

15-0376

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SHARON M. EULANEY
CLERK
CIRCUIT COURT
WETZEL COUNTY, WV

IN THE CIRCUIT COURT OF WETZEL COUNTY, WEST VIRGINIA

ANDREA KARPACS-BROWN,
Individually and as Administratrix of the
Estate of her Mother, Elizabeth Karpacs, and
the Estate of her Father, Andrew Karpacs,

Plaintiff,

vs.

ANANDHI MURTHY, M.D.

Defendant

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* CIVIL ACTION NO. 03-C-36-K
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**ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING
PLAINTIFF'S MOTION FOR ATTORNEY FEES AND COSTS**

On February 20, 2015, came Andrea Karpacs-Brown, individually and as Administratrix of the Estate of her mother, Elizabeth Karpacs, and the Estate of her father, Andrew Karpacs, by and through her counsel, Geoffrey Brown; Anandhi Murthy, M.D., by and through her counsel, Stephen Brooks and Robert James; and Woodbrook Casualty Company by and through its counsel, Ancil Ramey, for Evidentiary Hearing in the above-captioned matter relative to the plaintiff's *Renewed Motion for Attorney's Fees and Costs*.

In connection therewith, the plaintiff tendered all documents previously submitted in connection with the proceedings, including all exhibits attached to the Plaintiff's previously submitted motion for attorney's fees and costs.

Specifically, on or about February 5, 2008, the plaintiff filed her original *Motion for Attorney's Fees and Costs and Memorandum in Support*. Attached to that Motion, and incorporated therein, were certain pieces of correspondence between the parties through counsel, documentary evidence of the conduct of Medical Assurance, nka Woodbrook Casualty Insurance, Inc., as it relates to that entity's abuse of the civil justice system, an Affidavit submitted by defendant, Anandhi Murthy, M.D., and the Affidavit of Geoffrey C. Brown, Esq.

The plaintiff also incorporated, by reference, the sworn deposition and trial testimony of Anandhi Murthy, M.D., and the deposition of one of this defendant's experts, Roger Abrahams, M.D. Dr. Murthy's testimony, both at deposition and trial, the deposition testimony of Dr. Abrahams, and the entire trial are all a matter of record before the Court.

All of this evidence was accepted into evidence by the Court without objection. Indeed, Mr. Brown offered to make himself available for examination on any of these submissions and the defendant declined this opportunity to take further evidence from Mr. Brown and declined to cross-examine him on any issues.

Thereafter, Dr. Murthy tendered to the Court her own evidentiary submissions.

After careful consideration of the arguments presented by counsel and the prior evidentiary submissions of the parties, the Court hereby GRANTS the plaintiff's motion. The Court's FINDINGS OF FACT and CONCLUSIONS OF LAW are as follows:

1. On May 23, 2003, Andrew Karpacs commenced this wrongful death and survivorship action against Anandhi Murthy, M.D. and Wetzel County Hospital. Mr. Karpacs alleged that Dr. Murthy fell below the standard of care in her treatment of Elizabeth Karpacs at Wetzel County Hospital on June 1 and 2, 2001. Mr. Karpacs alleged that Dr. Murthy's deviations from the standard of care led directly to Elizabeth Karpacs' suffering and death.

2. After the commencement of this action, Andrew Karpacs died and Andrea Karpacs-Brown took his place as the plaintiff in her capacity as the Administratrix of the Estate of her father, Andrew Karpacs, and the Estate of her mother, Elizabeth Karpacs.

3. Wetzel County Hospital was eventually dismissed as a defendant and the case proceeded against Dr. Murthy.

4. On December 11, 2003, the plaintiff took Dr. Murthy's depositions. During her deposition, Dr. Murthy admitted the following facts:

A. Dr. Murthy admitted that she saw Elizabeth Karpacs in the Wetzel County Hospital Emergency Room before 9:48 a.m. on June 1, 2001. See Deposition of Anandhi Murthy, M.D. at 35-38.

B. Dr. Murthy admitted that as of the time of her first examination of Elizabeth Karpacs, Dr. Murthy knew that Mrs. Karpacs had a distended abdomen, a white-blood cell count of 43, 900, an abdominal x-ray suggestive of a life-threatening condition known as ischemic colitis, a lower than normal temperature, and a faster than normal pulse. Id. at 38–42.

C. Dr. Murthy admitted that as of the first time she saw Mrs. Karpacs that morning, she knew that Mrs. Karpacs was likely septic, needed emergency care, and would probably die without surgery. Id. at 41–43.

D. Dr. Murthy admitted that under such circumstances, the standard of care required the administration of antibiotics on an immediate basis. Id. at 54. Nonetheless, Dr. Murthy admitted that Mrs. Karpacs received no antibiotics at all for over six hours after Dr. Murthy saw Mrs. Karpacs in the emergency room. Id. at 54–55.

E. Dr. Murthy admitted that she wanted to operate on Mrs. Karpacs using a procedure known as an exploratory laparotomy. As Dr. Murthy admitted, an exploratory laparotomy could have told her what was wrong with Mrs. Karpacs and given her a chance to fix that problem. Id. at 84–85.

F. Dr. Murthy admitted that her perception of Mrs. Karpacs' hydration status was the only reason why she did not perform an exploratory laparotomy on Elizabeth Karpacs. As Dr. Murthy testified:

Q. Was Elizabeth Karpacs' hydration status at any point during the course of your treatment of her on June 1st, 2001, and June 2nd, 2001 – did her hydration status ever prevent you from operating on her?

A. Yes.

Q. Did it prevent you from operating on her the entire time?

A. Yes.

Q. Is that the reason you didn't operate on Elizabeth Karpacs?

A. Yes. I was afraid that if I took a poorly hydrated patient to the operating room, she might not even survive the anesthesia and the surgery.

Q. So if Elizabeth Karpacs had been properly hydrated, you would have operated on her; correct?

A. Yes.

Q. What surgery would you have performed?

A. An exploratory laparotomy.

Id. at 80.

G. Dr. Murthy admitted that she could have “hydrated [Mrs. Karpacs] much quicker” through the use of a piece of equipment known as a Swan-Ganz catheter. Id. at 83. When asked why she didn’t provide a Swan-Ganz catheter to Mrs. Karpacs, Dr. Murthy testified that no Swan-Ganz catheter was available at Wetzel County Hospital at the time. Id. at 83.

H. While it was undisputed that a Swan-Ganz catheter was available at hospitals like the Ohio Valley Medical Center and West Virginia University Hospitals at the time, Dr. Murthy’s plan for Elizabeth Karpacs never included a transfer to another facility where she could receive rapid hydration and life-saving surgery. Id. at 84.

5. Elizabeth Karpacs died at Wetzel County Hospital at 5:55 am on June 2, 2001. In her deposition, Dr. Murthy admitted that Mrs. Karpacs died as a result of an ischemic colon. Id. at 99-100.

DR. MURTHY’S DISREGARD OF COURT ORDERS REGARDING MEDIATION

6. Through its October 7, 2003 Scheduling Order, this Court Ordered the parties to mandatory mediation. See Mandatory Status Conference and Scheduling Order (10/7/03).

7. In preparation for that anticipated mediation, on June 14, 2004, the plaintiff extended an offer to Dr. Murthy to release her in exchange for the payment of her policy limits. See June 14, 2004 letter from Mr. Brown to Ms. Vaglienti.

8. That demand was summarily rejected with no counter-offer. See June 21, 2004 letter from Ms. Vaglienti to Mr. Brown. In that letter, defense counsel made it clear that no settlement offer would be forthcoming.

9. At the time, the parties had already scheduled mediation in front of a private mediator, former Judge McCarthy. See July 30, 2004 letter from Mr. Brown to Judge McCarthy.

10. However, in light of the defense's position that there would be no negotiation on her part, mediation was cancelled.

11. In March of 2007, Dr. Murthy was the defendant in a separate Wetzel County medical malpractice trial styled Roberts v. Murthy, Civil Action No.02-C-14-M. That trial resulted in a verdict of \$5,764,214.75 against Dr. Murthy. In the wake of Roberts, Dr. Murthy sought a continuance of the trial date in the present matter due to Dr. Murthy's emotional state and the Roberts verdict publicity.

12. Additionally, Dr. Murthy filed suit against her medical liability insurance company, Woodbrook, for its bad faith handling of the Roberts matter.

13. During the proceedings held in connection with Dr. Murthy's request for a continuance of the trial date in this case, this Court held the following direct discussion with counsel for Dr. Murthy:

I've had dealings with [Medical Assurance] for years. I've had this policy where they come in and don't do anything in trying to get a case settled when the hospitals pony up money, radiologists pony up money, but the doctor and Medical

Assurance do nothing. You can put the word out that I want to talk to the people from your company.

[MR. JAMES]: I will. I appreciate that, and I will pass it on.

Tr. of March 28th, 2003 hearing at 9.

14. Subsequently, the plaintiff filed a Motion to Compel Mediation citing the mandatory language of the Medical Professional Liability Act. The Court granted the plaintiff's request and the matter proceeded to mediation on July 30, 3007.

15. As evidenced by the Affidavit submitted by Geoffrey C. Brown, Esq., plaintiff's counsel, mediation was attended by Mr. Brown and his clients, Andrea Karpacs Brown and Carol Smittle. The mediation was also attended by Dr. Murthy and her attorney, Stephen Brooks, Esq. Robert James, Esq., also of Flaherty, Sensabaugh & Bonasso, may also have been present. The mediation was also attended by a representative of Woodbrook, Dr. Murthy's medical liability carrier. While the exact nature of the exchange of offers and demands is irrelevant to the Court's decision, the Court simply notes that mediation failed.

16. Then, on January 4, 2008, Robert James, Esq., defense counsel, called Mr. Brown. During that conversation, Mr. James asked Mr. Brown to make a revised demand on behalf of the plaintiff. Mr. James informed Mr. Brown that Dr. Murthy was *personally* interested in hearing a revised demand, *regardless of the settlement position adopted by her insurance carrier*. As the letter confirming that conversation reads:

When we [attorneys Brown and James] talked on Friday, you told me that Dr. Murthy was personally interested in a renewed settlement demand from my client. When I asked about Woodbrook's posture, you told me that as far as you know, Woodbrook's position remains unchanged from the position communicated to me a few months ago by Steve Brooks. That is, Woodbrook had (and has) authorized an offer of \$150,000, but no more. After speaking with you Friday, I have the continuing understanding that from Woodbrook's perspective, no more will be authorized to settle this case. Instead, I now

understand that Dr. Murthy is interested in hearing a renewed offer from my client out of her own desire to see if the case can be settled -- independent of the position taken by her carrier.

See January 7, 2008 letter from Mr. Brown to Mr. James.

17. Thereafter, and despite the conversation of January 4, 2008, the defense refused to enter into further negotiation and went so far as to "pull" the \$150,000 offer, preferring to try the case with a zero offer to the plaintiff. See Letter from Defendant's counsel dated January 10, 2008. In that letter, defense counsel stated the following:

We believe that \$150,000 represents a fair and reasonable offer in a case where the special damages are under \$12,000 and the liability is questionable. As you are fully aware, mediation ended when you provided a demand of \$725,000 to my client's offer of \$150,000. At that time, the view was that your clients were not taking settlement negotiations seriously with such an initial high demand and continued high demands in response to reasonable offers.

Dr. Murthy's carrier wanted it to be conveyed that while the \$150,000 is open at this time, the offer is withdrawn as of the close of business on January 14, 2008. Any settlement discussions after January 14, 2008, will have to occur with the understanding the carrier is incurring substantial expenses gearing up for trial. There is no guarantee that \$150,000 will ever be back on the table.

18. Again, the Court notes that the specifics of the offers and demands exchanged do not form a basis for this decision. Rather, it is the abusive nature of the entire approach to the Court's orders that is relevant, along with the egregious circumstances evidenced by the efforts to obstruct the Court's orders regardless of Dr. Murthy's personal feelings on the matter.

19. The case ultimately proceeded to trial and the jury returned a verdict of \$4,000,000 against Dr. Murthy.

20. The present case was not the first time that Woodbrook had adopted this type of vexatious settlement strategy. Indeed, Woodbrook, formerly known as Medical Assurance, has a history of offering nothing and rejecting offers to mediate in even the most

meritorious cases. For example, according to contemporaneous news accounts, in 2001 Medical Assurance opted to scour the country and contact 66 different experts in order to find an opinion favorable to its insured, rather than mediate a malpractice case. See “Physician Insurer Told to Reveal Info,” The Charleston Gazette, Page 10A, October 26, 2001.

21. When Medical Assurance (now known as Woodbrook) was contacted about its behavior in that case, it actually seemed proud of what it had done:

A Medical Assurance Spokesman linked its handling of the Miller case to a longstanding policy of aggressively fighting claims. Last year, the insurer’s CEO told stockholders that it spent more on defense costs than any of its competitors.

Id.

22. The Court has also reviewed the sworn declaration of physician Michael Austin, who was a Woodbrook insured who was sued for medical malpractice. In his case, Woodbrook denied the claim and decided to defend it without speaking to the doctor at all.

Id. at 1.¹

23. Following the efforts of a Woodbrook attorney to induce doctor Austin to give false testimony and then to prevent the doctor from correcting it, a Woodbrook Vice-President, Tony DaPore, and Woodbrook’s Director of Claims, Roberta Spack, met directly with the doctor. These Woodbrook executives directly instructed Dr. Austin to lie at trial. Id. at 3.

24. When the doctor refused to conspire with his insurer to defend the indefensible, Woodbrook threatened the doctor with the loss of coverage. Id. at 4-5, 7. Woodbrook’s hand-picked attorney for Austin told him that Woodbrook was taking every

¹ Woodbrook was operating at that time under the name ProAssurance.

case to trial regardless of the physician's potential final judgment exposure. Id. at 6 (see also id. at 7, wherein an independent source confirms Woodbrook's "no settlement" policy).

25. Through a series of three different attorneys, as well as through its own executives, Woodbrook attempted to defend the indefensible by pressuring a doctor to alter his testimony and perjure himself. Id. at 1-8.

26. Woodbrook's no-settlement scenario played itself out during the course of litigation in the recently concluded Roberts v. Murthy trial. In that case, the defense refused to offer a single penny to settle that case. When that trial resulted in a verdict of over \$5.7 million, Dr. Murthy filed an affidavit stating that she "experienced ridicule and great humiliation having to participate in the [Roberts] trial . . . , which resulted in a great deal of emotional distress." See Affidavit of Dr. Murthy at ¶ 3.

27. Significantly, Dr. Murthy eventually sued Medical Assurance for its bad-faith conduct in Roberts. (See civil action filed by Anandhi Murthy against Woodbrook Casualty Insurance Company, Case No. 07-C-37-K, in the Circuit Court of Wetzel County, West Virginia.)

**DR. MURTHY'S CONDUCT WITH REGARD TO HER EXPERT, ROGER
ABRAHAMS, M.D.**

28. On April 15, 2004, Dr. Murthy submitted her disclosure of expert witnesses pursuant to the Court's Scheduling Order. Among the witnesses disclosed by Dr. Murthy was Roger A. Abrahams, M.D. Dr. Murthy's disclosure regarding Dr. Abrahams reads, in its entirety:

Dr. Abrahams is a board-certified internal medicine specialist with a sub-specialty in pulmonary diseases. A more complete listing of Dr. Abrahams' qualifications is set forth in his curriculum vitae, a copy of which is attached hereto. **Dr. Abrahams will offer opinions regarding Elizabeth Karpacs'**

COPD and its effect on her life expectancy. Dr. Abrahams' opinions will be offered to a reasonable degree of medical probability. Dr. Abrahams' opinions are based on his education, training and experience as an internal medicine specialist with a sub-specialty in pulmonary diseases and upon his review of the medical records of Elizabeth Karpacs.

Dr. Abrahams is expected to testify that prior to June 1, 2001; Elizabeth Karpacs was suffering from chronic respiratory failure. Seventy percent of such patients survive for one year. Fifty percent of such patients survive for two years, and forty three percent of such patients survive for three years. Mrs. Karpacs' chances of survival within these percentages was further reduced because she continued to smoke and because of her age (76 years).

Dr. Abrahams will be made available for deposition so that plaintiff's counsel may more fully explore his opinions and the bases therefore.

Expert Witness Disclosure By Defendant, Anandhi Murthy, M.D. (emphasis supplied).

29. At his deposition, Dr. Abrahams admitted that the life-expectancy rates listed in his expert witness disclosure came from the abstract of a single piece of medical literature. Id. at 34-35.

30. Dr. Abrahams admitted that there were "probably plenty of other articles out there that would have other statistics that, you know, would be in this ballpark." Id. at 35.

31. When asked directly what he planned to say on the witness stand about Mrs. Karpacs' life expectancy, Dr. Abrahams testified that it was "a hard question to answer," with "a lot of variability." That he could "give [the jury] a ballpark," that "as long as nothing comes along and rocks the boat, [Mrs. Karpacs] may [have done] okay for a while," that "it's sort of a matter of luck," depending on "a flip of the coin." Id. at 38-45.

32. Perhaps most dramatically, Dr. Abrahams admitted that his lack of a fully formed opinion was due to the fact that he intentionally under-prepared for his deposition in order to save the defendant litigation costs. As Dr. Abrahams testified:

Q. Well, yeah, I understand. That's sort of why we're here today, so that I can explore why you think --

A. Okay.

Q. -- that those particular statistics might pertain to Elizabeth Karpacs. And I understand that that's not maybe --

A. Right. As long as you're not holding me to these precise numbers, yes, that's correct, you know.

I mean, these numbers come from an article. You know, I was using the article to give some scientific basis or numbers in terms of what survival was. And there are probably plenty of other articles out there that would have other statistics that, you know, would be in this ballpark. Some might be a little higher, some might be a little lower, you know.

And just -- and actually, when -- initially, when I did this, I didn't actually get the whole article. I just got the summary, because, at that time, when I got the articles, I didn't -- I didn't know how far this was going to go. And I was sort of not trying to put hours and hours of billing in for them.

So it's -- I mean, if things progressed, it looks like it's going to trial, I might actually try to pull some other articles and other things to assist with this aspect also.

Q. Have you done that already?

A. No.

Abrahams Dep. at 34-36 (emphasis supplied).

33. On December 8, 2008, and within the time limits established by the Court for pre-trial Motions, the plaintiff filed her "Motion in Limine to Exclude the Testimony of Roger Abrahams, M.D." along with a notice of hearing setting her Motion before this Honorable Court on January 21, 2005.

34. Dr. Murthy failed to respond to that Motion.

35. Dr. Murthy then failed to appear at the hearing.

36. At the January 21, 2005 hearing, the Court Ordered the plaintiff to submit proposed findings of fact and conclusions of law regarding her Motion. The plaintiff complied and on February 10, 2005, she served Dr. Murthy with her proposed Order.

37. Dr. Murthy did not respond to the plaintiff's submission or file a competing Order.

38. On September 27, 2005, the parties appeared before the Court for a status conference. At that conference, Dr. Murthy asked the Court to establish new deadlines for pre-trial motion practice. The Court granted Dr. Murthy's request. See Amended Scheduling Order (entered 10/5/05).

39. Dr. Murthy then submitted nothing under the deadlines she asked the Court to establish.

40. Having received no response from Dr. Murthy to her proposed Order, on January 24, 2006, the plaintiff filed a Motion to enter her proposed findings of fact and conclusions of law. See "Plaintiff's Motion for the Entry of Certain Pretrial Orders."

41. Dr. Murthy again failed to respond.

42. Thus, on March 24, 2007, the Court entered its "Findings of Facts and Conclusions of Law Regarding Plaintiff's Motion in Limine No. 4 and Plaintiff's Motion in Limine to Exclude The Testimony of Roger Abrahams, M.D." all without objection from Dr. Murthy.

43. Through that Order, the Court ruled that Dr. Abrahams would not be permitted to testify at trial. The Court held that Dr. Abrahams' opinions about June 1 and 2, 2001 were outside his area of expertise and cumulative. The Court also held that Dr. Abrahams' opinions regarding Mrs. Karpacs' life-expectancy were speculative and inadmissible.

44. Nearly nine months then elapsed without any word on the subject from Dr. Murthy. Thus, as of the middle of December 2007, it had been approximately three and a half years since Dr. Abrahams' deposition. During that time, Dr. Murthy had never supplemented her expert witness disclosure or even moved to do so. It had been three years since the plaintiff filed her *Motion in Limine* regarding Dr. Abrahams' opinions. During that time, Dr. Murthy had never objected to the plaintiff's Motion in any way. It had been almost three years since Dr. Murthy received the plaintiff's Proposed Findings of Fact and Conclusions of Law excluding Dr. Abrahams as a witness. During that time, Dr. Murthy never objected to the plaintiff's tendered proposal.

45. Then, on December 11, 2007, less than two months before trial, Dr. Murthy moved the Court to reconsider its prior ruling. On January 12, 2008, the Court denied this request, at least in part because:

Absent unusual circumstances, motions to reconsider are disfavored. That is particularly true when, as is the case here, the party asking for reconsideration submits no new evidence and cites no change in the law that would provide a basis for the Court to reverse its own prior decision.

"Order Denying Anandhi Murthy, M.D.'s Motion to Reconsider" at ¶ 3.

46. The trial of this matter commenced on January 22, 2008. In the early stages of trial and with the Court's guidance, the parties agreed to keep the evidentiary record open in order to allow the defendant to proffer Dr. Abrahams' testimony at a later date. It was the understanding of the Court that Dr. Abrahams' proffer would be used to elicit testimony from Dr. Abrahams on the subjects addressed by the Court's Order of March 24, 2007; that is, those *disclosed* opinions *excluded* by the Court's prior Order.

47. Later, and on *the fourth day of trial*, Dr. Murthy submitted her "Proffer of Anticipated But Excluded Testimony of Roger Abrahams, M.D." Significantly, Dr. Murthy

abused the opportunity afforded to her by the Court and the agreement of the plaintiff. Specifically, Dr. Murthy took advantage of the opportunity to submit a written proffer by using that proffer to disclose Dr. Abrahams to testify on a wide range of previously undisclosed subjects, the majority of which flatly contradicted his prior deposition answers.

48. This entire course of conduct has led to the needless expansion of this litigation process and has been a completely unnecessary drain on the resources of the Court and the parties.

**DR. MURTHY'S TRIAL TESTIMONY REGARDING CONVERSATIONS
WITH ELIZABETH KARPACS**

49. During her 2003 deposition in the present matter, Dr. Murthy testified that she could not remember any specific conversations with any members of the Karpacs family on June 1 or June 2, 2001. See Murthy Dep. at 103.

50. Following that deposition, the plaintiff served written discovery requests on Dr. Murthy that asked her to "Please describe with particularity each and every conversation you claim to have had on June 1, 2001 or June 2, 2001 with Elizabeth Karpacs and any members of her family, including Andrew Karpacs, Andrea Karpacs-Brown, Carol Smittle, Gary Smittle or Kevin Karpacs. Please describe these conversations by identifying them with reference to their date, time, participants, and substance." See Plaintiff's Second Set of Interrogatories and Request for Production of Documents at Interrogatory No. 1.

51. In her response, Dr. Murthy described her first interaction with Mrs. Karpacs on June 1, 2001 as follows:

June 1, 2001:

Sometime before 10:15 a.m.: I saw and examined Mrs. Karpacs in the Wetzel County Hospital Emergency Department. I asked for her history since the last time I had seen her and she related

the history to me. I told her that I would have to wait for test results before knowing how to proceed. I believe a family member was present with Mrs. Karpacs in the emergency room, but I do not know which family member it was. I do not recall any conversation with that family member.

52. In January of 2008, less than one month before trial, Dr. Murthy was deposed again. At the conclusion of that deposition, Dr. Murthy was asked if there was anything about her prior deposition that she would like to “change, edit, modify, [or] add something to.” Dr. Murthy responded that there was not. See Deposition of Anandhi Murthy, M.D. (1/14/08) at 33.

53. When the case proceeded to trial, Dr. Murthy was asked on the witness stand why she never told Mrs. Karpacs that she was probably going to die without surgery and why she never told Mrs. Karpacs that she could have been transferred to another hospital for emergency rehydration and life-saving surgery. For the first time, Dr. Murthy testified that she did remember conversations with Mrs. Karpacs wherein Mrs. Karpacs expressed extreme fear at the prospect of surgery, telling Dr. Murthy, “Please don’t tell me I need surgery.”

54. Again, this was not the first time that Dr. Murthy had altered her testimony on critical points at trial. In Roberts, Dr. Murthy admitted in her deposition that she had invented a new procedure in the middle of an elective surgery and that this new procedure was one that she had never read about, heard about, or seen before. Then, at trial, and after the plaintiff had already rested, Dr. Murthy recanted this entire portion of her prior sworn testimony. For the first time, she testified that she did not actually invent a new operation. Also, for the first time, she claimed that her deposition testimony to the contrary was the product of “intimidation” by plaintiff’s counsel.

CONCLUSIONS OF LAW

55. West Virginia Code § 55-7B-5 abolished the implied private right of action under the Unfair Trade Practices Act described in Jenkins v. J.C. Penney Casualty Ins. Co. in medical malpractice cases.

56. The statute did not, however, abolish the common law doctrines set forth in Suzuki v. Pritt, 204 W. Va. 388 (1998), Sally-Mike Properties v. Yocum, 179 W. Va. 48 (1986) and the inherent power of the court to control the litigants before it through the use of the sanctioning power under Rules 26(e) and 37 of the West Virginia Rules of Civil Procedure.

57. Suzuki v. Pritt recognized that “A well-established exception to the general rule prohibiting the award of attorney fees in the absence of statutory authorization, allows the assessment of fees against a losing party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” Pritt v. Suzuki Motor Co., Ltd., 204 W.Va. 388 (1998) (quoting Nelson v. West Virginia Public Employees Ins. Bd., 171 W.Va. 445, 451, 300 S.E.2d 86, 92 (1982)).

58. Prior to Suzuki, Sally-Mike Properties v. Yocum explained the circumstances under which a Circuit Court could depart from the “American Rule” in some detail:

This traditional exclusion of attorney's fees from “costs” recoverable by statute or court rule is derived from the principle that as a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement. Daily Gazette Co. v. Canady, 175 W.Va. 249, 250, 332 S.E.2d 262, 263 (1985); 1 S. Speiser, Attorneys' Fees §§ 12:1, 12:3-12:4 (1973). This so-called “American” rule (contrasted with the rule in England) has, in other jurisdictions as well as in this jurisdiction, been subject to exceptions in certain types of cases. For example, W.Va.Code, 59-2-11 [1931] authorizes a court of equity to exercise its traditional discretion in the award and allocation of costs. See Nagy v. Oakley, 172 W.Va. 569, 572, 309 S.E.2d 68, 71 (1983). See also 1 S. Speiser, Attorneys' Fees §§ 12:4, at 470-71, 12:11 (1973). There is authority in equity to award to the prevailing litigant his or her reasonable

attorney's fees as "costs," without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. Hechler v. Casey, 175 W.Va. 434, 450, 333 S.E.2d 799, 815 (1985); Daily Gazette Co. v. Canady, 175 W.Va. 249, 250, 332 S.E.2d 262, 263-64 (1985); Nelson v. West Virginia Public Employees Insurance Board, 171 W.Va. 445, 451, 300 S.E.2d 86, 92 (1982); Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-59, 95 S.Ct. 1612, 1622, 44 L.Ed.2d 141, 154 (1975). See also 1 S. Speiser, Attorneys' Fees § 12:11 (1973); annot., 31 A.L.R.Fed. 833 (1977). "Bad faith" may be found in conduct leading to the litigation or in conduct in connection with the litigation. Hall v. Cole, 412 U.S. 1, 15, 93 S.Ct. 1943, 1951, 36 L.Ed.2d 702, 713 (1973).

Id. at 248-49.

59. The defendant's aggregated misconduct in this case rises to the level of bad faith, vexatious and oppressive conduct that meets the requirements of Suzuki and Sally-Mike.

60. The defendant's vexations and oppressive conduct was pervasive in the case, and includes at least the following categories of misconduct: 1) the violation of court orders regarding mediation; 2) the failure to timely supplement prior incorrect discovery answers and deposition testimony under Rule 26(e); and 3) the material changes in testimony at trial following the plaintiff resting her case.

61. Mediation is required by law in medical cases as described above. Nevertheless, Dr. Murthy refused to engage in mediation as required by law, and as ordered by the Court. The failure to obey Court orders subjects a litigant to sanctions. According to pleadings filed by counsel hired by Woodbrook, Dr. Murthy personally refused to authorize her carrier to negotiate at court-ordered mediation. See Dr. Murthy's Response to Plaintiff's Motion to Compel Mediation. Whatever excuses are given, the Court's Order was to mediate and the violation of the Court's Order subjects the Defendant to sanction.

62. As described above, Dr. Murthy altered highly material, even potentially dispositive testimony in both Roberts and Karpacs. In Roberts, Dr. Murthy claimed she had been intimidated into admitting facts conclusively establishing her liability. In Karpacs, Murthy took a different tack, claiming to have had her memory jogged as to a critical exculpatory conversation with the deceased by appearing at trial. Arguments over interpretation or modest changes in testimony are part of ordinary trial practice. But a defendant who repeatedly attempts to change dispositive testimony after the plaintiff rests, citing un-examinable reasons like conversations to which only the deceased was a witness or a surgeon's purported fear of questioning makes a mockery of the oath and the discovery process.

63. It is particularly relevant that Dr. Murthy never honored her legal duty to supplement her discovery responses or deposition testimony when her memory changed. Dr. Murthy's conduct directly violated Rule 26(e) and constituted an attempt to immensely prejudice both plaintiffs. Rule 26(e)(2) states:

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which:

- (A) The party knows that the response was incorrect when made, or,
- (B) The party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

Id. See also Syl. pt. 3, Prager v. Meckling, 172 W.Va. 785, 310 S.E.2d 852 (1983) (“Rule 26(e)(2) of the Rules of Civil Procedure imposes a continuing obligation to supplement responses previously made when, in light of subsequent information, the original response is incorrect.”).

64. A litigant's obligation to supplement previously served discovery responses and answers is at its zenith when the answers are pivotal to the case. As the Prager Court put it:

Despite the lack of any express provision in Rule 26(e) authorizing the imposition of sanctions for failure to supplement previous discovery responses that are incorrect in light of current information, most courts have held that a trial court has inherent power to impose sanctions as a part of its obligation to conduct a fair and orderly trial.

Id. See also, Rule 37(b) (listing full range of sanctions available for violation of discovery rules, including default); Jenkins v. CSX Transp., Inc., 220 W.Va. 721, 649 S.E.2d 294, 300-02 (2007) (same).

65. Nevertheless, in Roberts and Karpacs, the first Plaintiff heard of Dr. Murthy's new exculpatory testimony and facts was when she took the stand. Trial by ambush is not contemplated by the Rules of Civil Procedure. McDougal v. McCammon, 193 W.Va. 229, 236-37, 455 S.E.2d 788, 795-96 (1995)). Furthermore:

[t]he discovery process is the manner in which each party in a dispute learns what evidence the opposing party is planning to present at trial. Each party has a duty to disclose its evidence upon proper inquiry. The discovery rules are based on the belief that each party is more likely to get a fair hearing when it knows beforehand what evidence the other party will present at trial. This allows for each party to respond to the other party's evidence, and it provides the jury with the best opportunity to hear and evaluate all of the relevant evidence, thus increasing the chances of a fair verdict.

Graham v. Wallace, 214 W. Va. 178, 184-85 (2003)

66. The violation of Rule 26(e) allows a Court to sanction the litigant on its own initiative or upon presentation of a motion. See W.Va.R.Civ.Pro. 26(e)(3).

67. As shown through the history of the Roberts case and this case, as well as Medical Assurance/Woodbrook's track record in West Virginia and around the nation, this insurer has a patently unlawful, illegitimate "business plan" when it comes to medical cases.

The plan is to take all or virtually all cases to trial, regardless of merit, in an effort to “send a message” that litigating medical cases against its insureds is more trouble than it’s worth. See Austin declaration. This strategy seeks to capitalize on the poisoning of the jury pool against medical negligence cases that this Court has recognized on multiple occasions.

68. Whatever the merits of this strategy as a matter of business judgment, it unambiguously violates the law.

69. Although the defendant’s conduct cannot be addressed through the Jenkins v. J.C. Penney Casualty Ins. Co., cause of action, that does not mean it cannot be addressed. In evaluating whether the Defendant’s conduct is vexatious and oppressive under Suzuki and Sally-Mike this Court can consider the legality of the conduct at issue. Conduct which violates the law is reasonably and properly viewed as oppressive, unreasonable and vexatious. While not every violation of the UTPA would be sufficient to trigger the common-law remedies of Suzuki and Sally-Mike, this case, considered in the totality of circumstances, does not present a difficult or close question. The Defendant’s behavior violated Court Orders, Rules of Civil Procedure and brought the integrity of the oath into serious question at two trials. On top of that the negotiation behavior of the insurer was vexatious and unreasonable. Under such circumstances, the shifting of attorney’s fees is entirely proper.

70. This Court is cognizant of the opinion issued by the West Virginia Supreme Court of Appeals on this motion. Karpacs-Brown v. Murthy, 224 W.Va. 516 (2009).

71. Accordingly, this Court must refrain from imposing “sanctions on a party for general misconduct which is unrelated to any identifiable harm suffered by the other party in the case.” Karpacs-Brown, 224 W.Va.at 526. As our Supreme Court of Appeals held in syllabus point 1, Bartles v. Hinkle, 196 W.Va. 381 (1996), a “relationship” must exist

“between the sanctioned party’s misconduct and the matters in controversy such that the transgression threatens to interfere with the respectful decision of the case.”

72. Accordingly, as to conduct that occurred outside of this Civil Action, this Court will not consider and has not considered that evidence unless it relates to an identifiable harm suffered by the plaintiff such that the transgression threatened to interfere with the respectfully decisions of the case.

73. To that end, evidence of the conduct of Dr. Murthy’s carrier in other matters and Dr. Murthy’s own conduct in Roberts is relevant to the Court’s consideration only insofar as it disproves an innocent or good-faith explanation for the egregious discovery abuses of Dr. Murthy in this very case.

74. Although not as extreme as this, witnesses do sometimes recall new facts. Although not as extreme as this, experts are sometimes unprepared for their depositions. More benign events of this type do not ordinarily rise to the levels of the kinds of vexatious or oppressive litigation strategies warranting sanctions. Here, however, no single element of misconduct can be viewed in isolation. Indeed, to some degree, this Court must consider the state of mind of the defendant when engaging in such conduct.

75. The fact that Dr. Murthy has, on another occasion, materially altered her trial testimony on a core issue, on the fly, without notice, is relevant to the Court’s determination that her decision to do so again here was not the product of an innocent recollection of the new facts.

76. The defendant’s financial decision to deliberately under-prepare an expert for deposition only to persist for years in trying to tender that expert for further testimony is a serious discovery violation. The evidence of the defendant’s disregard of this Court’s Orders

regarding mediation and the deliberate financial calculations underpinning this entire approach to litigation demonstrates the complete disregard this defendant had for legitimate process in this case.

77. No part of these conclusions of law rests on specific offers and demands exchanged by the parties during settlement negotiations. Rather, the Court's consideration of sanctions considers matters related to settlement only insofar as they relate to violations of the Court Orders on mediation and on the dramatic events just before trial where Dr. Murthy attempted to negotiate this matter despite her carrier's position.

Therefore, pursuant to this Court's inherent power, Suzuki and Sally-Mike, as well as West Virginia Civil Procedure Rules 26(e) and 37, the Court HEREBY GRANTS the plaintiff's Motion for Attorney's Fees and Costs. The defendant shall be responsible for the attorney's fees, expenses, and costs that would normally be borne by the Plaintiff and Plaintiff's fees, expenses and costs shall be borne by the Defendant or the Defendant's insurer.

The Plaintiff is ORDERED to tender to the Defendant a calculation of all attorney's fees, expenses and costs within thirty (30) days. If the parties are unable to agree on the amount of fees, expenses, and costs recoverable by the plaintiff, the plaintiff is instructed to contact the Court to arrange for a hearing on the matter.

The Clerk is directed to send attested copies of this Order to all counsel of record.

Dated this 25th day of MARCH, 2015

Mark A. Karl
MARK A. KARL, JUDGE

I HEREBY CERTIFY THAT THE ANNEXED INSTRUMENT IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN CLERK'S OFFICE
ATTEST Sharon M. Shuler CIRCUIT CLERK
WETZEL CO. WEST VIRGINIA
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