No. 25341, Lacy v. CSX Transportation, Inc.

Workman, Justice , dissenting:

I must respectfully dissent with the majority's conclusion that reversible error was committed, first by the trial court's ruling on the admissibility of a statement contained in a railroad investigative report, and second, by counsel for CSX during closing argument in addressing the effect of joint and several liability.

The most serious and significant error in the majority's opinion is its groundless determination that the trial court erred in making an evidentiary ruling concerning the admission of a portion of a document. Before proceeding to discuss the substantive problems with the majority position, I must first point out a flaw in the procedural path employed by the majority in its review of this issue. It is axiomatic that evidentiary rulings are reviewed under an abuse of discretion standard. See Syl. Pt. 1, McDougal v. McCammon, 193 W.Va. 229, 455 S.E.2d 788 (1995); see also West v. Wintergreen Partners, Inc., 908 F.2d 968 (4th Cir. 1990) (unpublished opinion) (stating that "determination of whether the proponent has met the foundation requirements of the business records exception and whether the circumstances indicate a lack of trustworthiness is left to the sound discretion of the trial judge"). To circumvent the inherent limitations placed on an appellate court with regard to a trial court's evidentiary ruling, the majority has constructed an argument that de novo review of the evidentiary ruling, as a whole, was permitted based on the trial court's improper application of the business records hearsay exception. See Gentry v. Mangum, 195 W.Va. 512, 518, 466

S.E.2d 171, 177 (1995) (stating that "[a] party challenging a circuit court's evidentiary rulings has an onerous burden because a reviewing court gives special deference to the evidentiary rulings of a circuit court"). The majority cites this Court's decision in State v. Sutphin, 195 W.Va. 551, 466 S.E.2d 402 (1995), to support its preferred approach of reviewing the trial court's ruling on a de novo basis. Sutphin, however, does not depart from utilizing abuse of discretion as the reviewing standard for evidentiary rulings; it merely recognizes that an appellate court is permitted to review in plenary fashion, the limited aspect of the trial court's interpretation of an evidentiary rule. Critically, the full review permitted of an evidentiary rule's interpretation by the trial court does not alter the abuse of discretion standard that controls all evidentiary rulings. This is made clear by Sutphin's pronouncement, which follows its recognition of plenary review for evidentiary interpretational issues, that "we will not disturb the evidentiary rulings absent an abuse of discretion by the trial court." Id. at 560, 466 S.E.2d at 411. The majority completely misses this distinction and thus, its decision to completely dispense with the abuse of discretion standard of review is fatally flawed.

Not only is the majority mistaken with regard to the applicable standard of review and how the same is applied, but the majority errs in characterizing the trial court's ruling on the evidentiary issue as being "grounded upon a legal conclusion regarding the foundational requirements of Rule 803(6)." The majority suggests that the sole basis for the trial court's ruling was the lack of personal knowledge on the document preparer's part. A review of the record demonstrates that this representation fails to accurately

depict the full grounds for the trial court's ruling. While the trial court did recognize that the document's preparer lacked personal knowledge concerning the descriptive information about the location of the eastbound locomotive, the trial court's stated basis for its ruling was the "third-hand hearsay" problem presented by the information and the inherent lack of reliability presented by such hearsay. The majority disingenuously omits reference to decisive comments made by the trial court concerning the basis for its ruling on the railroad investigatory report and further omits reference to the inherent discretion that is built into Rule 803(6) of the West Virginia Rules of Evidence (hereinafter "Rule 803(6)").

Most significantly, the majority circumscribes critical language in Rule 803(6) that is completely determinative of the evidentiary issue presented below. The business records hearsay exception permits the introduction of certain regularly conducted business activities **"unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."** W.Va.R.Evid.803(6), in part, (emphasis supplied); see also 2 Gregory P. Joseph, Stephen A. Saltzburg and Trial Evidence Comm. of the ABA Sec. of Litigation, Evidence in America, Rule 803 at 43 (1987) (observing that "[p]erhaps the most significant foundational requirement is trustworthiness" and "rule [803(6)] contemplates that the judge will exclude any document if the source of the information contained in it or the method or circumstances of its preparation indicate a lack of trustworthiness"); see also Munoz v. Strahm Farms, Inc., 69 F.3d 501, 503 (Fed. Cir. 1995) (stating that "[r]eliability is the basis for admitting

evidence under the business records exception"). The Second Circuit succinctly recognized in Saks Intern, Inc. v. M/V "Export Champion", 817 F.2d 1011 (2nd Cir. 1987), that "[t]he principal precondition to admission of documents as business records pursuant to Fed.R.Evid. 803(6) is that the records have sufficient indicia of trustworthiness to be considered reliable." Id. at 1013.

Ignoring the plain language used by the trial court with regard to its conclusion that the information at issue was not trustworthy, the majority states instead that "it is not entirely clear that the court below was attempting to exercise its discretion in this manner." The record makes clear that the trial court's ruling was indeed based on its determination that the handwritten train location details included on the railroad report were not reliable due to their "third-hand hearsay" origin. When pressed, the trial court explained its ruling: "Well, I've passed on it as to a lack of reliability. It's hearsay, only hearsay, and no one knows what the basis for the claims adjustor ['s notation regarding train location was]." How much clearer does the court have to state its rationale? The trial court, as the majority recognizes, likened the redaction, which it required, to that of police reports where hearsay comments are typically removed before the reports are introduced into evidence.[1] See United States v Saunders, 886 F.2d 56, 58 (4th Cir.

[1]The trial court stated:

> The judge has got a little discretion on these accident reports. We allow in the Department of Public Safety's and other police accident reports, and we redact certain portions that are too much hearsay and let the balance of it come in for the

1989) (holding that statements made to police officers by third parties under no business duty to report are not admissible under business records exception); Ramrattan v. Burger King Corp, 656 F.Supp. 522 (D. Md. 1987) (upholding trial court's in limine ruling that portions of police report containing statements of witnesses were inadmissible because witnesses were not acting in regular course of business in making statements); United States v. Pazsint, 703 F.2d 420 (9th Cir. 1983) (ruling that tape-recorded calls made by witnesses to police reporting defendant's actions were not business records since callers were not under business duty to report to police). The trial judge's use of the police report analogy demonstrates that the court's concern was in fact the hearsay problem presented by the descriptive information.

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benefit that it serves the jury.

The crux of the evidentiary problem presented by the CSX investigator's descriptive notation is the fact that such information is clearly hearsay and is being offered to prove the ultimate issue of liability.[2] Since the document itself is hearsay, a multiple hearsay problem is presented by the document's inclusion of information that originated from a third party. While the majority gives lip service to the proposition that Rule 803(6) does not solve the problem of hearsay within hearsay, it utterly fails to apply the very law which it cites concerning multiple hearsay to the facts presented by this case. See Baxter Healthcare Corp. v. Healthdyne, Inc., 944 F.2d 1573, 1577 (11th Cir. 1991) (stating that "Rule 803(6) does not eliminate a double hearsay problem unless the informant's statement also conforms to one of the exceptions to the rule against hearsay"), vacated, 956 F.2d 226 (11th Cir. 1992). To illustrate, the majority first cites the evidentiary assumption which underlies the admission of business records as requiring that "[e]ach participant in the chain that created the document--from the initial observer-reporter to the final entrant--must be acting in the course of the regularly conducted business . . . The reason underlying the business records exception fails if any of the participants is outside the pattern of regular activity." 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 803.11[4] at 803-69 (2d ed. 1999) (emphasis supplied). Continuing its recitation of applicable law, the majority recognizes that "hearsay statements contained in police reports are inadmissible where the declarant

[2]No one disputes that this descriptive information was extremely pertinent to the ultimate issue of liability.

has no duty to report" and even cites a case decided by the Tenth Circuit, acknowledging that "statements made to the [police] officer by third parties under no business duty to report may not" be admitted under Rule 803(6). United States v. Snyder, 787 F.2d 1429, 1434 (10th Cir.); cert. denied, 479 U.S. 836 (1986). When the facts of this case are applied to these well-established requirements for admission as a business record, it is clear that the necessary elements are not present.

Since the railroad employee who prepared the report in issue, Mr. G.A. Green, was not present at the time of the accident, the only way he could have obtained the descriptive information regarding the location of the eastbound locomotive was from speaking with third parties. Obviously, those third parties were under no business duty to accurately report their observations. Therein lies the problem faced by the trial court--an unknown and consequently inherently unreliable declarant may have provided the critical descriptive information to Mr. Green. Without knowing anything about where that declarant was at the time of the accident and additional details which would aid in determining whether the information provided to Mr. Green was trustworthy, the trial court properly determined that the predicate basis for admitting records under the business records exception--reliability--was missing with regard to the descriptive information concerning the location of the eastbound locomotive. Had the trial court determined that the investigative report could not come in at all, then the majority would have properly had a foundational basis for denouncing the trial court's reliance on lack of personal knowledge as a basis for excluding the documentary evidence. But that is not

what occurred in this case. The trial court never made a ruling that the record in issue was not a business record or that it could not come in for lack of a proper foundation. The trial court recognized this railroad investigative report for the business record that it was. But the trial court went a step further, as it is required to do, and determined that a portion of the document could not be deemed reliable, as it was based on "third-hand hearsay." See Meder v. Everest & Jennings, Inc., 637 F.2d 1182 (8th Cir. 1981) (holding that police report regarding cause of accident was inadmissible as business record because source of information was unknown as was information concerning when or under what circumstances information was obtained from source).

If the record provided an adequate basis for concluding that the unknown supplier of the crucial descriptive information was in fact a railroad employee who in turn was under a duty to accurately report the details of the accident, the analysis employed by the majority would be correct. The majority, however, reaches its conclusion that the source of the critical information was a railroad employee solely by inference. Since Appellant's expert testified that railroads routinely question railroad employees when investigating accidents, the majority leaps to the conclusion that the source of the descriptive comments was necessarily a railroad employee. The weakness of this inference is further demonstrated by the fact that the majority requires as part of the elements necessary to satisfy Rule 803(6) "that the information reported was transmitted by a person with knowledge, who was acting in the course of a regularly conducted

activity." (emphasis supplied) Since the duty to accurately report, and hence the inference of reliability, arises from information that is prepared "in the course of a regularly conducted activity," it is critical to the analysis employed by the majority that the source of the descriptive information relevant to the accident had to have been a railroad employee. As McCormick observes, "[i]f any person in the process is not acting in the regular course of the business, then an essential link in the trustworthiness chain fails, just as it does when the person feeding the information does not have firsthand knowledge." McCormick on Evidence § 290 at 274 (4th ed. 1992). And, yet, the record is utterly devoid of any evidence which supports the majority's assumption that the supplier of information to Mr. Green was a CSX employee. To proceed to the conclusion, as does the majority, that adequate guarantees of trustworthiness were present merely on the suggestion by Appellant's expert as to the origin of the information is simply not prudent appellate review. Especially when the issue of whether the declarant was under a duty to accurately report the information was critical, as it is here, to the admission of the information under the provisions of Rule 803(6).

Just as the majority sought to reward the Appellants with another bite at the proverbial "apple" by finding reversible error in the mentioning of the effect of joint and several liability, so too does the majority find reversible error on grounds that routinely and properly prohibit a determination of reversible error. See Grogg v. Missouri Pac. R.R., 841 F.2d 210 (8th Cir. 1988) (upholding trial court's exclusion of railroad document stating that air hose was broken on date of brake accident on grounds that no

evidence was presented that person who provided information recorded in railroad document was acting in regular course of business); City of Cleveland v. Cleveland Elec. Illuminating Co., 538 F.Supp. 1257 (N.D. Ohio 1980) (holding that reports prepared by City listing customers who canceled service and reasons for cancellation were not admissible as business records as customers were not under duty to City and comments were hearsay); Juneau Square Corp. v. First Wisconsin Nat'l Bank, 475 F.Supp. 451 (E.D. Wis. 1979) (upholding trial court's ruling in antitrust lawsuit on inadmissibility of handwritten notations under Rule 803(6) based on absence of testimony concerning the source of the notations and evidence that such notations were made in course of regularly conducted business); State v. Vance, 633 S.W.2d 442 (Mo. Ct. App. 1982) (holding that trial court correctly refused to admit police accident report under business records exception where officer did not witness accident as such information was inadmissible hearsay); accord Kuhl v. Aetna Cas. & Sur. Co., 443 A.2d 996, 1002 (Md. 1982), aff'd, 463 A.2d 822 (Md. 1983); McCormick , § 324.1 at 368 (recognizing that with regard to police reports of accident investigations, primary statement prepared by police officer is admissible as business or public record, but statements of individuals made to officer, unless they meet another hearsay exception, do not come in under Rule 803(6)). Succinctly stated, the trial court's ruling on the admission of the document in question was an ordinary evidentiary ruling, which is subject to reversal only for abuse of discretion. See Gentry, 195 W.Va. at 518, 466 S.E.2d at 177. The majority simply decided that it would have ruled differently had it been the trial court and thus, ignored

the trial court's right to make evidentiary rulings subject only to an abuse of discretion standard of review.

I am further concerned by the fact that the majority has used this case to carelessly insert a presumption of trustworthiness into the business records rule. Whereas this Court has previously recognized that business records are generally trustworthy, State v. Fairchild, 171 W.Va.137, 298 S.E.2d 110 (1982), it is quite another thing to elevate business records to a level of presumed trustworthiness. This is especially of concern when you consider the presumption in light of the majority's disinclination towards excluding obvious hearsay evidence from a business record--evidence that clearly would not be admissible if it were being offered independently. See Vance, 633 S.W.2d at 444 (discussing fact that police officer could not provide trial testimony concerning hearsay evidence contained in report sought to be admitted as a business record similarly proscribed introduction of hearsay evidence directly from report). The very concerns that Justice Douglas espoused in Palmer v. Hoffman, 318 U.S. 109 (1943), the seminal case which first addressed the issue of whether a statement given by the train's engineer following a railroad accident could be introduced as a business record under the Federal Records Act,[3] have come home to roost. In rejecting the admission of the engineer's

[3]The federal Act at issue in Palmer was 28 U.S.C. § 695; the current statute in effect is 28 U.S.C. § 1732 (1994). As recognized by the Second Circuit in United States v. Lieberman, 637 F.2d 95 (2d Cir. 1980), the differences between the Federal Business Records Act and Rule 803(6) are not significant. 637 F.2d at 100 n.7.

statement in Palmer,[4] Justice Douglas expressed concern that "[r]egularity of preparation would become the test rather than the character of the records and their earmarks of reliability." Id. at 114. Justice Douglas astutely anticipated that the very foundation of the business records exception could be eroded by virtue of merely requiring systematic record-keeping as the predicate basis for admission of business records rather than properly focusing on the more critical trustworthiness element:

> Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports under the Act. The result would be that the Act would cover any system of recording events or occurrences provided it was 'regular' and though it had little or nothing to do with the management or operation of the business as such. . . . The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule.

318 U.S. at 113-14 (emphasis supplied); see also Bowman v. Kaufman, 387 F.2d 582, 587 (2nd Cir. 1967) (observing that liberal construction of federal business records act "does not mean that any particular business record may be admitted without carefully scrutiny of its reliability for the purpose for which it is offered as evidence"). Apparently, the day rued by Justice Douglas--when regularity of document preparation would supersede concerns for trustworthiness--has already arrived.

[4]The rationale applied by the Supreme Court in Palmer was that the statement could not have been said to have properly made in the "regular course of business" within the meaning of 28 U.S.C. § 695, as the railroad's business was to run the railroad, but not to record its employees' versions of accidents. 318 U.S. at 113.

While I do not disagree with the majority's determination that a jury should not be advised as to the effect that joint and several liability will have on its verdict, I must part ways with the majority's determination that reversal is required in this case based on the closing argument comments. The better approach, and the one that is consistent with this Court's previous rulings concerning this issue, is to follow the rationale we applied in Valentine v. Wheeling Electric Co., 180 W.Va. 382, 376 S.E.2d 588 (1988). When faced with the analogous issue of whether reversible error was committed by instructing the jury concerning the fact that the defendant electric company could be held responsible for the entire verdict even if other tortfeasors were found to have been negligent, this Court determined that although it was error, such error was harmless because the jury found no negligence as to any of the defendants. Id. at 386, 376 S.E.2d at 592.

Just as the error was deemed harmless in Valentine, any error that occurred in the instant case similarly fell into the "harmless error" category. Unlike the fact finders in Valentine, the jury in this case did return a finding of negligence. The verdict form itself, however, demonstrates that no reversible error occurred as a result of the closing argument discussion of joint and several liability. The substance of defendant CSX's comments at trial which are presently at issue was that if the railroad was found to be even one percent negligent, it could be held responsible for the entire verdict. Significantly, the verdict form indicates that the jury did in fact assess one percent negligence against the railroad. Thus, it is clear that the closing argument comments

made by CSX did not dissuade the jury from assessing negligence against CSX. Thus, the comment, although erroneous, obviously caused no harm to the plaintiffs.

Where the majority goes astray is to assume that because the jury determined that the negligence it assessed against CSX was not the proximate cause of the accident, this secondary determination of proximate causation was necessarily affected by the joint and several liability comments. Only by proceeding down this analytical path of tying the joint and several liability discussion to the jury's proximate causation determination could the majority conceivably reach its result-oriented determination that reversible error occurred. But, to conclude, as the majority does, that the discussion of joint and several liability had an impermissibly prejudicial affect on the jury's determination regarding proximate causation not only requires the suspension of principles of logic, but also demonstrates a clear disdain for the jury's ability to hear and decide such issues. Furthermore, such conclusion is clearly contradicted by the record in this case.[5]

Not only did the majority leave logic out of its approach, but rather than addressing the jury's finding of one percent liability against CSX, the majority dispensed with that finding by characterizing it as "meaningless." As a matter of sound appellate review, jury rulings should not be discarded in such a casual and callous fashion. The far better practice is to accept the jury's rulings, especially, when as here, the Appellants

[5]Since the jury completed a verdict form wherein it indicated an assessment of one percent liability against CSX, it stands to reason that the jury chose to reject the railroad's plea not to find liability against it on the grounds that it would be forced to pay for the entire verdict.

failed to object to the jury verdict form below and similarly failed to raise the issue presented by the verdict form determinations as an assignment of error in their appeal to this Court. Thus, it is patently absurd for the majority to find reversible error arising from a jury verdict form from which no appeal has been taken.[6] The majority simply chose to disregard a valid jury determination for the predilected purpose of finding reversible error.

Finally, I must express my heartfelt concern with regard to the increasing disregard that this Court is showing for well-established principles of appellate review. The ease with which the Court chooses to dispense with both legal precedent and valid jury determinations is both disheartening and alarming. Such an approach can have but one impact, and that is negative. Both the legal profession and the judicial system, as a whole, will suffer immeasurably from the result-oriented brand of justice that is currently being dispensed.

I am authorized to state that Justice MAYNARD joins me in this dissenting opinion.

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[6]All of this post-verdict analysis could have been avoided in the first instance if the attorneys involved had prepared a verdict form that was properly worded. Question nine, as put to the jury, read "What percent of negligence, if any, do you assess to each of the parties listed below[?]" Had that question been drafted instead to read "What percent of negligence which proximately caused the plaintiffs' injuries, if any, do you assess to each of the parties below[?]", then it is quite likely that the fact finders' determination as to liability would not currently be the subject of discussion.