion testimony. Based on patrolman Miller’s own statements it was clear he was not qualified to offer expert opinion testimony on who was at fault in this accident. In any case, the decision rested with the lower Court’s discretion, which was not abused or clearly wrong. As the lower Court pointed out, even if patrolman Miller held some expertise, he still had no basis to support an opinion of who was at fault. Accordingly, the lower Court’s decision was proper and should be affirmed.

### **Conclusion**

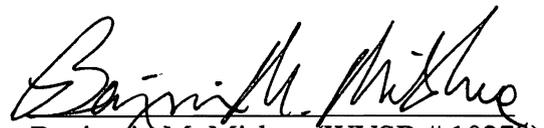
As set forth herein, the lower Court’s decisions were all appropriate and within its discretion, and all were amply explained and supported by the lower Court in its final order.

As to the statement on the 911 call, it satisfied all three factors to qualify as a present sense expression under that hearsay exception, it was relevant on multiple issues at trial, and it was within the Court’s discretion to modify its prior *in limine* ruling during the course of trial

once it became apparent the call was admissible. This is particularly true in the present case because the evidence at trial differed from the pre-trial proffer made by Petitioner.

As to the Court's decision to preclude expert opinion testimony of patrolman Jacob Miller, it too was within the Court's discretion, which was not abused or clearly wrong. A police officer is not and should not be permitted to offer opinion testimony on every auto accident he or she investigates, particularly when the officer's own admission is that he could not say who was at fault. This Court correctly precluded such testimony in this case.

For all of the reasons herein, Respondent asks this Court to affirm the rulings set forth in the Circuit Court's Order Denying Plaintiff's Motion for New Trial.



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**CERTIFICATE OF SERVICE**

I, Benjamin M. Mishoe, counsel for Respondent David Hickman, do hereby certify that on this 3<sup>rd</sup> day of March, 2014, I have served a true and exact copy of the foregoing **Respondent's Brief** by United State Mail, proper postage paid, as follows:

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