

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0252

BARBARA POWELL,

Petitioner,

v.

DONALD MEREDITH,

Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

I. FACTUAL HISTORY

On August 8, 2009, Defendant below and Respondent herein, Donald Meredith (hereinafter referred to as “Respondent”), was traveling North on US Route 19 in Clarksburg, Harrison County, West Virginia. A second vehicle, driven by Donald Powell transporting Plaintiff below and Petitioner herein, Barbara Powell (hereinafter referred to as “Ppetitioner”), was also traveling North on US Route 19 in front of Mr. Meredith. The Powell vehicle was stopped in the lane of traffic attempting to yield to traffic traveling South on WV Route 20 next to Wendy’s in downtown Clarksburg. Respondent stopped a few car lengths behind the Powell vehicle. As the Powell vehicle began to move out onto West Pike Street, Respondent began to pull out slowly behind them. Respondent checked for oncoming traffic as directed by the yield sign as he attempted to merge when the Powell vehicle abruptly stopped causing Respondent to rear-end the vehicle.

There were no indications at the scene of the accident that Petitioner had been injured. Following the accident, however, Petitioner was diagnosed with both a cervical and thoracic sprain/strain and occipital neuralgia (A.R. 31-33, 104, 111.) As a result, she was treated by emergency department personnel, her primary care physician, a pain specialist, physical therapists, and a chiropractor. She underwent diagnostic testing, received pain block injections, and was prescribed medication. Petitioner alleged past medical bills of \$15,325.46 which were stipulated at the trial. Petitioner also alleged future damages.

II. PROCEDURAL HISTORY

Ppetitioner filed her Complaint on or about July 27, 2011, and Respondent was served

shortly thereafter. Respondent served his Answer on or about August 24, 2011. Respondent ultimately retained Robert J. Cirincione, M.D., a board certified orthopedic surgeon, to conduct a medical records review (A.R. 29-37.) Respondent timely served his expert disclosure on or about April 30, 2012, which included a report authored by Dr. Cirincione. (A.R. 31-33.) In his report, as well as his evidentiary deposition, Dr. Cirincione agreed that Petitioner had suffered both a cervical and thoracic sprain/strain as a result of the automobile accident. (A.R. 31-33, 104.) He had no opinion as to Petitioner's occipital neuralgia diagnosis. (A.R. 31-33, 111.) Dr. Cirincione's report further contained references made to the Official Disability Guidelines (hereinafter referred to as the "ODG"), a study by Alice Kongsted, et al., entitled "Neck Collar, 'Act as Usual' or Active Mobilization for Whiplash Injury? A randomized Parallel-Group Trial" (hereinafter referred to as "Act as Usual"). (A.R. 31-33.) Dr. Cirincione concluded based on Petitioner's medical records, his experience, and the pertinent literature that Petitioner's continuation of physical therapy beyond ten visits over eight weeks was not supportable. (Id.) Dr. Cirincione's report was not admitted into evidence at trial.

Following Respondent's disclosure of Dr. Cirincione, Petitioner requested Respondent supplement his discovery responses. (A.R. 129.) Correspondence between the parties focused mainly on the literature upon which Dr. Cirincione relied. (A.R. 129-131.) Unfortunately, Dr. Cirincione advised that the ODG and "Act as Usual" were copyright protected, could not be printed, and were only available to him via a password protected online database. Respondent advised Petitioner of the same via written correspondence and informed her she could access the literature online or at the library. (A.R. 130.) Petitioner subsequently filed a motion to compel regarding Dr. Cirincione and the literature upon which he relied. (A.R. 124-132.) Ultimately,

Respondent served supplemental responses to Petitioner's discovery requests on or about July 27, 2012.¹ (A.R. 1.) Petitioner also served additional requests for production specifically tailored to Dr. Cirincione on or about June 7, 2012. (A.R. 133.) Respondent objected to a number of the requests but provided the documents available, which was the entirety of Dr. Cirincione's file related to the case. (Id.) Consequently, Petitioner filed a second motion to compel discovery regarding Dr. Cirincione and the literature upon which he relied, as well as two motions in *limine* to exclude the opinions held by Dr. Cirincione.

Petitioner's first motion in *limine* argued that Dr. Cirincione's opinion was neither relevant nor reliable and the literature Dr. Cirincione relied upon was not admissible under Daubert. (A.R. 47-65.) Respondent's response explained that Dr. Cirincione's opinion is reliable and admissible, and that opinion is not barred by Daubert as the medical literature was simply used to support his opinion. (A.R. 66-72, 73-123.) Petitioner's second motion in *limine* argued Dr. Cirincione should be precluded from offering any opinion evidence testimony regarding "Act as Usual" or the ODG as Respondent's counsel and Dr. Cirincione were not willing to produce the articles/treatise to Petitioner's counsel. (A.R. 213-221.) A hearing on the two motions was not immediately available.

Dr. Cirincione's deposition was held August 28, 2012. (A.R. 78.) At that time, in accordance with his report, Dr. Cirincione testified that Petitioner had suffered both a cervical and thoracic sprain/strain as a result of the automobile accident. (A.R. 31-33, 88, 104.) Dr.

¹ Respondent's supplemental discovery responses provided the copyright of the ODG. On a later date, it was determined that the ODG was available to Petitioner online at a cost of \$295.00. Petitioner ultimately obtained a copy of "Act as Usual" prior to Dr. Cirincione's evidentiary deposition but chose not to pay for access to the ODG. (A.R. 1.)

Cirincione had no opinion on Petitioner's occipital neuralgia diagnosis. (A.R. 31-33, 105.)

Based on his experience, the Petitioner's medical records, and the available literature, Dr.

Cirincione testified that Petitioner's injuries should have resolved in six to eight weeks, and that

Petitioner's treating physicians were treating her based on her subjective complaints and not any

objective findings. (A.R. 89, 108.) On cross-examination, Petitioner's counsel questioned Dr.

Cirincione regarding his reliance on the ODG in preparing his report. That testimony was as

follows:

Q. Doctor, you relied upon a book in your report, which was Official Disability Guidelines; is that right, sir?

A. It's not really a book, it's an online – I access it online, I don't have the book. Yes, but I used the Official Disability Guidelines.

Q. Do you know that it was not an official book in the State of West Virginia?

A. No, I don't know it's not an official book in the State of West Virginia. I use it, basically, I use it for – to access the peer-reviewed articles. I assume the peer-reviewed articles are accepted in West Virginia. So that's why I use it.

(A.R. 106.)

Though it is true that Dr. Cirincione referenced "peer-reviewed articles" he accessed via the ODG, Petitioner's counsel never objected to the reference or asked Dr. Cirincione to name

the titles of the works he specifically relied upon during that deposition. (A.R. 106-107.)

Furthermore, Petitioner's counsel never requested Dr. Cirincione's discovery deposition in which they could have asked the same. Furthermore, for a fee, Petitioner's counsel could have accessed the ODG.

At the pre-trial conference on September 5, 2012, there were no rulings made specifically as to Petitioner's motions to compel, but the Circuit Court did rule on her motions in *limine* to exclude the opinions of Dr. Cirincione. Both motions in *limine* were premised upon the non-disclosure of literature Dr. Cirincione relied upon to support his opinion. Both motions were denied. At trial, Respondent offered the evidentiary deposition of Dr. Cirincione.

Respondent also presented his closing argument. Petitioner's counsel made no objections to the closing argument either in the presence or absence of the jury. The entire trial lasted five days.² Following deliberations, the jury reached a verdict in favor of Petitioner on liability and damages. Petitioner was awarded past medical expenses in the amount of \$11,604.46; past pain and suffering in the amount of \$5,000.00; past aggravation, annoyance, anguish, and loss of enjoyment of life in the amount of \$5,000.00, for a total of \$21,604.40. The jury did not award Petitioner for past chiropractic care³ or future damages. This award was made consistent with all the evidence presented to the jury.⁴

SUMMARY OF ARGUMENT

Dr. Cirincione is a board certified orthopaedic surgeon with over thirty-five years of

²The circuit court recessed at the beginning of the third day of trial to permit Respondent's counsel to depose Petitioner's chiropractor, Michael Mason, D.C. (hereinafter referred to as "Dr. Mason"). The deposition was deemed necessary due to Dr. Mason's never-before-disclosed opinions on Petitioner's permanency and future care.

³Evidence introduced at trial confirmed that Petitioner did not seek chiropractic care until after Respondent's Motion in *Limine* to Exclude Undisclosed Expert Testimony was filed. Petitioner sought chiropractic care at the direction of counsel.

⁴First, the evidence showed that following a nearly two year gap in treatment Petitioner only sought treatment and opinions from Dr. Mason after Respondent filed a Motion in *Limine* to Exclude Undisclosed Expert Opinions. Dr. Mason ultimately opined that Petitioner would need life long care. Despite the untimeliness of the disclosure, Dr. Mason was allowed to give all his opinions at trial. Second, Petitioner's medical records revealed that Petitioner had nearly recovered two months after the accident. Finally, Petitioner's supervisor, Nalene Bice, testified that three months after the accident, Petitioner was a great worker, could stock shelves, and was even capable of lifting the heavy items.

experience in his field who relied on literature for additional support of his expert medical opinion. Dr. Cirincione was unable to provide Petitioner with copies of the literature, however, the literature was readily available to Petitioner. Furthermore, the Circuit Court did rule on Petitioner's motions in *limine* which, just as Petitioner's motions to compel, were based on Respondent's failure to produce the literature. As a result, Petitioner's ability to cross-examine or rebut Dr. Cirincione was not hindered and the Circuit Court's failure to specifically rule on her motions to compel was of no effect. Ultimately, the jury's award, devoid of future damages or past damages for chiropractic care, was the result of the entirety of the evidence presented at trial and not simply the testimony of Dr. Cirincione. The Circuit Court's refusal to grant Petitioner's Motion for a New Trial based upon the same did not constitute error.

Furthermore, Respondent's counsel did not personally attack or disparage Petitioner or Petitioner's counsel in closing arguments sufficient to prejudice Petitioner. Moreover, Petitioner's counsel failed to raise any objections to Respondent's closing argument and therefore waived the right to raise the issue on appeal. Therefore, the Circuit Court's refusal to grant Petitioner's Motion for a New Trial did not constitute error.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rev. R.A.P. 18(a), oral argument is not necessary as the facts and legal arguments are adequately presented in the briefs and record on appeal unless the Court decides the decisional process would be significantly aided by oral argument. If the Court decides oral argument is necessary, this case is appropriate for Rule 19 argument and disposition by memorandum decision.

ARGUMENT

I. THE CIRCUIT COURT RULED ON PETITIONER'S MOTIONS IN *LIMINE* WHICH, JUST AS PETITIONER'S MOTIONS TO COMPEL, WERE BASED UPON RESPONDENT'S FAILURE TO PROVIDE LITERATURE; THEREFORE, PETITIONER WAS NOT DENIED THE ABILITY TO EFFECTIVELY CROSS-EXAMINE OR REBUT DR. CIRINCIONE'S OPINION, AND NO ERROR OCCURRED.

Rule 37(a) of the West Virginia Rules of Civil Procedure permits a party to move for an order compelling discovery. W. Va. R. Civ. P. 37(a). Generally, a Circuit Court's ruling on a discovery request is reviewed for an abuse of discretion. State ex rel. Ward v. Hill, 200 W.Va. 270, 275, 489 S.E.2d 24, 29 (1997). However, when no findings are made, this Court proceeds under a heightened review of the Circuit Court's ruling. Id.

Here, despite Petitioner's argument otherwise, the Circuit Court did essentially rule on her motions to compel discovery.⁵ (A.R. 5-8, 9-11, 12-14.) Petitioner's two motions to compel were premised on Respondent's failure to provide literature upon which Dr. Cirincione referenced in his report. Similarly, Petitioner's motions in *limine* sought to exclude Dr. Cirincione's opinions due to Respondent's failure to provide the literature upon which he referenced.⁶ (A.R. 47-55, 213-221.) While it is true that the Circuit Court did not specifically rule on Petitioner's motions to compel, it did rule on her motions in *limine*, essentially combining the issues presented in all four of Petitioner's motions.⁷ (A.R. 5-8, 9-11, 12-14.) Argument on the motions in *limine* was heard at the pre-trial conference and the motions were denied. This

⁵In fact, in her Brief, even Petitioner recognizes that her motions to compel and motions in *limine* to exclude the opinions of Dr. Cirincione were based upon common grounds.

⁶Petitioner specifically references "Act as Usual" and the ODG in her motions in *limine*.

⁷Even Petitioner admits in her brief that her motions to compel and motions in *limine* to exclude the opinions of Dr. Cirincione were all based upon common grounds.

rendered any ruling specific to Petitioner's motions to compel unnecessary.

This idea that all four motions were combined is further bolstered by the Circuit Court's "Order Denying New Trial." (A.R. 1-4.) In that Order, the Circuit Court's ruling solidifies the notion that rulings on Petitioner's motions to compel were not necessary. (*Id.*) The Circuit Court points out that Petitioner had obtained a copy of the article "Act as Usual" and the ODG was available to Petitioner at a cost of \$295.00. (*Id.*) Therefore, on appeal, Petitioner now seeks to place blame with the Circuit Court for her inability to effectively cross-examine or rebut Dr. Cirincione's testimony when it was counsel that elected to proceed without the ODG.

Petitioner also states that Dr. Cirincione testified that he accessed "other peer reviewed articles" on the ODG website and that Dr. Cirincione never identified these articles. This, as Petitioner contends, also contributed to her inability to effectively challenge Dr. Cirincione's opinions. Petitioner, however, has waived any argument relating to "other peer reviewed articles" as Petitioner failed to object to Dr. Cirincione's reference during his evidentiary deposition, failed to ask Dr. Cirincione what these articles were, and ultimately failed to raise the argument before the Circuit Court.⁸ This Court has held that "In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." Syl. Pt. 1, *Mowery v. Hitt*, 155 W.Va. 103, 181 S.E.2d 334 (1971). Furthermore, Petitioner cites to Dr. Cirincione's copyright protection as his reason for refusing to produce the ODG and then references the "fair use" exception of the Copyright Act of 1976. Again, Petitioner failed to raise this argument before the Circuit Court; and therefore, the argument cannot be considered now on appeal.

⁸Petitioner's arguments before the Circuit Court focused exclusively on "Act as Usual" and the ODG.

Therefore, the Circuit Court did not err regarding Petitioner's motions to compel. To begin, the Circuit Court lumped the issue contained within Petitioner's motions to compel with Petitioner's motions in *limine* as they were all premised on the same notion: Respondent's failure to disclose literature on which Dr. Cirincione relied. Second, Petitioner fails to mention that a copy of "Act as Usual" and the ODG were both available to her. (A.R. 1-4.) In fact, Petitioner obtained a copy of "Act as Usual" and simply chose not to pay the cost to access the ODG, rendering any previously filed motions to compel moot. (*Id.*) Finally, Petitioner's arguments related to "other peer reviewed articles" and the "fair use" exception, though irrelevant given her ability to access the literature, were not argued before the Circuit Court. All in all, the Circuit Court did not err.

II. PETITIONER'S MOTIONS IN *LIMINE* WERE CORRECTLY DENIED AS PETITIONER EITHER HAD OR WAS CAPABLE OF OBTAINING THE LITERATURE ON WHICH DR. CIRINCIONE RELIED AND THEREFORE WAS NOT PREJUDICED IN HER ABILITY TO CHALLENGE DR. CIRINCIONE'S OPINIONS AND PROVE HER DAMAGES

Petitioner filed two motions in *limine* before the Circuit Court to exclude the testimony of Dr. Cirincione. (A.R. 47-65, 213-221.) Petitioner reasoned in her motions in *limine* that Dr. Cirincione's opinion should be excluded because he failed to provide the literature upon which he relied to support his medical opinion. (*Id.*) Petitioner argues that this resulted in a "two fold blow" as she was denied the discovery needed to challenge his opinions. Petitioner argues that Dr. Cirincione had no personal knowledge rendering his opinion unreliable, irrelevant, and inadmissible under Daubert. Second, Petitioner argues the overall point that he should not have been permitted to testify concerning the ODG and "other peer reviewed articles" which were not disclosed. Petitioner's argument is not well-founded.

First, Despite Petitioner’s contentions otherwise, Dr. Cirincione’s opinion regarding his review of Plaintiff’s medical records was reliable and admissible. Although general witness testimony is governed by Rule 602 of West Virginia Rules of Evidence (hereinafter referred to as the “WVRE”), expert testimony is governed by Rule 702 of the West Virginia Rules of Evidence. The much more liberal Rule 702 provides that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In fact, our Court has recognized that, the Rules of Evidence are liberal and should “err on the side of admissibility.” Gentry v. Magnum, 195 W.Va. 512, 525, 466 S.E.2d 171, 185 (1995).

Rule 703 of the WVRE goes on to provide that:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 703, however, applies only when inadmissible evidence is relied upon. Gentry, 195 W.Va. at 529, 466 S.E.2d at 188. If the expert’s opinion is based upon admissible evidence, Rule 703 does not apply. Id. Here, Dr. Cirincione’s testimony was based upon Petitioner’s medical records, his education, knowledge, and practical experience. Petitioner’s medical records are admissible, as well as any details regarding Dr. Cirincione’s education and experience.

Therefore, Rule 703 is inapplicable.

Furthermore, Petitioner’s argument that Dr. Cirincione lacked personal knowledge is misplaced. Although Dr. Cirincione never physically examined Petitioner, he was provided

copies of all her medical records obtained through discovery and a synopsis of the case. (A.R. 31-33, 82-83) Therefore, he did have personal knowledge as to Petitioner's claimed injuries and the treatment she received as a result. Additionally, the fact that Dr. Cirincione did not personally examine Petitioner goes to the weight of his testimony, not to its admissibility. This Court has accepted this sentiment, providing that, "The axiom is well recognized: the reliability of evidence goes 'more to its weight than to the admissibility of the evidence.'" Gentry, 195 W.Va. at 528, 187, 466 S.E.2d, citing United States v. Jakobetz, 955 F.2d 786, 800 (2d Cir. 1992).

Moreover, simply because Dr. Cirincione never personally examined Petitioner and does not diagnose his own patients based upon a records review does not render his opinion irrelevant and unreliable or inadmissible. Dr. Cirincione is a board certified orthopaedic surgeon with over thirty-five years of experience in his field. (A.R. 79-80.) Even though Petitioner did not have surgery, Dr. Cirincione examines, diagnoses, and treats patients on a daily basis with the same diagnosis of soft tissue injuries and complaints as Petitioner. Further, doctors routinely collaborate regarding appropriate treatment based upon records and films. In the end, Dr. Cirincione was not asked to examine Petitioner, and he testified at his evidentiary deposition that examining a whiplash patient, who has no objective findings more than two years after the accident, is not necessary for his opinion. (A.R. 109.) Again, he reviewed all of Petitioner's medical records, including reports from X-rays, an MRI, and an EMG, all of which were normal. (A.R. 84, 89.) Dr. Cirincione also testified that Petitioner reported herself that she went from severe pain and disability of the neck to mild within two months. (A.R. 87.) Based upon his experience and the medical records, Dr. Cirincione opined that given the lack of objective

evidence of any injury and Petitioner's decreased symptoms that two months of physical therapy would have been reasonable. (A.R. 107.) Ultimately, Petitioner seeks to eliminate an entire category of potential expert witnesses for any and all defense counsel. Her argument, at its core, is that to be qualified as an expert, that expert must have personally interacted with the Plaintiff. This, of course, would set a dangerous precedent and at times render claims defenseless.

Second, Dr. Cirincione's testimony was admissible and not barred by Daubert as Petitioner contends. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), provides that it is "the trial judge[s]...task to ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Under Daubert, the reliability requirement is only met once the trial court has found under Rule 104(a) that the scientific or technical theory which is the basis for the test results is indeed "scientific, technical, or ...specialized knowledge." Gentry, 195 W.Va. at 518, 466 S.E.2d at 178. The relevancy requirement, however, compels the trial judge to determine, under Rule 104(a), that the scientific evidence "will assist the tier of fact to understand the evidence or to determine a fact in issue. Id. citing W.Va. R. Evid. 702.

The circuit court's assessment will include such factors as the ability to be tested, peer review and publication, and potential rate of error. Daubert, 509 U.S. at 580. General acceptance is also an important factor although it is no longer determinative. Id. This Court has recognized, however, that these factors "are by no means a definitive checklist or test of reliability." San Francisco v. Wendy's Intern., Inc., 221 W.Va. 734, 742, 656 S.E.2d 485, 493 (2007). Moreover, the court is not required to afford equal weight to each factor, but instead may balance the factors as it deems appropriate. Gentry, 195 W.Va. at 180, 466 S.E.2d at 521. Furthermore, this Court has also recognized that because of the "liberal thrust" of the rules

pertaining to experts, circuit courts should err on the side of admissibility. Gentry, 195 W.Va. at 525, 466 S.E.2d at 184.

Here, Dr. Cirincione's opinion was not precluded by Daubert. Dr. Cirincione offered his medical opinion. His opinion was premised upon his education, knowledge, practical experience, as well as a review of Petitioner's medical records and the case synopsis. The bases for Dr. Cirincione's conclusions were all of these factors, and he offered medical literature to which Petitioner finds fault, as additional evidence to support his position. Dr. Cirincione did not rely entirely upon said literature to make his conclusions regarding Petitioner. Therefore, it is disingenuous to say that Dr. Cirincione's testimony should have been excluded. Dr. Cirincione is clearly a qualified expert that provided reliable testimony. He has had extensive experience with patients, just like Petitioner, over the course of his career as an orthopaedic surgeon. Undoubtedly he is educated and knowledgeable in his field. He also has in-depth knowledge as to Petitioner's claimed injuries and treatments on which he based his medical opinions. Furthermore, his testimony regarding Plaintiff's injuries and damages is relevant. Dr. Cirincione's testimony as to Petitioner's injuries assisted the jury in understanding Petitioner's injuries and the damages she claimed as a result.

Furthermore, Petitioner did not request a Daubert hearing and as a result, Dr. Cirincione was never questioned before the Circuit Court for the specific purpose of determining whether his qualifications were adequate, his opinions reliable and relevant, whether he lacked personal knowledge, and whether the literature he relied upon to support his opinions was peer reviewed. Nonetheless, Dr. Cirincione's evidentiary deposition was taken on Tuesday, August 28, 2012. At that deposition, Dr. Cirincione described his qualifications at length. Additionally, Dr.

Cirincione stated he has qualified as an expert in New York, Pennsylvania, West Virginia, Maryland, Virginia, and in Federal Courts in West Virginia and Maryland. Dr. Cirincione is an orthopedic surgeon, whose treatment has included conservative management of soft tissue injuries over the course of his thirty-five year practice. As a result, Dr. Cirincione's opinion was not barred by Daubert.

Finally, Petitioner raises a new argument indicating that Dr. Cirincione should not have been permitted to offer an opinion on scientific literature that could not be validated. Petitioner failed to raise this argument before the Circuit Court; and therefore, the argument cannot be considered now on appeal. Despite this, however, Petitioner fails to address that she had the ability to access the ODG and could have cross-examined Dr. Cirincione on the resource or any exceptions thereto. Petitioner also had the opportunity to question Dr. Cirincione at his evidentiary deposition or to request a discovery deposition. Finally, soft tissue injuries, such as Petitioner's, also occur in workplace settings. Simply because the method of injury may be different does not invalidate the ODG as the injuries, recommended treatment, and length of treatment remain the same.

III. PETITIONER'S FAILURE TO TIMELY OBJECT TO RESPONDENT'S CLOSING ARGUMENT WAIVES HER RIGHT TO ASSERT THE ERROR ON APPEAL.

Petitioner contends that her failure to object to remarks within Respondent's closing argument was due in part because such objections are generally disfavored, and cites Farmer v. Knight, 207 W.Va. 716, 536 S.E.2d 140 (2000), to justify the absence of any objection. In Farmer, a personal injury case, appellant argued that the circuit court erred by refusing to allow her counsel to object to the following remarks made by counsel for the appellees: "I think she's

been victimized by the system, by her boyfriend, by her family, by her attorney. This is a made up case with regard to the head injury.” Farmer, 207 W.Va. at 721. While the Circuit Court refused the appellant’s counsel permission to approach the bench when the statement was made, the objection was addressed following closing arguments and the jury was sent to the jury room for deliberations. Id. at 722. Ultimately, this Court found that the circuit court’s decision to address the objection after closing arguments were completed is not unusual considering the fact that such objections are generally disfavored. Id. at 721-722.

What Petitioner fails to point out is twofold. First, unlike appellant’s counsel in Farmer, Petitioner’s counsel made absolutely no objection or indication that remarks made by Respondent’s counsel were objectionable. Second, although Farmer provides that objections during closing arguments are generally disfavored, Farmer does not find that such objections are disallowed. In fact, West Virginia Trial Court Rule 23.04 allows for such objections, providing that:

Counsel shall not be interrupted in argument by opposing counsel, except as may be necessary to bring to the court’s attention objection to any statement to the jury made by opposing counsel and to obtain a ruling on such objection.

Therefore, if Petitioner’s counsel found the remarks made by counsel for Respondent irrelevant and disparaging, they were permitted, under the Trial Court Rules, to object. Because Petitioner’s counsel failed to object either during or after Respondent’s closing argument, she has waived her right to argue any error on appeal.

This Court has consistently held that:

Failure to make timely and proper objection to remarks of counsel made in presence of jury, during trial of case, constitutes waiver of

right to raise question thereafter either in trial court or in appeal court.

Syl. Pt. 6, Yuncke v. Welker, 128 W.Va. 299, 36 S.E.2d 410 (1945); Syl. Pt. 7, State v. Cirullo, 142 W.Va. 56, 93 S.E.2d 526 (1956); Syl. Pt. 5, State v. Davis, 180 W.Va. 357, 376 S.E.2d 563 (1988). This Court has further maintained that failure to make a timely objection seriously impairs the right to subsequently raise the objection. Johnson v. Garlow, 197 W.Va. 674, 478 S.E.2d 347 (1996). This Court has found that:

When a litigant deems himself or herself aggrieved by what he or she considers to be an important occurrence in the course of a trial or an erroneous ruling by a trial court, he or she ordinarily must object then and there or forfeit any right to complain at a later time. The pedigree for this rule is of ancient vintage, and it is premised on the notion that calling an error to the trial court's attention affords an opportunity to correct the problem before irreparable harm occurs.

State v. Whittaker, 221 W.Va. 117, 131-132, 650 S.E.2d 216, 230-231 (2007). Furthermore, the "raise or waive" rule has been explained to prevent a party from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error. Id. at 132, 231.

Admittedly, the "raise or waive" rule is not absolute where, in extraordinary circumstances, the failure to object constitutes plain error. Id. at 131. "The 'plain error' doctrine grants appellate courts in the interest of justice, the authority to notice error to which no objection has been made." State v. Miller, 194 W.Va. 3, 18, 459 S.E.2d 114, 129 (1995). "To trigger application of the plain error doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, Page v. Columbia Natural Resources, Inc., 198 W.Va. 378, 480 S.E.2d 817 (1996). Overall, the doctrine should be exercised only to avoid a miscarriage of

justice. Syl. Pt. 7, State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996). The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings. Id.

Here, the closing argument Petitioner challenges is not saved by plain error. In Miller, this Court explained that the plain error analysis begins with a determination of whether there was in fact an error. The Court reasoned that:

[D]eviation from a rule of law is error unless there is a waiver. Waiver ... is the 'intentional relinquishment or abandonment of a known right.' ... [W]hen there has been such a knowing waiver, there is no error and the inquiry as to the effect of the deviation from a rule of law need not be determined.

Miller, 194 W.Va. at 18, 459 S.E.2d at 129. The Miller Court went on to explain that “[n]ormally, to affect substantial rights means that the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court.” Id. In the case at hand, Petitioner fails to consider that the entire record, not simply closing arguments, were considered by the jury. For example, Petitioner’s witness and supervisor, Nalene Bice, testified that in November 2009, just three months after the accident, Petitioner came to work for her at Elder Beerman. Ms. Bice described Petitioner as a great worker, and testified she was capable of stocking shelves, even with heavy stuff. Additionally, Petitioner’s medical records, consistent with Dr. Cirincione’s testimony of strains and sprains, indicated Petitioner’s injuries were nearly resolved two months after the accident.

Despite what Petitioner’s brief would lead this Court to believe, there was sufficient evidence to support the jury’s verdict. Therefore, plain error is not triggered and Petitioner’s

failure to raise any objections waived her right to argue any error on appeal.

Any error made with regard to Respondent's closing argument is that of Petitioner, and not that of the Circuit Court. Furthermore, Respondent's closing argument was not improper and certainly was not on par with the personal attacks made by defense counsel in Farmer.

CONCLUSION

The Circuit Court did not abuse its discretion when it did not specifically rule on Petitioner's motions to compel as it essentially ruled on the motions when it ruled on Petitioner's motions in *limine* as all four motions were based upon common grounds. Petitioner's motions in *limine* to exclude Dr. Cirincione's opinions were correctly denied by the Circuit Court as Petitioner had the "Act as Usual" article and was capable of accessing the ODG. Therefore, Petitioner was not prevented from challenging Dr. Cirincione's opinions on cross-examination or rebuttal. Furthermore, despite Respondent's contention that remarks during closing argument were not improper, irrelevant, or inflammatory, Petitioner failure to timely object effectively waives her right to assert the error on appeal. Ultimately, the Circuit Court did not err in refusing to award Petitioner a new trial. The Circuit Court's ruling should be affirmed and Petitioner's Appeal dismissed.

Respectfully submitted,



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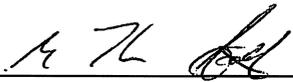
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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of July, 2013, I served the foregoing “**Respondent’s Brief**” upon the following by depositing a true copy thereof in the United States mail, postage prepaid, in a sealed envelope addressed as follows:

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