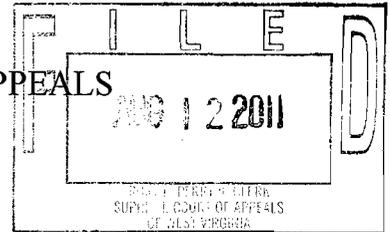


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



LEE JAMES CRAWFORD,
Defendant Below, Petitioner,

vs.

Case No. 101579
(Jefferson County Civil Action No. 06-C-243)

DAVID SNYDER and MARY SNYDER,
Personal Representatives of the Estate of
Michael Snyder, deceased, Plaintiffs Below, and
HUNTFIELD, L.C., Defendant Below, Respondents.

SUPPLEMENTAL BRIEF IN RESPONSE TO APPEAL OF LEE CRAWFORD
BY DAVID AND MARY SNYDER,
PERSONAL REPRESENTATIVES OF THE ESTATE OF MICHAEL SNYDER.

A handwritten signature in cursive script, appearing to read "F. Samuel Byrer".

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I. STATEMENT OF THE CASE

Respondents David and Mary Snyder, Personal Representatives of the Estate of Michael Snyder, deceased, respectfully submit this Supplemental Brief pursuant to this Court's Order of June 22, 2011, and West Virginia Rule of Appellate Procedure 10(h). Respondents previously briefed this matter and herein supplement their argument on one particular point, and incorporate by reference their previous brief on the other issues raised by the Petitioner Lee Crawford. The sum and substance of this brief is that West Virginia Rule of Evidence 611(b)(1) allows cross-examination of a party upon any relevant issue. Notwithstanding that rule, the trial court limited the cross-examination of a party to matters within the scope of direct examination, thus precluding the jury from hearing important evidence concerning proximate cause.

This case is a civil action for wrongful death pursuant to West Virginia Code § 55-7-5, *et seq.* The action was filed by David and Mary Snyder. Their son and only child, Michael, was killed while flagging traffic at Huntfield's construction site. The car which struck Michael was driven by Petitioner Lee Crawford. Huntfield, by its own admission, failed to comply with the public safety requirements of its Highway Entrance Permit, due to the absence of required traffic control elements, a "One Lane Road 1000 Feet" sign and operational flashing lights visible from 1000 feet on its signs. The extent to which this failure was a proximate cause of Michael Snyder's death was a key issue. The trial court precluded Crawford from testifying on cross-examination about crucial issues

concerning proximate cause, and candidly acknowledged its lack of familiarity with West Virginia Rule of Evidence 611(b)(1).

The specific facts relevant to the issue which is the subject of this Supplemental Brief are as follows: on Monday, July 19, 2004, Lee Crawford, a professional driver, was driving a passenger car south on Augustine Avenue in Jefferson County, West Virginia. At the time, Crawford was taking two customers of a transportation service to appointments in Winchester, Virginia. Crawford traveled Augustine Avenue frequently.

July 19 was also the third day of road work undertaken by Huntfield, LC, a large northern Virginia real estate development company which was in the midst of residential development work in Charles Town, West Virginia. In order to provide appropriate access to the development, the West Virginia Division of Highways (WVDOH) required Huntfield to construct a turn lane on a portion of Augustine Avenue near the entrance to the development.

The road work necessitated entry by workers and equipment onto Augustine Avenue, and required, at times, closure of the southbound lane of travel. The WVDOH had granted to Huntfield a highway entrance permit authorizing the encroachment. The permit required Huntfield to abide by the Division of Highways' "Traffic Control for Streets and Highways Construction and Maintenance Operations" manual, which required a series of signs in a lane closure situation. In order, as one approached the lane closure, the required signs were "ROAD WORK AHEAD," followed by "SHOULDER WORK AHEAD," followed by "ONE LANE ROAD 1000 FEET," followed by a sign showing the flagger symbol.

On July 19, 2004, Petitioner Crawford was driving south on Augustine Avenue. The road at that point is typically a two-lane highway with a fifty-five mile per hour speed limit, but on the morning of July 19, 2004, the southbound lane was closed for Huntfield's road shoulder widening work, and two flaggers were directing traffic. At the time, Huntfield's worksite did not comply with the requirements of the state permit because the sign for southbound traffic stating "ONE LANE ROAD 1000 FEET" was not in place, in addition to other deficiencies.

In the absence of the sign warning of the lane closure, southbound driver Petitioner Lee Crawford had no notice that his lane would be closed. He did not have the required notice that the man he thought he saw either in the road or on the shoulder ahead was actually directing traffic in his lane. Without the warning of the lane closure, Mr. Crawford diverted his attention, reached for his cup in the cup holder, and collided with Michael Snyder, who was flagging traffic in the closed lane, throwing him ninety feet through the air and killing him.

Crawford is a resident of Keyser. His counsel transported him to one day of the trial, December 3, 2009, and Mr. and Mrs. Snyder called him as an adverse witness. Crawford came to trial with an oxygen tank. His early testimony was unclear, his breathing was labored, and he seemed unwell. During a sidebar concerning an objection, Crawford was having difficulty breathing. His oxygen tank was nearly empty. The trial court recessed until emergency medical services personnel could bring a new oxygen tank.

Mr. and Mrs. Snyder's examination of Crawford focused upon his relationship to VIP. Crawford's own counsel then attempted to inquire about the effect the traffic control failings had on his driving. Counsel for Ryan Incorporated Central objected, asserting that the question was outside the scope of direct examination. The trial court expressed unfamiliarity with the West Virginia Rule of Evidence (Rule 611(b)(1)) which allows the scope of cross-examination of a party to exceed the scope of direct examination. The Court sustained the objection and prevented Crawford from providing the jury with his explanation of what effect the proper sign would have had on his driving. Crawford did not attend any other day of trial, and was the only witness who could have testified to the effect the sign would have had on his driving.

The jury returned a verdict finding that Lee Crawford was 100% responsible for Michael Snyder's death, and that Huntfield was without fault which was a proximate cause of Michael Snyder's death. The jury further returned a verdict of \$2,509,308.00 in compensatory damages and \$300,000.00 in punitive damages against Crawford. The trial court denied all motions for new trial. Mr. and Mrs. Snyder filed an appeal of the trial court's rulings, and this Court affirmed the trial court by a Memorandum Opinion dated June 24, 2011, in Case No. 101580. Mr. Crawford's appeal, the subject of this brief, was accepted to the Rule 19 docket.

II. SUMMARY OF ARGUMENT

This case presents the opportunity for the Court to determine whether a trial court commits reversible error when it prevents counsel from cross-examining his or her own party-client on matters outside the scope of direct examination, where the adverse party has called the party to testify in its case-in-chief. In this case, the trial court refused to allow such cross-examination as to the crucial subject of proximate cause, despite the fact that the party whose cross-examination was limited was ill and was not certain to be able to attend another day of trial, and despite the fact that the party was the only person who could testify to the issue from first-hand knowledge.

The fatal wreck occurred during road construction work at a site owned by a Virginia company real estate development company called Huntfield, which, by its own admission, failed to comply with the requirements of the West Virginia Division of Highways Highway Entrance Permit, primarily by neglecting to have a “One Lane Road 1000 Feet” sign in place. Without benefit of the required sign warning of the lane closure, Crawford diverted his attention to a cup in his vehicle and collided with Michael Snyder in the closed lane, throwing him ninety feet down the highway.

Proximate cause was hotly contested issue at trial. During the trial, the Snyders called Crawford as a witness and conducted a direct examination concerning Crawford’s employment status. Thereafter, on cross-examination, Crawford’s counsel attempted to ask a question about the effect appropriate signage might have had upon his driving. Despite Crawford’s medical condition requiring a recess to be taken to obtain an oxygen

container on an emergency basis, the trial court erroneously sustained an objection that the question exceeded the scope of direct examination. The trial court candidly admitted a lack of familiarity with the applicable rule of evidence. This decision was wrong as a matter of law and constituted reversible error.

Without the benefit of this testimony by Crawford, the jury erroneously placed 100% of the fault on the driver and dispatcher individually, and exonerated Huntfield, VIP Limousine Service, and the other Defendants. The jury awarded \$2,509,308.00 in compensatory damages against the driver and dispatcher, and \$300,000.00 in punitive damages against the driver.

III. POINTS AND AUTHORITIES RELIED UPON

W.Va.R.Evid. 611(b)(1)

Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (1995)

State v. Sutphin, 195 W.Va. 551, 560, 466 S.E.2d 402, 411 (1995)

Lacy v. CSX Transp., Inc., 205 W.Va. 630, 520 S.E.2d 418, 434 (1999)

Cleckley, Handbook on West Virginia Evidence, §611(F)(4)(a)

IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument will be beneficial to the Court, and aid its decisional process, because the Court has not before addressed the limits of cross-examination of a party under West Virginia Rule of Evidence 611(b)(1).

VI. DISCUSSION OF LAW

A. The trial court committed reversible error when it prevented Crawford from testifying about the vital issue of proximate cause, in violation of Rule of Evidence 611(b)(1), where Crawford, a party, was testifying on cross-examination.

The trial court's error consists of a clear violation of West Virginia Rule of Evidence 611(b)(1). After the Snyders called Petitioner Lee Crawford to testify as an adverse witness during their case-in-chief, Crawford's counsel cross-examined him. The Snyders' examination of Crawford dealt only with the issue of Crawford's employment on the day of the fatal collision. Crawford's counsel attempted to ask questions concerning other factors which led to the wreck. The trial court erroneously limited the cross-examination of Crawford by his own counsel to matters covered in the direct examination.

The specific question, objection, and response were as follows:

Q. [Mr. Molenda] There has been a lot of testimony that there was a sign that should have been out, a sign that said—

MR. NOONEY: I object to improper cross-examination. There was no direct dealing with the accident itself, the questions were agency and employment. This is not [proper] cross-examination and I object to it.

MR. MOLEND: He is a party and a party's cross-examination is wide open.

(Tr. Dec. 3, 2009, at page 200, lines 17 – 24). Thereafter, the trial court conducted a sidebar discussion concerning the objection. The trial court acknowledged the practical concerns about cutting off the testimony of “the witness who is on bottled oxygen[,] has very limited means and has been dragged across several counties to be here today in

some sort of medical distress just sort of being on the stand.” (Tr. Dec. 3, 2009, at page 203, lines 18 – 21). Despite that concern, the Court ultimately ruled as follows:

Well, Mr. Molenda, I am unfamiliar with the rule that you assert that scope is not a reasonable objection when a party is a witness. The practice that I am familiar with is that it is scope of the direct which does define the scope of cross. That is the objection that we have got before us. I sustain the objection.

(Tr. Dec. 3, 2009, at page 204, lines 15 – 20). The trial court’s ruling was wrong and constituted reversible error.

The applicable rule of evidence is explicit. “A party may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interest of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.” W.Va.R.Evid. 611(b)(1). The trial court acted upon a clear misapprehension of the law, and committed reversible error in sustaining the objection.

Rule 611 is less restrictive than the parallel federal rule, which limits all cross-examination to the scope of direct examination. Fed.R.Evid. 611. As Professor Cleckley has noted, “[t]he restrictive scope rule is followed in West Virginia only when the witness is not a party to the action. . . . When a party to an action in West Virginia takes the stand, cross-examination is permitted on anything that is *relevant* to the case including credibility.” Cleckley, Handbook on West Virginia Evidence, §611(F)(4)(a), page 798 (citations omitted).¹

¹ The Snyders note that Professor Cleckley, at pages 802 – 804, catalogs cases which have found unreasonable limitation upon cross-examination to be an abuse of discretion.

The question posed to Crawford was absolutely relevant. A central issue in this case was whether Crawford's inattentive driving was the sole proximate cause of Michael Snyder's death, or whether the traffic control failings of Huntfield or others concurred with Crawford's negligence to proximately cause Michael Snyder's death. Due to the trial court's ruling, the jury did not hear Crawford testify about the different action he would have taken had he actually had notice of the lane closure. In fact, Crawford was the only witness who could testify about how his driving would have been different if the required sign had been in place. This evidence directly and uniquely addressed the proximate cause issue. This question was crucial.

Both Crawford and the Snyders sought to establish that Huntfield and others were guilty of negligence which concurred with Crawford's negligence. The trial court could have acted efficiently and practically, and in accordance with Rule 611(b)(1), by allowing Crawford, already on the stand, to testify that the absent lane closed sign was the reason for his inattentive driving. This testimony likely would have provided a basis for the jury to conclude that Huntfield was also at fault for the fatal collision. Instead, the jury never heard this testimony, and exonerated Huntfield despite its clear failings on the day of Michael Snyder's death.

Because of the importance of the erroneously excluded evidence and the trial court's plainly wrong application of Rule 611(b)(1), a new trial is warranted.

B. The standard of review for addressing this error should be *de novo*, because the trial court's explicit ruling hinged upon its interpretation of a rule of evidence.

The Court should review this issue *de novo*. "An interpretation of the West Virginia Rules of Evidence presents a question of law subject to *de novo* review." Syl. Pt. 1, *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995). "A trial court's ruling on the admissibility of testimony is reviewed for an abuse of discretion, but to the extent the [circuit] court's ruling turns on an interpretation of a [West Virginia] Rule of Evidence our review is plenary." *State v. Sutphin*, 195 W.Va. 551, 560, 466 S.E.2d 402, 411 (1995); quoted in *Lacy v. CSX Transp., Inc.*, 205 W.Va. 630, 520 S.E.2d 418, 434 (1999). In its ruling, the trial court explicitly determined that the scope of cross-examination of a party could not exceed the scope of direct examination. The trial court incorrectly interpreted West Virginia Rule of Evidence 611(b)(2), which clearly allows cross-examination of a party as to all relevant matters. The trial court's error prevented the jury from hearing important testimony concerning relevant issues; therefore, reversal is merited.

An analogous case is *Lacy v. CSX Transp., Inc.*, 205 W.Va. 630, 520 S.E.2d 418, 434 (1999). In *Lacy*, the plaintiffs were passengers in a car which drove around a railroad crossing arm. The car was struck by an oncoming locomotive. Both the driver of the car and the railroad company were defendants in the case. The jury returned a verdict finding, *inter alia*, that the railroad company's negligence was not a proximate cause of the collision. In that case, the trial court precluded a portion of an investigative record from coming into evidence. This Court reviewed that evidentiary error *de novo*

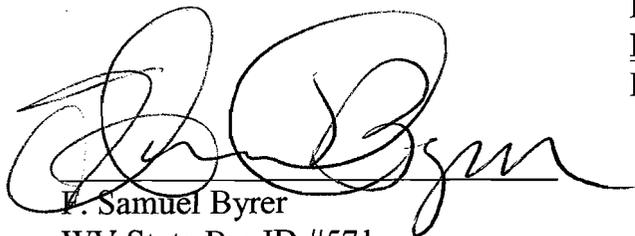
and reversed and remanded for a new trial based upon “the importance of the evidence” excluded. *Id.* at 438.

The Snyders are mindful that questions of admissibility of evidence are typically reviewed under an abuse of discretion standard. *Id.* at 518, 177. Where, as here, the testimony concerned a central issue and where the party-witness’ condition was such that even the trial court questioned his ability to return for another day of trial, the trial court abused its discretion by refusing to allow Crawford, a party, to answer questions from his own counsel concerning relevant matters. This error was not harmless. The precluded evidence focused squarely upon whether the required sign’s absence was a proximate cause of Michael Snyder’s death, and would have been testimony from the single witness in any position to be able to so testify. The trial court’s erroneous exclusion of the evidence merits a new trial.

VII. CONCLUSION

Mr. and Mrs. Snyder do not agree with all of the errors assigned by Petitioner Crawford; however, in light of the substantial error by the trial court in limiting Crawford's examination by his own counsel on a vital point in clear violation of a rule of evidence. Mr. and Mrs. Snyder pray that this honorable Court reverse the jury's verdict and remand this case for a new trial.

David Snyder and Mary Snyder,
Personal Representatives of the Estate of
Michael C. Snyder, deceased, Petitioners
By counsel



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Certificate of Service

I, F. Samuel Byrer, hereby certify that I have served a copy of the foregoing Supplemental Brief in Response to Appeal of Lee Crawford by David and Mary Snyder, Personal Representatives of the Estate of Michael Snyder, upon the following persons, by U.S. Mail, postage prepaid, on the 9th day of August, 2011:

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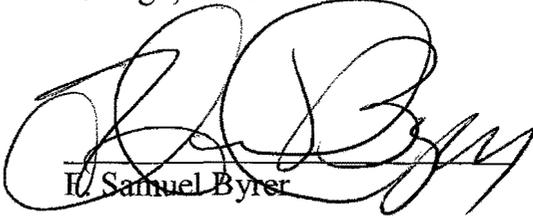
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