IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

FILED
November 10, 2026
ASHLEY N. DEEM, CHIEF DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

RONALD P. SWINDLER,
Plaintiff Below, Petitioner

v.) No. 26-ICA-3 (Cir. Ct. Upshur Cnty. Case No. CC-49-2024-C-21)

JAMES TENNEY and
SHEPPARD FURNITURE, INC.,
Defendants Below, Respondents

MEMORANDUM DECISION

Petitioner Ronald P. Swindler appeals the Circuit Court of Upshur County's December 2, 2025, order confirming a jury's verdict and entering judgment in favor of Respondents James Tenney and Sheppard Furniture, Inc. ("Sheppard Furniture"), and the circuit court's December 22, 2025, order denying Mr. Swindler's motion for a new trial. Mr. Tenney and Sheppard Furniture filed a joint response.[1] Mr. Swindler filed a reply.

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2026). After considering the parties' arguments, the record on appeal, and the applicable law, this Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's orders is appropriate under Rule 21 of the West Virginia Rules of Appellate Procedure.

This case arises from an incident on March 7, 2022, at the Buckhannon Waste Transfer Station. At that time, Mr. Swindler was employed as a sanitation worker for the City of Buckhannon, and Mr. Tenney, driving a Sheppard Furniture truck, was delivering a load of refuse.

Upon arrival, Mr. Tenney attempted to back the truck into a transfer bay but paused when he observed Mr. Swindler working nearby. After completing his task, Mr. Swindler advised Mr. Tenney that he could continue backing. Mr. Tenney resumed but stopped again when he heard shouting. Seeing no sign of Mr. Swindler, he continued backing until he heard further yelling. He exited the vehicle and found Mr. Swindler in the pit below.

[1] Mr. Swindler is represented by Ambria M. Britton, Esq., and Karl J. Kolenich, Esq. Mr. Tenney and Sheppard Furniture are represented by G. Thomas Smith, Esq., Woody A. Trent, Esq., and Afton L. Aman, Esq.

On March 7, 2024, Mr. Swindler filed suit seeking damages for injuries allegedly caused by Mr. Tenney's negligent operation of the truck. After discovery concluded, a three-day jury trial commenced on October 27, 2025.

While testifying during his case-in-chief, Mr. Swindler attempted to introduce an incident report prepared by his supervisor, Jerry Arnold. Respondents objected on hearsay grounds, and the circuit court sustained the objection. Mr. Swindler next called his coworker, Terry Hawkins. Mr. Swindler attempted to introduce a written statement made by Mr. Hawkins on the day of the incident, but respondents objected, claiming a lack of foundation. In response, Mr. Swindler's counsel acknowledged that she had not yet asked foundational questions and continued with Mr. Hawkins' examination without ever returning to the written statement and moving for its admission. Mr. Swindler then presented the videotaped deposition of Mr. Tenney. During the deposition, counsel offered Mr. Tenney's own written statement from the day of the incident. Respondents raised no objection, and the circuit court admitted Mr. Tenney's statement.

Regarding damages, Mr. Swindler called his treating podiatrist, Dr. Jennifer Michael. On cross-examination, respondents asked about treatment recommended by Carl Hasselman, MD, Mr. Swindler's treating orthopedic surgeon. As background, although Mr. Swindler had disclosed Dr. Hasselman as a witness, he did not disclose any opinions regarding future care. Respondents moved to exclude those undisclosed opinions, and the circuit court granted the motion at an October 20, 2025, hearing. Mr. Swindler objected based on the court's prior in limine ruling. After reviewing the audio from the earlier hearing, the circuit court confirmed its ruling excluding Dr. Hasselman's undisclosed future surgery opinions, and respondents discontinued the line of questioning.

At one point during trial, when overruling respondents' counsel's relevance objection, the circuit court noted that Mr. Swindler's counsel was spending significant amounts of time questioning witnesses and commented that "I think . . . you're losing the attention [of the] jury." Later, the circuit court admonished Mr. Swindler's counsel at a bench conference for disruptive behavior, noting that counsel was "talking over" him. The white noise system was activated, and the jury could not hear the exchange. The court made no comments to the jury regarding evidence, credibility, or the merits of the case.

During closing argument, respondents' counsel suggested that Mr. Swindler relied on a life-care planner rather than his treating surgeon, Dr. Hasselman, because the surgeon "wasn't going to help him…wasn't going to give him a big number." The circuit court immediately instructed the jury that Dr. Hasselman did not testify for reasons unrelated to respondents' insinuation.

After closing arguments concluded around 6:30 p.m. on the third day of trial, the circuit court provided instructions to the jury, including an instruction to disregard any

comments made by the judge during trial, and offered them the option to adjourn or begin deliberations. The jury elected to deliberate and ultimately returned a verdict finding Mr. Swindler entirely at fault. Because respondents prevailed on liability, the jury did not reach damages. In its December 2, 2025, order, the circuit court confirmed the jury's verdict and entered judgment for respondents.

Mr. Swindler moved for a new trial pursuant to Rule 59(a) of the West Virginia Rules of Civil Procedure, asserting erroneous evidentiary rulings, prejudicial conduct by respondents' counsel and the circuit court, and that the verdict was against the clear weight of the evidence. In its December 22, 2025, order, the circuit court denied the motion finding that the trial was fair and that the asserted grounds for a new trial lacked merit. This appeal of the December 2, 2025, and December 22, 2025, orders followed.

We review a circuit court's ruling on a motion for a new trial under an abuse of discretion standard, mindful that such rulings are entitled to great deference and will be reversed only when a circuit court acts under a misapprehension of law or evidence. *See Lunsford v. Shy*, 243 W. Va. 175, 181, 842 S.E.2d 728, 734 (2020); Syl. Pt. 2, *Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc.*, 223 W. Va. 209, 672 S.E.2d 345 (2008). Applying these standards, we address the parties' arguments.

On appeal, Mr. Swindler raises seven assignments of error paralleling those asserted in his Rule 59(a) motion. He argues that the circuit court made erroneous evidentiary rulings, that prejudicial conduct by respondents' counsel and the court affected his substantial rights, and that the jury's verdict was contrary to the clear weight of the evidence. Respondents maintain that the evidentiary rulings were proper, that any potentially prejudicial conduct was cured, and that the evidence supported the verdict. We agree with respondents and find that the circuit court did not err in denying Mr. Swindler's motion for a new trial.

We first address the evidentiary rulings, which we review for abuse of discretion. *See McKenzie v. Carroll Int'l Corp.*, 216 W. Va. 686, 690, 610 S.E.2d 341, 345 (2004). Under this standard, we discern no error.

First, we find no abuse of discretion by the circuit court by excluding Mr. Arnold's incident report. The foundation offered at trial failed to establish the document as a present sense impression or a business record exception to hearsay. *See* W. Va. R. Evid. 803(1), 803(6). Mr. Arnold did not testify, had no firsthand knowledge of the event, and was not shown to be a custodian of records. Additionally, the report was prepared the day after the incident and was not contemporaneous with Mr. Swindler's statements. Given the deficiencies in authentication, timing, and reliability, exclusion was within the court's discretion.

We likewise reject Mr. Swindler's argument that Mr. Hawkins's written statement was improperly excluded. The record shows that respondents objected on foundational grounds, that the statement was never formally offered, and that the circuit court was never asked to rule on its admissibility after testimony was developed. Without a ruling from the circuit court, there is nothing for this Court to review.

We also find no error in the admission of Mr. Tenney's written statement. As a party-opponent admission under Rule 801(d)(2), it was not hearsay. Moreover, Mr. Swindler offered the statement himself, and a litigant may not invite error and then assign it as a ground for reversal. *See* Syl. Pt. 3, in part, *Hopkins v. DC Chapman Ventures, Inc.*, 228 W. Va. 213, 719 S.E.2d 381 (2011) (party may not actively contribute to an error and then raise that error as a reason for reversal on appeal).

Turning to the allegations of prejudicial conduct, the record does not support granting a new trial. Respondents' examination of Dr. Michael regarding Dr. Hasselman's recommendations ceased immediately upon objection, and no improper testimony reached the jury. The court's curative instruction regarding respondents' closing argument eliminated any potential prejudice, and any error would in any event be harmless. *See* W. Va. R. Civ. P. 61.[2] Because the jury found respondents not liable, and Dr. Hasselman's opinions related only to damages, no prejudice occurred.

Mr. Swindler also has not shown that the court's comments were improper or prejudicial. The court's comment that Mr. Swindler's counsel appeared to be "losing" the jury was actually made when overruling one of respondents' counsel's objections, and in context appears to have been a reminder to counsel to keep questions relevant. The bench admonishment of Mr. Swindler's counsel for "talking over" the court likewise does not warrant a new trial. The jury could not hear the discussion, and it did not comment on evidence or credibility. The court also instructed the jury to disregard any comments made during trial.

Additionally, we reject Mr. Swindler's argument that the circuit court pressured the jury to give a verdict. The parties agreed to a three-day trial and the circuit court expressly gave the jury the option to adjourn before deliberating. The jury voluntarily chose to

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[2] Rule 61 of the West Virginia Rules of Civil Procedure provides:

> Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is grounds for granting a new trial, for setting aside a verdict, or for vacating, modifying or otherwise disturbing a judgment or order. At every stage of the proceeding, the court shall disregard all errors and defects that do not affect any party's substantial rights.

deliberate. Nothing in the record indicates that the jurors felt rushed or were prevented from engaging in full deliberation.

Finally, Mr. Swindler argues that the jury's verdict finding him entirely at fault was against the clear weight of the evidence. We disagree. An appellate court will not set aside a jury verdict unless it is clearly wrong or without evidence to support it. *See* Syl. Pt. 2, *Walker v. Monongahela Power Co.*, 147 W. Va. 825, 131 S.E.2d 736 (1963). The jury was presented with conflicting evidence and resolved those conflicts against Mr. Swindler. Testimony indicated that his injuries and clothing were inconsistent with being struck or dragged, and that Mr. Swindler positioned himself in the truck's blind spot, offered improper hand signals, and gave no clear command to stop. Mr. Tenney testified that the backup alarm was functioning, that he stopped when he heard yelling, and that he found Mr. Swindler already in the pit. The record contains sufficient evidence to support the jury's verdict, and we discern no basis for disturbing the verdict on appeal.

For the foregoing reasons, we affirm the circuit court's December 2, 2025, and December 22, 2025, orders.

Affirmed.

ISSUED: November 10, 2026

CONCURRED IN BY:

Chief Judge Daniel W. Greear
Judge Charles O. Lorensen
Judge S. Ryan White