

13-0252

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

BARBARA POWELL,

Plaintiff,

v.

CIVIL ACTION NO. 11-C-324-1  
JUDGE J. LEWIS MARKS, JR.

DONALD MEREDITH,

Defendant.

**ORDER DENYING NEW TRIAL**

On the 15<sup>th</sup> day of January, 2013, came the parties by their respective counsel of record pursuant to the Plaintiff's "Motion for New Trial".

The Plaintiff argued that the Court should grant a new trial for essentially two reasons. First the Plaintiff argued that Defendant had not produced certain Discovery, particularly related to Defendant's Expert, Dr. Robert Cirincione, including prior reports, a copy of the complete file and literature cited by Dr. Cirincione in his report. Secondly, the Plaintiff argued that Defense counsel's closing argument was grossly improper and made several irrelevant disparaging remarks, warranting a new trial.

Upon review of the Pleadings filed herein, argument of counsel and Discovery documents filed for the purpose of defending this Motion, the Court finds that Defendant served Supplemental Discovery Responses on or about July 27<sup>th</sup>, 2012, indicating that Dr. Cirincione revealed that he does not keep copies of prior I.M.E. reports and that the entirety of Dr. Cirincione's file had been produced to Plaintiff. Further it appears that Plaintiff had obtained a copy of the article "Act as Usual" prior to the evidentiary deposition of Dr. Cirincione. Additionally, it appears by Supplemental Discovery Responses served herein on July 27<sup>th</sup>, 2011, Defendant identified the copyright of the "Official Disability Guideline" referred to in Dr. Cirincione's report. It further appears that a copy of the Guideline was available to the Plaintiff at a cost of approximately \$295.00. Accordingly, the Court finds that the literature, which Dr. Cirincione did not produce citing copyright infringement was available to Plaintiff. Plaintiff could have purchased the "Official Disability Guidelines" and sought the cost from the Defendant. Hence, the Court will not grant a new trial based on the failure to provide the

literature.

The Court further finds that Plaintiff did not object to any statement of defense counsel during closing argument. The court finds that failure to timely object to remarks of counsel made in the presence of the jury, constitutes a waiver or the right to raise the question thereafter absent extraordinary circumstances invoking the plain error doctrine. *State v. Griffy*, 727 S.E.2d 847 (WV 2012). The Plaintiff has not established extraordinary circumstances invoking the plain error doctrine. The plain error doctrine should only be involved to avoid a miscarriage of justice. *State v. LaRock*, 470 S.E.2d, 613 (WV 1996). The Court finds that Plaintiff has not demonstrated extraordinary circumstances or a substantial miscarriage of justice.

For all of the foregoing reasons, the Court denies Plaintiff's "Motion for New Trial".

The Clerk is directed to forward a certified copy of this order to all counsel of record at the addresses listed below.

ENTER: February 7, 2013  
John Lewis Marko, Jr.  
JUDGE

PREPARED BY:

G. Thomas Smith  
G. Thomas Smith (WVSB #4617)  
Afton L. Aman (WVSB #10808)  
Smith, McMunn & Glover, PLLC  
516 West Main Street  
Clarksburg, WV 26301  
**Counsel for Defendant, Donald Meredith**

SEND COPY OF ORDER TO:

Jo Marie Pitrolo (WVSB #2916)  
Higinbotham & Higinbotham, PLLC  
PO Box 567  
Fairmont, WV 26554-0567  
**Counsel for Plaintiff, Barbara Powell**

STATE OF WEST VIRGINIA  
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18<sup>th</sup>  
Family Court Circuit of Harrison County, West Virginia, hereby certify the  
foregoing to be a true copy of the ORDER entered in the above styled action  
on the 7 day of February, 2013.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix

Seal of the Court this 7 day of February, 2013.

Donald L. Kopp II  
Fifteenth Judicial Circuit & 18<sup>th</sup> Family Court  
Circuit Clerk  
Harrison County, West Virginia

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

BARBARA POWELL, :  
 :  
 Plaintiff, :  
 :  
 v. : Civil Action No. 11-C-324-1  
 : John Lewis Marks, Jr.  
 DONALD MEREDITH, :  
 :  
 Defendant. :

**ORDER RULING ON REMAINING MOTIONS**

The Court, by letter ruling dated September 14, 2012, set forth its rulings on the remaining motions pending in this case. The Court now **ORDERS** as follows:

Plaintiff's motion in limine no. 14 (headrest photographs/argument) -- **GRANTED**, insofar as no testimony shall be permitted concerning the effect of the headrest on plaintiff's injuries because no expert testimony is available in that regard.

Plaintiff's motion in limine no 15 (expert opinion testimony of Dr. Robert Cirincione) -- **DENIED**

Plaintiff's motion in limine no. 17 (license suspensions of Dr. Maurice Rhodes) -- **GRANTED**

Plaintiff's motion in limine no. 23 (summary exhibits) -- **GRANTED**

Plaintiff's motion in limine no. 26 (unavoidable collision) -- **GRANTED**, insofar as there can be no unavoidable accident argument. However, the Court will permit the parties to adduce evidence concerning the physical conditions existing at the time of the collision.

Defendant's motion in limine no. 11 (date of liability admission) -- **HELD IN ABEYANCE**. The Court will be in a better position to rule upon this motion at trial.

Defendant's motion in limine no. 12 (kidney donation) -- **DENIED**

The Circuit Clerk is **DIRECTED** to send certified copies of this Order to the following:

Jo Marie Pitrolo, Esq.  
HIGINBOTHAM & HIGINBOTHAM, PLLC  
132 Adams Street, Suite 100  
Post Office Box 567  
Fairmont, WV 26554

April J. Wheeler, Esq.  
KHAN & ASSOCIATES  
53 Fourteenth Street, Suite 602  
Wheeling, WV 26003

G. Thomas Smith, Esq.  
Afton Hutson, Esq.  
SMITH, McMUNN & GLOVER, PLLC  
516 West Main Street  
Clarksburg, WV 26301

ENTER: September 17, 2012

John Lewis Marks, Jr.  
The Hon. John Lewis Marks, Jr., Chief Judge

STATE OF WEST VIRGINIA  
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18<sup>th</sup>  
Family Court Circuit of Harrison County, West Virginia, hereby certify the  
foregoing to be a true copy of the ORDER entered in the above styled action

on the 17 day of September, 2012.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix

Seal of the Court this 17 day of September, 2012.

Donald L. Kopp II su  
Fifteenth Judicial Circuit & 18<sup>th</sup> Family Court  
Circuit Clerk  
Harrison County, West Virginia

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

BARBARA POWELL,

Plaintiff,

v.

Civil Action No. 11-C-324-1

DONALD MEREDITH,

Defendant.

**ORDER REGARDING OUTSTANDING MOTIONS IN LIMINE**

On the 5<sup>th</sup> day of September, 2012, came the parties by their respective counsel of record pursuant to the Pre-Trial Conference and the Court heard argument regarding various "Motions in *Limine*". The Court ruled on several of the Motions but held 7 various Motions in abeyance and gave the parties additional time to supply supplemental memorandum in support thereof.

Upon consideration of the Pleadings and argument of counsel, the Court makes the following rulings regarding the outstanding Motions in *Limine*.

The Court grants Plaintiff's Motion in *Limine* #14, insofar as the Court will prevent testimony concerning the effect of the headrest on Plaintiff's injuries, because no Expert testimony is available in that regard. The Court denies Plaintiff's Motion in *Limine* #15, (Dr. Cirincione) and Defendant's Motion in *Limine* #12 (kidney donation). The Court grants Plaintiff's Motion in *Limine* #17, regarding license suspensions of Dr. Rhodes and grants Plaintiff's Motion in *Limine* #23, regarding Plaintiff's summary exhibits. Plaintiff's Motion in *Limine* #26, is granted insofar as there can be no unavoidable accident argument. However, the Court will permit the parties to adduce evidence concerning the physical conditions existing at the time of the collision.

Each party objects and excepts to the Rulings which are adverse to them.

The Clerk is directed to forward a certified copy of this order to all counsel of record at the addresses listed below.

ENTER: September 18, 2012  
Donald Lewis Meredith, Jr.  
JUDGE

PREPARED BY:

  
G. Thomas Smith (WVSB #4617)  
Afton L. Hutson (WVSB #10808)  
Smith, McMunn & Glover, PLLC  
516 West Main Street  
Clarksburg, WV 26301  
**Counsel for Defendant, Donald Meredith**

SEND COPY OF ORDER TO:  
George R. Higinbotham, Jr. (WVSB #1719)  
Jo Marie Pitrolo (WVSB #2916)  
Higinbotham & Higinbotham, PLLC  
PO Box 567  
Fairmont, WV 26554-0567  
**Counsel for Plaintiff, Barbara Powell**

STATE OF WEST VIRGINIA  
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18<sup>th</sup>  
Family Court Circuit of Harrison County, West Virginia, hereby certify the  
foregoing to be a true copy of the ORDER entered in the above styled action  
on the 18 day of September, 2012.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix

Seal of the Court this 24 day of September, 2012.

Donald L Kopp II  
Fifteenth Judicial Circuit & 18<sup>th</sup> Family Court  
Circuit Clerk  
Harrison County, West Virginia

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

BARBARA POWELL,

Plaintiff,

v.

Civil Action No. 11-C-324-1

DONALD MEREDITH,

Defendant.

ORDER

On the 5<sup>th</sup> day of September, 2012, came the parties by their respective counsel of record pursuant to the "Final Pre-Trial Conference". The Court heard argument regarding the various Motions in *Limine* filed by the parties and made the following rulings.

Plaintiff's Motions in *Limine*, 1 through 6, and Motions 8 through 11, 16, and 18 through <sup>and 22</sup> 20, are granted. Motion 7, is held in abeyance, but Defendant is ordered to notify Plaintiff and the Court if he intends to introduce evidence of the date that Plaintiff retained counsel and the Court will address the issue. Motion 12, is moot as there are no gratuitous services involved. Motion 13, is held in abeyance as the Court will need to hear the evidence at Trial before any such ruling could be made. The Defendant is ordered to respond in writing to Motions 14, 15, and 17, on or before Monday, September 10, 2012. The Court denies Motions 21, and 24. The Court further orders that Defendant advise the Court on or before Monday, September 10<sup>th</sup>, whether he has any objection to the Plaintiff's summary exhibits of medical bills and treatment and future medical expenses identified in Motion 23.

*pcms*

As to Plaintiff's supplemental Motions in *Limine*, the Court denies Motion 25, as the investigating Officer is entitled to testify as to any statement made to him by the Plaintiff, or his

observations at the scene. The Defendant represented that he did not intend to illicit an opinion from the Officer regarding Plaintiff's injuries. Motion 26, is taken under advisement and the Defendant may submit a response to that Motion on or before Monday, September 10<sup>th</sup>. In response to Motion 27, the Defendant represented he intended to produce no evidence or argument of Comparative fault of the Plaintiff, but Defendant may explain how the accident occurred.

The Court then heard argument of counsel regarding Defendant's Motions in *Limine*. Defendant clarified that Motion 1, was only sought at this time to exclude any evidence which has not hereto before been provided to avoid surprise and prejudice. To the extent that said Motion is modified, it is granted. The Court further granted Motions 2 through 10, filed by the Defendant. Defendant withdrew Motion 13, and the Court directed the parties to brief their position with regard to Defendant's Motion 11 and 12, on or before 9/10/12. The Court cautions the parties that the rulings on these Motions in *Limine* are pre-trial rulings and that either party may open the door to permit evidence which has been otherwise ruled inadmissible in this Order. The parties are directed to notify the Court as soon as practical if a party believes a door has been opened and wishes to revisit the Court's rulings on any of these Motions.

The Court then heard the Plaintiff's "Motion to Quash Subpoena" and ordered that the United Hospital Center records be returned to the United Hospital Center and that Defendant pay the Plaintiff, ½ of Plaintiff's cost of obtaining the United Hospital Center's records in the amount of \$42.00.

The parties are directed to pre-mark their Exhibits they wish to introduce at trial. The parties are further directed to appear on or before 8:30, a.m., on September 18<sup>th</sup>, 2012, to begin

trial.

The parties are further directed to provide to the Court their actual witness list and a brief paragraph regarding their contentions before the start of trial.

Each party reserves and preserves their objections to all rulings adverse to them.

The Clerk is directed to forward a certified copy of this order to all counsel of record at the addresses listed below.

ENTER: September 11, 2012  
John Quinn  
JUDGE

PREPARED BY:

G. Thomas Smith  
G. Thomas Smith (WVSB #4617)  
Afton L. Hutson (WVSB #10808)  
Smith, McMunn & Glover, PLLC  
516 West Main Street  
Clarksburg, WV 26301  
**Counsel for Defendant, Donald Meredith**

APPROVED BY:

George R. Higinbotham  
George R. Higinbotham (WVSB #1719)  
Jo Marie Pitrolo (WVSB #2916)  
Higinbotham & Higinbotham, PLLC  
PO Box 567  
Fairmont, WV 26554-0567  
**Counsel for Plaintiff, Barbara Powell**

STATE OF WEST VIRGINIA  
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18<sup>th</sup>  
Family Court Circuit of Harrison County, West Virginia, hereby certify the  
foregoing to be a true copy of the ORDER entered in the above styled action

on the 11 day of September, 2012.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix

Seal of the Court this 11 day of September, 2012.

Donald L. Kopp II  
Fifteenth Judicial Circuit & 18<sup>th</sup> Family Court  
Circuit Clerk  
Harrison County, West Virginia