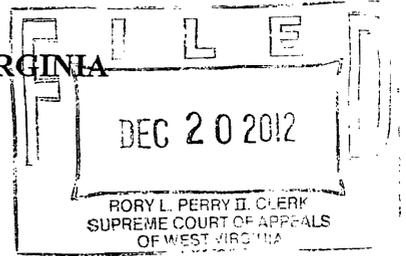


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 12-0888



**Matthew Edward Dreher, Defendant below,
Petitioner**

vs. Appeal from Final Order of Circuit Court Kanawha County (08-C-1771)

**Richard R. Anderson, Plaintiff below,
Respondent,**

and

**JES, Inc., D/B/A The Sound Factory,
Defendant/Third-Party Plaintiff below,
Respondent.**

PETITIONER'S REPLY BRIEF


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II. TABLE OF AUTHORITIES

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Rule 613 of the West Virginia Rules of Evidence 9, 11, 12

Case law and Secondary Sources

Cleckley's Handbook on Evidence for West Virginia Lawyers, section 6-9(B)(2)(b) . . 11

III. ASSIGNMENTS OF ERROR

1. The Circuit Court committed error when it precluded Defendant Dreher, through counsel and, Plaintiff, through counsel, to use a prior, inconsistent statement of Conrad Carpenter, at trial, to impeach the direct testimony of Mr. Carpenter.

IV. STATEMENT OF THE CASE

Petitioner stands upon his statement of the case in the Petition for Appeal and would further like to address the statement of the case as referenced by JES Inc. d/b/a the Sound Factory in Respondent's Brief

First, in the first paragraph of Respondent's statement of the case, it is stated that "[D]espite a lack of evidence placing Mr. Dreher in the establishment, the sound factory was pursued under a claim that it was negligent in serving alcohol to Mr. Dreher." This statement is entirely false and misleading. Petitioner Dreher testified consistently in both his deposition and at trial that he was at the Sound Factory on the evening in question, before the accident. His testimony was not inconsistent in this regard at any time and, he had no incentive to not tell the truth about this fact because he admitted liability in the case at trial and, admitted in his deposition that he had drank alcoholic beverages and was under the influence, before the accident. And, while there was conflicting evidence from the trial about whether Dreher was in the Sound Factory before the accident, based upon the testimony of Conrad Carpenter and Laura Walker, it is obviously Carpenter's inconsistent testimony when compared to his recorded statement that is at issue in this appeal; and, it is Petitioner's strong position that Walker's testimony at trial that she knew Dreher was not in the bar that night because she new everyone who was in the bar,

was not credible testimony. Therefore, as far as competent evidence is concerned, there was **clearly** evidence that Dreher was in the sound factory on the night in question before the accident and the statement of Respondent to the opposite is simply incorrect and disingenuous.

Second, Respondent states in the second paragraph that the ruling related to the prohibition of the use of the statement of Conrad Carpenter Petitioner Dreher and Plaintiff Anderson are challenging in this appeal never occurred. Again, this is a clear misstatement of fact. The Court can see from the transcript that the lower court did state that the statement could not be used as impeachment evidence and, that Carpenter could not be cross-examined as to whether he had made a prior, inconsistent statement to a third-party or questioned about the substance of the statement. On page 14 of the October 31, 2011, trial transcript, (Appendix p. 361), the Court indicated that the statement could not be used in the direct testimony of Plaintiff's expert. In fact, counsel for the Sound Factory, during the direct testimony of Carpenter, objected to Plaintiff's counsel's attempted use of the statement as impeachment evidence, and indicated that: ". . . **you gave a previous ruling** that it could not be brought up in this case, and so I would like to uphold that ruling at this point." Transcript, p. 12, November 1, 2011. (Appendix p. 365). Then, on page 37 of the transcript, the trial judge states: "**Yeah, I'm not going to allow it.** It was requested in discovery, it was not forthcoming, it was not – has been requested even as late as last week or so . . ." (Appendix p. 298). Further, the Undersigned basically asked the Court to reconsider its ruling and, to permit the witness to be cross-examined based upon having given a prior, inconsistent statement. This Court can clearly see from the trial court's discussion on page 47 of the November 1,

2011, transcript that she would not allow the evidence to be used. (Appendix p. 309). Therefore, the Court's ruling on the Motion for New Trial, that it never actually excluded this evidence, was in error and Respondents position in this regard in this appeal is not persuasive. The lower court may not have used some magic words that Respondent would have liked to have been used but all counsel at the trial knew that the court had ruled that the statement was not to be used as evidence, for impeachment or in any other manner because it had not been disclosed in discovery. It is irrelevant whether Petitioner's counsel then attempted to use the evidence and was precluded as all counsel were informed that the statement could not be used. Petitioner does have standing to raise this issue on appeal. Again, the Undersigned asked the Court to reconsider its ruling regarding the use of the statement on the next day of trial after the statement was precluded and the Court reaffirmed its ruling. This reaffirmation was referred to in Respondent's Brief at page 10 and the recitation of the court's statement: "yeah. I'm not going to allow it." In fact, Respondent states in its brief that "[D]uring this point of the trial, the Court had issued a ruling that the statements could not be used and the jury was brought back into the courtroom." Respondent admits on page 10 that the court excluded the use of this statement. The fact that the statement was not specifically used and then excluded is simply form over substance.

On page 5 of Respondent's brief, at the bottom of the page, it is stated that "there was no ruling instructing plaintiff's counsel with regard to this statement." Again, this is incorrect, Plaintiff's counsel understood that the Court had already ruled that the statement could not be used, consistent with the discussion above, so counsel simply gave in and did not push the point. This is not the same as saying that Plaintiff's counsel did

not attempt to use the evidence and a ruling was made preventing him. This same issue was addressed in Respondent's Brief at page 7, and the indication that Plaintiff voluntarily withdrew the attempt to use the statement was simply because the court had already held that the statement could not be used. This "withdrawal" that Respondent relies upon is not a fair interpretation of the overall discussion of the court and the parties or the issue as to the use of the statement. Plaintiff's counsel's statement that he was "withdrawing" the request to use the statement was really unnecessary as the statement had already been precluded; counsel's statement that the recorded and transcribed statement was being withdrawn was really an affirmation that the statement had already been excluded. It is further disingenuous to argue that because the statement was not then used to impeach Carpenter, that the use of the statement had not previously been precluded by the court more than once. Simply stated, Plaintiff's counsel and the Undersigned had argued that the statement should be allowed to be used and the court held that it could not so the statement was not used in cross-examination of Carpenter so as to invite error on behalf of counsel in attempting to run afoul of the court's previous rulings.

VII. ARGUMENT

A. **The Court did make a ruling that the statement could not be used at trial.**

The Court can see from the discussion above and the transcript that the lower court did rule that the statement could not be used as impeachment evidence and, that Carpenter could not be cross-examined as to whether he had made a prior, inconsistent statement to a third-party. In fact, counsel for the Sound Factory, during the direct testimony of Carpenter, objected to Plaintiff's counsel attempted use of the statement as

impeachment evidence, and indicated that: “. . . you gave a previous ruling that it could not be brought up in this case, and so I would like to uphold that ruling at this point.” Transcript, p. 12, November 1, 2011. (Appendix p. 365). Respondent’s argument that error must specifically occur at the trial court level and will not be presumed is not a relevant statement as to the facts of this case. Petitioner has not asserted that the error is to be presumed, it occurred and the lower court’s ruling on the Motion for New Trial which stated that the ruling did not it actually occur and that it did not actually exclude this evidence, was in error as a matter of fact.

On page 15 of the Respondent’s Brief, it is stated that the Undersigned agreed that the statement of Carpenter that was not turned over by Plaintiff, should have been turned over in discovery prior to the trial. Therefore, Respondent contends that the basis of this appeal is inconsistent with the Petitioner’s position at trial. However, this is not the crucial point. Concerning the production of the statement, initially, Plaintiff’s counsel contended that the statement was not discoverable because it was privileged and/or work product. The Undersigned disagreed that the statement, which had been given to a plaintiff’s expert, could be classified as privileged. However, this is not the same as taking the position that the statement, once turned over during the trial, could not be used at trial. It is Petitioner’s argument that the Court’s sanction of Plaintiff and Petitioner from using the evidence at trial as impeachment evidence, was not a proper sanction for the Plaintiff’s counsel’s failure to disclose the statement in discovery; these are two different issues and the Undersigned has not changed his position that was taken regarding the objection that a privilege did not cover the statement and prevent its disclosure.

B. The Court committed error in not permitting the statement to be used as a sanction against Plaintiff for failing to produce the statement in written discovery in the case.

As stated in the Petition, the court's sanction, while appropriate as against Plaintiff's counsel, for non-compliance with the scope of discovery under rules 26 and 34, was not an appropriate sanction in relationship to the use of the statement solely as impeachment under Rule 613. Certainly, it was an abuse of discretion for the Court to have prohibited the Undersigned from using the document, once he was provided same and was aware of the contents, as impeachment evidence under Rule 613 as the Undersigned should not have been sanctioned for Plaintiff's counsel's failure to disclose same prior to trial.

Respondent cites to factors recognized by this Court associated with determining whether to supplement discovery should result in the exclusion of the evidence. The factors listed, generally, are as follows: 1) prejudice or surprise to opposing party; 2) ability to cure the prejudice; 3) bad faith or willfulness of party who withheld the evidence; and, 4) importance of the evidence. These factors will be addressed one by one.¹

First, no one could have been surprised by the fact that the statement existed as Carpenter stated in his deposition that he had given the statement. Everyone knew the statement had been taken and Carpenter presumably knew what he said in the statement that he gave. Second, the sound factory had the prejudice cured by the production of the statement. Third, there is no evidence that the statement was not turned over due to bad

¹ Again, it is Petitioner's position in this appeal that the issue of the exclusion of the statement is more related to the ruling that it could not be used as impeachment evidence than whether it should have been excluded from the trial in the Plaintiff's case in chief for the failure of the Plaintiff to have disclosed the document in discovery.

faith on behalf of Plaintiff's counsel. It was stated in the case that the statement was inadvertently disclosed to the plaintiff's expert in the first place. In addition, Respondent never filed a Motion to Compel the production of the statement that was known to exist. Fourth, there can be no legitimate argument that the statement, now that everyone knows what is contained within the statement, was not crucial evidence for the jury to have heard.

Further, Respondent takes the position that the Undersigned never attempted to use the statement at trial to impeach Carpenter; therefore, the court did not have the chance to exclude the use of the statement, so there is no appealable issue. Petitioner disagrees with this argument consistent with the above discussion. Not only did the court rule that the statement could not be used, the undersigned basically asked the court to reconsider its opinion as referenced in the portions of the transcript cited on page 11 of the Respondent's brief and referenced in the Petitioner's Brief.

Petitioner disagrees with Respondent's position that the statement was not attempted to be used and an objection drawn; this did occur, simply within the context of asking the court if the statement could be used and how. The court clearly indicated that the statement could not be used. Neither Petitioner nor Plaintiff's counsel acquiesced to the alleged error; they simply did not attempt to disobey the court's ruling by using a document that was previously excluded by two rulings of the court.

Finally, on page 21 of Respondent's brief, it is argued that the Undersigned aided in Plaintiff's counsel's error for which now Petitioner complains by objecting to Plaintiff's counsel's position that the statement was privileged as expert witness work product. As stated earlier, while Petitioner does believe that there is no such privilege

recognized in WV; this argument in response to Plaintiff's counsel's argument initially as to why the statement of Carpenter was not required to be disclosed in discovery doesn't mean that the statement could not be used as impeachment evidence. It does also not follow that objecting to Plaintiff's counsel's argument that the document was protected by a non-existent privilege, further means that the document should have been excluded from the trial by the court as a sanction. No where in the record did the Undersigned agree that the proper sanction by the court was to exclude the document from the trial. It was not until the document was actually provided and reviewed by defense counsel that the Undersigned realized the document had probative value for impeachment and, that it was not proper for the court to completely exclude the document for all purposes.

C. The Court improperly held that Rule 613(a) of the West Virginia Rules of Evidence requires documents to be used for impeachment purposes to be disclosed prior to the trial, in discovery.

Respondent states on page 22 of the Response that Petitioner's argument as to the production of the prior statement and the timing thereof, is incorrect as no case law has been cited to support this conclusion. Petitioner believes that the language of Rule 613(a) is clear and unambiguous and no citation to case law is necessary to support Petitioner's argument. Further, Respondent does not cite to any case law that stands for the opposite position. To the extent authority is needed for this proposition, the Court is referred to Respondent Anderson's Response Brief and the citation to Cleckley's Handbook on Evidence for West Virginia Lawyers, section 6-9(B)(2)(b) which states that during impeachment of a witness with a prior inconsistent statement, under rule 613, the statement need not be disclosed until the witness is examined.

Respondent somehow manages to argue that Carpenter was actually examined in his deposition about this prior statement as the dialogue in the deposition is contained on page 23 of the Respondent's Brief. However, again, this argument is clearly misleading: the statement was not disclosed so the document was not given to the witness nor was anyone able to question Carpenter concerning the statement she actually made in this transcribed, recorded statement. The only questions asked were general questions about what Carpenter may have said or would have said to the investigator who took the statement; however, what is equally as clear from reviewing this deposition testimony is that Carpenter, at the time of his deposition, had no clue what he had stated to the investigator that was later transcribed and which became the inconsistent statement. Carpenter was unable to provide any detail regarding his statements; he was confused about the facts of this case related to the investigator with a factual scenario involving another incident at the bar with an out-of-state patron; and had no clear recall of the timing of the events. Clearly, Carpenter was not shown the statement, his recollection was not refreshed as to the statement contained within the document and, he was not cross-examined on the actual statements he made to the investigator. Therefore, Respondent's argument that the requirements of Rule 613 were NOT met, based upon the deposition testimony of Carpenter, is neither accurate nor persuasive.²

D. The Court's ruling in denying the Motions for New Trial that the error could only have had an impact on the jury's determination of credibility; therefore, the error did not support a Motion for New Trial, was wrong as a matter of law.

² Petitioner is not sure what Respondent's argument in this regard actually consists of when it is stated that because Carpenter was actually impeached during his deposition, that Petitioner's argument as to the application and interpretation of Rule 613 is in error. This argument seems to be a red herring as Rule 613 would seem to be limited to trial and not a deposition.

Petitioner does not dispute the standard for granting a Motion for New Trial as stated in Respondent's Brief but simply disagrees with the factual and procedural basis from which Respondent concludes that the lower court's ruling was accurate. It has been conclusively proven that the lower court did rule against Petitioner and Plaintiff as to the use of the prior inconsistent statement as impeachment evidence as a sanction for Plaintiff's counsel's failure to provide the statement in discovery. It is clear that both Petitioner and Plaintiff's counsel was precluded from using the statement under Rule 613. It is clear that the content of the statement was inconsistent with the testimony of Carpenter in his deposition and at trial; and that this evidence was clearly probative as to the jury's determination of his credibility, the credibility assessment of Laura Walker as well; and, evidence which a jury could have easily relied upon to conclude that Dreher's testimony was corroborated and, that the entire case in chief of the Respondent Sound Factory was a lie. This assessment by the jury could have easily resulted in a different decision as to the liability determination on Plaintiff's claim against the bar which would have impacted a joint and several liability assessment related to the damages awarded to Plaintiff. Therefore, this error was crucial. And, the lower court's findings and conclusions in its order denying the Motion for New Trial were erroneous both as a matter of fact and law.

VIII. CONCLUSION

The trial court committed error in its application of Rule 613; in its exercise of discretion in sanctioning both Plaintiff and Petitioner from impeaching Carpenter with his prior, inconsistent statement; because of the position taken that Plaintiff did not disclose the statement in discovery; and, the trial court improperly determined that credibility

issues cannot give rise to a new trial. Petitioner requests that this appeal be granted and that a new trial be required.

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CERTIFICATE OF SERVICE

I, Albert C. Dunn, Jr., counsel for the Defendant, Matthew Edward Dreher, do hereby certify that I have served a true and accurate copy of the foregoing **PETITIONER'S REPLY BRIEF** upon the following counsel of record by depositing the same in the United States mail, with postage prepaid and/or via Facsimile on December 19, 2012, addressed as follows:

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