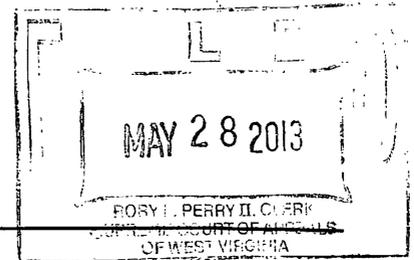


No. 13-0252



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
At Charleston

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BARBARA POWELL,  
Petitioner,

v.

DONALD MEREDITH,  
Respondent.

From the Circuit Court of  
Harrison County, West Virginia  
Civil Action No. 11- C-324

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PETITIONER'S BRIEF

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### **ASSIGNMENTS OF ERROR:**

- I. The lack of a ruling by the circuit court upon Petitioner's motions to compel discovery, particularly concerning the literature upon which the defense medical expert relied, deprived Petitioner of the ability to effectively cross-examine or rebut the defense doctor's opinions and constituted error.
- II. The circuit court abused its discretion and committed error in denying Petitioner's motions in limine in regard to the defense medical expert which resulted in extreme prejudice to Petitioner in her ability to challenge said expert's opinions and prove her damages, particularly with respect to past chiropractic treatment and any future damages.
- III. Respondent's closing argument contained comments that wrongfully attacked the integrity, character and credibility of Petitioner and her counsel and as a result, wrongfully injected prejudice into the case which resulted in manifest injustice and constituted plain error.

### **STATEMENT OF THE CASE:**

Petitioner, Barbara Powell, Plaintiff below, was injured in a rear motor vehicle collision in Harrison County, West Virginia, on August 7, 2009. Petitioner was a front seat passenger in a 1998 Nissan Frontier operated by her husband. Respondent, Donald Meredith, Defendant below, collided with the rear of the Powell truck, at a yield sign. The Powell's vehicle was declared a total loss. Respondent disputed liability.

#### **Petitioner's Injuries:**

Petitioner, Barbara Powell, was diagnosed as having cervical and thoracic sprain/strain and occipital neuralgia. She received past medical treatment consisting of emergency room treatment, diagnostic testing, medication, physical therapy, doctors' examinations, nerve block injections and chiropractic care. Her past medical bills were \$15,325.46. The dollar amount and reasonableness of the charges was stipulated at the trial.

### **Defense Medical Expert:**

The Respondent retained Dr. Robert Cirincione, M.D. of Hagerstown, Maryland, to conduct a "records review only" medical examination pursuant to Rule 35 of the West Virginia Rules of Civil Procedure. Dr. Cirincione never performed a physical exam on Petitioner.

Respondent filed "Defendant's Expert Disclosure" which included a report by Dr. Cirincione. (A.R. 31 - 33). In his report, and later in his evidentiary deposition, Dr. Cirincione agreed with the diagnosis of cervical/thoracic sprain/strain. (A.R. 31 - 33 and Dr. Cirincione deposition at page 108). He did not render an opinion as to the diagnosis of occipital neuralgia. (A.R. 31 - 33 and A.R. 330, Dr. Cirincione deposition at page 111). Dr. Cirincione opined in his report that:

... I believe appropriate treatment for these injuries would have been the emergency room visit, the diagnostic studies performed in the emergency room when the patient was seen and approximately ten physical therapy visits over eight weeks. According to the *Official Disability Guidelines*, for patients with cervicalgia, i.e., neck pain the general treatment recommended is ten physical therapy visits over eight weeks. A study by Kongsted, et al, published by *Spine* 2007 March 15;32(6) 618-626 entitled *Neck Collar, "Act-as-Usual" or Active Mobilization for Whiplash Injury? A Randomized Parallel-Group Trial* concluded that immobilization or allowing the patients to "act as usual" and mobilization techniques, such as physical therapy techniques, had similar effects regarding prevention of pain, disability and work capacity one year after a whiplash injury. There was noted to be "no significant differences noted between the three intervention groups." **Therefore, continuation of physical therapy beyond approximately ten visits over eight weeks is not supported in the medical literature** (emphasis added).

**Discovery Dispute and Motions by Petitioner, Plaintiff below:**

Consequently, Petitioner served discovery upon Respondent which sought information concerning the defense medical expert. Specifically, Petitioner's First Request for Production requested: "13. *Any treatises or authoritative literature on which any expert intends to rely on his or her testimony in this case.*"

Among other things, the defense objected to the production of the literature upon which Dr. Cirincione relied that being, *Spine* 2007 March 15;32(b) 618- 626 entitled *Neck Collar, "Act-as-Usual" or Active Mobilization for Whiplash Injury? A Randomized Parallel-Group Trial* and the *Official Disability Guidelines*. (A.R. 29 - 37). In a letter dated May 21, 2012, the defense refused to produce the literature because Dr. Cirincione represented that "... both references are copyright protected and cannot be printed. The assess (sic) is via an online service which is password protected." (A.R. 130). By letter dated May 23, 2012, Petitioner, by counsel, requested an opportunity to review and inspect the literature without copying it. (A.R. 131). Respondent continued to refuse to produce documents in connection with the request for production.<sup>1</sup>

Petitioner filed two motions in limine to exclude the opinion of Dr. Cirincione and two motions to compel discovery, specifically, the discovery regarding the defense expert and the literature upon which he relied. The circuit court refused to schedule the Petitioner's motions until the pre-trial conference of September 5, 2012. Therefore, the hearing was

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<sup>1</sup> Petitioner's counsel obtained a copy of the *Spine* article at the West Virginia University Medical School Library and subsequently provided a copy of that article to defense counsel because Dr. Cinincione would not provide it to defense counsel. However, the *Official Disability Guidelines* was not available at the West Virginia University Medical School Library and was never produced in discovery. (A.R. 58).

not until **after** the evidentiary deposition of Dr. Cirincione that took place on August 28, 2012.

**Evidentiary Deposition of Dr. Cirincione:**

At the evidentiary deposition, in accordance with his written opinion, Dr. Cirincione testified that Barbara Powell suffered cervical and thoracic strain/sprain as a result of the accident. (A.R. 32 and A.R. 330, Dr. Cirincione deposition at page 108). Dr. Cirincione did not dispute the diagnosis of occipital neuralgia. (A.R. 31 - 33 and A.R. 330, Dr. Cirincione deposition at page 111). However, in regard to sprain/strain injuries, contrary to the opinion of Petitioner's treating doctors who testified that Petitioner's injuries were permanent, Dr. Cirincione testified that "... it's generally accepted that most of these will heal uncomplicated in about six - - six to eight weeks. (A.R. 330, Dr. Cirincione deposition at page 47). Also, contrary to Petitioner's medical doctors who testified that she would need future chiropractic care, Dr. Cirincione further opined that "Petitioner did not need chiropractic care." (A.R. 330, Dr. Cirincione deposition at pages 50-51).

Most importantly, for purposes of this appeal, on cross examination, in regard to his reliance on certain literature and treatises, Dr. Cirincione testified as follows:

Q. *I see. And so in this matter, what have you done?*

A. *... I will highlight what I feel are important issues. I then will go to the literature and see what articles there are in the literature ...  
... Part of the way I formulate my opinion is to look at - - to look at the literature and articles ...*

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 (sic) 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. 330, Dr. Cirincione deposition at pages 19-20, 115-116).

Neither Dr. Cirincione nor the defense disclosed the “other peer reviewed articles” upon which Dr. Cirincione accessed through the *Official Disability Guidelines*. Nobody but Dr. Cirincione knows what “other peer reviewed articles” he reviewed, what the articles say or even if there were legitimate medical articles.

#### **Pre-Trial Motions:**

At the pre-trial conference on September 5, 2012, the circuit court failed to rule on Petitioner's motions to compel. The circuit court further denied Petitioner's motions in limine to exclude the opinion of Dr. Robert Cirincione. This was in light of Petitioner's argument that the “other peer reviewed articles” were never identified, never disclosed and never produced to **either** counsel.

#### **Trial:**

At the trial, the defense offered the evidentiary deposition of Dr. Cirincione. The trial

lasted five days<sup>2</sup>. The jury returned a verdict in favor of Petitioner on liability and for damages, the jury awarded partial 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 award of \$21,604.40. (A.R. 15 - 18). However, the jury did not award Petitioner damages for past chiropractic care of \$3,721.00 or any future damages. (A.R. 15 - 18). It is obvious that the jury's verdict was consistent with Dr. Cirincione's opinion.

Further, the closing argument of defense counsel contained comments that wrongfully attacked the integrity, character, and credibility of Petitioner and her counsel. Respondent's counsel, G. Thomas Smith, made the following remarks:

This is important. Before they get back to their office after this verdict, people will be calling. People that do what they do to find out how much money did they get in this case. And it will effect not just this case, but how many other suits are filed. So this is important. (A.R. 320, trial transcript p. 20).

It's not a lottery. You don't come down here, and use psychology, and get rich, or - - or hit the jackpot, or spin the wheel like you do with the lottery. This is not a lottery system. (A.R. 311, trial transcript p. 12).

Now, I want to talk to you a minute about strategies, that plaintiff's attorneys use. There are - - there's actually a national organization for lawyers that represent plaintiffs. That teaches seminars and provides material, and they teach a lot of strategies about how to do better in the practice. ... They also teach strategies to use in a courtroom to get more money. (A.R. 307, trial transcript p. 7-8).

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<sup>2</sup> The circuit court recessed at the beginning of the third day of trial to permit defense counsel to depose Plaintiff's treating chiropractic, Dr. Michael Mason.

### **SUMMARY OF ARGUMENT:**

The Circuit Court allowed a renegade medical expert to render opinions that Petitioner's injuries should have healed, uncomplicated, in six to eight weeks when that expert refused to produce or disclose the literature upon which he relied to either Petitioner's counsel or Respondent's counsel. The circuit court abused its discretion by failing to rule on Petitioner's motions to compel discovery and by denying her motions in limine to preclude the opinion testimony of this expert. Consequently, Petitioner was not able to effectively cross-examine or rebut the defense expert and as a result, the jury failed to award Petitioner future damages or past damages for chiropractic care. The circuit court committed error by denying Petitioner's Motion for a New Trial based upon those issues.

Further, Respondent's counsel made irrelevant, disparaging remarks about Petitioner and Petitioner's counsel in his closing arguments and the remarks constituted plain error. The circuit court denied Petitioner's Motion for a New Trial based upon the Respondent's closing argument and the denial constitutes error.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION:**

Because the principle issues in this case have been authoritatively decided in the Court's decisions in Johnson v. General Motors Corp., 190 W.Va. 236, 438 S.E. 2d 28 (1993); Roberts v. Consolidation Coal Company, 208 W.Va. 218, 539 S.E. 2d 478 (2000) and Jones v. Sester, 224 W.Va. 483, 686 S.E. 2d 623 (2009), oral argument under Rev. R.A.P. 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for Rule 19 argument and disposition by memorandum decision.

## ARGUMENT

### I. THE LACK OF A RULING BY THE CIRCUIT COURT UPON PETITIONER'S MOTIONS TO COMPEL DISCOVERY, PARTICULARLY CONCERNING THE LITERATURE UPON WHICH THE DEFENSE MEDICAL EXPERT RELIED, DEPRIVED PETITIONER OF THE ABILITY TO EFFECTIVELY CROSS-EXAMINE OR REBUT THE DEFENSE DOCTOR'S OPINION AND CONSTITUTED ERROR.

#### A. STANDARD OF REVIEW:

The circuit court failed to rule on Petitioner's motions to compel discovery. Generally, a circuit court's ruling on a discovery request is reviewed under an abuse of discretion standard. State ex rel. Ward v. Hill, 200 W.Va. 270, 275, 489 S.E. 2d 24, 29 (1997). According to Roberts v. Consolidation Coal Company, 208 W.Va. 218, 539 S.E. 2d 478, 497 (2000), "Where, however, 'the trial court makes no findings, we proceed under a heightened review of the lower court's discovery ruling.'" (quoting State ex rel. United States Fidelity and Guar. Co. v. Canady, 194 W.Va. 431, 439, 460 S.E. 2d 677, 685 (1995)).

#### B. THERE WERE NO DISCOVERY RULINGS BELOW:

In Roberts, this Court reversed the circuit court because the discovery commissioner made no findings on the merits of the Petitioner's discovery requests. Justice Davis found, "Therefore, due to the importance of the evidence sought to be discovered, vis-a-vis Roberts' burden of proof, we instruct the circuit court to obtain a final determination of this discovery matter prior to the commencement of the new trial in this case. Roberts, 539 S.E. 2d at 498. Just as in Roberts, Petitioner, Barbara Powell, had the burden of proof regarding damages, past and future, with regard to her injuries and the permanency thereof. She was prohibited in her ability to challenge the defense expert's opinions

because the circuit court **never** ruled on discovery matters that primarily dealt with the defense expert.

Pursuant to Rule 26 of the West Virginia Rules of Civil Procedure, Petitioner filed interrogatories and requests for production regarding the defense medical expert, Dr. Robert Cirincione, M.D.<sup>3</sup> (A.R. 150 - 159). As stated above Respondent refused to

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**Plaintiff's First Set of Interrogatories to Defendant**

22. As to each Defense Medical Examination doctor you intend to use, please state how much the doctor has charged for the review, report, deposition and examination; number of examinations in the past five years for which this doctor has been hired by Defendant's insurance company; number of such examinations this medical exam doctor has performed in total over the past five (5) years; gross income collected by this medical exam doctor for such examinations and depositions in preceding five (5) years; and identify articles and speeches given by this medical exam doctor.

**ANSWER:** Unknown at this time.

**Plaintiff's First Request for Production to Defendant**

9. Any and all expert reports that were or will be reviewed by a testifying expert in this case.

**RESPONSE:** Please see Response to Request No. 3. (Defendant's Response to Request No. 3 was "Defendant has not determined what experts, if any, will be utilized at trial. The Defendant will supplement this Response as required by the West Virginia Rules of Civil Procedure and with the scheduling order entered by the Court").

10. Any and all expert reports or things that were or will be relied upon in whole or in part by any testifying expert in this case.

**RESPONSE:** Please see Response to Request No. 3.

11. Any and all work papers, notes, and documents in this file of any expert witness who is expected to testify, or in the file of any expert witness who has written a report which is or will be relied upon in whole or in part by the testifying expert.

**RESPONSE:** Please see Response to Request No. 3.

12. All documents or tangible things prepared by any expert whom you expect to call as a witness, including, but not limited to, those which would include his or her other reports, factual, observations, opinions, conclusions, photographs, field notes, calculations, models, and exhibits.

**RESPONSE:** Please see Response to Request No. 3.

13. Any treatises or authoritative literature on which any expert intends to rely on his or her testimony in this case.

**RESPONSE:** Please see Response to Request No. 3.

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14. Any and all books, documents, photographs or other tangible things which may be used at the time of trial, which may have a bearing on this case of action.

**RESPONSE:** It is unknown what tangible things will be introduced or used at the time of trial. Defendant has previously produced documents in anticipation of their use at trial in response to Plaintiff's Interrogatory No. 19. (Defendant's Response to Request No. 19 was "A copy of the title is attached hereto as Exhibit 2.)

**Plaintiff's Third Request for Production to Defendant**

1. Copies of every report Dr. Cirincione or any other Defense Medical Examination doctor identified in this matter has prepared in the preceding 5 years as part of such examination procedure, with name and address of person examined redacted.

**RESPONSE:** Objection, this request is overly broad and unduly burdensome and designed to annoy or harass Defendant and/or Dr. Cirincione. In addition, the request is vague and ambiguous in that the phrase "...as part of such examination procedure,..." is not defined. Further Dr. Cirincione did not perform a medical exam in this matter. Notwithstanding the foregoing objections, the Defendant is not in possession, custody or control of the requested documents. A conference with Dr. Cirincione reveals that he does not keep copies of the reports either.

2. A copy of Dr. Cirincione's complete file or that of any medical doctor hired by the defense in this matter regarding the examination including all of his or her notes from the examination and documentation concerning Plaintiff and this lawsuit.

**RESPONSE:** Objection, the documents requested are not in the possession, custody or control of the Defendant. A request has been made of Dr. Cirincione and he responded that the report, the medical records of Plaintiff and letters from counsel are the only documents in his file. The letters from counsel are attached hereto as Exhibit 1.

3. A copy of Dr. Cirincione's or any other medical doctor hired by the defense in this matter rate schedule for services performed for evaluations and any matter concerning litigation.

**RESPONSE:** Dr. Cirincione charged \$550.00, for the records review. A copy of his rate schedule is attached hereto as Exhibit 2.

4. A copy of tax records for income earned from independent medical examinations, records review, depositions and trial testimony and related consultation fees by Dr. Cirincione or any other medical doctor hired by the defense in this matter.

**RESPONSE:** Objection, this request is overly broad, unduly burdensome, and is designed to annoy or harass Dr. Cirincione. Further, it invades the privacy of Dr. Cirincione. In addition, the request is vague and ambiguous, and sets forth no temporal or geographic limitations. Notwithstanding the foregoing objections, Dr. Cirincione advises that he does not keep 1099s. The tax returns do not differentiate between type of work performed.

6. Identify all data or other information considered by Dr. Cirincione in forming his expert opinions in this matter and provide the same for inspection and/or copying.

**RESPONSE:** Objection, this information is not within the possession, custody or control of the Defendant. **Dr. Cirincione reports that he reviewed the Plaintiff's**

produce for inspection and/or copying an electronic treatise titled the *Official Disability Guidelines* (hereinafter "ODG"). The Respondent objected to most of the discovery requested concerning Dr. Cirincione. The only discovery the defense produced concerning Dr. Cirincione was a list of 171 cases where Dr. Cirincione provided prior testimony, his curriculum vitae, his fee schedule and two letters from defense counsel contained in his file.<sup>4</sup> (A.R. 181 - 212).

Pursuant to Rule 37 of the West Virginia Rules of Civil Procedure, Petitioner filed two motions to compel discovery. The circuit court refused to schedule Petitioner's motions to compel until the pre-trial conference that was held September 5, 2012, and even then, there was no ruling. Petitioner was, thus, prohibited in the cross-examination of Dr. Cirincione.<sup>5</sup> Further, Petitioner was prevented from having the undisclosed medical

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**medical records that were provided in Discovery and the literature cited in his report.**

7. Any exhibits that the defense will use to summarize or support Dr. Cirincione or any other defense experts opinions.

**RESPONSE:** The Defendant may utilize any and all of Plaintiff's medical records, bills, and all documents produced in Discovery. In addition, Defendant may utilize medical illustration or drawings, particularly those from Netter's Atlas, which is available for inspection at the office of Smith, McMunn & Glover.

8. A list of other cases in which during the previous five years, Dr. Cirincione or any other defense expert, testified as an expert at trial or by deposition, including court and case number.

**RESPONSE:** Objection, this information is not within the possession, custody or control of the Defendant. This information has been requested and Dr. Cirincione provided the case list which is attached hereto as Exhibit 3.

<sup>4</sup> Defense counsel has advised that Dr. Cirincione has now retired and is no longer doing Independent Medical Examinations.

<sup>5</sup> The defense originally scheduled Dr. Cirincione's evidentiary deposition for September 6, 2012, which would have been after the pre-trial conference. The date was then changed and the deposition was noticed for August 28, 2012. The Circuit Court was made aware of the scheduling dilemma but would not schedule any hearing in advance of the evidentiary deposition.

literature reviewed by her treating medical providers who testified at trial.<sup>6</sup>

Because of a lack of **any** discovery rulings, Petitioner was unjustly limited in refuting Dr. Cirincione's opinions in rebuttal at the trial. Dr. Cirincione was permitted to render his opinions without disclosing the underlying facts or data upon which he relied. Dr. Cirincione's opinions at trial were that: 1) Cervical/thoracic sprain/strain injury "should have healed in six to eight weeks"; and 2) Petitioner did not need chiropractic care. (A.R. 330, Dr. Cirincione deposition at pages 47, 50 - 51, 111.

Dr. Cirincione refused to produce the literature not only to Petitioner's counsel but he also refused to produce it to defense counsel as well. The lack of a discovery ruling by the circuit court resulted in a substantial injustice to Petitioner because Dr. Cirincione testified that he accessed "**other peer reviewed articles**" through the *ODG* website. (A.R. 330, Dr. Cirincione deposition at page 116). Dr. Cirincione never identified the "other peer reviewed articles." Because the circuit court never ruled on Petitioner's motions, Dr. Cirincione was never required to disclose anything including the "other peer reviewed articles." Petitioner could not effectively challenge the defense expert's opinions because of the unknown and undisclosed "other peer reviewed articles" and the refusal to produce the *ODG*.

The literature that Dr. Cirincione relied upon was clearly relevant under Rule 26 of the West Virginia Rules of Civil Procedure and had the circuit court made any discovery rulings, it is likely that Petitioner's motions to compel would have been granted, particularly regarding the literature.

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<sup>6</sup> Dr. Maurice Rhodes, M.D., John Spadafore, P.T. and Dr. Mike Mason, D.C.

Johnson v. General Motors Corp., 190 W.Va. 236, 438 S.E. 2d 28 (1993) syllabus point 16 states, an “[E]xpert witness may base his opinion on [a] professional treatise or publication but must first show the authoritative nature of [the] work.” Johnson relied upon the decision in Ventura v. Winegardner, 178 W.Va. 82, 357 S.E. 2d 764 (W.Va.1987). In Ventura, this Court found that the circuit court erred when it allowed the plaintiff’s expert to base his opinion of future lost earnings of a professional tennis player in an article in *Tennis Week* magazine and held that the expert must first show the authoritative nature of the publication upon which he relied. Justice Brotherton wrote, “ While we do not wish to disparage *Tennis Week* magazine, it’s purpose is not for the scientific enlightenment of tennis professionals. The figures provided were for the amusement of the readers and not to be relied on in any professional manner.” The expert in Ventura, admitted that he did not know if the figures were net or gross income or who prepared the figures or how. Importantly, this Court required the expert in Ventura to *show* that the literature and data he relied upon was authoritative. In the present case, Barbara Powell was wrongfully denied the opportunity to challenge the authoritative data because she did not even know what it was. The circuit court erred and abused its discretion in allowing the defense to keep the alleged authoritative literature a “secret.”

In Hager v. Shanmugham, 190 W.Va. 703, 441 S.E. 2d 720 (1993), and Thornton v. CAMC, et al., 172 W.Va. 360, 305 S.E. 2d 316 (1983), syllabus point 3, this Court found, “[W]here a treatise is recognized by a medical expert as authoritative, then he can be asked about its statements for purposes of impeachment during cross-examination. Thornton relied upon a Fourth Circuit decision in Lawrence v. Nutter, 203 F. 2d 540, 542-43 (4<sup>th</sup> Cir. 1953) which states:

[A] substantial body of authority ... holds that when a witness is testifying as an expert, it is competent to test his knowledge on cross-examination by reading to him extracts from scientific authorities, which he recognizes as standard upon the subject matter involved, and then ask him whether he agrees or disagrees with what has been read ....

And further:

...(1) [S]ome courts have held that where the expert has relied generally or specifically upon the authorities, he may be attacked upon the basis of authorities which are not necessarily the same as those which he has himself used; (2) another group of cases takes the view that the expert may be examined upon the basis of treatises which he has himself recognized as having authoritative status, whether or not he relied thereon in forming his opinion; and (3) there are many cases recognizing that the cross-examiner may use treatises, the authority of which is established in any acceptable manner, to test the qualifications of the witness, regardless of whether that witness has relied upon or recognized the treatise." (Footnotes omitted). See also Annot., 60 A.L.R. 2d 77 (1958).

Here, Dr. Cirincione was a true "wild card." His sources were a kept secret.

Nobody, but Dr. Cirincione, knows what he read, researched or upon what he based his opinions.

Rule 705 of the West Virginia Rules of Evidence provides:

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. **The expert may in any event be required to disclose the underlying facts or data upon cross-examination.** (emphasis added).

The circuit court committed error by not requiring Dr. Cirincione to disclose the "other peer reviewed articles" and violated Rule 705 and the precedent established by the aforementioned case law. The result was that Petitioner's ability to meet her burden of proof to establish her full damages was substantially impaired and as a result, the jury

denied her future damages and past chiropractic treatment.

**C. RESPONDENT’S COPYRIGHT OBJECTION:**

Dr. Cirincione cited copyright protection as his reason for refusing to produce the *ODG*. Dr. Cirincione’s reliance on copyright protection in his refusal to produce the literature is clearly wrong and not supported by the Copyright Act of 1976. The Copyright Act of 1976 contains a “fair use” exception. 17 U.S.C. §107 defines “fair use” as a limitation on the exclusive right of copyright. Section 107 states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, **teaching (including multiple copies for classroom use), scholarship, or research,** (emphasis added) is not an infringement of copyright.

The fair use doctrine “creates a limited privilege in those other than the owner of a copyright to use the copyrighted material in a reasonable manner without the owner’s consent and permits and requires courts to avoid rigid application of the copyright statute when, on occasion it would stifle the very creativity which that law is designed to foster.”

See Fisher v. Dees, 794 F. 2d 432, 435 (9<sup>th</sup> Cir. 1986). In City Consumer Services, Inc. v. Horne, et al., 100 F.R.D. 740, 748 (U.S. Dist. Court D. Utah, C.D. 1983), the federal district court ruled that, “use of a copyrighted work for scholarship and research does not constitute infringement.”<sup>7</sup>

Jackson v. West Virginia Hospitals, U.S. District Court for the Northern District of

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<sup>7</sup> In that case, the plaintiff raised a copyright objection concerning the production of a compilation of business records that were alleged to be a collection of pre-existing materials and data. The court ruled that the materials were not copyright protected because of the fair use exception.

West Virginia (2011 WL 1831591), is a decision by United States Magistrate Judge John Kaull which addresses the production of internet search materials. The Plaintiff in Jackson identified fifty four categories of documents in his expert disclosure which he obtained, in part, through internet searches and which he refused to produce in discovery. The Plaintiff in Jackson filed objections to the Defendant's discovery requests for the internet materials on the basis that the internet contains public information that anybody can access. Magistrate Judge Kaull relied upon St. Paul Reinsurance Col. Ltd. v. Commercial Financial Corp., 198 F.R.D. 508, 514 (N.D. Iowa, 2000) which held:

The plaintiffs' fifth objection to CFC's request is based on the ground that it seeks information and documents equally available to the propounding parties from their own records or from records which are equally available to the propounding parties. However, with respect to this objection, courts have unambiguously stated that this exact objection is insufficient to resist a discovery request. See e.g., City Consumer Services v. Horne, 100 F.R.D. 740, 747 (D. Utah, 1983).

The court in Jackson, supra, ordered that the Plaintiff produce the materials from the internet and reasoned:

This court finds that production through discovery requests insures: 1) both parties to the litigation will be working from the same documents at depositions or trial; 2) there is a certification by counsel that the document produced is the document on which he will rely whereas there is no such certification when the document is procured outside of discovery through FOIA or EEOC or an **internet search** (emphasis added); and 3) experts will be able to rely on a common set of documents in researching and formulating any opinion relevant to the litigation. In short, production through discovery as opposed to FOIA, EEOC, or **internet search** (emphasis added) promotes clarity in the litigation context. These protections do not exist with respect to documents not produced in discovery.

In the present case, the copyright objection cited by defense expert was not a valid

objection according to the Copyright Act of 1976 and the “fair use exception.” Furthermore, because the circuit court did not rule on the discovery motions, not only were both parties prevented from having common documents, **neither** party could assess the relevancy or reliability of the purported research.

In the present case, the defense expert would not even produce the literature to defense counsel. No expert should ever be permitted to engage in such covert conduct during litigation without ramifications. The circuit court erred and abused its discretion when it allowed this to happen and created a dangerous precedent.

**II. THE CIRCUIT COURT ABUSED ITS DISCRETION AND COMMITTED ERROR IN DENYING PETITIONER’S MOTIONS IN LIMINE IN REGARD TO THE DEFENSE MEDICAL EXPERT WHICH RESULTED IN EXTREME PREJUDICE TO PETITIONER IN HER ABILITY TO CHALLENGE THE SAID EXPERT’S OPINIONS AND PROVE HER DAMAGES, PARTICULARLY WITH RESPECT TO PAST CHIROPRACTIC TREATMENT AND ANY FUTURE DAMAGES.**

**A. STANDARD OF REVIEW:**

An expert must disclose all of the sources upon which he relies upon. If he does not, then his testimony should be excluded. The refusal to produce and identify the literature by the defense expert eliminated Petitioner’s claim for future losses and past chiropractic treatment.

The action of a circuit court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such amounts to an abuse of discretion, State v. Morris, syllabus point 1, 227 W.Va. 76, 705 S.E. 2d 583 (2010). Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the circuit court and it’s ruling on that point will not ordinarily be disturbed

unless it clearly appears that the circuit court abused its discretion. Id. at syllabus point 2.

#### **B. PETITIONER'S MOTIONS IN LIMINE:**

Petitioner below made two motions in limine to exclude the testimony of the defense medical expert, Dr. Robert Cirincione. (A.R. 42 - 47). The court denied Petitioner's motions in limine by orders entered September 17, 2012, and September 18, 2012. (A.R. 9 - 14.) The Petitioner's objections and exceptions were reserved.<sup>8</sup> As grounds for her motion for a new trial, Petitioner alleged that the circuit court erred in denying her motions in limine to exclude the opinion of Dr. Cirincione.

Petitioner's motions to compel discovery and her motions in limine to exclude the opinions of Dr. Cirincione were both based upon common grounds. Specifically, Petitioner alleged in both her motions to compel and motions in limine that Dr. Cirincione refused to provide or disclose the literature upon which he relied in arriving at his opinions and in his testimony. This resulted in a "two fold blow" to Petitioner. Not only were the opinions of Dr. Cirincione allowed, Petitioner was denied the discovery needed to challenge his opinions. Thus, Dr. Cirincione's opinions were presented to jury in despite the fact that: (1) he had no personal knowledge; (2) his opinion was not relevant and reliable; and (3) he should not have been permitted to present testimony concerning the *ODG* and the "other peer reviewed articles" which he refused to produce or disclose. The failure to grant Petitioner's motions in limine was an abuse of discretion by the circuit court.

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<sup>8</sup> The defense argued at the hearing on Petitioner's Motion for a New Trial that Petitioner did not preserve her objection. This is incorrect as the objections of the parties are set forth in the September 17 and 18, 2012 orders. Further, Wimer v. Hinkle, syllabus 1, 180 W.Va. 660, 379 S.E. 2d 383 (1989) states, "An objection to an adverse ruling on a motion in limine to bar evidence at trial will preserve the point, even though no objection was made at the time evidence was offered, ..." This hearing preceded the evidentiary video deposition of Dr. Cirincione offered at the trial.

**1. Dr. Cirincione lacked personal knowledge.**

A witness may only testify about matters of which he or she has personal knowledge. Rule 602 of the West Virginia Rules of Evidence states:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703 relating to opinion testimony by expert witnesses.

Personal knowledge is a matter to be determined by the trier of fact. The court may reject evidence of personal knowledge where "as a matter of law no trier of fact could find that the witness actually perceived the matter about which he is testifying." *Weinstein's Evidence*, §602 [02] at 602-9. See *Kemp v. Balboa*, 23 F. 3d 211 (8<sup>th</sup> Cir. 1994).

In the instant case, Dr. Cirincione did not do a physical examination of Petitioner Barbara Powell. He only reviewed her medical records. He did not read her deposition. He did not take a history from her and he did not speak to her treating physicians. (A.R. 330, Dr. Cirincione deposition at pages 65, 66, 71, and 73). Dr. Cirincione's opinion lacked sufficient knowledge and, therefore, it is unreliable and not relevant. *Sheehan v. Daily Racing Form, Inc.*, 104 F. 3d 940 (7<sup>th</sup> Cir. 1997) found that in determining reliability, the Court shall consider whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." Dr. Cirincione testified that "he examines his patients" and does not treat them based upon a records only review. (A.R. 330, Dr. Cirincione deposition at page 74). Therefore, Dr. Cirincione's opinion should not even qualify as a Rule 35 "physical examination" and the circuit court should have applied

the Daubert factors to this expert and it did not.

Further, Dr. Cirincione should not have been permitted to render an opinion on Petitioner's medical condition solely upon a records review. His opinion was unreliable and not relevant, especially his opinion that Petitioner did not need future medical treatment and did not need chiropractic care. Without a physical examination of Petitioner, Dr. Cirincione had no personal knowledge of the condition of her cervical and thoracic spine or whether she continued to suffer from muscle spasms and loss of range of motion in her cervical spine.<sup>9</sup> Dr. Cirincione's expert status was not a substitute for personal knowledge in this case. It was impossible for Dr. Cirincione to measure Petitioner's range of motion or muscle spasms by reading her medical records without the benefit of a physical exam.

Finally, Dr. Cirincione's opinions were contrary to the opinions of Petitioner's treating doctors. Not having performed a physical examination, he failed to adequately account for alternative explanations and his only bases for his disagreement with the diagnosis of Petitioner's doctors and her future prognosis was the literature that he failed to disclose. In Claar v. Burlington Northern R. Co., 29 F. 3d 499 (9<sup>th</sup> Cir. 1994), the Court found that it is relevant as to whether the expert has adequately accounted for obvious alternative explanations. Dr. Cirincione did not and he could not because he never performed a physical examination.

## **2. Dr. Cirincione's opinion was not reliable and was not relevant.**

The admissibility of expert testimony is governed by the Rules of 702 and 703 of the

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<sup>9</sup> Petitioner's treating medical doctor, Dr. Rhodes, examined her on May 18, 2012, only 18 days after the report of Dr. Cirincione, and found that, "Her range of motion really hasn't significantly improved since she had her accident..." and "Her neck remains tight with some residual spasm." (A.R. 44 - 45). Dr. Rhodes testimony was consistent with his report.

West Virginia Rules of Evidence. The cases Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993), and Wilt v. Buracker, 191 W.Va. 39, 443 S.E. 2d 196 (1993), cert denied, 511 U.S. 1129, 114 S.Ct. 2137, 128 L.Ed. 2d 867 (1994), provide the contour of analysis regarding the admissibility of scientific testimony under the West Virginia Rules of Evidence. These decisions and Rule 702 impose upon a circuit court the duty to screen scientific evidence for relevance and reliability.

West Virginia Rule of Evidence 702 provides:

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.

And Rule 703 provides:

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.

Rules on the admissibility of expert testimony under Rule 702 are committed to the sound discretion of the circuit court. General Elec. Co. v. Joiner, 522 U.S. 136, 141-42, 118 S.Ct. 512, 139 L.Ed. 2d 508 (1997). In Daubert v. Merrell Dow Pharmaceuticals, Inc., the United States Supreme Court imposed a gatekeeping obligation on trial judges to engage in objective screening designed to ensure that scientific evidence that is put before the jury “is not only relevant, but reliable.” 509 U.S. 579, 589.

The Supreme Court in Daubert listed four nonexclusive factors that a circuit court might, in the exercise of its discretion, consider to assess reliability: 1) whether a theory or

technique can be tested; 2) whether it has been subjected to peer review and publication; 3) the known or potential error rate of the theory or technique; and 4) whether the theory or technique enjoys general acceptance within the relevant scientific community. Id. at 592-93. None of these factors were tested by the circuit court here because the scientific literature was never produced and never identified.

The threshold questions for admissibility of expert scientific testimony are whether the proffered testimony reflects scientific knowledge and whether it will assist the trier of fact. Id. at 592. The Daubert Court instructed that in exercising the “gatekeeper” function of deciding whether to admit such testimony, a circuit court must make “a preliminary assessment of whether the reasoning or methodology properly can be applied to the facts in issue.” Id. at 592-593. An expert’s testimony must be grounded in the methods and procedures of science, and must be more than unsupported speculation or subjective belief. Id. 593. An expert’s “bald assurance of validity is not enough.” Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F. 3d 1311, 1316 (9<sup>th</sup> Cir. 1995) (“*Daubert II*”). A proponent of the testimony does not have the burden of proving that the testimony is scientifically correct, but rather that the testimony, by a preponderance of the evidence, is reliable. The “focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.” General Elec. Co. v. Joiner, 522 U.S. at 146, 118 S.Ct. 512 (quoting Daubert, 509 U.S. at 595).

In the present case, it was impossible for the circuit court, as well as the parties, to access the principals, reasoning or methodology because Dr. Cirincione never disclosed the literature upon which he relied. The circuit court abused it’s discretion when it allowed Dr. Cirincione’s opinion which amounted to a “bald assurance of validity” thus failing the

parameters of Daubert.

**3. The defense expert should not have been permitted to offer an opinion on scientific literature that could not be validated.**

Dr. Cirincione relied upon the *ODG* in his opinion that for “patients with cervicalgia, i.e. neck pain, the general treatment recommended is ten physical therapy visits over a period of eight weeks.” According to an internet search, the *ODG* is a “product line produced by the Work Loss Data Institute,” (hereafter referred to as the “WLD”). The WLD is “an independent database development company focused on **workplace health** (emphasis added) and productivity with offices in Texas and California.” According to the website of the WLD, the mission is, “[T]o create, maintain and market information databases to implement standards for managing workforce productivity based upon strict principals of evidence based methodology with ongoing focus on healthcare cost containment.” (A.R. 59 - 64.) Thus, the *ODG* is primarily used for workers’ compensation and healthcare costs containment.

The *ODG* has **not** been adopted by the State of West Virginia for workers’ compensation purposes. It is not even available at the West Virginia University Medical School Library. (A.R. 58). Plaintiff did not have a workers’ compensation claim and she did not miss any work because of her injury.

Dr. Cirincione’s reliance on a workers’ compensation/workplace treatise was, therefore, misplaced. The WLD website also states that there are exceptions to the *ODG*. The Petitioner was prevented from cross-examining Dr. Cirincione on any exceptions.

**III. RESPONDENT’S CLOSING ARGUMENT CONTAINED COMMENTS THAT WRONGFULLY ATTACKED THE INTEGRITY, CHARACTER, AND CREDIBILITY OF PETITIONER AND HER COUNSEL AND AS A RESULT, WRONGFULLY INJECTED PREJUDICE INTO THE CASE WHICH RESULTED IN MANIFEST INJUSTICE AND CONSTITUTED PLAIN ERROR.**

**A. STANDARD OF REVIEW:**

The West Virginia Supreme Court of Appeal reviews rulings by a circuit court concerning the appropriateness of argument by counsel before the jury under an abuse of discretion standard. Lacy v. CSX Transportation, Inc. et al., 205 W.Va. 630, 520 S.E. 2d 418, 427 (1999). “[A] trial court has broad discretion in controlling argument by counsel before the jury.” Dawson v. Casey, 178 W.Va. 717, 721, 364 S.E. 2d 43, 47 (1987) and such discretion “. . . will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced or that manifest injustice resulted therefore.” syllabus point 3, State v. Boggs, 103 W.Va. 641, 138 S.E. 321 (1927).

**B. THE RESPONDENT’S COMMENTS CONSTITUTED PLAIN ERROR THAT PREJUDICED PETITIONER’S RIGHTS AND RESULTED IN MANIFEST INJUSTICE:**

In his closing argument, defense counsel made several irrelevant, disparaging remarks about Petitioner and Petitioner’s counsel. Specifically, Respondent’s counsel told the jury:

This is important. Before they get back to their office after this verdict, people will be calling. People that do what they do to find out how much money did they get in this case. And it will effect not just this case, but how many other suits are filed. So this is important. (A.R. 320, trial transcript p. 20).

It’s not a lottery. You don’t come down here, and use psychology, and get rich, or - - or hit the jackpot, or spin the

wheel like you do with the lottery. This is not a lottery system. (A.R. 311, trial transcript p. 12).

Now, I want to talk to you a minute about strategies, that plaintiff's attorneys use. There are - - there's actually a national organization for lawyers that represent plaintiffs. That teaches seminars and provides material, and they teach a lot of strategies about how to do better in the practice. ... They also teach strategies to use in a courtroom to get more money. (A.R. 307, trial transcript p. 7-8).

In Respondent's Response to Petitioner's Motion for a New Trial, defense counsel argued before the circuit court that because Petitioner's counsel did not object nor request a curative instruction, then there was no error. (A.R. 230). In other words, Respondent seeks to validate his comments, thus allowing him to come away from them unscathed. Granted, Petitioner's counsel did not object to the comments of defense counsel. However, to do so would have brought additional attention to the disparaging remarks. Any objection would have appeared to be self-serving. In analogy, the water was already spilled and neither Petitioner's lawyers nor anyone else could put it back into the cup. Further, objections during closing arguments are generally disfavored. Farmer v. Knight, 207 W.Va. 716, 536 S.E. 2d 140 (2000).

In Farmer, 536 S.E. 2d at 145, a personal injury case, defense counsel argued in closing argument: "I think she's (Plaintiff) 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." The circuit judge would not allow Plaintiff's counsel to the bench to object during the closing and the court addressed the comments after the jury began deliberations. The judge stated to the parties that it was obvious what the objection was, and that is why he did not interrupt the defense closing argument. This Court found that the circuit judge's decision to address

the objection after closing arguments were completed was not unusual considering the fact that such objections are greatly disfavored. Id. at 145-146.<sup>10</sup>

The comments of Respondent's counsel in the present case constitute plain error. Said counsel did not even argue below that the comments were proper or in support of his theory of the case because, obviously, they were not. The defense comments were improper, inflammatory and irrelevant. They had nothing to do with the facts or evidence presented nor did they address the Respondent's theory of the case. Any objection by Petitioner's counsel would not undo the harm caused by the statements that were irrevocable.

The Respondent argued below, that any alleged error was waived. However, according to State v. Griffy, 229 W.Va. 171, 727 S.E. 2d 847 (2012), "[I]t is well established that [o]rdinarily a party must raise his or her objection contemporaneously with the circuit court's ruling to which it relates or be forever barred from asserting that that ruling was error." State v. Whittaker, 221 W.Va. 117, 131, 650 S.E. 2d 216, 230 (2007). This Court has recognized, however, that "[T]he 'raise or waive' rule is not absolute where, in extraordinary circumstances, the failure to object constitutes plain error." Id. at 131 n. 18, 650 S.E. 2d at 230 n. 18. "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).

In State v. Poore, 226 W.Va. 727, 704 S.E. 2d 727 (2010), this Court addressed the

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<sup>10</sup> This Court found that because the comments in Farmer concerned the Defendant's theory of the case, then they were not improper. Respondent's comments in the present case do not go to his theory and were irrelevant and inflammatory.

“plain error rule” and stated, to be “plain”, “the error must be ‘clear’ or ‘obvious.’” Here, the Respondent counsel’s comments were obviously absurd and a complete surprise to Petitioner’s counsel and were “below the belt”. Poore Id. at 733 goes on to state:

Under the law, “[t]o 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.” syllabus Point 7, State v. Miller, 194 W.Va. 3, 459 S.E. 2d 114 (1995). Moreover, an unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. 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. Syllabus Point 7, State v. LaRock, 196 W.Va. 284, 470 S.E. 2d 613 (1996).

In Jones v. Setser, 224 W.Va. 483, 686 S.E. 2d 623, syllabus point 1 (2009), this Court held that, “[T]he discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced or that manifest injustice resulted therefore.” Jones further held in syllabus point 2, that “[G]reat latitude is allowed counsel in argument of cases, but counsel must keep within the evidence, not make statements calculated to inflame, prejudice or mislead the jury... .” Defense counsel’s statements in the present case were not at all about the evidence or this theory of the case. His comments were clearly intended to inflame and mislead the jury, and impede the fairness, integrity and reputation of the judicial process.

In Jones, Id. at 628-629, the Court reversed the denial of Petitioner’s motion for a

new trial based upon the disparaging remarks of defense counsel. Jones relies upon an Ohio law and states:

When asked to examine the propriety of personalized attacks on opposing counsel and witnesses during closing argument, courts have had little difficulty determining that such attacks exceed the scope of permissible argument. In Roetenberger v. Christ Hospital, 163 Ohio App. 3d 555, 839 N.E. 2d 441 (2005), the defense counsel criticized plaintiff's expert witnesses during closing argument, "accusing them of 'manipulating' the case and 'participating the[e] creation of this lawsuit against this good doctor to make all kinds of money.'" Id. at 445. Describing one of plaintiff's medical experts as "an idiot" and disparaging his credibility "because he wore 'gym shoes and baggy pants,'" defense counsel argued that a verdict for the plaintiff would reward the plaintiff's greed while his client would be "brand[ed] 'with malpractice for the rest of his life.'" 839 N.E. 2d at 445. Defense counsel criticized plaintiff's counsel at length, branding them as heartless, soulless, and entirely motivated by money. He further accused them of trying "every trick in the book," belittled their cross-examination skills, and suggestion that returning a verdict in plaintiff's favor "would 'affirm' the behavior of plaintiff's counsel." Id. at 445.

Concluding that the personalized attacks on the plaintiff; his counsel; and his witnesses were clearly beyond the scope of final argument, the Ohio court identified the following guidelines which govern the parameters of closing argument:

Closing argument presents counsel with the opportunity to comment on the evidence and the reasonable inferences to be drawn from the evidence. Remarks or arguments that are not supported by the evidence and are designed to arouse passions or prejudice to the extent that there is a substantial likelihood that the jury may be misled are improper. "When argument spills into disparagement not based on any evidence, it is improper." Counsel is obligated to refrain from unwarranted attacks on opposing counsel, the opposing party, and the witnesses. It is the trial court's duty to see that counsel's statements are confined to proper limits and to prohibit counsel from creating an atmosphere of passion and prejudice or misleading the jury. Abusive comments directed at opposing counsel, the opposing party, and the opposing

party's witnesses should not be permitted. If there is room for doubt about whether counsel's improper remarks may have influenced the outcome of the case, that doubt should be resolved in favor of the losing party. Roetenberger, 839 N.E. 2d at 446 (citations omitted).

Here, the remarks of defense counsel were grossly improper. If there is doubt as to whether the remarks influenced, prejudiced or mislead the jury, then the doubt should be resolved in favor of the party against whom the disparaging remarks were directed. Jones, Id. at 629. The abusive comments by Respondent's counsel, particularly, that Petitioner should not be able to "get rich" or "hit the jackpot" or "spin the wheel" and "[B]efore they get back to their office after this verdict, people will be calling. People that do what they do to find out how much money did they get in this case" were only made to arouse passion and prejudice against Petitioner, her counsel and the judicial system as it relates to tort claims and damages. To permit such comments will only encourage a loss of trust and respect for the current judicial tort process. The fact that the jury did not award Petitioner past damages for chiropractic care and no future damages demonstrates that the defense comments obviously influenced the jury and resulted in manifest injustice to the Plaintiff. The defense comments were fundamentally unfair and this Court should find that they were not permissible and that the circuit court abused its discretion in not awarding Petitioner a new trial.

#### **CONCLUSION:**

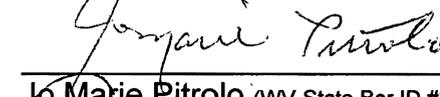
The circuit court abused its discretion in not ruling on Petitioner's discovery motions. The circuit court further abused its discretion in denying Petitioner's motions in limine to exclude the defense medical expert. The combination of these two errors erected a substantial injustice to Petitioner because she was prevented from challenging Dr.

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Cirincione's opinions in cross-examination or rebuttal. This Court should not allow an expert to testify at trial if he has failed to disclose his scientific sources to either counsel. Further, the circuit court abused its discretion in failing to award a new trial based upon the improper, irrelevant, inflammatory remarks of defense counsel in the Respondent's closing argument. The defense remarks as well as the lack of discovery rulings and denial of Petitioner's motions in limine all resulted in a jury award that eliminated Petitioner's future damages and partial past special damages. The circuit court's denial of Petitioner's Motion for a New Trial should be reversed and the case remanded.

Barbara Powell  
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No. 13-0252

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
At Charleston

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BARBARA POWELL,  
Petitioner,

v.

DONALD MEREDITH,  
Respondent.

From the Circuit Court of  
Harrison County, West Virginia  
Civil Action No. 11- C-324

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**CERTIFICATE OF SERVICE**

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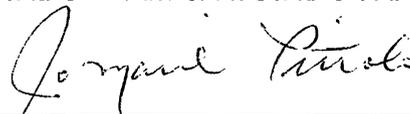
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I do hereby certify that a true copy of the foregoing "PETITIONER'S BRIEF" and "APPENDIX" has been served upon counsel of record, via United States mail, postage prepaid, on this the 23<sup>rd</sup> day of May, 2013, as follows:

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