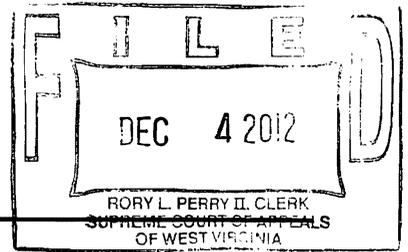


No. 12-0888



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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MATTHEW EDWARD DREHER,

*Petitioner and  
Defendant below,*

v.

RICHARD R. ANDERSON

*Respondent and  
Plaintiff Below.*

and

JES, INC., d/b/a THE SOUND FACTORY

*Respondent and  
Third Party Plaintiff Below*

From Kanawha County Circuit Court  
No. 08-C-1771

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**RESPONDENT'S BRIEF**

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## STATEMENT OF THE CASE

This case presents an appeal of the Circuit Court of Kanawha County, West Virginia jury verdict finding the Defendant tortfeasor guilty of negligence proximately causing the injuries of the Plaintiff.<sup>1</sup> The Plaintiff in this matter, Richard Anderson, was injured in a motor vehicle collision which occurred on July 19, 2008.<sup>2</sup> *Record* at 4. Mr. Anderson's vehicle was struck by a vehicle operated by Andrew Dreher (hereinafter "Defendant Dreher") who was intoxicated at the time of the collision. Subsequent to the accident, Defendant Dreher stated<sup>3</sup> that he consumed alcohol at a local bar called "The Sound Factory" which is owned and operated by JES, Inc. Despite a lack of evidence placing Mr. Dreher in the establishment<sup>4</sup>, The Sound Factory was pursued under a claim that it was negligent in serving alcohol to Mr. Dreher.

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. However, as the record clearly reflects, the "error" to which counsel for Defendant Dreher now appeals did not occur in the manner in which his pleadings allege. In fact, the record clearly reflects that the "ruling" to which he bases his appeal never actually occurred. Perhaps even more important is the fact that the issue for which Defendant Dreher now appeals is an issue for which he has no standing to appeal as he never attempted to offer the alleged statement as it was not his "evidence" to offer.

As a matter of background for the Court on the discovery/trial issue argued by Defendant Dreher, both Defendant JES, Inc. and Defendant Dreher engaged in written discovery with the

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<sup>1</sup> JES, Inc. feels it important to note that the Plaintiff has not participated in this appeal.

<sup>2</sup> As a note of background, this motor vehicle accident occurred on at approximately 11:20 p.m. near the corner of Washington and Elizabeth Streets where Defendant Dreher ran a red light nearly two miles from "The Sound Factory" and in the opposite direction of Defendant Dreher's home. *Record* at 4.

<sup>3</sup> During Defendant Dreher's deposition and at trial he indicated that he had only recently moved to the Charleston area and, while he had frequented several local bars, he could only remember the names of "The Sound Factory" and "Barney's" off of Westmoreland Drive, Charleston.

<sup>4</sup> The only evidence offered at trial placing Mr. Dreher in the establishment is his own self-serving statements.

Plaintiff in this matter. Specifically, 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. *Record* at 156. Furthermore, JES, Inc. provided definitions and instructions to the Plaintiff in this matter which clearly indicated that the responses were to come from Plaintiff, his agents, representatives, attorneys, or others acting on his behalf. *Id.* As is clear from Plaintiff's responses, the identity of the persons whom statements were taken, the dates of those statements and the custodian of those statements were never disclosed to Defendant JES, Inc. until the Amended Pre-Trial Memorandum provided by Plaintiff. Furthermore, the entire basis of the expert opinions were clearly not provided as documents which were shown to have been relied on by expert witnesses were not provided, ever.

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. Defendant Dreher additionally requested the production of these documents, which were never provided until trial, in his Requests for Production of Documents 4, 5, 6, and 10. *Record* at 209.

As is clear from the record in this case, no recorded statements, nor the mention of any recorded statements, were made to either Defendant prior to the Pre-Trial Memorandum of the Plaintiff. Additionally, the natures of any prior statements were not accurately reflected in the summary provided by Plaintiff Anderson.<sup>5</sup> Specifically, during the deposition of Conrad Carpenter in this matter, the entire exchange concerning any previous statements was made:

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<sup>5</sup> Of additional note is the fact that Plaintiff Anderson did not follow the proper procedure in claiming documents were work product as has been directed by this Court in *State ex rel. Nationwide Mutual Insurance Company v. Kaufman*, 658 S.E.2d 728 (W.Va. 2008). In the discovery response provided by Plaintiff, the Uniform

- Q. You would have never given any statements prior to today stating that Mr. Dreher was in that bar, would you?
- A. I don't know if I did or not; but the private eye, when he called me, there was another incident. I keep mentioning out-of-state IDs. There was an incident where a gentleman with an out-of-state ID, I don't know if it was a week or two weeks prior to that, and it was a Tennessee ID. I remember this specifically, because he gave us, gave us a little bit of trouble. And I don't remember the incident specifically; but I remember when he asked me about a guy, he said something about a guy with an out-of-state ID in an accident, I assumed that it was the other fellow, because I had forgotten about this one.  
And then I called him back immediately afterwards and said: Wait a minute. That's not right; and I gave another statement. So I would have given a statement about another gentleman with an out-of-state ID, but it was a different incident.
- Q. An incident that occurred before July 9, 2008?
- A. I don't know, I don't know if it was before. See, I don't know when the private investigator contacted me. It could have happened even after that point.
- Q. But you know that this gentleman with the Tennessee ID that you recall was not at the bar on July 19, 2008, because you never mentioned that to Sergeant Abbott.
- A. That's correct. There was nobody else on that date within an out-of-state ID., right.
- Q. So you would not have told anyone that there was a gentleman in the bar on July 19, 2008, with a South Carolina ID, would you?
- A. No. No one was there.
- Q. Because you denied access to the only gentleman that appeared at the door with an out-of-state ID.
- A. That's correct.

*Record* at 256. As is reflected appropriately in the deposition transcript, Mr. Conrad was questioned with regard to a possible inconsistent statement and Mr. Carpenter explained the distinction. At that time, no Defendant had been provided copies of any audio recordings which possibly were made nor were there any written statements provided to counsel or been made aware that any recordings or writings existed.

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Crash Report was cited and attorney work product asserted in general. No privilege log was provided identifying any documents. So, there was no way of the Defendants of knowing statements had been taken. *Petitioner's Appendix* at 197.

As is reflected in the motion for new trial that was previously made by Plaintiff Anderson's counsel, the alleged statements (of which Conrad Carpenter's constitutes only one of many alleged audio recordings) were never produced to any Defendant in this matter as they considered them "work product." However, the trial testimony clearly reflects that these statements were provided to experts in order to formulate their opinions. Specifically, during the trial testimony of Mark Willingham, a named Plaintiff's expert, he disclosed the existence of a "telephone statement" as follows:

Q: Let me stop you there and first ask you, interrupt you just a second. What makes you believe that Matthew Dreher was at The Sound Factory and drank at The Sound Factory?

A: Matthew Dreher admitted to the police officers during the arresting process. In fact, admitted to several police officers, that he had been drinking at The Sound Factory. Shane Keefe admitted to at least one police officer that he and Matthew has been at The Sound Factory. **Conrad Carpenter indicated in his statement to Mr. Kidd, his telephone statement to Mr. Kidd –**

MR. GRIFFITH: I'm going to note an objection, Your Honor and I'd like to approach on this issue.

THE COURT: All right. If you'll hold on a minute, sir. I'll ask counsel to approach.

(Bench conference on the record)

MR. GRIFFITH: And Your Honor, I want to put an objection --

THE COURT: Okay, it's just you need to lower your voice.

MR. GRIFFITH: I'm sorry. I can't help it sometimes. I want to put an objection on the record with regard to him discussing and then testifying with regard to the statement that they're saying was given to Mr. Kidd over the telephone. I actually spoke to Mr. Hayhurst about this previously. The discovery was never supplemented. Those statements, the investigator they hired to interview these people, I reminded Eric that they had never been presented to me. I asked him to send them to me last week and I wouldn't make a stink about it. I still don't have them, so I'm going to object about it now. I mean, it's at trial and I still haven't seen them.

MR. DUNN: Work product. **There's no expert witness work product recognized in West Virginia. Whatever an expert witness has reviewed, this is discoverable and entitled to be seen.**

MR. CURNUTTE: No, it was intended to be impeachment evidence, Your Honor, for the testimony of Conrad Carpenter. **He has reviewed it, though, and it's helped him formulate his opinion.**

MR. GRIFFITH: That's great. He's reviewed it, but I haven't and neither has Mr. Dunn. I mean, if it wasn't produced in discovery it's kind of hard to give it to me at trial while he's testifying.

MR. CURNUTTE: It isn't -- impeachment material. We can look at it now if you want to.

MR. GRIFFITH: Little late.

THE COURT: From where I stand, I mean, how do you impeach somebody who's not testified. I mean, if they're going to be here and testify so he really, he should not be discussing what he's read that someone said, because the only way it's been testified to is through this witness. They haven't been able to see it or even been able to confirm it.

MR. CURNUTTE: All right. Thank you.

MR. GRIFFITH: Are we going to instruct the witness, Your Honor?

THE COURT: Well --

MR. CURNUTTE: **I'll redirect him away from that, Your Honor.**

THE COURT: Okay.

(Bench conference concluded.)

BY MR. CURNUTTE: You satisfied yourself that Mr. Dreher was at The Sound Factory?

A: Yes, sir.

*Record* at 278. (emphasis added). As the record clearly reflects, an objection was made and a bench conference was held; however, **there was no ruling** instructing Plaintiff's counsel with regard to this alleged statement. To that end, Plaintiff's counsel voluntarily agreed to steer the

expert away from the subject matter.<sup>6</sup> However, the damage had been done. This alleged “work product” had been disclosed to an expert witness which he utilized to formulate his opinions and it was never provided to either defendant despite clear discovery requests requiring its disclosure and, at that point, any argument of work product is completely removed from the issue.

Thereafter, in JES, Inc.’s case in chief, Conrad Carpenter was called to offer testimony as to his recollections of the evening of July 19, 2008 as he was volunteering as a doorman for JES, Inc. that night. During direct testimony, Mr. Carpenter testified as follows:

BY MR. GRIFFITH: Okay. Do remember if you were working the door at The Sound Factory on July 19, 2008?

A: I have to tell you, the only reason that I will say yes is because I remember an incident. I didn't remember the date, but that's the date that's set forth in my deposition, so I would have to say yes only because of that reason.

Q: You remember an incident?

A: I do.

Q: Are you speaking of the car accident that we're here with today?

A: The accident itself, no. I was at the door and I don't know what time and it was dark. **Sgt. Mark Abbott come up to the door with the Charleston Police Department. He had asked me if anyone had been in the bar recently with an out-of-state ID. I told him the only guy that came to the bar that night, and I only knew this because it was very slow, I told him the only gentleman that came to the door that night with an out-of-state ID was loud. He appeared too intoxicated and a little mouthy so I denied him access.** I don't believe I gave him a description because at the time it seemed insignificant. But I told him that the only person I seen with an out-of-state ID that night was denied access to the bar.

Q: So at the time -- do you remember when about in the evening Sgt. Abbott from the Charleston Police Department spoke to you about this?

---

<sup>6</sup> In Plaintiff's motion for new trial, he asserted that an objection was made during the testimony of Mr. Willingham and that “[t]he Court sustained the objection and prohibited Mr. Willingham from further testimony regarding the Carpenter statement.” See Plaintiff's Motion for New Trial, p. 5. Plaintiff also asserted that “the Court ruled that Mr. Willingham could not testify about the Carpenter statement because the statement had not been disclosed.” *Id.* at 6. As the record clearly reflects, Plaintiff's assertion in this regard is simply inaccurate.

A: I'm sorry, I don't. It's been two years. I don't remember. I know it was dark. When he came to speak with me it was -- you know, I don't even know if I can tell you it was dark. I don't know. It's been two years, a little bit over.

Q: Did he mention anything specific about the accident?

A: No. When I asked him why -- I was curious -- he didn't mention at first, but I asked him why he was asking. He said that there'd been an accident somewhere near Elizabeth Street. That was about the extent of it.

Q: But at the time he spoke to you the accident had already occurred?

A: Yes, sir.

Q: And at that point on July 19, 2008, you recall that you did not let anyone into The Sound Factory that had an out-of-state driver's license?

A: That's correct. There wasn't [sic] many people in there.

*Record* at 286. (emphasis added). Now, during Plaintiff's cross examination of Mr. Carpenter, counsel performed a very brief lead-up and moved into the "recorded statement" issue which resulted in two separate lengthy debates occurred before the Court out of the presence of the jury. **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.** Consequently, there was no "ruling" for which Defendant Dreher can now claim was in error. The bulk of the hearings on these statements contained within the record for review as attachments to JES, Inc.'s Omnibus Response to . However, to summarize the exchange, the following occurred:

BY MR. CURNUTTE: Yes, Your Honor. You indicated you had been a Charleston policeman at this time?

A: Yes, sir.

Q: And you're not a Charleston policeman now?

A: That's correct, sir.

Q: And you were a Montgomery policeman after that?

A: Yes, sir.

Q: You're not now?

A: That's correct, sir.

Q: Do you remember a statement that you gave to a gentleman? An investigator named Mike --

MR. GRIFFITH: Your Honor, I have an objection now. May we approach?

THE COURT: Yes.

(Bench conference on the record)

MR. GRIFFITH: Your Honor, this was brought --

THE COURT: Can you lower your voice and get closer to the microphone?

MR. GRIFFITH: Okay. Your Honor, this was brought up early on in the case. There was a discussion when Mr. -- I believe his name is Williams -- the expert they had, testified. And I brought it to the Court's attention that there were apparently statements.

THE COURT: Right.

MR. GRIFFITH: They'd hired an investigator to speak and it was recorded. Now I can actually show you, I pulled the discovery request in anticipation of this, where we had asked for not only any statements that were taken which they claim work product --

THE COURT: You need to lower your voice.

MR. GRIFFITH: **Any statements they had which they claimed work product for, but then also we asked for files of their experts. Their expert testified on the stand that he was given this statement and then it was never produced to us. That took away the work product.** I must remind the Court, I reminded Mr. Hayhurst and Mr. Curnutte after the deposition of Dr. Guberman on last Monday, I believe it was the 24th, that I'd never received these statements and if they'd get them to me I wouldn't make a stink at trial. They never did. I've never seen them. They never produced them. It's not work product because they gave it to their experts and 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.

...

MR. GRIFFITH: Your Honor, they took the statement. **Apparently it was a recorded telephone conversation. Actually, it was taken by an investigator that they hired. I think there's probably a foundation problem with it, too, since they've never given a copy to Mr. Conrad to review. But I've had to bring it up to opposing counsel, this is I think the third time.**

THE COURT: I tell you what we're going to do.

(Bench conference concluded.)

THE COURT: Ladies and gentlemen, I'm going to ask you to return to the jury room for a few moments while we have some discussions out of your presence. Thank you very much.

(Jury exits courtroom)

...

THE COURT: All right, so I think we're under Rule 613 of the Rules of Evidence concerning a prior statement. It's my understanding that through discovery the defendants, J E S, did request any statements be given to them. Any statements taken, I guess, by any witness, of any witness. They've renewed that request but none has been forthcoming. There has been testimony in this court that at least one of the experts hired by the plaintiff had those statements that were apparently taken by an investigator hired by the plaintiff law firm. Mr. Griffith is objecting to any use of those statements for any impeachment purposes of the witness who is presently on the witness stand, as I understand that.

Anything else you want to add to your objection, Mr. Griffith?

MR. GRIFFITH: Your Honor, all I'll add is what I reiterated, what I stated at the bench. Prior statements of a witness, they can examine a witness, but if you look at the last sentence of Section A, "But on request, the same shall be shown or disclosed to opposing counsel." All parties to the defense of this case have asked in discovery early on in the case whether the attorney, its agents or representatives from them are in possession or custody of any statement made or allegedly made by the defendant or any officer, agent, employee, representative of the defendant. If so, they got to give the date of the statement, the name, whether the statement was taken and the substance of each statement. **They objected to that interrogatory to the extent it seeks disclosure of attorney work product. As Mr. Dunn aptly pointed out when the first expert witness was on the stand, the expert witness was talking about these**

**prior statements which were never disclosed to us, and by giving them to the expert witness, they are no longer attorney work product and should've been disclosed to us.** Actually, I think they should've been disclosed to us under the rule anyway, but this goes around the attorney work product portion. Your Honor, also we asked details into the files of expert witnesses in written discovery. The summary, grounds, and the complete description all materials submitted to the expert for review, and they objected that they would give that in accordance with the Court's scheduling order. I will reiterate that on October 24, 2011 when we took the videotaped deposition of Dr. Guberman at Farmer Cline and Campbell, we consulted, all current trial counsel consulted, as the Court ordered, with regard to exhibits that would be offered in trial to try to hamper down a lengthy exhibit list and witnesses that would be offered at trial. At that meeting I told Mr. Curnutte and Mr. Hayhurst that I had never received those statements and I would like to see them prior to trial. They never supplemented with those.

Then yesterday when we brought it up with regard to the expert witness, they never gave them again, and now they're trying to use them to impeach a witness at trial when they've never provided them to us, even though I believe they're under a duty to seasonably supplement their discovery, and under the rule, to provide us with the prior statements of any witnesses on the request that we -- they disclose the same.

...

THE COURT: 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, and I don't think that based on what I understand the discovery request to be, the Court determines whether or not something is going to be admissible at trial if there's an issue. But I am a big supporter of very broad discovery. No one ever came to this Court and sought any ruling, and I don't think that you can argue work product if your expert's now testified before this jury that he looked at that, and understanding what he believed the facts of this case were.

*Record* at 288. (emphasis added). During this point of the trial, the Court had issued a ruling that the statements could not be used and jury was brought back into the Courtroom. However, this did not end the debate on these witness statements that allegedly existed as Mr. Dunn, counsel for Mr. Dreher, asked the Court to reconsider its ruling as follows:

(Witness resumes the stand)

MR. DUNN: Your Honor, can we approach the bench? I have a question.

THE COURT: Yes, sir. Wait a minute. We've got the jury coming in, but yeah, that's fine. Whatever, sir.

(Bench conference on the record, jury enters courtroom)

MR. DUNN: I don't want to run afoul of the Court's ruling. I mean, I had that chance to look at the statement and I understand the Court's ruling. But for example, in this statement, this witness said that he told the officer that the gentleman that was from out-of-state that was turned away had a Texas driver's license. I think he's already testified here, he testified in his deposition he turned the gentleman away who had a South Carolina driver's license. Ironically, my client's from South Carolina. Are we prohibited from asking this witness, "Have you ever told anybody that you turned somebody away because they had a Texas driver's license?" And then if he says no, you know, if he either lies or he just says no, we can't use that statement to impeach him, but can we at least ask the question, you know, "Haven't you told somebody else previously something that's in that statement?"

*Record* at 301. During this point of the trial, the Court removed the Jury *again* in order to more fully consider the statement which was subject of the original objection.

Thereafter, the parties engaged in another lengthy discussion on the issue until Mr.

Curnutte, for the Plaintiff, made the following concession:

THE COURT: That's what I think, and that's where I think there is fundamental fairness, a fundamental fairness issue. **Frankly, I don't even know how you can take a written something that's alleged to have been typed from some kind of a recording that nobody's seen, either, and try to use it in the courtroom, either. I don't think that -- if this is something taken from some recording, we think, which we frankly don't even know, I don't know, and somebody else has typed it, wasn't the person who recorded it, I'm even thinking it's getting more and more suspect.**

And that's frankly why we have discovery and we don't do things like this at trial. Certainly don't have some gazillion dollar paid expert to come in who says they've seen it and the defense counsel have never seen it, and the defense counsel couldn't even properly question your expert at a deposition, frankly, because they never had the benefit of what the expert had reviewed for purposes of the deposition. I mean, we can unwind this a whole lot. Much less what the trial testimony is and what they relied on is what they believe are the facts, which we don't even know if they are the facts.

**MR. CURNUTTE: Your Honor, we won't use this statement at all then. We can call Michael Kidd as rebuttal witness.**

...

**THE COURT: Well, they're withdrawing their request to even use it, so that's where we're going to stay.**

But that's not with any understanding from me that that's going to be proper rebuttal evidence, so that may be argument for another day. I don't know. For now, we're going to try to get through the end of this trial. Do you need a break, Madam Court Reporter?

*Record* at 309. (emphasis added). As the record clearly reflects, the Plaintiff voluntarily withdrew offering the alleged statement in favor of attempting to later introduce the alleged statement through a rebuttal witness.<sup>7</sup> Consequently, there is no “ruling” which Defendant Dreher can claim was in error. **The fact that this alleged statement was not used was at the choice of the Plaintiff.**

What follows in the record is the cross examination of Mr. Carpenter by Plaintiff's Anderson's counsel and counsel for Defendant Dreher. **Neither party attempted to elicit any testimony regarding the alleged “recorded statement” made by Mr. Carpenter.** However, as the record clearly reflects, clear evidentiary issues were brought to the Court's attention and arguments were made with regard to the alleged “recorded statement” of Mr. Carpenter. At the conclusion of those arguments, counsel for Plaintiff, clearly the custodian of these records who had provided them to an expert prior to trial, withdrew the statement to impeach Mr. Carpenter and elected to place a rebuttal witness on the stand later in the trial. For whatever reason, Plaintiff's counsel never presented a rebuttal witness. Nevertheless, there clearly was no “ruling” by the Court for any party to complain regarding the subject “statement” as Plaintiff's

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<sup>7</sup> When given the opportunity, Plaintiff chose not to call any rebuttal witnesses at the close of the Defendants' case in chief.

counsel after argument simply informed the Court that they did not intend to use the statement to impeach Conrad.

Now, both Plaintiff Anderson and Defendant Dreher have made motions for a new trial claiming a clearly prejudicial error was placed on the record by a limiting ruling which was never made. Consequently, Defendant JES, Inc. states that both motions should be denied and for such further relief as the Court deems necessary and appropriate.

### **SUMMARY OF THE ARGUMENT**

The trial court committed no error below as the Order to which Defendant Dreher claims with regard to impeachment under Rule 613 of the West Virginia Rules of Evidence as no ruling was ever issued by the Court. Had an Order been issued the court would have been completely appropriate in issuing a limiting instruction; however, the Plaintiff specifically withdrew their attempt to attempt to impeach the witness. Furthermore, Defendant Dreher never attempted to impeach the witness with a prior inconsistent statement in his cross-examination of the witness. Consequently, the Circuit Court ruled appropriately and lawfully in denying Plaintiff Anderson's and Defendant Dreher's respective motions for new trial.

### **STANDARD OF REVIEW**

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).

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

### ARGUMENT

As there was no “ruling” in the record of which Defendant Dreher complain, there is no injustice that was done so as to require a reversal in this matter. Furthermore, had such a ruling occurred, it would have been completely appropriate as a sanction for the failure to provide non-privileged information to the Defendants after it was utilized by an expert witness in formulating his opinion.

#### **I. THE RECORD CLEARLY REFLECTS THAT THERE WAS NO “RULING” MADE BY THE COURT WHICH IS THE SUBJECT OF DEFENDANT DREHER’S APPEAL**

Defendant Dreher complains that an adverse ruling from the court prohibiting the Plaintiff from cross-examining a witness at trial with a prior inconsistent statement resulted in substantial injustice. Defendant Dreher is wrong as a review of the trial transcript reflects that the “ruling” of which they complain never occurred. This “ruling” never occurred as Plaintiff’s counsel specifically withdrew any attempts to cross-examine the witness during trial. 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”).

In the instant case, Defendant Dreher alleges that the “error” that occurred during this trial was an order from the Court prohibiting the Plaintiff (and himself) from cross examining Mr. Carpenter with a prior inconsistent statement. It is this defendant’s firm belief that, had Mr. Curnutte not withdrawn offering the alleged prior inconsistent statement during the bench conference, the Court would have ordered just that. 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.” See Exhibit G, p. 48 (emphasis added). As there was no Order or ruling from the Court, there can be no error.

Interestingly, this case presents a situation where a co-defendant asks for this Court to find an abuse of discretion of a Trial Court Judge because they did not let the Plaintiff perform an act that they themselves attempted to object to at trial. When the bench discussions over this alleged statement occurred, Mr. Dunn agreed that the statements should have been provided and should not be permitted at trial. The specific exchange occurred as follows:

MR. GRIFFITH: I'm sorry. I can't help it sometimes. I want to put an objection on the record with regard to him discussing and then testifying with regard to the statement that they're saying was given to Mr. Kidd over the telephone. I actually spoke to Mr. Hayhurst about this previously. The discovery was never supplemented. Those statements, the investigator they hired to interview these people, I reminded Eric that they had never been presented to me. I asked him to send them to me last week and I wouldn't make a stink about it. I still don't have them, so I'm going to object about it now. I mean, it's at trial and I still haven't seen them.

MR. DUNN: Work product. **There's no expert witness work product recognized in West Virginia. Whatever an expert witness has reviewed, this is discoverable and entitled to be seen.**

*Record* at \_\_\_\_\_. Counsel for Dreher, Mr. Dunn, was the party who made the argument before the Court that giving the alleged statements of these witnesses to the expert witnesses in the case removed any and all argument regarding the work product doctrine during trial. Now, he has completely reversed his argument in an attempt to gain a new trial on appeal. This error will be discussed further below.

Nevertheless, Defendant Dreher cannot now ask for a new trial based on an alleged error that never even occurred. As there was no need for a ruling, no ruling can be the basis for an appeal.

**II. EVEN IF THE UNDERLYING CIRCUIT COURT HAD SANCTIONED PLAINTIFF FOR FAILING TO PRODUCE THIS ALLEGED STATEMENT AND DIRECTING THAT THE STATEMENT COULD NOT BE USED.**

Again, the Plaintiff on the record withdrew offering this alleged statement so that the Court did not have to issue a ruling. Nevertheless, Defendant Dreher now appeals to this Court claiming that he was prohibited from impeaching Witness Carpenter with Plaintiff Anderson's statement. In fact, Mr. Dunn never attempted to impeach Witness Carpenter with this alleged statement as is reflected by his direct examination of the witness.

First, with the allegation that there was a ruling for sanctioning Plaintiff Anderson for failing to produce this alleged statement at trial, this Court has well addressed the issues of discovery sanctions. Specifically, this Court has held that "[t]he 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." Syllabus Point 1, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995)." Syl. Pt. 1, *Graham v. Wallace*, 214 W. Va. 178, 588 S.E.2d 167 (2003). 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, 3<sup>rd</sup> Ed., Rule 26 §26(b)(4), p. 665. (Citations omitted).

The Court has established "[f]actors to be considered in determining whether the failure to supplement discovery requests under Rule 26(e)(2) of the Rules of Civil Procedure should require exclusion of evidence related to the supplementary material include: (1) the prejudice or surprise in fact of the party against whom the evidence is to be admitted; (2) the ability of that party to cure the prejudice; (3) the bad faith or willfulness of the party who failed to supplement discovery requests; and (4) the practical importance of the evidence excluded. *Id.* at 184, 178.

In *Graham v. Wallace*, the Court was considering a ruling from a trial court which chose to not supplement its discovery with opinions of an expert witness. Specifically, this Court found that an expert witness testified to opinions that he had not testified to in his deposition four weeks prior to trial. The prejudice was not successfully corrected on cross exam. The failure to

supplement was particularly egregious as the case had been vigorously litigated with extensive discovery. And, that the failure to disclose this information was an attempt to unfairly ambush a party at trial. In short, the Court reversed the case for a new trial finding that the evidence should have been excluded by a trial judge.

Take the facts of the instant case. Plaintiff Anderson had in his possession a statement that was allegedly taken by an investigator of Conrad Carpenter. This statement was disclosed to Plaintiff's expert witness and was used to formulate his opinions as was admitted by Plaintiff's counsel. Plaintiff's counsel explained that he would "steer the witness away from the statement." Later, after Conrad Carpenter had been called to the stand at trial and his direct exam taken by counsel for JES, Inc. the statement was literally handed to all defense counsel. The importance of the alleged statement is clearly demonstrated by counsel for Defendant Dreher's arguments. Had the Judge been forced to issue a ruling, that ruling would not have been an abuse of discretion. **But, the Trial Judge did not have to issue a ruling as counsel for Plaintiff voluntarily withdrew their attempt to offer the statement.**

But, this is not the real issue with regard to Defendant Dreher because on his cross examination of Conrad Carpenter, Mr. Dunn never even brought the alleged statement to Mr. Conrad's attention. "Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal.' Syl. pt. 1, *State Road Commission v. Ferguson*, 148 W. Va. 742, 137 S.E.2d 206 (1964)." Syl. pt. 1, *Estep v. Brewer*, 192 W. Va. 511, 453 S.E.2d 345 (1994). Mr. Dunn's cross examination was limited to who was definitively in "The Sound Factory" and the witness's training as follows:

By Mr. Dunn:

Q This is Matthew Dreher sitting to my left. Have you ever seen him?  
A Sir, I couldn't remember if I have or not. I've seen so many faces.  
Q Okay. You can't testify he wasn't in the Sound Factory on the night of this accident; is that correct?  
A I can testify that, I'm testifying that the only gentleman that appeared in front of me with an out-of-state ID was rejected. If that was him, then he was rejected. If he had an in-state ID, he may have made it inside.  
Q Who was in the bar that night?  
A I don't know, but they were all in-state IDs.  
Q How many people were in the bar that night?  
A Don't have an exact count, but it was very light for a Saturday.  
Q How many?  
A I don't have an exact count, but it was very light for a Saturday.  
Q Was it five or was it 50?

Mr. Griffith: Objection. Asked and answered.

The Court: I think he can – I'm going to give Mr. Dunn some latitude and some further questions on that.

Witness: From opening to close, I would say between 15-30.

By Mr. Dunn:

Q Do you know what any of them were wearing?  
A No, sir.  
Q Do you know how many men versus women?  
A No, sir.  
Q Know what any of them drank?  
A I'm sorry?  
Q Do you know what any of them drank?  
A No, sir. I was on the door.  
Q Do you know how long any of them were there?  
A No, sir.  
Q Do you have any names of any of these individuals that were there?  
A Not offhand, no.  
Q Did you have some type of sign in sheet or list when people came in, that you had to show an ID? Did they sign a sheet and indicate where they were from or who they were or any type of list?  
A No, sir.  
Q Do you know what the weather was like that night? Was it raining?  
A I can't answer that. I don't know. It's been over two years.  
Q Do you know anything else about what happened in The Sound Factory that night other than the fact that you remember my client wasn't in the bar?  
A I did not say I didn't remember your client wasn't in the bar.  
Q Well, you're implying to this jury that he wasn't in the bar.

Mr. Griffith: Objection. Counsel's testifying.  
The Court: Objection is sustained.

By Mr. Dunn:

Q So you're not here to tell this jury that my client wasn't in The Sound Factory that night?

A All I'm testifying to today is that I don't know this gentleman's face and I know that the only person that night that had an out-of-state ID was rejected. And if that was him, then yes, he was rejected.

Q Was that person a male or female?

A It was a male.

Q What state was that drivers license from?

A I don't know.

Mr. Dunn: Okay, thank you.

*See Respondent's Appendix.*

You must attempt to introduce evidence and draw the objection in order to preserve an issue on appeal. The entire issue brought before this Court on appeal by Defendant Dreher involves a situation created by Plaintiff Anderson and supported by Defendant Dreher. 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)).<sup>8</sup>

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<sup>8</sup> "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

In the instant case it is beyond cavil that every issue with regard to the alleged statements taken by an investigator and given to Plaintiff's expert witnesses is a situation created by the Plaintiff. First, it appears that Plaintiff allegedly had statements taken of several witnesses to this action. Next, during discovery, he chose to claim work product privilege for those alleged statements providing no privilege log indicating whose statements had been taken and/or who took those statements. Then, Plaintiff finally discloses that several alleged statements exist in their pretrial memorandum to the Court and, for the first time, identify their investigator. Nevertheless, Plaintiff refuses to provide the alleged statements to the defendants despite repeated requests. At trial, it is discovered that the experts retained by the Plaintiff have reviewed these alleged statements and utilized them in formulating opinions about the case. *See* Exhibit C, p. 13. Still, Plaintiff does not provide Defendants with these alleged statements, the recordings, or the name of the person who allegedly transcribed them. Regardless, the entire situation was one of Plaintiff's own making.

Defendant Dreher additionally aided in the "error" to which he now complains. Specifically, counsel for Dreher, Mr. Dunn, was the party who made the argument before the Court that giving the alleged statements of these witnesses to the expert witnesses in the case removed any and all argument regarding the work product doctrine during trial by stating as follows:

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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. . . .").

MR. DUNN: Work product. **There's no expert witness work product recognized in West Virginia. Whatever an expert witness has reviewed, this is discoverable and entitled to be seen.**

See Exhibit 3, p. 13 (emphasis added). Clearly, Mr. Dunn argued that the failure to provide these alleged statements to counsel was inappropriate to the Court to the end that they should not be permitted at trial. Now, Defendant 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. **Thereafter, Defendant Dreher did not even attempt to illicit the testimony he claims he required therefore the draw an objection and obtain a ruling for which to appeal.** Consequently, there is no “error” for which this Court might consider reversal on appeal.

**III. EVEN IF A RULING HAD BEEN MADE, IT WOULD NOT HAVE BEEN ERROR TO LIMIT THE CROSS-EXAMINATION OF CARPENTER UNDER RULE 613(a) AS THE PREVIOUS STATEMENT HAD BEEN SPECIFICALLY REQUESTED BY OPPOSING COUNSEL AFTER CONRAD CARPENTER WAS CROSS EXAMINED AND WAS DENIED ACCESS AND THE ALLEGED STATEMENT WAS PREVIOUSLY DISCLOSED TO AN EXPERT WITNESS.**

As an initial note on Defendant Dreher’s argument with regard to Rule 613(a) impeachment, the Court should note that he has provided no legal basis to his argument. He simply asserts *ipse dixit* that he is right and the Circuit Court was wrong to the point it was an abuse of discretion. Defendant Dreher’s brief in this matter completely *ignores* the fact that counsel for Plaintiff made a strategic decision to not use the alleged statements, *ignores* the fact that all alleged statements were given to expert witnesses, *ignores* the fact that there was never a limiting instruction given, and *ignores* the fact that Defendant’s counsel specifically requested the alleged statements prior to trial in accordance to Rule 613 after the witness had been

examined regarding the statement. 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.

Additionally, Rule 30(c) of the West Virginia Rules of Civil Procedure directs that

“[e]xamination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the West Virginia Rules of Evidence.”

During the deposition of Conrad Carpenter prior to trial he was impeached on a supposed prior inconsistent statement as follows:

Q. You would have never given any statements prior to today stating that Mr. Dreher was in that bar, would you?

A. I don't know if I did or not; but the private eye, when he called me, there was another incident. I keep mentioning out-of-state IDs. There was an incident where a gentleman with an out-of-state ID, I don't know if it was a week or two weeks prior to that, and it was a Tennessee ID. I remember this specifically, because he gave us, gave us a little bit of trouble. And I don't remember the incident specifically; but I remember when he asked me about a guy, he said something about a guy with an out-of-state ID in an accident, I assumed that it was the other fellow, because I had forgotten about this one.

And then I called him back immediately afterwards and said: Wait a minute. That's not right; and I gave another statement. So I would have given a statement about another gentleman with an out-of-state ID, but it was a different incident.

Q. An incident that occurred before July 9, 2008?

A. I don't know, I don't know if it was before. See, I don't know when the private investigator contacted me. It could have happened even after that point.

Q. But you know that this gentlemen with the Tennessee ID that you recall was not at the bar on July 19, 2008, because you never mentioned that to Sergeant Abbott.

A. That's correct. There was nobody else on that date within an out-of-state ID., right.

Q. So you would not have told anyone that there was a gentlemen in the bar on July 19, 2008, with a South Carolina ID, would you?

- A. No. No one was there.
- Q. Because you denied access to the only gentleman that appeared at the door with an out-of-state ID.
- A. That's correct.

Thereafter, counsel for Defendant JES, Inc. repeatedly requested the alleged prior statement.

Now, 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.

*See Exhibits D & E.* Prior to this 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 after the deposition of Conrad Carpenter and after their existence was disclosed 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. *See Exhibit C, p. 42.* 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.

#### **IV. THE CIRCUIT COURT RULED LAWFULLY AND APPROPRIATELY IN DENYING PLAINTIFF ANDERSON'S AND DEFENDANT DREHER'S MOTIONS FOR NEW TRIAL.**

The underlying Circuit Court Judge ruled lawfully and appropriately in denying Plaintiff Anderson's and Defendant Dreher's respective motions for new trial. 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).

In the instant case, the underlying trial Judge ruled exactly as she should have given the circumstances. The Plaintiff voluntarily withdrew his attempt to introduce the alleged statement during the cross examination of Conrad Carpenter. Defendant Dreher was not precluded from cross examining the witness as he never attempted to illicit the testimony he claims. Consequently, the Court ruled lawfully and properly in denying the respective motions for new trial.

### CONCLUSION

The underlying court ruled lawfully and appropriately in denying Plaintiff Anderson's and Defendant Dreher's motions for new trial. There was never an order issued by the Court for which Defendant Dreher could even base an appeal. Furthermore, the Court was not required to sanction the Plaintiff for failing to produce the statement given their voluntary withdrawal of offering the same. Nevertheless, had a sanction been issued it would have been appropriate given the failure to produce a privilege log and failure to produce the alleged statement after providing it to an expert. The Court did not have to rule on the Rule 613 issue; but, had such an order been issued it would have been appropriate given the ramification of Rule 30(c) of the West Virginia Rules of Civil Procedure. Consequently, there was no miscarriage of justice in this case and the ruling of the underlying Circuit Court should stand on appeal.

Respectfully Submitted,



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Travis A. Griffith, Esquire (WVSB#9343)

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
CHARLESTON

MATTHEW EDWARD DREHER,  
*Petitioner,*

v.

No. 12-0888

RICHARD R. ANDERSON  
*Respondent,*

and

JES, INC., d/b/a THE SOUND FACTORY  
*Respondent/Third Party Plaintiff,*

**CERTIFICATE OF SERVICE**

The undersigned counsel for Defendant/Third Party Plaintiff, JES, Inc., does hereby certify that a true copy of the foregoing "*Respondent's Brief and Respondent's Appendix*" has been served on this 3<sup>rd</sup> day of December, 2012, via United States Mail, in an envelope properly addressed and with postage fully paid to the following:

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