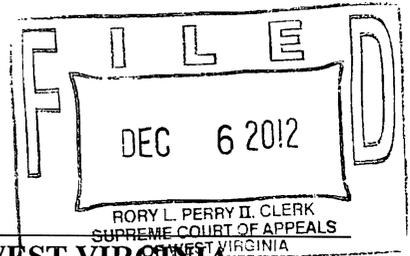


No. 12-0888



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MATTHEW EDWARD DREHER, Defendant below,
Petitioner,

v.

RICHARD R. ANDERSON, Plaintiff below,
Respondent,

and

JES, INC., d/b/a The Sound Factory,
Defendant/Third-Party Plaintiff below,
Respondent.

**Appeal from Final Order of
Circuit Court of Kanawha County, West Virginia
Civil Action No. 08-C-1771**

RESPONDENT RICHARD ANDERSON'S SUMMARY RESPONSE

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III. STATEMENT OF THE CASE

On or about July 19, 2008, the Plaintiff below and Respondent herein, Richard R. Anderson (hereinafter “Respondent Anderson”), was involved in an automobile collision at the intersection of Washington and Elizabeth Streets in the east end of Charleston, West Virginia. The driver of the automobile that struck Respondent Anderson’s car was the Petitioner, Matthew Edward Dreher (hereinafter “Ppetitioner”). By his own admission and the testimony of investigating police officers, the Petitioner had been drinking that evening and was intoxicated at the time of the collision. The Petitioner admitted to the police officers at the scene that he had been drinking at The Sound Factory, a local bar, and he maintained such admission at trial.¹ As a result of the automobile collision, Respondent Anderson suffered severe and life-threatening injuries, resulting in substantial damages, for which he subsequently brought suit against both the Petitioner and The Sound Factory.

During the course of investigating this case, Respondent Anderson’s counsel hired an investigator to take statements from certain potential witnesses. The statement at issue in the present appeal was given by Conrad Carpenter, a part-time, volunteer doorman/bouncer/bartender at The Sound Factory. Mr. Carpenter provided a recorded statement to Respondent Anderson’s counsel’s investigator on October 5, 2009, which was later transcribed by Respondent Anderson’s counsel’s office (the transcribed statement hereinafter will be referred as “Carpenter Statement”). All parties to the action below knew that Mr. Carpenter was a potential witness, as he had been identified by The Sound Factory as a person working there on July 19, 2008. *See* Exhibit A of “Plaintiff’s

¹The Sound Factory, the other named respondent to this appeal, is a bar located on Kanawha Boulevard, East, in Charleston, West Virginia. The Sound Factory is owned by John Sanese through J E S, Inc., a West Virginia corporation doing business as “The Sound Factory.” The establishment will hereinafter be referred to as “The Sound Factory.”

Memorandum of Law in Support of Motion for New Trial,” Line 309, Kanawha County Circuit Court Record (hereinafter “Respondent Anderson’s Memorandum for New Trial”).

In the Carpenter Statement, Mr. Carpenter stated that he recalled that the Petitioner had been in The Sound Factory on July 19, 2008 and had left around 11:00 p.m, just minutes before the collision occurred. Mr. Carpenter also stated that the Petitioner was the only person in The Sound Factory on July 19, 2008 with an out-of-state identification.

During the course of discovery, The Sound Factory, through its counsel, served written discovery requests upon Respondent Anderson on July 16, 2009. In particular, The Sound Factory made a request that Respondent Anderson *identify* any statements regarding the above-referenced incident that Respondent Anderson had obtained. *See* Exhibit C of Respondent Anderson’s Memorandum for New Trial, The Sound Factory’s Interrogatory Number 19. However, The Sound Factory never made a formal request for the *production* of any such statements.²

On August 31, 2009, and more than one month prior to obtaining the Carpenter Statement, Respondent Anderson served his responses to The Sound Factory’s written discovery requests. *See* Exhibit D of Respondent Anderson’s Memorandum for New Trial. Specifically, in answering Interrogatory No. 19, Respondent Anderson stated that he was unaware of any statements other than those contained in the accident investigation report and those that may be contained in Respondent Anderson’s medical records. *Id.* At the time it was made, Respondent Anderson’s response was complete and correct, as the Carpenter Statement was not taken until October 5, 2009, more than a month after Respondent Anderson responded to The Sound Factory’s discovery requests. Further,

² Defendant Dreher requested production of statements in his discovery requests, however, when the Plaintiff served his responses on August 31, 2009, the Carpenter Statement did not exist.

Respondent Anderson's response included an objection to the extent that the Interrogatory sought disclosure of attorney work product (i.e., statements taken by counsel or their agent).

Not only was it no surprise that Mr. Carpenter was a witness, it was also no surprise that Carpenter had given a prior statement to Respondent Anderson's counsel as Respondent Anderson's counsel mentioned the prior statement on numerous occasions while in the company of the Defendant's counsel. Specifically, when Mr. Carpenter was deposed in April 2011 (more than six months prior to trial) he admitted to talking to a private investigator and giving a prior statement. *See Depo. Conrad Carpenter 42:13-48:1(April 13, 2011), Exhibit E of Respondent Anderson's Memorandum for New Trial.* He even admitted that he may have stated, in a prior statement, that the Petitioner was at The Sound Factory on the night in question:

Q: You would have never given any statements prior to today stating that [the Petitioner] was in that bar, would you?

A: I don't know if I did or not[.]

See Depo. Conrad Carpenter 42:13-16 (April 13, 2011), Ex. E of Respondent Anderson's Memorandum for New Trial. Therefore, all parties were well aware, at the time Mr. Carpenter was deposed and for at least six months prior to trial, that Mr. Carpenter had given a statement and that it was likely contradictory to his deposition testimony. Despite having such information, no party sent a formal discovery request or filed a motion to compel the production of any such statement. Further, at no time did Mr. Carpenter request a copy of his statement.

Prior to the trial, Respondent Anderson identified the Carpenter Statement as a potential trial exhibit for impeachment purposes only. *See Exhibit F of Respondent Anderson's Memorandum for New Trial; Lines 260 and 284, Kanawha County Circuit Court Record.* Respondent Anderson's

counsel continuously maintained that the content of the Carpenter Statement was protected by the work-product doctrine and did not, at any time during discovery, reveal its contents to any third-party. It was not until a pre-trial conference among counsel held at Respondent Anderson's counsels' office on or about October 24, 2011, that counsel for The Sound Factory made a verbal request for the production of recorded statements possessed by Respondent Anderson. At that point, discovery had concluded, no formal request had been made, and Respondent Anderson's counsel only intended to use the Carpenter Statement for impeachment purposes pursuant to Rule 613 of the West Virginia Rules of Evidence. Thus, Respondent Anderson did not produce the Carpenter Statement. The Sound Factory chose not to ask the court to compel the production of the Carpenter Statement, even though discovery had already ended.

During the trial of this matter, which was held October 31, 2011 through November 2, 2011, Respondent Anderson's counsel elicited testimony from a liability expert, Mark Willingham. During Mr. Willingham's testimony, it became apparent that he had seen a copy of the Carpenter Statement, which was provided to him on October 28, 2011; three days before the trial. *See* Trial Transcript Excerpt, October 31, 2011 ("Trial Excerpt I"), 12:14-15; Line 313, Kanawha County Circuit Court Record. At that time, counsel for The Sound Factory objected to Mr. Willingham's reliance on the Carpenter Statement, as well as any mention of it during his testimony, as it had not been disclosed. The court sustained counsel's objection and prohibited Mr. Willingham from further testimony regarding the Carpenter Statement. Trial Excerpt I, 12:16-14:19.

During The Sound Factory's presentation of evidence, it chose to call Conrad Carpenter as a witness, with full knowledge that Mr. Carpenter had provided a prior statement which was likely contradictory to the testimony he was about to give, and while knowing that Respondent Anderson's

counsel had listed the statement as an exhibit for impeachment purposes. Prior to calling Mr. Carpenter and utilizing his testimony, counsel never sought production of the statement or a ruling from the court that it should be produced. During direct examination, Mr. Carpenter testified that he knew that the Petitioner was not in The Sound Factory on the evening of July 19, 2008, because he, as the doorman, had turned away the only person with an out-of-state identification. *See* Trial Transcript Excerpt, November 1, 2011 (“Trial Excerpt II”), 7:19-8:20; Line 312, Kanawha County Circuit Court Record. This testimony was a direct contradiction to his statement to Respondent Anderson’s counsel’s investigator, wherein he admitted that a gentleman with an out-of-state identification was at The Sound Factory that night.

During cross-examination, Respondent Anderson’s counsel began questioning Mr. Carpenter regarding prior statements that Mr. Carpenter had given related to this matter. Trial Excerpt II, 10:24-11:1. At that time, counsel for The Sound Factory objected to the use and/or mention of the Carpenter Statement. *Id.* at 11:2-3. At that time, The Sound Factory and the Petitioner were provided copies of the Carpenter Statement. After argument of counsel was heard outside the presence of the jury, the court ruled that, given that the Carpenter Statement had not been provided to opposing counsel in discovery and in light of its divulgence to Mr. Willingham, that it would be “fundamentally unfair” for counsel for both Respondent Anderson and the Petitioner to be able to use the statement to impeach the credibility of Mr. Carpenter. Trial Excerpt II, 21:21-23:9; 30:23-31:1. Although in its Order denying the Motions for a New Trial the circuit court found that it did not make a “ruling” on whether the Carpenter Statement could be used for impeachment purposes, the transcript is clear that even though the circuit court did not use the specific words “order” or “rule,” it did prevent Respondent Anderson’s counsel and the Petitioner’s counsel from using the

Carpenter Statement to impeach Mr. Carpenter, in clear contradiction to Rule 613 of the West Virginia Rules of Evidence.

Despite the Petitioner's admission that he was at The Sound Factory, became intoxicated at The Sound Factory, was served alcohol at The Sound Factory after becoming intoxicated, and expert testimony that Mr. Dreher would have exhibited obvious signs of intoxication while at The Sound Factory, the jury returned a verdict which apportioned 100 percent of the fault on the Petitioner and no liability on the part of The Sound Factory. This decision was obviously based on the fact that Mr. Carpenter, the doorman at The Sound Factory, testified that there was no one in the bar with an out-of-state identification and that he had turned away the only person with out-of-state identification because he was visibly intoxicated. Given the court's ruling on the admissibility of Mr. Carpenter's prior and inconsistent statement, the jury was free to believe Mr. Carpenter's unchallenged testimony. As discussed below, the failure to inform the jury that Mr. Carpenter had provided a directly contradictory statement in the past was clear error.

IV. ARGUMENT

A. RESPONDENT ANDERSON HAD NO DUTY TO SUPPLEMENT DISCOVERY AND PROVIDE DEFENDANTS WITH THE CARPENTER STATEMENT WHILE IT WAS PRIVILEGED WORK PRODUCT.

The West Virginia Rules of Civil Procedure do not require a party to supplement a discovery response if the response was correct when made, unless it relates to the identity of persons with knowledge, or unless it represents knowing concealment . Specifically, Rule 26(e) states, in relevant part, that:

A party who has responded to a request for discovery with a response that was *complete when made* is under no duty to supplement the response to include information thereafter acquired, except as follows:

- (1) A party is under a duty seasonably to supplement that party's response with respect to any question directly addressed to:
 - (A) The identity and location of persons having knowledge of discoverable information, and
 - (B) The identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony.
- (2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which:
 - (A) The party knows that the response was incorrect when made, or,
 - (B) The party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

W.Va. R. Civ. P. 26(e) (emphasis added).

In this case, it is clear that Respondent Anderson was under no duty to supplement his discovery responses. First, the response was correct when it was made because the Carpenter Statement did not exist at that time. Second, The Sound Factory and the Petitioner never served a formal discovery request for such a statement and thus, Respondent Anderson and his counsel had no duty to disclose the Carpenter Statement during the course of discovery as his existence as a witness was already known by all parties. Finally, even if The Sound Factory's discovery requests could be construed as a formal discovery request for the production of the Carpenter Statement, until its disclosure to Respondent Anderson's liability expert mere days before trial, the Carpenter Statement was attorney work product and not discoverable. Although aware of the existence of the Carpenter Statement at least six months prior to trial, neither The Sound Factory, nor the Petitioner challenged this assertion by filing a motion to compel the production of the statement.

The Carpenter Statement was protected by the work-product doctrine until the time it was divulged to Respondent Anderson's expert witness, mere days prior to trial. At that point, discovery had ended and The Sound Factory had never filed a formal discovery request for the statement. Thus, until the disclosure, Respondent Anderson's counsel had no duty to disclose the Carpenter Statement or the contents thereof, aside from identifying the Carpenter Statement as a potential trial exhibit for impeachment purposes only, in Respondent Anderson's pre-trial memorandum. Therefore, even if one assumes out of "fundamental fairness" that the Carpenter Statement should have been provided to The Sound Factory when it was provided to Respondent Anderson's expert on October 28, 2011, an appropriate remedy was to prohibit Respondent Anderson's expert from testifying about the Carpenter Statement, which the trial court did. However, the trial court committed clear error when later in the trial it ruled that neither Respondent Anderson, nor the

Petitioner, could use the Carpenter Statement to impeach the testimony of Mr. Carpenter, in clear contradiction to Rule 613 of the West Virginia Rules of Evidence.

B. RULING THAT RESPONDENT ANDERSON’S COUNSEL COULD NOT QUESTION MR. CARPENTER ABOUT THE PRIOR INCONSISTENT STATEMENT WAS CONTRARY TO RULE 613 OF THE WEST VIRGINIA RULES OF EVIDENCE

Impeachment of a witness, especially on cross-examination, is a fundamental element of American jurisprudence. In fact, impeachment is a bedrock principle in the Rules of Evidence: “[t]he credibility of a witness may be attacked and impeached by any party, including the party calling the witness.” W.Va. R. Evid. 607. Moreover, impeachment based upon prior statements by a witness is specifically recognized by Rule 613, which provides:

- (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.
- (b) Extrinsic evidence of prior inconsistent statement of witness. - Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

W.Va. R. Evid. 613 (emphasis added).

Questioning a witness regarding a prior inconsistent statement is a common and vital practice to attack the credibility of a witness, an issue solely in the province of the jury. Further, as the credibility of a witness is known to determine the outcome of trials, “matters affecting credibility of the witness are always open to cross-examination”. See Cleckley, *Handbook on Evidence for West Virginia Lawyers*, §6-7, (B)(emphasis added).

In this case, the court refused to allow either Respondent Anderson’s counsel or the Petitioner’s counsel to cross-examine a key witness, Mr. Carpenter, about a prior inconsistent statement regarding a key fact in the case: whether the Petitioner was at the Sound Factory on the night in question. Mr. Carpenter testified at trial that there was no one in The Sound Factory on July 19, 2008 whom presented an out-of-state identification. Mr. Carpenter further testified that he turned away the only person who showed up at The Sound Factory’s door that evening presenting an out-of-state identification. Both of those statements made by Mr. Carpenter on the witness stand were in direct contravention of the statements he made in the Carpenter Statement. *See* Ex. B of Respondent Anderson’s Memorandum for New Trial. Clearly, given the inconsistency of Mr. Carpenter’s testimony and his prior statements, and given the importance of the issue, there was a serious question regarding his credibility. Further, the existence and content of the Carpenter Statement was highly probative of Mr. Carpenter’s truthfulness or untruthfulness and any prejudice was substantially outweighed by the probative value of a prior inconsistent statement.

Upon objection of the use of the Carpenter Statement by Respondent Anderson’s counsel, a copy of the prior statement was provided to counsel for both The Sound Factory and the Petitioner. Importantly, as noted by Justice Cleckley in the Handbook on Evidence for West Virginia Lawyers, Respondent Anderson’s counsel was not required to disclose the statement prior to that time:

“[t]he only procedural requirement that counsel must meet before examining a witness about a prior inconsistent statement is to show or disclose the statement to opposing counsel (not the witness) when specifically requested. Counsel should be alert to make a specific request. However, the language of the rule indicates that even upon request, the statement need not be disclosed to opposing counsel until the witness is actually examined concerning the statement.”

Cleckley, *Handbook on Evidence for West Virginia Lawyers*, §6-9(B)(2)(b) (emphasis added).

Respondent Anderson's counsel made clear to the court during argument on this issue that it desired to question Mr. Carpenter regarding the statement for impeachment purposes only, similar to what had occurred during his deposition. The court could have entered a limiting instruction as is common for situations where a witness is impeached by a prior inconsistent statement. However, counsel for both the Petitioner and Respondent Anderson were prohibited from not only questioning Mr. Carpenter about his prior statement, but from even questioning whether he had ever provided a prior statement, facts he clearly admitted during his deposition and facts that all counsel were aware of prior to trial. Such ruling prohibited the jury, whose job it is to assess Mr. Carpenter's credibility, from hearing that Mr. Carpenter had previously stated the exact opposite from that which he had just testified.

The court's ruling that Respondent Anderson's counsel could not inquire as to the prior statement can only be viewed as a clearly erroneous sanction which unfairly prejudiced the Respondent Anderson's case against The Sound Factory, who had never formally requested the Carpenter Statement. Further, as stated above, the appropriate sanction was to prohibit Respondent Anderson's expert from testifying about the Carpenter Statement, which the trial court did. If the court's ruling was not intended to act as a sanction, but rather was based on Rule 403 of the West Virginia Rules of Evidence, such ruling was clear error as it is impossible to say that the probative value of a directly contradictory statement of a key witness is outweighed by any prejudice The Sound Factory suffered by failing to file formal discovery requests or demand production of a statement prior to calling a witness for which it knew had provided a prior inconsistent statement.

V. CONCLUSION

Based on the foregoing, Respondent Anderson agrees with the Petitioner that the trial court's ruling prohibiting either the Petitioner's counsel or Respondent Anderson's counsel from using the Carpenter Statement for impeachment purposes was clear error and in direct contradiction with Rule 613 of the West Virginia Rules of Evidence. However, as the present appeal is that of the Petitioner, Respondent Anderson takes no affirmative position as to any relief sought by the Petitioner.

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CERTIFICATE OF SERVICE

I, Eric M. Hayhurst, counsel for Plaintiff, does hereby certify that I have served the foregoing “Respondent’s Summary Response” upon the Parties, by depositing a true and accurate copy of this pleading in the United States Mail, postage prepaid, as indicated below, this 6th day of December, 2012, addressed as follows:

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