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**COURT OF APPEALS FOR THE STATE OF
WASHINGTON**
DIVISION II
Tacoma Washington

Robert Frantom
Appellant/Plaintiff

v.

Deputy Sheriff Shane Hanson
Of the Kitsap Sheriff's Office
Defendant/Appellee

COA # 52007-9 - II

Appellant/Plaintiff's
Opening Brief

Due Date: January 11, 2019

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Appellant's OPENING Brief

Civil Case Division
Case No.: 15-2-13409-0
Pierce County Superior Court

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Introduction

The underlying case was a civil action based on an automobile collision that occurred on November 17, 2012. Robert Frampton and Lori Johnson were driving down Bucklin Hill Road on a rainy Saturday morning. When the light at Bucklin and Silverdale Way turned green, they started to cross the intersection. A Lincoln, on Silverdale and traveling approximately 100 mph, smashed into the passenger's side of Frampton's vehicle. The crash killed Ms. Johnson, and seriously injuring Mr. Frantom. The Lincoln's Driver was Lorena Llamas.

At the time of the incident, Ms. Llamas, was being pursued by Appellee, Deputy Sheriff Shane Hanson, of the Kitsap County Sheriff's office. The chase started in Silverdale at the Old Town Bistro and terminated with the collision. Ms. Lamas survived with minimal injuries. She was charged with, and convicted of, vehicular homicide, along with other crimes.

The event started while Llamas was sitting in the front passenger's seat of the parked Lincoln, waiting for her date to come to the car, and ended in a fatal car crash.

The Lincoln was across the street from a local "club" – the Bistro. Her date was walking towards the Lincoln when officers approached him and drew their handguns. As the police approached her date, who was about 15 feet from the Lincoln, he threw a small container into the car, and then turned around and interacted with the officers.

At the time Llamas was on parole, and suspected that the package, which the drive had thrown into the car, contained contraband. A few seconds later an officer came up to the passenger side of the Lincoln and pointed a gun at her. Llamas had not committed a crime before the police made initial contact

with her. The officers had no knowledge of Llamas' background or parole status, nor did they have any facts that would lead a reasonable person to believe that she had committed any illegal act. She did not understand why there was a gun pointed at her face since all she was doing was sitting in a car. Looking at the screaming officer who had the gun pointed at her face, and being a person of color, she became fearful for her life and panicked.

She moved to the driver's seat, started the vehicle and quickly drove off. The Officers, who had pulled their guns yelled for her to stop. Llamas was so frightened that she continued to try and get out of the area, and ignored the commands to stop. Hansen heard the officers' commands for Llamas to stop. Llamas ignored the commands and drove past Hanson. He initiated pursuit.

According to Llamas, she wanted to get far enough away so she could toss the small package out the window. Llamas stated that she wanted to get out of the view of the pursuing police vehicles and jettison the package. She would then stop and deal with the traffic issues.

Her intent was to go as fast as necessary so as to elude the police. She testified that the officer pursuing her was catching up and she continued to accelerating in order to get away. If Hanson had followed department procedures for when to terminate a pursuit she would not have continued to accelerate. Appellant asserted that but for Hanson's pursuit the collision would not have occurred.

In January of 2018 a jury trial was held in Pierce County Superior Court, before the honorable G. Helen Whitener. The Court refused the Appellant's request to have Llamas transported from the Woman's Correction Facility so

that she would be available for in person testimony.¹ At the end of the trial the jury awarded \$400,000 in damages to Frantom, finding Llamas liable but finding Hanson free from any responsibility.

During the trial the Court refused to allow the Appellant to treat the defendant and his fellow officers as hostile witnesses, adverse parties or as witnesses associated with an adverse party. Appellant made an oral motion to have the Court designate the Defendant as a hostile witness and/or allowing cross examination as a party opponent. The Court refused to allow the Appellant to treat the Law Enforcement officers as hostile, or to allow leading questions of the party opponent when called by the plaintiff.

However, the Court allowed the Appellee to treat Hanson, the Defendant, and his fellow officers, as if they were being cross examine, during their cross examination when the Appellant had called them as witnesses in his case in chief, thus allowing the use of leading questions on their own witness.

This appeal is based on the Court's failure to comply with ER § 611(c). Specifically, the appeal is founded on the failure of the Court to allow the Appellant to use leading questions with party opponent, and officers closely associated with them. The Court ruled that the Plaintiff could not use leading questions with any witness that they called, including the defendant, an adverse party opponent, or a witness associated with an opposing party. The Converse was also true. The Court allowed the Appellee to use leading questions when "crossing" their client, or officers closely associated with their client, when called by the Appellant. This deprived the Appellant of an

¹ The Woman's Correctional facility located in Gig Harbor is approximately a 30 minute drive from the Court

opportunity to properly develop the Appellee's testimony and allowed the Appellee to cross their client and the sworn law enforcement witnesses.

Appellant suffered on going detriment as a result of the Court's clear order to not use leading questions and her dismissal of Appellant's attempt to make a motion to identify the defendant as an adverse party.

Appellant found that the questioning they intended to do, was for all purposes foreclosed, hence greatly restricting their ability to present their case against the Defendant / Appellee. Police officers are taught, in the academy, how to testify and have years of practice doing so. Leading questions are necessary to break their testimony down. The Court's refusal to follow EC § 611(c) prejudiced the Appellant throughout the trial.

Assignment of Error

1. The trial court erred when it ruled that Plaintiff could not treat the Defendant, Deputy Sheriff Hanson, as a hostile witness when called to testify by the Plaintiff.
2. The trial court erred when it ruled that Plaintiff could not treat Defendant's fellow Sheriff's Deputies, and other officers, as a hostile witness when called to testify by the Plaintiff.
3. The trial Court erred when it ruled that the defendant's attorney could cross examine the Defendant when the Defendant had been called to testify by the Plaintiff.
4. The trial Court erred when it ruled that the defendant's attorney could cross examine the Defendant's fellow Sheriff's Deputies when they had been called to testify by the Plaintiff.

5. The trial Court erred when it ruled that Plaintiff/Appellant needed to make a motion to declare the Party opponent an adverse witness.

Statement Of The Issues

- 1 Did the trial court err when it denied the Plaintiff/Appellant the right to treat the defendant (a Deputy Sheriff) as an adverse witness when called to the stand by the Plaintiff/Appellant?
- 2 Did the trial court err when it granted the Defendant/Appellee the right to cross examine their client when called to the stand by the Plaintiff/Appellant?
- 3 Did the trial court err when it denied the Plaintiff/Appellant the right to treat the defendant's co-works (Deputy Sheriffs) as adverse witnesses when called to the stand by the Plaintiff/Appellant?
- 4 Did the trial court err when it granted the Defendant/Appellee the right to cross examine their client's co-workers (Deputy Sheriffs) when called to the stand by the Plaintiff/Appellant?
- 5 Did the trial Court err when it ruled that Plaintiff/Appellant needed to make a motion to declare a party opponent an adverse witness?

Statement Of The Case

I. Substantive Facts

Llamas had not committed any crime, felony or misdemeanor other than a driving violation, when Hanson decided to give chase. (RT P149:L16-18)

Llamas asserted at trial that the pursuit by Deputy Hanson caused Llamas to increase the speed she was driving. (RT P154:L4-16)

During trial, Plaintiff's co-counsel, Mr. Olmstead, examined the Appellee, Hanson, and several other officers associated with the incident. Appellee objected to Appellant use of leading questions. (RT P15:L1-4 ; P22:L2-4 ; P71:L1-9 ; P93:L12-P96:L12) The Objection were sustained. On several occasions during the examinations of some of Appellees witnesses, Appellant objected to the Appellee's use of leading questions. These objections were over ruled. (RT P36:L8-11; P128:L1-6; P166:L13-19). The current law takes a dim view of such activities. "To the extent plaintiff's counsel is permitted to ask **leading questions** of a **witness** on direct examination, the presumption is that the **witness** is hostile to plaintiff. The normal justification for allowing **leading questions** on cross-examination disappears in those circumstances. **Leading questions** will not, therefore, be permitted on defendants' cross-examination" *Yousefi v. Delta Elec. Motors, Inc.*, No. C13-1632RSL, 2015 U.S. Dist. LEXIS 180844, at *4 (W.D. Wash. May 11, 2015)

The Court stated that Appellant had not made a motion to declare the Appellee and his fellow officer hostile. Appellant made an oral motion to find Appellee both a hostile witness and a party opponent. (RT P93-96) This would have permitted Appellant to use leading question. The court denied the motion, and in fact stated that "Well, as I just indicated, there isn't a record in regards to allowing you to treat him as a hostile witness. Just because you don't get an answer that you like from a witness does not mean the witness is hostile". [P96:L3-7]. EC § 611(c) presumes that a party opponent is hostile and does not require that the Appellant prove that the witness is hostile. "Rule 611(c),

however, significantly enlarged the class of witnesses presumed hostile, 'and therefore subject to interrogation by leading questions without further showing of actual hostility.' " *Satgunam v. Basson*, No. 1:12-CV-220, 2016 WL 9274720, at *1 (W.D. Mich. 2016) see also *Stahl v. Sun Microsystems, Inc.*, 775 F. Supp. 1397, 1398 (D. Colo. 1991).

On the issue of EC § 611(c) and leading questions, the Court had admonished the Appellant enough so that continuing to ask leading questions could have led to sanctions.

II. Procedural Facts

The Court disregarded ER § 611(c) which allows cross examination using leading question when: [1] the witness is hostile; [2] The witness is an adverse party; [3] The witness is identified with an adverse party. *Rosa-Rivera v. Dorado Health, Inc.*, 787 F.3d 614, 616–17 (1st Cir. 2015); *Chonich v. Wayne County Community College*, 874 F.2d 359, 368 (6th Cir.1989) or when the witness is hostile. *National Railroad Pass. Corp. v. Certain Temporary Easements Above R.R. Right of Way*, 357 F.3d 36, 42 (1st Cir. 2004).

Appellant raised ER § 611(c) and its exception to the general rule that "leading questions should not be used on the direct examination of a witness." (Washington Evidence Rule § 611(c))² The Court instructed the Appellant that

² **Rule 611.** (a) **Control by Court** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) **Scope of Cross—Examination** Cross—examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) **Leading Questions** Leading questions should not be used on the direct examination of a witness except

leading questions could not be used on witnesses that Appellant called to the stand.^{3, 4} The Court also opined that the Appellee could use leading questions for their client and witnesses hostile to the Appellant, when called by the Appellant. Thus, the trial court flipped ER § 611(c) on its head.

Standard of Review

The standard for review is a preliminary question for this Appellate Court. One view is that the standard is "abuse of discretion" and the other view is that evidentiary rulings should be reviewed "de novo" when it comes to interpreting the statute. The *Peralta* court took the "abuse of discretion" approach.

"The standard of review for evidentiary rulings made by the trial court is abuse of discretion." *City of Spokane v. Neff*, 152 Wash.2d 85, 91, (2004). We will reverse a trial court's evidentiary ruling " 'only when no reasonable person would take the view adopted by the trial court.' " *State*

as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.
[Adopted 1979. Amended 1992.]

³ Plaintiff called 6 witness that the Court's order applied to. The Order stopped the Appellant from using leading questions and had a negative effect on the ability of the Appellant to fully develop the witness' testimony. .Once the Court stated "There was an objection made to you leading this witness. It runs afoul of Evidence Rule 611, and it will not be allowed. And as I indicated, the other portion that you read, which means trying to treat the witness as a hostile witness as you're trying to do the adverse part, no motion was made to this Court to do so, and there isn't a record to support it, so even that would have been not allowed; so the objection is sustained. Let's get the jurors.¶ MR. OLMSTEAD: I'd like to make the motion, then, to ask the Court to allow me to treat him as a hostile witness. ¶ THE COURT: Well, as I just indicated, there isn't a record in regards to allowing you to treat him as a hostile witness. Just because you don't get an answer that you like from a witness does not mean the witness is hostile.¶ MR. OLMSTEAD: All right. I'm sorry, Your Honor.¶ THE COURT: But your objection, of course, is noted for the record. Let's get the jury out. . . . it would have been improper to ignore the Court's instructions and continue to ask leading questions.

⁴ Evidence Rule 611 does not indicate that a written motion is required to establish that a witness is hostile. Case law makes it clear that Motions In Limine are a disfavored approach to evoking the § 611(c) exceptions. *Amy C. Pigott, V. Battle Ground Academy And John W. Griffith* 2013 U.S. Dist. LEXIS 59536

v. Ellis, 136 Wash.2d 498, 504, (1998) (quoting *State v. Castellanos*, 132 Wash.2d 94, 97, (1997)).

Peralta v. State, 187 Wash. 2d 888, 894 (2017). *U.S. v. Blue Bird*, 372 F.3d 989, 991 (8th Cir. 2004) took a different view and concluded that the standard for some evidentiary rulings was de nova. While *Blue Bird* has not been directly overruled *United States v. Pirani*, 406 F.3d 543, 555 (8th Cir. 2005) has diminished the import of *Blue Bird*. Because the trial court was engaged in an interpretation of ER § 611(c) the Appellate Court can review the trial court's ruling on this statute either for an abuse of discretion or de nova.

EC § 611(c)

Evidence Code § 611(c) set forth the exemptions to the general rule that leading questions should not be used on direct examination. The wording of the listed exceptions is explicate; the last sentence of Rule 611(c) provides that certain categories of witnesses can automatically be treated as **hostile**.

General Exceptions To ER § 611(b)

The Federal Rule of Evidence § 611(c) is identical to the Washington Evidence Rule § 611(c).⁵ Washington Courts "sometimes looked for guidance to **cases interpreting equivalent federal law.**" *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512 (1993) cited by *Marquis v. City of Spokane*, 130 Wash. 2d 97, 109 (1996). Where state statutes, or laws, are similar to equivalent Federal statutes or laws, the Court can be guided by the federal laws. *Sintra, Inc., et al, v. The*

⁵ There is a structural difference. The Federal rule breaks down the State rule into three components. FRE § 611(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions: (1) on cross-examination; and (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party. WER § 611(c) Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

City of Seattle, et al 119 Wn.2d 1 (1992). As such both Federal and Washington Case law can be used to resolve questions concerning Washington ER § 611(c).

The primary question is whether ER § 611(c) provides exceptions to the general rule that Leading Questions should not be used on the direct examination of a witness.

The exception listed in § 611(c) are: [a] When a party calls a hostile witness, [b] When a party calls an adverse party, and [c] When a party calls a witness identified with an adverse party. This ability to use leading questions is not absolute, and the court can evaluate the bias of the witness to determine if the bias runs to the calling party or to the other side.

Although the last sentence of *Rule 611(c)* provides that certain categories of witnesses can automatically be treated as hostile, the rule does not give the calling party an absolute right to ask leading questions even when the witness is identified with an adverse party. There may be instances where, although a witness is identified with the opposing party, he or she is also identified, because of sympathy or bias, with the calling party. In such cases the court has discretion to preclude the use of leading questions to avoid abuses of the rule. *See* WEINSTEIN'S FEDERAL EVIDENCE, 2d ed. § 611.06[3], at 611-64 Vol 4 (1999). The use of leading questions during direct examination remains within the trial court's sound discretion, and we review that decision only to determine whether there has been a clear abuse of discretion. *Woods v. Lecureux*, 110 F.3d 1215, 1222 (6th Cir. 1997) (citing *Chonich v. Wayne County Community College*, 874 F.2d 359, 368 (6th Cir. 1989)). *Emph. added.* *SEC v. Goldstone* 317 FDR 174 (NM 2016). Also See *Ellis v City of Chicago* 667 F.2d at 613.

"The term 'witness identified with an adverse party' is intended to apply broadly to an identification of the witness based upon employment by the party or by virtue of a demonstrated connection to an opposing party." *United States*

v. McLaughlin, No. CRIM.A. 95-CR-113, 1998 U.S. Dist. LEXIS 18588, 1998 WL 966014, at *1 (E.D. Pa. Nov. 19, 1998) “The normal sense of a person ‘identified with an adverse party’ has come to mean, in general, an employee, agent, friend, or relative of an adverse party.” *Vanemmerik v. The Ground Round, Inc.*, No. CIV.A. 97-5923, 1998 WL 474106, at *1 (E.D.Pa. July 16, 1998). *Fehr v. SUS-Q Cyber Charter Sch.*, No. 4:13-CV-01871, 2015 WL 6166627, at *3 (M.D. Pa. Oct. 20, 2015). Using this broad definition, all of the law enforcement officer called by the Appellant would be covered as witness identified with the adverse party, and should have been able to be questioned on direct with leading questions.

This Appeal Deals With The Court’s Refusal To Allow Leading Questions To Be Asked By The Appellant With Witnesses Called By Appellant

ER § 611(c) has three categories of witnesses that can be call and be subject to leading questions.

Hostile Witnesses

[a] A hostile witness can be questioned using leading questions after the hostility has been, in some way, demonstrated. *Hodgins v. Oles*, 8 Wash. App. 279, 284, (1973). A witness can be hostile if they are unwilling to testify; are biased against a party or who act in a way to demonstrate hostility. *Suarez Matos v. Ashford Presbyterian Cmty. Hosp.*, 4 F.3d 47, 50 (1st Cir. 1993). A **hostile witness** is one who demonstrates it by his demeanor. *Lambert v. State Farm Mut. Auto. Ins. Co.*, 2 Wash. App. 136, 137 (1970) For example, a witness, while at first friendly and free to talk, became hostile before the actual

trial and would answer only when direct questions were put to her, was properly classified as hostile. *Harringer v. Keenan*, 117 Wash. 311, 315 (1921).

Adverse Witnesses

[b] An adverse witness can be questioned with leading questions. An **adverse party**, (a party to the litigation with differing views or claims), or an officer, director, or managing agent of a public or private corporation, partnership, or association that is an adverse party. *Hodgins v. Oles*, 8 Wash. App. 279, 279, 505 P.2d 825, 826 (1973).

Identified with an adverse Party

Ratliff v. Chicago et.al, 2012 U.S. Dist. LEXIS 164500; 2012 WL 5845551 is applicable to this case. Witnesses identified with an adverse party are presumed hostile in law under ER § 611(c). *Ellis v. City of Chicago*, 667 F.2d 606, 612-13 (7th Cir. 1981) (noting that "when the city is a defendant to a §1983 claim, police officers employed by the city and who were present during portions of the incident at issue are 'clearly qualified as a witness identified with an adverse party'"); *Favila v. City of Chicago*, No. 09-C-3265, 2011 U.S. Dist. LEXIS 58751 (N.D. Ill. 2011) (holding that "the real test for leading questions under the Rule is whether the other officers are "identified with an adverse party" in this case).

Employees are often treated as adverse witnesses to the employer's opposing party, as they are considered to be identified with the adverse party. *Ellis v. City of Chi.*, 667 F.2d 606, 613 (7th Cir. 1981) for example, officers of the City of Chicago are adverse to the civil rights plaintiff. "In addition to current employment, a witness is most likely to be treated as adverse where he or she was employed at the time of the incident in question and had a hand in

the incident that resulted in suit." *Ratliff v. City of Chicago*, No. 10 CV 739, 2012 U.S. Dist. LEXIS 165411, 2012 WL 7993412, *1 (N.D. Ill. Nov. 20, 2012). Even when that involvement is tangential, an employee of a city defendant may be considered to be identified with an adverse party. *Gibbons v. Vill. of Sauk Vill.*, No. 15 CV 4950, 2017 U.S. Dist. LEXIS 179108, (N.D. Ill. 2017) Prior parties who were adverse as parties are "witnesses identified with an adverse party. *Rice v. City of Boise City*, 2018 U.S. Dist. LEXIS 58600, (D. Idaho 2018). Washington State Patrol troopers Zoellin and Barraclough were defendants in this case before they settled the claims against them.⁶ Thus they were identified with an adverse party, a position that the trial court took exception to.

The Advisory Committee note to Rule § 611(c) addresses the situation where a party calls an adverse witness and on direct uses leading question. Then the attorney for the adverse party uses leading questions on their cross. *Fed. R. Evid. 611(c)*. It explains that the rule provides "a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the 'cross-examination' of a party by his own counsel after being called by the opponent.; see also *Morvant v. Constr. Aggregates Corp.*, 570 F.2d 626, 635 (6th Cir. 1978) ("If the witness is friendly to the examiner, there is the same danger of suggestiveness as on direct; and consequently the court may forbid the use of leading questions." *Pigott v. Battle Ground Acad.*, 2013 U.S. Dist. LEXIS 59536, at *3-4 (M.D. Tenn., 2013)

"[T]he court is directed to allow leading questions when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party." Fed. R. Evid. 611(c)(2). Separate and apart from the contention that Mr. Street is a hostile witness is the fact that Mr.

⁶ These two officers were the first to be called by the Plaintiff, See Deposition transcript.

Street is a witness identified with an adverse party. Therefore, the Douds' counsel is permitted to ask leading questions of him on direct examination if called as a witness in their case in chief. While a motion in limine may not be the appropriate vehicle to raise this issue, the court nevertheless GRANTS the Douds' motion.

Doud, V. Yellow Cab Of Reno, Inc., 2015 U.S. Dist. LEXIS 134721

The advisory committee notes to the Federal Rules of Evidence § 611 are clear. There are several relationships which fall within the category where leading questions are allowed by statute. For example, an employer employee relationship is considered to be covered by the exception for leading question; *Couch v. Wayne City Comm. Coll.*, 874 F.2d.359 (6th Cir. 1980) Employer/employee; *United States v. Tsui* 848 F.2d 365 (9th Cir.1981) Law Enforcement investigations.

Adverse Party

[c] Leading questions may be used on direct examination if the witness is a party to the litigation. EC § 611 clearly sets forth an exception to the “no leading questions” restriction on direct examination. The rule specifies that leading questions can be used on direct examination of an adverse party. The trial court refused to allow Plaintiffs to use leading question when defendant Hanson was on the stand.

The examination of all of the police officers that were called by the Appellant were subject to the Court’s prohibition on using leading questions on Direct examination and the Appellee was granted the leave to us leading questions for their cross examination of their own witnesses, who were call by the Appellant in his case in chief. This ruling by the Court denied the Plaintiff

the ability to properly examine law enforcement officers who are trained witness and who know how to tell a story that looks good for them.

Argument

ISSUE 1:

Did the trial court err when it denied the Plaintiff/Appellant the right to treat the defendant (a Deputy Sheriff) as an adverse party witness when called to the stand by the Plaintiff/Appellant?

EC § 611(c) specifically exempts an adverse party from having to make a motion for leave to use leading questions when an adverse party is called on direct examination. There is no need to make a motion, or establish a hostile attitude before using leading questions, as there is a presumption of hostility. "Rule 611(c), however, significantly enlarged the class of witnesses presumed hostile, 'and therefore subject to interrogation by leading questions without further showing of actual hostility.' "

Satgunam v. Basson, No. 1:12-CV-220, 2016 WL 9274720, at *1 (W.D. Mich. 2016) see also *Stahl v. Sun Microsystems, Inc.*, 775 F. Supp. 1397, 1398 (D. Colo. 1991).

In a salient criminal case the Court said: the use of leading questions in direct examination of a law enforcement official by the defense is philosophically supportable based on the reasoning of the Sixth Circuit in *Bryant*, that Fed.R.Evid. § 611(c) is applicable in criminal trials, and that a law enforcement official or other investigating agent (regardless of whether he or she be a local, state or federal officer) may qualify as a witness identified with an adverse party in an action brought by the Government against criminal defendants, absent a positive showing by the Government that

the witness is not hostile, biased or so identified with the adverse party that the presumption of hostility which is the cornerstone of Fed.R.Evid. § 611(c) should not be indulged. Therefore, Defendants' Motion to Invoke Rule § 611(c) in direct examination of police officers and government agents is granted.

United States v. Duncan, 712 F. Supp. 124, 126–27 (S.D. Ohio 1988)

The appellant was entitled to the presumption that the defendant officer was a hostile witness, and had no need to show otherwise. If a question did come up as to the actual hostility of the defendant then the burden would be on the appellee to demonstrate that the witness was not hostile.

The Court erred when it required the Plaintiff/Appellant to make a motion finding the Defendant/Appellee hostile, and then denied the motion for a lack of proven hostility.

ISSUE 2

Did the trial court err when it granted the Defendant/Appellee the right to cross examine their client when called to the stand by the Plaintiff/Appellant?

The Fed. R. Evid. 611(c) ⁷ advisory committee's note explains that the rule provides "a basis for denying the use of leading questions when

⁷ **Note to Subdivision (c).** The rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable. Within this tradition, however, numerous exceptions have achieved recognition: The witness who is hostile, unwilling, or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 Wigmore §§ 774-778. An almost total unwillingness to reverse for infractions has been manifested by appellate courts. See cases cited in 3 Wigmore § 770. The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command.¶ The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the "cross-examination" of a party by his own counsel after

the cross-examination is cross-examination in form only and not in fact, as for example the 'cross-examination' of a party by his own counsel after being called by the opponent (savoring more of a redirect) *Morvant v. Constr. Aggregates Corp.*, 570 F.2d 626, 635 (6th Cir. 1978) ("If the witness is friendly to the examiner, there is the same danger of suggestiveness as on direct; and consequently the court may, in its discretion, forbid the use of leading questions.").

The language of Rule § 611 is not mandatory—whether to allow leading questions under these circumstances is entirely within the Court's discretion. *Woods v. Lecureux*, 110 F.3d 1215, 1221 (6th Cir. 1997) ("[A] district court's decision to allow leading questions when a party is cross-examining his own witness is a matter within the court's traditional discretion to control the mode of interrogation.") *Pendleton v. Bob Frensley Chrysler Jeep Dodge Ram, Inc.*, No. 3:14 C 02325, 2016 WL 10703740, at *3 (M.D. Tenn. Aug. 17, 2016)

The Trial Court erred when it allowed unfettered questioning of the Defendant. The scope of the "Cross" was exceeded and thus was improper.

ISSUE 3:

Did the trial court err when it denied the Plaintiff/Appellant the right to treat the defendant's co-works (Deputy Sheriffs) as adverse witnesses when called to the stand by the Plaintiff/Appellant?

being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff. **The final sentence deals with categories of witnesses automatically regarded and treated as hostile.**

EC § 611(c) specifically exempts an adverse party from having to make a motion for leave to use leading questions when an adverse party is called on direct examination by the opposing side. There is no need to make a motion, or establish a hostile attitude before using leading questions as there is a presumption of hostility. "Rule 611(c), however, significantly enlarged the class of witnesses presumed hostile, 'and therefore subject to interrogation by leading questions without further showing of actual hostility.' " *Satgunam v. Basson*, No. 1:12-CV-220, 2016 WL 9274720, at *1 (W.D. Mich. 2016) see also *Stahl v. Sun Microsystems, Inc.*, 775 F. Supp. 1397, 1398 (D. Colo. 1991).

In a salient criminal case the Court said: the use of leading questions in direct examination of a law enforcement official by the defense is philosophically supportable based on the reasoning of the Sixth Circuit in *Bryant*, that Fed.R.Evid. § 611(c) is applicable in criminal trials, and that a law enforcement official or other investigating agent (regardless of whether he or she be a local, state or federal officer) may qualify as a witness identified with an adverse party in an action brought by the Government against criminal defendants, absent a positive showing by the Government that the witness is not hostile, biased or so identified with the adverse party that the presumption of hostility which is the cornerstone of Fed.R.Evid. § 611(c) should not be indulged.² Therefore, Defendants' Motion *127 to Invoke Rule 611(c) in direct examination of police officers and government agents is granted.

United States v. Duncan, 712 F. Supp. 124, 126–27 (S.D. Ohio 1988)

The appellant was entitled to the presumption that the defendant officer was a hostile witness, and had no need to show otherwise. If a

question did come up as to the actual hostility of the defendant then the burden would be on the appellee to demonstrate that the witness was not hostile.

The Trial Court erred because the other officers were employed by the same law enforcement agency and/or were defendants before settling their cases. ER § 611(c) makes it clear that individuals in this class are presumed to be hostile and it is the opposing parties burden to show that they are not.

ISSUE 4:

Did the trial court err when it granted the Defendant/Appellee the right to cross examine their client's co-workers (Deputy Sheriffs) when called to the stand by the Plaintiff/Appellant?

The Fed. R. Evid. 611(c) advisory committee's note explains that the rule provides "a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the 'cross-examination' of a party by his own counsel after being called by the opponent (savoring more of a redirect)" ⁸*Morvant v. Constr. Aggregates Corp.*, 570 F.2d 626, 635 (6th

⁸ **Note to Subdivision (c).** The rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable. Within this tradition, however, numerous exceptions have achieved recognition: The witness who is hostile, unwilling, or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 Wigmore §§ 774-778. An almost total unwillingness to reverse for infractions has been manifested by appellate courts. See cases cited in 3 Wigmore § 770. The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command.¶ The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the "cross-examination" of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured

Cir. 1978) (“If the witness is friendly to the examiner, there is the same danger of suggestiveness as on direct; and consequently the court may, in its discretion, forbid the use of leading questions.”).

The language of Rule § 611 is not mandatory—whether to allow leading questions under these circumstances is entirely within the court’s discretion. *Woods v. Lecureux*, 110 F.3d 1215, 1221 (6th Cir. 1997) (“[A] district court’s decision to allow leading questions when a party is cross-examining his own witness is a matter within the court’s traditional discretion to control the mode of interrogation.”) *Pendleton v. Bob Frensley Chrysler Jeep Dodge Ram, Inc.*, No. 3:14 C 02325, 2016 WL 10703740, at *3 (M.D. Tenn. Aug. 17, 2016)

If the “Cross Examination” is limited to the material covered on direct then the use of leading question would be both rational and proper. On the other hand, if the examination departs from the subjects covered on direct it would be improper.

The questions asked on “Cross” were outside the scope of direct, and thus improper. Yet, the Trial Court allowed the Appellee free reign in asking their questions.

ISSUE 5:

Did the trial Court err when it ruled that Plaintiff/Appellant needed to make a motion to declare a party opponent an adverse witness?

defendant who proves to be friendly to the plaintiff. **The final sentence deals with categories of witnesses automatically regarded and treated as hostile.**

“It is uncontroverted that a party may use leading questions during a direct examination of a hostile or adverse witness.” *Pendleton v. Bob Frensley Chrysler Jeep Dodge Ram, Inc.*, No. 3:14 C 02325, 2016 WL 10703740, at *3 (M.D. Tenn. Aug. 17, 2016) Party opponents and a witness identified with an adverse party are presumed to be hostile and leading questions are allowed. There is no need to make a motion to use leading questions on the direct examination of an adverse party of a witness identified with an adverse party.

ER § 611 refers to an adverse party and states that leading questions can be used on direct with an adverse party or a person identified with an adverse party. A person “identified with an adverse party” has come to mean, in general, an employee, agent, friend, or relative of an adverse party. *Haney v. Mizell Memorial Hosp* 744 F.2d 1467, 1477–78 (11th Cir.1984); *United States v. Hicks*, 748 F.2d 854, 859 (4th Cir.1984) (allowing plaintiff to lead defendant's girlfriend); *Ellis v. Chicago*, 667 F.2d 606, 613 (7th Cir.1981) (allowing plaintiff to lead police officers who worked closely with defendant police officer); *Vanemmerik v. The Ground Round, Inc.*, No. CIV.A. 97-5923, 1998 WL 474106, at *1 (E.D. Pa. July 16, 1998).

There are two different categories of adverse witnesses: (1) hostile witness; (2) adverse party or an officer, director, or managing agent of a public or private corporation, partnership, or association that is an adverse party. *Gabel v. Koba*, 1 Wash.App. 684, (1969). In the first category, the witness' hostility must, in some way, be demonstrated before he can be examined as an adverse witness. In the second

category, the witness is presumed to be hostile in nature and may be called as an adverse witness as a matter of right.

In the first case, the party opposing the questioning of the hostile witness would have to make a motion to preclude the use of leading questions based on a lack of actual hostility. In the second case, the party conducting the examination has a right to do so, and no motion is required.⁹

The Court did err in requiring that the plaintiff make a motion to for permission to question the Defendant with leading questions.

Conclusion

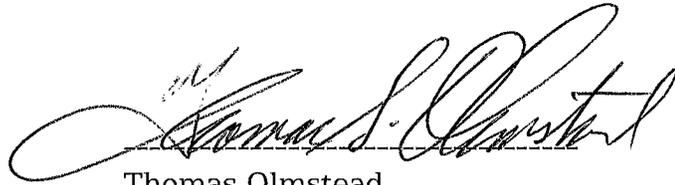
The errors made by the Court, if taken as a single misinterpretation has a very insignificant effect on the trial. But the Court's error was not a single misdirection, but permeated the Plaintiff's presentation. The Court made it clear that it would not tolerate more objections from the Plaintiff about the defendant's use of leading questions to law enforcement witness who were called by the Plaintiff.

The Court removed the Plaintiff's ability to put the police witnesses through the crucible of cross examination. This completely shattered the trial preparation of the Plaintiff's counsel who would have aggressively dissected the Defendants testimony through the use of leading questions.

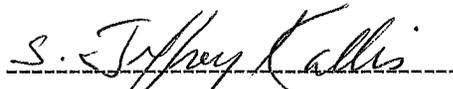
⁹ Appellant has searched for a Washington or federal Court Rule or statute that requires a motion be use to get permission to questions an adverse party with leading questions. Numerous cases indicate that a motion in limine is not a proper platform for seeking to declare a witness hostile or adversarial.

Appellant does not question the Court's right to manage the trial, limit testimony on cross to the answers of direct, etc. Appellant does question the improper application of rules of evidence; multiple times. The cumulative effect of these ruling denied the Appellant the ability to put on their trial and denied them the ability to use one of the most effective tools in a trial lawyers tool box.

Dated: 1/3/2019

A handwritten signature in black ink, appearing to read "Thomas S. Olmstead", written over a horizontal dashed line.

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A handwritten signature in black ink, appearing to read "M. Jeffery Kallis", written over a horizontal dashed line.

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