STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 2nd day of June, 2010, the following order was made and entered:

Lenora Perrine; Carolyn Holbert; Waunona Messinger Crouser;
Rebeccah Morlock; Anthony Beezel; Mary Montgomery;
Mary Luzader; Truman R. Desist; Larry Beezel; and Joseph Bradshaw,
individuals residing in West Virginia, on behalf of themselves and
all others similarly situated, Plaintiffs below, Appellants in No. 34333,
Appellees in Nos. 34334 and 34335

vs.) Nos. 34333, 34334 and 34335

E.I. du Pont de Nemours and Company, a Delaware corporation
doing business in West Virginia; Meadowbrook Corporation, a dissolved West Virginia corporation; Matthiessen & Hegeler Zinc Company, Inc., a dissolved Illinois corporation formerly doing business in West Virginia; and T.L. Diamond & Company, Inc., a New York corporation doing business in West Virginia, Defendants below

E.I. du Pont de Nemours and Company, a Delaware corporation
doing business in West Virginia; Defendant below, Appellee in No. 34333,
Appellant in Nos. 34344 and 34335

The Court, having maturely considered the petition for rehearing filed by E.I. du Pont de Nemours and Company, by Allen, Guthrie and Thomas, David B. Thomas, James S. Arnold, Stephanie Thacker and Jeffrey Hall, their attorneys, is of the opinion to and does hereby refuse said petition for rehearing for the reasons more fully set forth in the opinion thereon issued this day by the Court. The opinion of the Court on the petition for rehearing is hereby directed to be affixed to the published report of this case.

The motion to supplement the record filed by E.I. du Pont de Nemours and Company is denied.

Justice Benjamin and Justice McHugh disqualified. Judge Derek C. Swope and Judge Alan D. Moats sitting by temporary assignment.

A True Copy

Attest: _____
Clerk, Supreme Court of Appeals

Nos. 34333, 34334, and 34335 - *Lenora Perrine; Carolyn Holbert; Waunona Messinger Crouser; Rebeccah Morlock; Anthony Beezel; Mary Montgomery; Mary Luzader; Truman R. Desist; Larry Beezel; and Joseph Bradshaw, individuals residing in West Virginia, on behalf of themselves and all others similarly situated v. E.I. du Pont de Nemours and Company, a Delaware corporation doing business in West Virginia; Meadowbrook Corporation, a dissolved West Virginia corporation; Matthiessen & Hegeler Zinc Company, Inc., a dissolved Illinois corporation formerly doing business in West Virginia; and T.L. Diamond & Company, Inc., a New York corporation doing business in West Virginia*

On Petition for Rehearing

FILED
June 2, 2010
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

PER CURIAM:

On March 26, 2010, this Court issued an opinion in this case which affirmed the lower court's judgment in part, conditionally affirmed in part, and reversed in part. DuPont filed a petition for rehearing on April 23, 2010, seeking to have this Court reconsider the disposition of the punitive damages allocation for medical monitoring.[1] As pointed out in the majority opinion, the verdict form in this case did not allocate punitive damages between the Plaintiffs' property damage claims and their medical monitoring claims. The majority opinion, after finding that punitive damages could not be awarded for medical monitoring, allocated forty percent of the punitive damages for medical monitoring and

[1]DuPont also raised an issue in its petition for rehearing that involves the remand trial on the issue of statute of limitations. Insofar as the issue raised by DuPont on this matter is beyond the scope of the issues decided in the original opinion, we decline to address the matter.

thereafter reduced the punitive damages by forty percent.[2] In the petition for rehearing DuPont contends that this Court should have allocated seventy percent of the punitive damages for medical monitoring. In support of its argument Dupont presents essentially two contentions: (1) this Court should not have considered statements made during oral argument regarding the allocation of forty percent of the punitive damages for medical monitoring, and (2) that evidence exists which shows that seventy percent of the punitive damages should have been awarded for medical monitoring. We will address both contentions separately.

1. Representations Made During Oral Argument

During oral arguments, this Court specifically asked counsel for Plaintiffs whether the trial court made an allocation of the punitive damages between the property damage claims and the medical monitoring claims. This question was asked for two reasons. First, the record submitted to this Court did not contain any reference to an allocation of punitive damages between the property damage claims and the medical monitoring claims. Second, and most importantly, the question was asked because one of DuPont's assignments of error concerned whether or not punitive damages could be awarded for medical monitoring.

[2]Punitive damages were further reduced for other reasons not relevant to the petition for rehearing.

Counsel for Plaintiffs informed this Court, in response to our direct question, that the trial court allocated forty percent of the punitive damages for medical monitoring. After counsel for Plaintiffs informed this Court of how the trial court ruled on the issue of the allocation of punitive damages, counsel for DuPont closed out its argument without challenging the representations made by Plaintiffs' counsel. That is, DuPont failed to inform the Court that it disagreed with Plaintiffs' counsel's response to our question.

In its petition for rehearing, DuPont contends, for the first time, that "[t]he Circuit Court made no such allocation[.]" Assuming that DuPont is correct in representing to this Court that the circuit court did not make such an allocation, well settled principles of appellate procedure indicate that "a rehearing on an appeal can be granted only for purposes of correcting errors that the court has made, and the party seeking a rehearing cannot assign as error points or arguments that could have been raised before the appeal was resolved." *In re Leslie H.*, 861 N.E.2d 1010, 1015 (Ill. App. Ct. 2006).[3] *See also SouthTrust Bank v. Copeland One, L.L.C.*, 886 So. 2d 38, 43 (Ala. 2003) ("Matters not argued . . . on original submission cannot be raised for the first time on application for rehearing."); *Pacific Bell Wireless, LLC v. Public Utils. Comm'n of California*, 140 Cal. App. 4th 718, 746, 44 Cal. Rptr. 3d 733, 754 (Cal. Ct. App. 2006) ("Arguments cannot be raised for the first time in a

[3]Rule 24(a) of our Rules of Appellate Procedure states, in part, that a "petition [for rehearing] shall state particularly the points of law or fact which in the opinion of the petitioner the Court has overlooked or misapprehended[.]"

petition for rehearing."); *Massey v. Conseco Servs., L.L.C.*, 886 N.E.2d 581, 582 (Ind. Ct. App. 2008) ("[On petition for rehearing] Massey waived this issue by failing to raise it on appeal."); *Kinzenbaw v. Director of Revenue*, 62 S.W.3d 49, 54 n.9 (Mo. 2001) ("Issues raised for the first time in a motion for rehearing will not be considered."). It has been correctly noted that "[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked[.]" *Kennedy v. South Carolina Ret. Sys.*, 564 S.E.2d 322, 322 (S.C. 2001) (quotations and citation omitted).

"There are sound reasons for requiring a party to present all known arguments or claims to an appellate court before its decision is rendered." *Northern Indiana Commuter Transp. Dist. v. Chicago SouthShore & S. Bend R.R.*, 685 N.E.2d 680, 687 (Ind. 1997). "One of the reasons for the rule is to prevent a party from appealing in a piecemeal manner. The rule also keeps a party from shifting its position. The basic purposes are to promote the finality of appellate courts' decisions and to conserve judicial time." *Kentner v. Gulf Ins. Co.*, 689 P.2d 955, 957 (Or. 1984) (citations omitted). *See also OAIC Commercial Assets, L.L.C. v. Stonegate Vill., L.P.*, 234 S.W.3d 726, 747 (Tex. Ct. App. 2007) ("A motion for rehearing does not afford a party an opportunity to raise new issues after the case has been briefed, argued, and decided on other grounds, unless the error is fundamental. Fundamental error exists in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the

statutes or the Constitution[.]") (internal quotations and citations omitted). As more fully discussed in the next section, as a result of DuPont's silence during oral argument, it has waived its right to contest the issue of an allocation of punitive damages by the circuit court. *See Butch v. State Comp. Comm'r*, 112 W. Va. 493, 498, 165 S.E. 672, 674 (1932) ("The petition for rehearing now states the fact to be that the letter containing the protest was actually filed with the commissioner on April 28th. We cannot now consider a different state of facts from what was shown on the submission of the case.").

In addition to contending that the circuit court did not make an allocation for punitive damages, DuPont argues that this Court could not consider the statements of Plaintiffs' counsel during oral argument because "statements by counsel during argument do not constitute evidence." This contention by DuPont shows a lack of understanding of the purpose of appellate oral argument and the discretionary weight that is given to argument of counsel.

"Oral arguments before the appellate court are intended to aid the court in understanding the points raised and discussed in the briefs filed by the parties." *Security Dev. & Inv. Co. v. Ben O'Callaghan Co.*, 188 S.E.2d 238, 244 (Ga. Ct. App. 1972) (quotations and citation omitted). "Indeed, courts routinely rely on counsel's statements during oral argument and rely on these representations when deciding cases." *Matthews v.*

State, 165 S.W.3d 104, 110 (Tex. Ct. App. 2005) (quotations and citation omitted). Moreover, "[o]ral concessions developed during oral argument before [an appellate] court may properly be used even where the trial record is silent." *Staples v. Palten*, 571 A.2d 97, 101 n.1 (Conn. 1990). *See also Village Saloon, Inc. v. Division of Alcoholic Beverages & Tobacco, Dep't. of Bus. Regulation*, 463 So. 2d 278, 281 (Fla. Dist. Ct. App. 1984) ("Though the record is silent on the matter, it was represented during oral argument that a preliminary hearing was held as scheduled on November 16, without achieving any satisfactory resolution of the charges."); *Hoover v. Allied Van Lines, Inc*., 2005 WL 1277952, at *2 (Kan. Ct. App. 2005) ("As the record on appeal was silent as to why the district court relied upon § 14704(e) rather than § 14708(d), we asked the parties during oral argument for an explanation. Neither party had an explanation."); *State v. Hunter*, 1984 WL 3984, at *1 (Ohio Ct. App. 1984) ("During oral argument on appeal counsel did indicate that an in camera inspection of the tape was had, although the record is silent on this point.").

Although it is rare, this Court has disposed of cases based upon representations made by the parties during oral argument, which are not contained in the record. A case on point is *State v. Board of Canvassers of Nicholas County*, 106 W. Va. 544, 146 S.E. 378 (1929). The decision in *Smith* involved a petition for a writ of mandamus. The petition was filed by Ray Lambert seeking to have this Court compel the board of canvassers to reconvene and to properly count certain ballots, and to declare him the winner of a majority of all the

votes cast for the office of sheriff of Nicholas County. During oral argument in the case, the parties stated that this Court should assume that Mr. Lambert received 3,733 votes and that his opponent received 3,745 votes, exclusive of ballots to which there were objections. Based upon the representations the parties made at oral argument, this Court issued the requested writ. The opinion in *Smith* concluded that, based upon "the figures hereinbefore agreed to [at oral argument], we find that [the opponent] has received a total of 3,795 votes and [Mr.] Lambert 3,795 votes." *Smith*, 106 W. Va. at 554, 146 S.E. at 383. After this Court issued the opinion in *Smith*, Mr. Lambert filed a petition for rehearing. The basis for the rehearing was that Mr. Lambert "discovered that his counsel were mistaken when they stipulated with opposing counsel at the bar of this court that the court should assume that [the opponent] had 3,745 votes and [Mr.] Lambert 3,733 votes . . .; that, as a matter of fact, . . . [the opponent] had 3,744 votes and [Mr.] Lambert 3,733." *Smith*, 106 W. Va. at 554, 146 S.E. at 383. In summarily rejecting the petition for rehearing, this Court stated that Mr. Lambert "has pointed out nothing in the decision to indicate that there should be a rehearing of the case. Nor are we of opinion that the alleged mistake in the [opponent's] total . . . affords basis for rehearing." *Smith*, 106 W. Va. at 554, 146 S.E. at 383. *See also In re Skyelan H.*, 219 W. Va. 661, 664, 639 S.E.2d 753, 756 (2006) ("On the basis of the parties' statements during oral argument, we . . . reverse the circuit court's decisions and remand the case.").

Thus, it is clear that this Court may rely on representations made by counsel during oral argument regarding an issue that is not addressed in the record on appeal.

2. Evidence Showing That Seventy Percent of the Punitive Damages Should Be Awarded for Medical Monitoring

The petition for rehearing points out that, while this case was pending before this Court, and prior to oral arguments, the parties conducted proceedings before a special master to address the issue of the allocation of punitive damages. Specifically, Dupont contends that on August 29, 2008, Plaintiffs' counsel authored a letter suggesting that seventy percent of the punitive damages should be allocated for the medical monitoring claims. According to DuPont, the special master adopted this recommendation in a report rendered on November 25, 2008. For the reasons set out below, we find this nonbinding evidence to be untimely.[4]

DuPont readily admits that the special master's report was submitted to the circuit court on November 25, 2008. From that date to the date of oral arguments in this case, April 7, 2009, DuPont was aware of the special master's recommendation that seventy

[4]We characterize the special master's report as nonbinding for two reasons. First, DuPont has not alleged that the circuit court adopted the special master's recommendation. Second, the report expressly stated that "no action of the Parties or the [Trial] Court is being requested by this Report until the date that all appeals are resolved or this case is settled among the Parties."

percent of the punitive damages should be allocated for the medical monitoring claims. Even though DuPont had knowledge of the report long before the date of oral arguments, DuPont failed to file a motion with this Court to supplement the record with the report. Further, DuPont had such knowledge at the time this Court specifically asked Plaintiffs' counsel whether the trial court had made an allocation of the punitive damages award. After Plaintiffs' counsel represented to this Court that forty percent of the punitive damages was allocated to the medical monitoring claims, DuPont failed to challenge that assertion during rebuttal by informing this Court that no such allocation was made, and that a special master had adopted the suggestion of Plaintiffs' counsel that seventy percent of the punitive damages be awarded for the medical monitoring claims.

It has been correctly observed that, when a party is familiar with an issue in a case *prior to* appellate argument yet asserts for the first time in a petition for rehearing that the issue was not correctly represented on appeal, the failure of the party "to make . . . mention of the subject until after it had lost the case . . ., if deliberate, is a breach of duty to the court and, if inadvertent, is still inexcusable." *Carr v. F. T. C.*, 302 F.2d 688, 692 (1st Cir. 1962). *See also Hurst v. Gulf Oil Corp*., 254 F.2d 287, 288 (5th Cir. 1958) ("The first ground urged in support of the petition for rehearing is that the Court 'erred in deciding this case under the laws of Texas . . . .' Unless our recollection of the oral argument is faulty, no question as to the stipulation [that Texas law applied] was then raised and there

was no insistence on the law of New Mexico. This ground of the petition for rehearing comes too late."). A longstanding legal maxim adhered to by this Court is that "[t]he law aids those who are diligent, not those who sleep upon their rights." *Dimon v. Mansy*, 198 W. Va. 40, 48, 479 S.E.2d 339, 347 (1996) (internal quotations and citation omitted). "We have explained this principle of law to mean that when attorneys are careless, and [do] not attend to their interests in court . . . , they must suffer the consequences of their folly." *Law v. Monongahela Power Co.*, 210 W. Va. 549, 561, 558 S.E.2d 349, 361 (2001) (Davis, J., dissenting) (internal quotations and citation omitted). *See also Hanlon v. Logan County Bd. of Educ*., 201 W. Va. 305, 315, 496 S.E.2d 447, 457 (1997) ("Long standing case law and procedural requirements in this State mandate that a party must alert a tribunal as to perceived defects at the time such defects occur[.]"); *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996) ("The rule in West Virginia is that parties must speak clearly in . . . court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace.").

Further, "counsel cannot remain silent [on an issue raised during oral arguments] and then for the first time on [a petition for rehearing] spring out an objection that[,] if made [during oral arguments,] would have given [this Court] an opportunity to correct the alleged error." *State v. Lease*, 196 W. Va. 318, 323, 472 S.E.2d 59, 64 (1996). This Court has consistently held that "silence may operate as a waiver of objections to error

and irregularities[.]" *State v. Grimmer*, 162 W. Va. 588, 595, 251 S.E.2d 780, 785 (1979), *overruled on other grounds by State v. Petry*, 166 W. Va. 153, 273 S.E.2d 346 (1980). This raise or waive rule is designed "to prevent a party from obtaining an unfair advantage by failing to give [a] court an opportunity to rule on the objection and thereby correct potential error." *Wimer v. Hinkle*, 180 W. Va. 660, 663, 379 S.E.2d 383, 386 (1989). There is another salutary justification for the raise or waive rule. That is, "[i]t prevents a party from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error (or even worse, planting an error and nurturing the seed as a guarantee against a bad result)." *State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996). Although the raise or waive rule is usually invoked for errors or irregularities at the trial court level, the rule has equal force and application at the appellate level. As pointed out by the Ninth Circuit Court of Appeals, "[o]rdinarily, arguments not timely presented are deemed waived[, and t]his general doctrine of waiver applies to arguments raised for the first time in a petition for rehearing." *Narang v. Gonzales*, 138 Fed. App'x 26, 27 (9th Cir. 2005) (internal quotations and citation omitted). *See also Noonan v. Staples, Inc.*, 561 F.3d 4, 6 (1st Cir. 2009) ("That Staples did not timely raise the issue is also made clear by the fact that it has not, until now [(on a petition for rehearing en banc)], filed the notice required for a challenge to the constitutionality of a state statute. The issue is waived, and the fact that the issue raises constitutional concerns does not save the waiver."); *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1173 n.35 (9th Cir. 2009) ("On petition for rehearing en banc, MBNA raises

for the first time an argument that allowing private enforcement of California Civil Code section 1785.25(a) is inconsistent with the purpose of the FCRA and thus is preempted under both FCRA § 1681t(a) and ordinary conflict preemption provisions. MBNA did not advance this contention before us initially, so the argument is waived."); *United States v. Pipkins*, 412 F.3d 1251, 1253 (11th Cir. 2005) ("We have a long-standing rule that we will not consider issues that were argued for the first time in a petition for rehearing, and we adhere to that rule today."); *Keating v. F.E.R.C.*, 927 F.2d 616, 625-26 (D.C. Cir. 1991) ("It was not until the instant petition for rehearing that California raised for the first time a claim that the Corps permit is not a permit 'with respect to the construction of a[] facility' within the meaning of the statute. Because California failed to raise this argument until its petition for rehearing, the argument is waived and we decline to reopen the matter now.").

Petition for rehearing denied.