IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL DIVISION B LAW

BILLIE J. CROYLE, and BONNIE CROYLE, his spouse, Plaintiffs, v. RAY F. SMITH, SUNFLOWER CARRIERS a division of CRETE CARRIER, CORPORATION, SHAFFER TRUCKING, INC., a division of CRETE CARRIER CORPORATION, CRETE CARRIER CORPORATION, and DUANE W. ACKLE, Defendants.	)	No. 2003B2690

Attorney for Plaintiffs — *Mark A. Givler, Esq.*
Attorney for Defendants — *Douglas Marcello, Esq.*

OPINION AND ORDER

KISTLER, J.

Presently before this Court is Billie J. and Bonnie Croyles' (hereinafter "Plaintiffs") Motions for a New Trial. This matter arises out of a collision between Plaintiff Billie Croyle's motorcycle and Ray Smith's (hereinafter "Defendant") tractor trailer. Mr. Croyle was driving southbound on state route 26 when Defendant, who was driving northbound,

made a left turn in front of Mr. Croyle. Mr. Croyle was injured as a result.

Plaintiffs subsequently brought suit against Defendant and his employer, Shaffer Trucking, Inc. A trial was held on January 3 and 4, 2006. Having heard all the testimony and examined all the evidence, the jury concluded that Defendant and Mr. Croyle were each causally negligent, with Defendant being forty-seven percent (47%) negligent and Mr. Croyle being fifty-three percent (53%) negligent. One (1) juror declined to join the others in the verdict.

Plaintiffs request a new trial, based on the following:

(1) That this Court erred in not permitting Plaintiffs to introduce the written summary of witness Thomas Dunbar's statement of September 3, 2002 as extrinsic evidence of a prior inconsistent statement.

(2) That this Court erred in not permitting Plaintiffs to introduce the written summary of Thomas Dunbar's statement of September 3, 2002 as substantive evidence where it otherwise would have been, but for the Defendants losing the cassette recording of said statement.

(3) That this Court erred in refusing to allow witness police officer, Michael Danneker, to testify to the content of a statement made to him by Thomas Dunbar at the scene on August 20, 2002, as that statement was allowable under either or both the present sense

impression or excited utterance exception.

First, Plaintiffs contend the written summary of the statement made by Thomas Dunbar to an insurance company employee on September 3, 2002, was admissible as extrinsic evidence of a prior inconsistent statement.[1] Plaintiffs believe that if the jury had seen this summary, it could have changed the outcome of the case as it would have shifted the percentage allotted by the jury for causal negligence. In short, Plaintiffs argue they were prejudiced by this information's exclusion at trial.

Second, Plaintiffs argue that since Mr. Dunbar's statement would have been admissible had it not been lost, the summary should be admissible under the recorded recollection exception. Plaintiffs contend the written summary was an accurate account of Mr. Dunbar's original statement. Plaintiffs also believe Defendant should not be permitted to benefit from the loss of the original statement under the spoliation doctrine.

Third, Plaintiffs argue that Officer Danneker's interviewing of Mr. Dunbar occurred

[1] Mr. Dunbar produced a written statement to Defendant's insurance company allegedly stating he saw two motorcycles on the road. An employee for this insurance company made a written summary of this statement. The original statement was subsequently misplaced by the insurance company. Plaintiffs were attempting to get the employee's summary of the original statement admitted into evidence to show Mr. Dunbar saw two motorcycles, not one.

immediately following the accident. As such, Mr. Dunbar's statements are admissible as a Present Sense Impression or an Excited Utterance. Plaintiffs believe Officer Danneker should have been able to testify that Mr. Dunbar told him he saw two motorcycles on the road.

On the other hand, Defendant believes this Court properly disallowed any statements made by Mr. Dunbar to other individuals regarding the accident. First, Defendant believes the summary of Mr. Dunbar's statement does not fall into the Extrinsic Evidence of Prior Inconsistent Statement of Witness exception. Defendant argues the exhibit at issue is not a statement; rather, it is a summary of a recorded statement, which is inadmissible hearsay. Additionally, Defendant contends the proposed summary is inadmissible because Plaintiffs are intending to use it for substantive purposes, not for impeachment purposes.

Second, Defendant also argues the summary is inadmissible under the Recorded Recollection exception. Defendant notes that this exception is only available where the proponent of the statement affirmatively pleads that the witness is presently unable to

recall the relevant events. In order to utilize this exception, a party must establish that a witness has no independent recollection of the subject matter even after reviewing the statement. Commonwealth v. Cooley, 454 Pa. 422, 311 A.2d 572 (1973). Defendant contends that Mr. Dunbar did not lack a recollection of the number of motorcycles

pulling out; rather, he testified to seeing one motorcycle pull out. (Deposition of Dunbar, p. 30).

Third, Defendant argues that Mr. Dunbar's statements to Officer Danneker were not Excited Utterances or Present Sense Impressions. Defendant notes that after the accident Mr. Dunbar spoke with Mr. Croyle, Mr. Bickle, and Defendant. (Deposition of Dunbar, p. 33-34). After having these three conversations, Officer Danneker arrived, and Mr. Dunbar allegedly discussed the accident with him. Defendant also believes the subject of the conversation, whether Defendant saw two motorcycles or one, is not a topic an individual would utter excitedly.

In addition, Defendants argue these statements were not present sense impressions. Defendant contends the trustworthiness of the statement arises from its timing. *See* Pa.R.E. 803 (Committee Comments). Here, Mr. Dunbar's statements did not occur during or even immediately after the accident.

Having reviewed the parties' briefs and the relevant legal authority, this Court believes it is appropriate to deny Plaintiffs' Motions for a New Trial.

A new trial is warranted where the trial court has made an error of law which has resulted in prejudice. Stalsitz v. Allentown Hospital, 814 A.2d 766 (Pa.Super. 2002); *appeal denied,* 854 A.2d 968 (Pa. 2004). A new trial is necessitated where an evidentiary ruling is erroneous as a matter of law and has been harmful or prejudicial to the complaining party. Potochnick v. Perry, 861 A.2d 277 (Pa.Super. 2004).

With respect to Plaintiffs' first claim, this Court does not believe Mr. Dunbar's statements are admissible under the Prior Inconsistent Statement exception. Pennsylvania Rule of Evidence 613(b) states:

> Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is admissible only if, during the examination of the witness,
>
> (1) The statement, if written, is shown to, or if not written, its contents are disclosed to, the witness;
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> (2) The witness is given the opportunity to explain or deny the making of the statement; and,
>
> (3) The opposing party is given an opportunity to question the witness.

Here, Plaintiffs' proposed "statement" is actually a *summary* of a statement. The "statement" was really an insurance company employee's personal account of what she

recalled the contents of Mr. Dunbar's original statement to be. Summaries of what a witness said are not considered statements. Commonwealth v. Hill, 267 Pa.Super. 264, 406 A.2d 796 (1979). The Court in Hill held that the defendant could not introduce an officer's summary of a witness' comments. The Hill court reasoned that "[i]t would have been unfair to permit impeachment of the witnesses through use of an officer's interpretation of what they had said, not their earlier recollections." Id. at 270, 799. *See also* Pa.R.E. 607(a) (Committee Comments) ("a prior inconsistent statement may be used only for impeachment purposes and not substantively unless it is an admission of a party opponent under . . . the statement of a witness other than a party-opponent . . . or a statement of prior identification . . .."). Here, Plaintiffs did not give Mr. Dunbar the opportunity to explain or deny making the statement. Instead, Plaintiffs asked the following, referring to the summary of Mr. Dunbar's statement:

> Q: Okay. Do you—is it true that at that time, you told her that you saw two motorcycles pulling out of a side road on your right-hand side?
>
> A: That's what is written in there, yes.

(Deposition of Dunbar, p. 40). Mr. Dunbar did not admit or deny seeing two motorcycles; rather, he merely acknowledged that the summary stated there were two motorcycles. As such, this Court determines the summary is inadmissible hearsay because Plaintiffs are attempting to use a document, composed out of court by someone other than the witness, to prove that Mr. Dunbar saw two motorcycles rather than one.

Moreover, this Court does not believe the spoliation doctrine should apply to the loss of Mr. Dunbar's statement. The spoliation doctrine is intended to further the public policy of protecting defendants who may be unable to prepare a defense after the destruction or loss of an allegedly defective product. Schroeder v. DOT, 551 Pa. 243, 710 A.2d 23 (1998). In determining whether the doctrine of spoliation applies, the Schroeder court looked at (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct. Id.

As per Plaintiffs' request, this Court imposed a lesser sanction, and instructed the jury that the recorded statement would have been unfavorable to Defendant. Plaintiffs also questioned Mr. Dunbar on direct examination regarding the summary. (Deposition of Dunbar, p. 39-43). There was no evidence that Defendant purposefully lost the summary in order to bolster his case. As such, the spoliation doctrine is inapplicable.

This Court believes Plaintiffs' second argument also lacks merit. Pennsylvania Rule of Evidence 803.1(3) states:

> **(3) Recorded Recollection**—A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory, providing that the witness testifies that the record correctly reflects that knowledge. If admitted, the memorandum or record may be read into evidence and received as an exhibit, but may be shown to the jury only in exceptional circumstances or when offered by an adverse party.

This exception applies only when the witness is unable to recall the relevant events. Commonwealth v. Cargo, 498 Pa. 5, 444 A.2d 639 (1982). The witness must testify under oath that he or she has no present recollection of the events recorded in writing. Commonwealth v. Canales, 454 Pa. 422, 311 A.2d 572 (1973). Where a witness is available to testify from present memory, his or her notes can not properly be introduced into evidence under the Past Recollection Recorded exception. Id.

Here, Mr. Dunbar had present recollection of the number of motorcycles he saw on the road—one. (Deposition of Dunbar, p. 30).[2] He did not have a failure to recall. Plaintiffs did not like the answer, and would have liked to impeach the witness, but it was not an exception to the hearsay rule to introduce the summary as direct evidence.

Furthermore, Mr. Dunbar never "adopted" the summary as accurate when his

[2] Q: Did you see one or more than one motorcycle at that point?
A: At that point, I only saw the one, that I can remember.
Q: All right. Eventually, did you see another?
A: Yes, after the truck made his turn.
(Deposition of Dunbar, p. 30).

memory was fresh, as the rule requires.

Plaintiffs' third claim is also without merit, as Mr. Dunbar's statements to Officer Danneker were not Excited Utterances or Present Sense Impressions. An Excited Utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Pa.R.E. 803(2). Factors other courts have used to determine whether a statement is an Excited Utterance is (1) whether the declarant witnessed the startling event; (2) the time that elapsed between the startling event and the declaration; (3) whether the statement was in narrative form; and (4) whether the declarent spoke to others prior to making the statement, or whether he had the opportunity to speak to others. Commonwealth v. Sanford, 397 Pa.Super. 581, 580 A.2d 784 (1990), allocatur denied, 527 Pa. 586, 588 A.2d 508 (1991); Hammel v. Christian, 416 Pa.Super. 78, 610 A.2d 979 (1992). Where the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded unless there is evidence showing the declarant did not have time for reflective thought. Hammel *supra*. However, a court must look at the totality of the circumstances in determining whether this exception is applicable. Commonwealth v. Gore, 262 Pa.Super. 540, 547, 396 A.2d 1302, 1305 (1978).

Here, this Court believes Mr. Dunbar had time to reflect on what he observed. Mr. Dunbar saw the accident while he was driving. He stopped his truck, exited his truck, and went to Mr. Croyle's aid. On direct examination, Mr. Dunbar testified that he spoke with Mr. Croyle, Mr. Bickle, and Defendant prior to talking to Officer Danneker. (Deposition of Dunbar, p. 33-34). This Court believes getting out of his truck, talking with

three other individuals, and then talking with Officer Danneker does not make any statement made to Officer Danneker an Excited Utterance. Too much time for reflection had passed.

Regarding Plaintiffs claim that Mr. Dunbar's statements to Officer Danneker were Present Sense Impressions, this Court believes the statements were too far removed from the accident to qualify under this exception. A Present Sense Impression is defined as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Pa.R.E. 803(1). "For this exception to apply, a declarant need not be excited or otherwise emotionally affected by the event or condition perceived. The trustworthiness of the statement arises from its timing. The requirement of contemporaneousness, or near contemporaneousness, reduces the chance of premeditated prevarication or loss of memory." Pa.R.E. 803(1) (Committee Comments).

Here, Mr. Dunbar conversed with Mr. Bickle, Plaintiff Croyle, and Defendant prior to speaking with Officer Danneker. Mr. Dunbar also stopped his truck and exited it prior to conversing with these individuals. This Court again determines such a lengthy period of time negates Mr. Dunbar's statements to Officer Danneker from falling under the Present Sense Impression exception, as they were not made close enough in time to the witnessing of the accident.

ORDER

AND NOW, this _____ day of April, 2006, Plaintiffs' Motions for a New Trial is

hereby **DENIED.**

BY THE COURT:

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Thomas King Kistler, Judge