

12-0888

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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CATHY S. GARDNER, CLERK
KANAWHA COUNTY CIRCUIT COURT

RICHARD R. ANDERSON,

Plaintiff,

v.

Civil Action No.:08-C-1771
Honorable Jennifer Bailey Walker

MATTHEW EDWARD DREHER,
J E S, INC., d/b/a THE SOUND FACTORY,
JOHN DOE #1, ESSEX INSURANCE COMPANY,
KERRY ELLISON d/b/a BLACK HAWK SALOON,
JOHN DOE COMPANY d/b/a BLACK HAWK
SALOON, and JOHN DOE #2,

Defendants,

AND

J E S, INC., d/b/a THE SOUND FACTORY,

Defendant/Third-Party Plaintiff,

v.

JIM LIVELY INSURANCE, INC. and
JAMES E. LIVELY,

Third-Party Defendants.

**ORDER DENYING PLAINTIFF RICHARD ANDERSON'S AND DEFENDANT
MATTHEW DREHER'S, RESPECTIVE, MOTIONS FOR NEW TRIAL**

On a former day, to-wit, came the Plaintiff, Richard Anderson, and Defendants, Matthew Dreher, Jr., and JES, Inc. d/b/a The Sound Factory, by their respective counsel, on Plaintiff, Richard Anderson's Motion for New Trial and Defendant, Mathew Dreher's, Motion for New Trial. For the foregoing reasons, the Court DENIES both Plaintiff Anderson's and Defendant Dreher's Motions and hereby tenders the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Plaintiff in this matter, Richard Anderson, was injured in a motor vehicle collision which occurred on July 19, 2008.

2. Mr. Anderson's vehicle was struck by a vehicle operated by Mathew Dreher who was intoxicated at the time of the collision. Mr. Dreher claimed that he consumed alcohol at a local bar called "The Sound Factory" which is owned and operated by JES, Inc.

3. JES, Inc. d/b/a "The Sound Factory" (hereinafter "JES, Inc.") was pursued under a claim that it was negligent in serving alcohol to Mr. Dreher.

4. Trial was held in this matter from October 31, 2011 through November 2, 2011. During the course of this trial, objections to certain evidence were made by counsel and various in-trial motions were heard.

5. On November 2, 2011, the jury returned a verdict in favor of the Plaintiff and against Defendant Mathew Dreher.

6. In their verdict, the jury found no negligence on the part of JES, Inc. and attributed no fault to Defendant JES, Inc.

7. Subsequent to trial, Plaintiff Anderson and Defendant Dreher made separate motions requesting a new trial.

8. Defendant Dreher's motion argued credibility issues and specifically argued that the Court had committed error in excluding a prior inconsistent statement of a witness, Conrad Carpenter, made to an investigator for the Plaintiff.

9. Plaintiff Anderson also made arguments with regard to the previous statement of Conrad Carpenter and claimed that the Court committed error in excluding its use at trial. In Plaintiff Anderson's Motion for New Trial, he made three distinct arguments in favor of a new trial as follows:

a. Plaintiff had no duty to supplement discovery and provide Defendants with the Carpenter statement while it is privileged work product;

b. Ruling that Plaintiff's Counsel could not question Mr. Carpenter about the prior inconsistent statement was contrary to Rule 613 of the West Virginia Rules of Evidence; and,

c. The refusal to allow Plaintiff's Counsel to question a key witness about a prior inconsistent statement was [*sic*] clear miscarriage of justice, which requires a new trial.

10. Thereafter, JES, Inc. filed an omnibus response to both motions attaching a great deal of the trial transcript and arguing as follows:

a. The record of the trial clearly reflects that there was no "ruling" made by the Court which was the subject of both motions for new trial;

b. That both defendants cannot prevail on a motion for new trial claiming an alleged error which they created;

c. Even if a ruling had been issued by the Court, it would not have been error for the Court to exclude the evidence upon finding that counsel for Plaintiff was required to supplement discovery with alleged statements of witnesses after providing those statements to expert witnesses to formulate opinions;

d. Even if a ruling had been issued by the Court, it would not have been error to limit the cross-examination of Mr. Carpenter under Rule 613 of the West Virginia Rules of Civil Procedure as the alleged prior statement had been specifically requested by opposing counsel; and,

e. Credibility is an issue left to the discretion of a jury.

11. Plaintiff Anderson later filed a reply to JES, Inc.'s response arguing as follows:

a. The Court did issue a ruling on the record prohibiting the use of Conrad

Carpenter's statement; and,

b. The error was not created by Plaintiff Anderson or Defendant Dreher;

12. There are several statements allegedly taken by an investigator for Plaintiff which Defendants requested on numerous occasions in this matter; however, Plaintiff refused production of those statements claiming attorney work product.

13. During the course of the discovery phase of the case Defendant JES, Inc. engaged in discovery on issues of potential witnesses, witness statements, experts, and the basis for expert opinions and specifically asking for witness statements, expert opinions, and the basis of those expert opinions in Interrogatories 19, 20, 23 and 25, which were provided to the Court in JES, Inc.'s response to the motions for a new trial.

14. Furthermore, Defendant Dreher engaged in discovery in this matter by making similar inquiries asking for witness statements, expert opinions, the basis for expert opinions and the contents of experts' files in Interrogatories 2, 15 and 17. Those Interrogatories were also provided to the Court in JES, Inc.'s response to the motions for new trial.

15. During the testimony of Plaintiff expert Mark Willingham, it became apparent that Mr. Willingham had utilized one of these alleged statements to formulate his opinions in the case as he specifically referred to a "telephone statement" of Mr. Carpenter. Counsel for the Plaintiff confirmed that the expert had reviewed this "telephone interview" and it was used to formulate the expert's opinions.

16. The fact that Plaintiff's expert had seen and utilized one such statement in formulating an opinion in this case caused an objection by counsel for Defendant JES, Inc.

arguing that there is no attorney work product exception to documents once they have been reviewed by an expert witness.

17. At that time, the Court issued no ruling as to the admissibility of the statement as counsel for Plaintiff indicated that he would “redirect him away from that.”

18. Later, during Defendant JES, Inc.’s case-in-chief, Conrad Carpenter was called to offer testimony.

19. During Plaintiff’s cross examination of Mr. Carpenter, Plaintiff’s counsel performed a very brief lead-up and moved into the “recorded statement” issue which resulted in objection and two separate lengthy debates occurred before the Court out of the presence of the jury.

20. The culmination of these lengthy discussions resulted in counsel for Plaintiff voluntarily withdrawing his attempt to impeach Mr. Carpenter with this “recorded statement” altogether and stating they would introduce the information during rebuttal. The Court specifically acknowledged the Plaintiff’s withdrawal of the alleged statement.

21. Counsel for Plaintiff made no attempt to offer any rebuttal testimony and the close of the Defendant, JES, Inc.’s case-in-chief.

CONCLUSIONS OF LAW

1. Under the law of West Virginia, a trial judge should rarely grant a new trial and a new trial should be granted only where it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done. *Morrison v. Sharma*, 200 W.Va. 192, 488 S.E.2d 467 (1997). Moreover, a trial judge’s decision to grant or deny a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure is not subject to appellate review unless the trial

judge abuses his or her discretion. *Id.*; see also *Brooks v. Harris*, 201 W.Va. 184, 495 S.E.2d 55 (1997).

2. It is well settled law in West Virginia that “[a] [party] must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment.” Syl. Pt. 2, *WV Dept. of Health & Human Resources Employees Fed. Credit Union v. Tennant*, 215 W.Va. 387; 599 S.E. 2d 810 (2004) (quoting Syl. Pt. 5, *Morgan v. Price*, 151 W.Va. 158, 150 S.E.2d 897 (1966)); see also *State v. Browning* 199 W.Va. 417; 485 S.E.2d 1 (1997) (“This Court will not consider an error which is not properly preserved in the record nor apparent on the face of the record”).

3. Our Supreme Court has “continuously stated that to preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect.” Syl. Pt. 2, *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 470 S.E.2d 162 (1996). The Court has further explained:

The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace. . . . It must be emphasized that the contours for appeal are shaped at the circuit court level by setting forth with particularity and at the appropriate time the legal ground upon which the parties intend to rely.

Id. at 216, 470 S.E.2d at 170 (citation omitted).

4. In the instant case, Plaintiff Anderson and Defendant Dreher allege that the “error” that occurred during this trial was an order from the Court prohibiting the Plaintiff from cross examining Mr. Carpenter with a prior inconsistent statement. However, the Court was not made to make any ruling at all as a result of the concession of Plaintiff’s counsel who stated on the record, “[y]our Honor, we won’t use this statement at all then. We can call Michael Kidd as

rebuttal witness." As there was no Order or ruling from the Court, there can be no error.

Consequently, both Anderson's and Dreher's motion for a new trial must be denied.

5. It is well settled law in West Virginia that "[a] litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal." Syl. Pt. 2, *Hopkins v. DC Champman Ventures, Inc.*, - W.Va. -, - S.E.2d -, 2011 W.Va. Lexis 310 (2011) (quoting Syl. Pt. 1, *Maples v. West Virginia Dep't of Commerce*, 197 W.Va. 318, 475 S.E.2d 410 (1996)). Furthermore, "[a] judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal." Syl. Pt. 3, *Id.* (quoting Syl. Pt. 21, *State v. Riley*, 151 W.Va. 364, 151 S.E.2d 308 (1966), overruled on other grounds by *Proudfoot v. Dan's Marine Service, Inc.*, 210 W.Va. 498, 558 S.E.2d 298 (2001)).

6. "Invited error" is a cardinal rule of appellate review applied to a wide range of conduct. It is a branch of the doctrine of waiver which prevents a party from inducing an inappropriate or erroneous response and then later seeking to profit from that error. The idea of invited error is not to make the evidence admissible but to protect principles underlying notions of judicial economy and integrity by allocating appropriate responsibility for the inducement of error. Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences. *Hopkins, supra.* at 17. (quoting *State v. Crabtree*, 198 W.Va. 620, 627, 482 S.E.2d 605, 612 (1996)). See also *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W.Va. 585, 599, 396 S.E.2d 766, 780 (1990) ("[T]he appellant cannot benefit from the consequences of error it invited."); *In re Tiffany Marie S.*, 196 W.Va. 223, 233, 470 S.E.2d 177, 187 (1996) ("[W]e regularly turn a deaf ear to error that was invited by the complaining party."); *Comer v. Ritter Lumber Co.*, 59 W.Va. 688, 689, 53 S.E. 906, 907 (1906) (the party inviting "the error ... must accept its results"); Syllabus Point 1, *McElhinny v.*

Minor, 91 W.Va. 755, 114 S.E. 147 (1922) ("appellant cannot complain of errors ... which he alone caused"); *Smith v. Bechtold*, 190 W.Va. 315, 438 S.E.2d 347 (1993) ("invited error" when appellant moved for the very delay that was the subject of the appeal); Syllabus Point 2, *Young v. Young*, 194 W.Va. 405, 460 S.E.2d 651 (1995) ("A judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal."); Syllabus Point 2, *State v. Bowman*, 155 W.Va. 562, 184 S.E.2d 314 (1971) ("An appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited. . . .").

7. In the instant case, discovery was sought by both Defendant JES, Inc. and Defendant Dreher with regard to statements which may have been taken by the Plaintiff or their counsel. Each was met with objections claiming any such statements would be protected under the work product doctrine. Nevertheless, during trial it became clear that at least one expert had reviewed the statement which is the subject of both motions for new trial. Both Defendants in this matter also sought discovery of expert opinions and what those opinions were based upon. Information utilized by an expert witness is discoverable and any argument that the alleged statement of Mr. Carpenter was attorney work product was removed after it was disclosed to an expert witness. Consequently, even if this Court had issued a ruling excluding the statements from use, it would have been an appropriate sanction as the statement was not disclosed in discovery. Consequently, the entire issue with regard to the alleged statement of Mr. Conrad is a situation created by the Plaintiff which he now attempts to exploit in order to gain a new trial. Consequently, Plaintiff Anderson's motion for new trial must be DENIED.

8. Furthermore, during trial counsel for Dreher was the attorney who made the argument before the Court that giving the alleged statements of these witnesses to the expert witnesses removed any and all argument regarding the work product doctrine during trial. Now,

Defendant Dreher has completely reversed a position that was specifically taken at trial in an effort to obtain a new trial. If there had been a ruling issued by the Court, it would have been based not only on the objections of JES, Inc, but also on the arguments which were made by counsel for Defendant Dreher. Consequently, Defendant Dreher cannot succeed on a motion for new trial involving an alleged error he helped to create. Therefore, Defendant Dreher's motion for new trial must be DENIED.

9. With regard to the disclosure requirements of Rule 26, commentators have stated as follows:

Under Rule 26(b)(4)(A(i) a party may use interrogatories to require an opposing party to (1) identify each person whom the other party expects to call as an expert witness at trial, (2) to state the subject matter on which the expert is expected to testify, and (3) to state the substance of the facts and opinions to which the expert is expected to testify, along with a summary of the grounds for each opinion. The preliminary purpose of this required disclosure is to permit the opposing party to prepare an effective cross-examination. A prohibition against discovery of information, including facts and opinions, held by expert witnesses produces acute form the very evils that discovery has been created to prevent. A lawyer even with the help of his/her own expert frequently cannot anticipate the particular approach the opponent's expert will take or the data on which the expert will base his/her judgment. Consequently, the litigant is entitled automatically and without prior judicial approval to substantial, though not complete discovery from the expert who expectably will be used at trial.

See Cleckley, F.; Davis, J.; Palmer, Jr., L.; Litigation Handbook on West Virginia Rules of Civil Procedure, 3rd. Ed., Rule 26 §26(b)(4), p. 665. (Citations omitted).

10. Plaintiff has made the argument that the alleged statements which may have been recorded by an investigator are factual work product that was prepared in anticipation of litigation. Nevertheless, this information was clearly provided to an expert witness as is indicated in the trial transcript. This expert clearly used this information to formulate their opinions in this case (as was admitted by counsel at trial) and were never disclosed to any Defendant despite a clear request for all information relied upon by the Plaintiff's experts.

Consequently, even if the Court *had* made a ruling limiting the cross examination of Carpenter, that ruling would have been completely appropriate given the nature of Rule 26. Consequently, Plaintiff Anderson's motion for new trial must be DENIED.

11. Rule 613(a) of the West Virginia Rules of Evidence provides as follows:

(a) Examining witness concerning prior statement.

In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

12. It is clear from the trial transcript that Defendants' counsel specifically requested copies of the alleged statements listed in Plaintiff's Pre-trial Memorandum prior to the trial of this matter. Prior to the trial of this matter, all counsel were Ordered to meet and discuss the exhibits to be offered at trial. All counsel complied with this Order. At least twice prior to trial, counsel for Defendants specifically requested counsel for Plaintiff to provide copies of these alleged statements and those requests went unanswered. Furthermore, it is clear from all the evidence that these statements were never provided. Finally, it is clear from the evidence that, in the case of Conrad Carpenter, the witness had already actually been examined concerning an alleged prior inconsistent statement during his deposition. Consequently, the requirements of Rule 613 were *not* met as is alleged in the motion filed by Plaintiff in this matter. Therefore, even if the Court *had* made the ruling limiting Plaintiff's during the cross-examination of Mr. Carpenter, such a ruling would have been correct. Consequently, Plaintiff Anderson's motion for new trial must be DENIED.

13. It is well settled law in West Virginia that "[t]he jury is the trier of the facts and in performing that duty it is the sole judge as to the weight of the evidence and the credibility of the

witnesses." Syl. Pt. 2, *State v. Martin*, 151 W. Va. 796, 155 S.E.2d 850 (1967) (quoting Syl. Pt. 2, *State v. Bailey*, 151 W. Va. 796, 155 S.E.2d 850 (1967)).

14. Defendant Dreher has argued issues of credibility with regard to Mr. Carpenter and another witness, Laura Walker, during the trial of this matter. It is well settled that the jury is the sole judge as to the weight of the evidence and the credibility of the witnesses. Consequently, Defendant Dreher's motion for new trial in this regard must be DENIED.

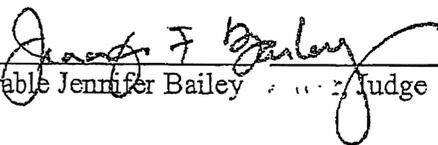
15. Consequently, the Court hereby DENIES Plaintiff Anderson's Motion for New Trial and Defendant Dreher's Motion for New Trial.

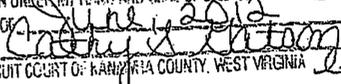
For the foregoing reasons, Plaintiff Anderson's and Defendant Dreher's respective Motions for New Trial are hereby DENIED.

The objections and exceptions of the parties are hereby preserved for the record.

The Clerk is hereby ORDERED to provide certified copies of this ORDER to all counsel of record and all unrepresented parties.

Entered this 18th day of June, 2012.


Honorable Jennifer Bailey, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GRIFFIN, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 22
DAY OF June, 2012.
 CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA 24