

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

LEE JAMES CRAWFORD,

Petitioner,

v.

Case No.: 101579

From the Circuit Court of Jefferson County
Civil Action No. 06-C-243

DAVID SNYDER AND MARY SNYDER

Personal Representatives of the
Estate of Michael C. Snyder, Deceased,
HUNTFIELD, L.C.,

Respondents.

REPLY TO SUPPLEMENTAL BRIEF OF APPEAL
FILED BY DAVID AND MARY SNYDER,
PERSONAL REPRESENTATIVES
OF THE ESTATE OF MICHAEL SNYDER

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I. Response to Assignments of Error

Huntfield files this reply to address the position taken by the Snyders in their supplemental brief. The Snyders ask the court to accept two out of the five asserted points of error assigned by the Petitioner Mr. Crawford and remand this case for retrial. Huntfield asks that any remand be for the limited purposes of the errors raised by Mr. Crawford and be limited only to those claims as between Mr. Crawford and the Snyders. The Snyders made their own challenge to favorable judgments entered in favor of defendants other than Mr. Crawford. The trial court's judgment in favor of these other defendants has been affirmed and a mandate has issued. The law of the case demands that this judgment be honored and that nothing done in this appeal be used to undermine or subvert the rulings of this Court in the companion appeal. Further, with regard to the two errors assigned by Mr. Crawford which do not relate to the procedure and calculation of damages, the trial court acted within its discretion. We ask that this Court observe the law of the case for those matters already fully and finally decided in the companion appeal and further to affirm the trial court's evidentiary rulings challenged by Mr. Crawford and co-opted by the Snyders.

II. Statement of the Case

Respondent Huntfield, L.C., by counsel, replies to the supplemental brief in response to appeal filed by David and Mary Snyder (hereinafter to “the Snyders”) to the appeal petition filed by Lee James Crawford.

The Snyders invite this Court to “reverse the jury’s verdict and remand the case for a new trial.” Supplemental Brief at p. 14. The Snyders do not, however, address the scope of the new trial sought. In the underlying civil action before the Circuit Court of Jefferson County, the Petitioner Mr. Crawford made no claim against Huntfield. Mr. Crawford’s answer filed under certificate of service September 5, 2006, Mr. Crawford did not assert a cross claim against any other defendant. Mr. Crawford answered the cross claim of Respondent Huntfield on January 26, 2007, but asserted no cross claim himself.

This Court decided all claims against Huntfield and other defendants, except for Heather Strachan and Mr. Crawford, in *Snyder v. Huntfield* Case No. 101580. This Court denied the Snyders’ appeal in a unanimous memorandum decision entered June 24, 2011. This Court found no merit the Snyder’s contention that the trial court erred in entering judgment in favor of Huntfield as well as other defendants. June 24, 2011 Memorandum Opinion and Order, Case No. 101580, page 8.

The Snyders filed no motion to stay, reconsider or rehear the matters addressed in the June 24, 2011 Memorandum Opinion and Order. This Court entered a Mandate on July 25, 2011, in Case No. 101580, rendering that decision final and terminating the Court's jurisdiction over those claims.

Mr. Crawford's claims presented to the jury during the two week trial in December 2009, defended himself against the claims of the Snyders. He presented no claims in his pleadings or through judgment against Huntfield or any other defendant. If the Court should accept the Snyder's invitation to reverse the judgment entered against Mr. Crawford and return this matter to a retrial, it should be for the sole purpose of their claims as to Mr. Crawford and to no one else.

III. Summary of Argument

This Court fully and finally decided any issues between the Snyders and all other parties except Mr. Crawford in Case No. 101580. The Court issued a mandate and that appeal is over. Rule 26, Revised Rules of Appellate Procedure. The mandate terminates the jurisdiction of the Court over issues raised in that appeal and the decision now constitutes the law of the case.

The trial court did not err in limiting cross of Mr. Crawford. Rule 611(b), West Virginia Rules of Evidence, grants the trial court discretion to limit the cross of a party "where the interests of justice require". Mr. Crawford

experienced problems affecting his ability to continue as a witness for that day, but Mr. Crawford did not claim then or now that there was any medical or other impediment to him returning to testify on his own behalf during the two week trial.

The trial court did not err in admitting the report of witness Michael Fanning as the inclusion of opinion is permitted by Rule 803(6), West Virginia Rules of Evidence, and Mr. Fanning, whose opinions were stated, was available to be cross examined and in fact was cross examined.

IV. Statement Regarding Oral Argument and Decision

This matter is set for October 19, 2011. Your respondent would ask to appear for the purpose of addressing any issue the Court may desire and any argument offered to avoid the final results in Case No. 101580. Since the Snyders now wish to have a new trial, your respondent asks that such retrial be limited consistent with the Court's prior decision in Case No. 101580.

V. Argument

A. The law of the case limits the scope of what can be considered on remand.

Once this Court has ruled and mandate has issued, its ruling is the law of the case. It is final and binding on all courts and parties.

The general rule is that when a question has been definitely determined by this Court its decision is conclusive on parties, privies and courts, *including this*

Court, upon a second appeal or writ of error and it is regarded as the law of the case.

Syl. Pt. 1, *Mullens v. Green*, 145 W. Va. 469, 115 S.E.2d 320 (1960), Syl. Pt. 3, *Bass v. Rose*, 216 W. Va. 587, 609 S.E.2d 848 (2004) (per curiam) (emphasis added).

This Court has already considered all of the errors claimed by the Snyders in *Snyder v. Huntfield*, Case No. 101580, decided June 24, 2011. The Snyders did not request rehearing. The Snyders did not request a stay of the mandate pending application for certiorari or for any further relief. This Court issued its mandate July 25, 2011, and the decision rendered therein is now conclusive on the parties and courts, including this Court, according to the well established law.

The Snyders request for remand and retrial should be viewed in the context of the law of the case. Any remand should be for the sole purpose of determining the claims by and between Mr. Crawford and the Snyders, consistent with the law of the case.

B. The trial court properly required Mr. Crawford to put his case on during his case in chief.

Mr. Crawford asserts, and the Snyders agree, that the trial court erred in prohibiting cross-examination of Mr. Crawford by his own counsel beyond the scope of the direct examination conducted by the Snyders. The Snyders go on to argue that this is not just an abuse of discretion but a ruling which should be

considered *de novo*. Huntfield respectfully resists both the notion that this is error and that it is governed by *de novo* review.

Rule 611(b) itself addresses discretion afforded a trial court in applying the rule. The general proscription of Rule 611(b) is expressly subject to the trial court's determination of what is "in the interest of justice".

The trial court had advantage of observing Mr. Crawford as he testified. He could observe Mr. Crawford as he dealt with the oxygen issue to which Mr. Crawford's counsel now alludes. Tr. 12-3-09 at p. 203. As the Trial Court would have experienced having been personally present during the proceeding, Mr. Crawford was called late in the day after having been left sitting around all day. Tr. 12-3-09 at p. 128 line 15. His tank of oxygen dwindling, his examination began well into the afternoon session. Mr. Crawford's examination and was interrupted once by the exhaustion of his supply of oxygen. Tr. 12-3-09 at p. 145. Examinations of several witnesses, including Mr. Crawford, were punctuated by multiple objections and side bars. Tr. 12-3-09 pp. 128-207. As the trial court pointed out, Mr. Crawford's counsel could call him back if desired. Id. at 201, 207. Neither Mr. Crawford or his counsel advised the trial court that Mr. Crawford could not return. This should be ample reason enough for the trial court to keep this particular visit to the stand by Mr. Crawford as brief as possible.

The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard.

Syl. Pt. 1, of *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995).

In using his discretion under Rule 611(b) to limit the scope of cross-examination to the issues raised by the Snyder's in their direct is not an abuse of discretion. Mr. Crawford had a clear and easy opportunity to remedy any problems or difficulties created by the restriction of his cross-examination by simply showing up for his own case in chief, which was days after this cross-examination was limited. Why Crawford elected not to return and testify can only be answered by him and his counsel. Mr. Crawford no medical or other substantiated excuse, which would excuse or demonstrate why Mr. Crawford's absence from trial at the time his case in chief was put to the jury.

C. The trial court did not err in admitting the report of Mr. Fanning as a business record.

Mr. Crawford asserts, and the Snyders agree, that the Court erred in admitting the business record of Mr. Fanning of the regularly produced incident report from the occurrence which resulted in Michael Snyder's death.

The foundation for the business record is set forth on pages 7-10 of the trial proceedings of December 7, 2009. Mr. Fanning testified that the document was prepared in the regular course of business. It was a document that he generated routinely for the safety of Defendant Ryan Central's employees. Mr. Fanning personally observed much of the information which was included in the report.

(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. ...

Rule 803(6), West Virginia Rules of Evidence.

When the report was offered as an exhibit, counsel for Mr. Crawford objected, Tr. 12-7-09 at p. 10, to the effect that it included opinion. The opinion was that the accident was due to driver inattention and that the road was well marked. The inclusion of opinion information is not prohibited by Rule 803(6). Mr. Fanning was the author of the report and it was his opinion, based on his observation, reported to his employer, which was related in the document. The objection that it contained opinion, the precise objection stated at trial, is not a

proper objection to a business record. The objection Crawford now raises, that the source was not regularly relied upon misconstrues the exhibit and its source. The exhibit represents the witness' conclusions, not someone else's. Mr. Fanning personally saw the signage and cones.

Q. Who told you that all of the proper sign and cones were put out?

A. No one told me that. After I was down there I took a walk to see if the signs were up.

Tr. 12-7-09 at p. 15.

He was present to be cross examined on this statement and was in fact cross examined on his report. Tr. 12-2-09, pp. 14-17.

This Court should know that Mr. Crawford admitted he was not paying attention. Excerpts from his deposition were admitted as exhibits. Mr. Crawford admitted to the investigating officer that he was looking for his spit cup for his chewing tobacco during the time leading up to striking Mr. Snyder with his automobile. Tr. 12-2-09, p. 57. Mr. Crawford did not contest the opinions of Mr. Fanning this from the day the accident happened. It was obvious to anyone who was at the scene and at the trial.

Other witnesses confirmed Mr. Fanning's lay observations. This other evidence which were received without objection. Charles Town Police Officer James Knott, testified as follows:

Q. So in your view having your knowledge of accident investigations this was a well-marked construction site, right?

A. Yes, sir.

Tr. 12-2-09, p. 45.

The trial court here was well within his discretion to admit the record any harm claimed as a result of admitting an opinion or statement of other pales in the context of the evidence. It does not affect the fairness of the trial as a whole.

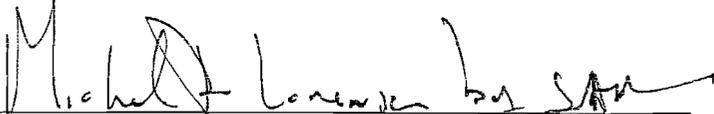
VI. Conclusion

As the Court has already held, the Snyders received a fair trial. The Court should recognize the law of the case and limit any remand to just those claims between Crawford and Snyder.

Respectfully submitted,

HUNTFIELD, L.C.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing **REPLY TO SUPPLEMENTAL BRIEF OF APPEAL** was served upon the below named counsel or party on the date indicated by depositing a true and correct copy of the foregoing in the United States Mail, first class postage prepaid to them at their addresses as follows:

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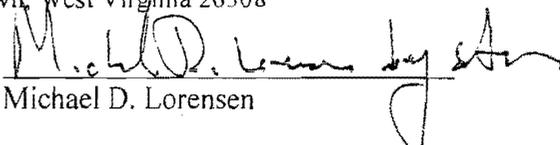
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