No. 13-0252

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

BARBARA POWELL,
Petitioner,

v.

DONALD MEREDITH,
Respondent.

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

PETITIONER'S RESPONSE BRIEF

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ARGUMENT

I. A MOTION TO COMPEL DISCOVERY SERVES A COMPLETELY DIFFERENT PURPOSE THAN A MOTION IN *LIMINE.*

Motions to Compel Discovery and Motions in *Limine* serve completely different purposes. The two types of motions are not mutually exclusive. They are separate and distinct. A discovery motion is for fact finding purposes. A motion in *limine* is to control evidentiary matters to be presented at trial and is contingent upon discovery. Respondent urges this Court to find that because the Circuit Court ruled upon Petitioner's Motions in *Limine* but not her Motions to Compel, there was no prejudice to her. Respondent's argument has no basis in the law.

Petitioner was denied the discovery to which she was entitled pursuant to Rule 26(b)(1) of the West Virginia Rules of Civil Procedure.[1] Discovery is to be produced **prior** to trial. If it is not, then a Motion to Compel pursuant to Rule 37 of the West Virginia Rules of Civil Procedure is available for "failure to cooperate." Respondent never "offered" the literature as alleged in Respondent's Brief. To the contrary, Respondent's medical expert refused to even provide the literature to defense counsel.

Respondent argues that Petitioner should have asked Dr. Cirincione what other peer reviewed articles he relied upon during the evidentiary deposition. It was impossible for

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[1] Rule 26(b)(1) of the West Virginia Rules of Civil Procedure states: *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of person having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Petitioner to know in advance that Dr. Cirincione relied upon "other peer reviewed articles." That fact was only disclosed ***during*** his evidentiary deposition. If Respondent had produced the "Official Disability Guidelines" ***prior*** to Dr. Cirincione's evidentiary deposition, then Petitioner could have, in advance, reviewed any references listed therein and cross examined Dr. Cirincione concerning those other references or attempted to obtain the other references to share with her own medical experts. Because, Petitioner was denied her right to discovery, Dr. Cirincione's bases for his opinions could never be completely explored. Petitioner was, therefore, adversely affected in her ability to cross examine Dr. Cirincione and to prove her damages.

The Circuit Court did not make the ruling that Petitioner could have paid a fee of $295.00 until ***after*** Petitioner's Motion for a New Trial. (A.R.1 - 2). Further, the Circuit Court, in the "Order Denying New Trial," ruled that, "Plaintiff could have purchased the 'Official Disability Guidelines' and sought the cost from the Defendant." It is implied in that ruling that the Circuit Court believed that the literature upon which the defense expert relied was discoverable and should have been produced.

Petitioner should not be forced to pay Two Hundred Ninety Five Dollars ($295.00), or any fee for that matter, for the literature upon which the defense medical expert relied nor should she be required to pay the fee and then seek reimbursement from the Respondent. In any event, that ruling was not made until post trial motions. Finally, the discovery motions were never ruled upon.

In the present case, there is no way to even know what the total potential fees would be because Dr. Cirincione only disclosed that he reviewed "other peer reviewed articles"

during the evidentiary deposition. Respondent's argument again ignores the fact that Petitioner requested "all literature" in discovery. Further, Respondent failed to disclose that Dr. Cirincione reviewed "other peer reviewed articles" in his expert disclosure. (A.R.29 - 33).

To affirm the Circuit Court's ruling in respect to the Two Hundred Ninety Five Dollars ($295.00) fee would set an unpredictable precedent and stifle discovery for all future litigants. What will the fee be the next time? Will it be $295.00, $1000.00, or $5,000.00? There is no requirement by statute or case law that requires a party to pay for literature, that an expert relies upon in his or her opinion. The requirement to pay **any** fee for research based literature would create a travesty of justice.

Respondent urges this Court to condone his failure to cooperate in discovery. He argues that Petitioner was not prejudiced because of Dr. Cirincione's opinion testimony. However, Respondent's counsel admits that not even he had access to the literature that Dr. Cirincione relied upon. Therefore, he has no justification for his argument that Petitioner was not prejudiced. If Respondent did not know about the other peer reviewed articles how could he expect Petitioner to know about them? Respondent's argument is absurd in this regard and is again, an attempt to justify his failure to cooperate in discovery.

Respondent argues that Petitioner did not raise the "fair use" exception to The Copyright Act of 1976.[2] This argument should fail for two reasons. Firstly, Respondent relies upon Mowery v. Hite, 155 W.Va. 103, 181 S.E. 2d 334 (1971) which states that the appellate court will not consider nonjurisdictional questions which were not considered

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[2] Petitioner recollects that the "fair use" exception was raised at oral argument for her Motion for a New Trial.

below. What the Respondent fails to recognize is that Mowery deals with new **issues** not statutes or case law cited in reply to a legal argument raised below.[3]

Secondly, Respondent and his expert, Dr. Cirincione, cited "copyright protection" as the grounds for refusing to produce the literature. (A.R. 57). Therefore, since Respondent first asserted copyright as an objection, then presumably, he should be aware of what The Copyright Act of 1976 requires as well as any exceptions including the "fair use" exception.

II. PETITIONER'S MOTIONS IN *LIMINE* CONCERNING THE DEFENSE MEDICAL EXPERT WERE IMPROPERLY DENIED AND CONSTITUTED ERROR BELOW.

Respondent urges this Court to merge the Motions to Compel and the Motions in *Limine*. Respondent is correct that the motions were based upon common grounds. However, it was impossible for the Circuit Court to have appropriately evaluated Petitioner's Motions in *Limine* because the Circuit Court did not have the benefit of reviewing the literature either because it was never produced. The Circuit Court committed error as the rulings denying the Motions in *Limine* could only *assume* that the literature was relevant and reliable under Daubert, when in fact, **nobody** was able to determine the substance or validity but the defense medical expert, who refused to produce it.

Because the Official Disability Guidelines and the "other peer reviewed articles" contained therein were **never** produced, of course they could not be validated, not even by defense counsel. Contrary to Respondent's argument, Petitioner raised the validation issue below in her Motions in *Limine* to Exclude Testimony or Opinion Testimony of Dr.

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[3] See State ex. rel. State Farm Mutual Automobile Ins. Co. v. Bedell, 228 W.Va. 252, 719 S.E. 2d 722, 734 (W.Va. 2011).

Robert Cirincione. (A.R. 47 - 66). The Circuit Court never had an opportunity to judge the reliability or validity of the scientific literature upon which Dr. Cirincione relied because it was never produced. The only thing we have in this case is Dr. Cirincione's bold assertion that the scientific literature upon which he relied was valid or in other words reliable and subjected to peer review. As stated previously, "An expert's bold assertion of validity is not enough." Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F. 3d 1311, 1316 (9th Cir. 1995) ("Daubert"). If the literature was not produced, it is impossible to know how to assess the factors required in Daubert.

The Motions in *Limine* were contigent upon the Motions to Compel. The discovery that should have been produced in order for the Circuit Court to give proper consideration to the Motions in *Limine,* was never forthcoming. Therefore, the Circuit Court's rulings were not based upon actual information and any scrutiny was absent.

Further, the Circuit Court abused its discretion and committed error by allowing Dr. Cirincione's testimony as the doctor clearly lacked personal knowledge of any objective findings because he never performed a physical examination of Petitioner. His opinion testimony that there were no objective findings was allowed even though he never performed any range of motion tests upon Petitioner and never physically examined her to see if she suffered from muscle spasm after the date of his report.[4] In that regard, his opinion testimony should have been prohibited and Petitioner's Motions in *Limine* should have been granted.

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[4] See (A.R. 44 - 45) Dr. Rhodes' (Petitioner's treating physician) record of his physical exam of Petitioner on May 30, 2012 which is after the date of Dr. Cirincione's medical records review and opinion report of April 30, 2012.

III. THE "RAISE OR WAIVE RULE" DOES NOT APPLY WHERE THERE IS "PLAIN ERROR".

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. Griffy, 229 W.Va. 171, 727 S.E. 2d 847, 854 (2012) citing State v. Miller, 194 W.Va. 3, 18, 459 S.E. 2d 114, 129 (1995). To be "plain," the error must be "clear" or "obvious." State v. Miller, syl. 8 at 118. Assuming that the error is "plain," the inquiry must proceed and a determination made as to whether it affects the substantial rights of the complaining party. Id. at syl. 9.

In the present case, the closing comments of Respondent's counsel in question were not related to any facts or theory of the case. The sole purpose was to prejudice the Petitioner and inflame and prejudice the jury and deter the award of damages to the Petitioner. The defense counsel's comments in Farmer v. Knight, 207 W.Va. 716, 536 S.E. 2d 140 (2000), were not found to be improper because they were related to the defense theory of the case. In the present case, the defense comments in closing argument were unlike those in Farmer v. Knight and were not in any way related to the facts or theory. Here, the sole purpose was to adversely affect any damage award. The closing remarks, combined with the other errors set forth above, lead to the jury's verdict which reduced Petitioner's past medical expenses and excluded all future damages.

CONCLUSION

Counsel for Petitioner offers the following analogy.

Suppose that counsel was standing before this Court arguing this case. A justice asks counsel, "What is the authority upon which you rely?" Counsel then responds by holding up a volume of Southeast Second, "It's in this book, but I cannot give you a copy

because of copyright." Another justice then says, "Well, of two of the cases you have relied upon, I find some inconsistencies with your position." Counsel then responds, "That is because you justices don't understand case law." This is analogous to Dr. Cirincione testimony wherein he stated, "Well that's where you have to understand medical literature. (A.R. 330 Dr. Cirincione deposition at page 85). Dr. Cirincione wants to be the only one in the case to interpret the literature upon which he relied. That is wrong.

Counsel doubts she could get away with this. The rules of evidence do not allow an expert to get away with an analogous situation.

The circuit court's denial of Petitioner's Motion for a New Trial should be reversed and the case remanded.

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CERTIFICATE OF SERVICE

I do hereby certify that a true copy of the foregoing "PETITIONER'S RESPONSE BRIEF" has been served upon counsel of record, via United States Mail, postage prepaid, on this the 24TH day of July, 2013, as follows:

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