



No. 15-0376

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

**ANANDHI MURTHY, M.D. and
WOODBROOK CASUALTY INSURANCE COMPANY,**

Appellants,

v.

**ANDREA KARPACS-BROWN, individually and as ADMINISTRATRIX OF THE
ESTATE OF HER MOTHER, ELIZABETH KARPACS, and the
ESTATE OF HER FATHER, ANDREW KARPACS,**

Appellee.

*From the Circuit Court of Wetzel County, West Virginia
Civil Action No. 03-C-36K*

APPELLANT, ANANDHI MURTHY'S BRIEF

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ASSIGNMENTS OF ERROR

The Appellant, Anandhi Murthy, M.D. (hereinafter “Murthy”), asserts that the Circuit Court of Wetzel County (“Circuit Court”), erred as follows:

- (1) The Circuit Court erred in exceeding the scope of this Court’s remand.
- (2) The Circuit Court erred in awarding attorney fees and costs outside the provisions of Rules 11, 16, and 37 of the Rules of Civil Procedure by effectively holding Dr. Murthy personally liable for third-party bad faith.
- (3) The Circuit Court erred in basing its award of attorney fees and costs, in part, on a claim that its Order mandating mediation was violated when the Court had actually amended the Order regarding mediation.
- (4) The Circuit Court erred in basing its award of attorney fees and costs on a claim of changing testimony at trial when it was not a material issue and the jury ultimately addressed the situation through its verdict.
- (5) The Circuit Court erred in basing an award of attorney fees and costs in part on conduct during settlement negotiations.
- (6) The Circuit Court erred in basing its award of attorney fees and costs, in part, on conduct involving Dr. Abrahams, when the Plaintiff simply conducted a successful deposition which resulted in his testimony being excluded and the Defendant sought reconsideration and to preserve the record on this issue.

STATEMENT OF THE CASE

I. Statement of Facts

This underlying case is a medical malpractice case brought by Andrea Karpacs-Brown, individually and as Administratrix of the Estate of Her Mother, Elizabeth Karpacs. (hereinafter “Karpacs”).

The medical malpractice case involved Elizabeth Karpacs, who was a 76 year old woman with late or end stage COPD, who had spent three weeks in May of 2001 hospitalized for her COPD and pneumonia during which she received extensive oxygen therapy and antibiotic therapy before being discharged on May 22, 2001. The actual medical malpractice claim involved her admission to Wetzel County Hospital on June 1, 2001, with a history of vomiting,

diarrhea, and a current symptom of abdominal pain. The Plaintiff alleged that Dr. Murthy was negligent in failing to conduct exploratory surgery on Ms. Karpacs's abdomen on June 1, 2001, and in otherwise failing to properly treat her or transfer her to another facility. Ms. Karpacs passed away during that admission on June 2, 2001. The jury ultimately returned a verdict in favor of Karpacs and against Dr. Murthy for medical malpractice during the June 1 and 2, 2001 admission.

Post-trial motions included Plaintiff's filing of a Motion for Attorney Fees and Costs. This Appeal arises from that Motion.

II. Procedural History

On May 23, 2003, Karpacs initiated this lawsuit by filing a Complaint with the Wetzel County Circuit Court. (*See* Complaint; Appendix pp. A 1 – A 10). Murthy timely answered and the parties began conducting discovery.

On October 4, 2003, a Mandatory Status Conference and Scheduling Order was entered which mandated that the parties conduct mediation. (Appendix pp. A 19 – A 20).

On June 15, 2004, the October 2003 Scheduling Order was amended to state, as it applies to mediation, that “the parties be permitted to engage in mediation...”. (Appendix p. A 36).

On June 14, 2004, Karpacs sent a demand letter asking for the policy limit from Murthy to settle the case. (Appendix p. A 2557). In a correspondence dated June 21, 2004, Murthy's counsel provided a response that made no mention of mediation. (Appendix p. A 2558). On June 23, 2004, Karpacs's counsel wrote and advocated cancelling mediation. (Appendix p. A 2559). On June 25, 2004, Murthy's counsel responded making it clear they were still open minded about mediation, but advocated taking Dr. Battle and Tallman's depositions first. (Appendix p. A 2560). On August 3, 2004, Murthy sent a correspondence to the mediator, Judge

McCarthy, indicating that Murthy was still prepared to attend mediation. Nevertheless, no mediation occurred in 2004. (Appendix p. A 2561).

After deposing Roger Abrahams, M.D., Karpacs filed on December 11, 2004, a Motion in Limine regarding Roger Abrahams, M.D. (Appendix pp. 48 – A 84). She sought to preclude him from testifying at trial because his opinions were not specific enough and were speculative on the issue of life expectancy of Elizabeth Karpacs. Murthy did not contest this Motion and on March 27, 2007, the Circuit Court entered Findings of Fact and Conclusions of Law confirming that Dr. Abrahams's opinions regarding Ms. Karpacs life expectancy were speculative and his testimony was inadmissible. (Appendix pp. A 116 – A 179).

Karpacs then filed a Motion to Compel Mediation, which the Circuit Court granted, and the matter then proceeded to mediation on July 30, 2007. (Appendix pp. A 178 – A 179). While the parties attended the mediation, the mediation did not succeed in settling the case.

In November 2007, this Court issued a decision on another matter addressing exclusion of experts. *See State ex rel. Jones v. Recht*, 221 W. Va. 380, 655 S.E.2d 126 (2007). After evaluating this ruling, Murthy filed a Motion to Reconsider the exclusion of the testimony of Dr. Abrahams. (Appendix pp. A 203 – A 211). The Motion was filed on December 12, 2007, and argued on December 21, 2007. The Circuit Court denied the Motion. (Appendix pp. A 239 - 240).

In early 2008, conversations and correspondence were exchanged between the parties in a final attempt to resolve the matter before proceeding to trial. This was not successful, and the case proceeded to trial on January 22, 2008. (Appendix p. A 407).

On January 25, 2008, the jury returned a verdict in Karpacs's favor and against Murthy. (Appendix pp. A 408 - A 411).

Post-trial Motions were filed on a variety of issues that ultimately resulted in an appeal before this Court, in which it upheld some of the Circuit Court's rulings and overturned other rulings. This Court's opinion reduced the jury verdict from \$4,000,000 to \$1,000,000 consistent with the applicable cap under the Medical Professional Liabilities Act, but otherwise denied Dr. Murthy's request for a new trial. Karpacs-Brown v. Murthy, 224 W. Va. 516, 686 S.E.2d. 746 (2009).

Meanwhile, as to the issues involving this appeal, back on July 29, 2008, the Circuit Court entered Findings of Fact and Conclusions of Law finding that attorney fees and costs were appropriate. (Appendix pp. A 728 - A 746). On December 21, 2009, however, following Murthy's appeal of the Circuit Court's decision, this Court issued an Order remanding the case for an evidentiary hearing on the Motion for Attorney Fees and Costs and provided additional directives for the Circuit Court with regard to evaluating attorney fees and costs. See Karpacs-Brown v. Murthy, 224 W. Va. 516, 686 S.E.2d. 746 (2009).

Upon remand, written discovery was exchanged between the parties.¹ In addition, Dr. Murthy filed a series of Motions in Limine, attempting to provide structure and clarifications for the issues at the evidentiary hearing. (Appendix pp. A 2097 – A 2118).

¹ Murthy served Interrogatories, Requests for Production of Documents, and Request for Admissions upon Karpacs on or about February 17, 2010, (Appendix pp. A 2056- A 2063); Karpacs served Requests for Admissions and Interrogatories upon Murthy on or about February 20, 2010, (Appendix pp. A 2064 - A 2086); Murthy served Answers to Karpacs's Requests for Admissions and Interrogatories on or about April 5, 2010, (Appendix pp. A 2165 - A 2167); Karpacs served Answers and Responses to Murthy's Interrogatories, Requests for Production of Documents and Request for Admissions on or about April 23, 2010, (Appendix pp. A 2314 - A 2327); Karpacs served a Fourth Set of Requests for Production of Documents on Murthy on or about June 24, 2010, (Appendix pp. A 2328 – A 2332); Murthy served Supplemental Interrogatories, Request for Production of Documents and Request for Admissions upon Karpacs on or about July 26, 2010, (Appendix pp. A 2333 - A 2343); Murthy served Answers and Responses to Karpacs's Fourth Set of Interrogatories and Requests for Production of Documents on or about July 26, 2010, (Appendix pp. A 2344 - A 2348); Karpacs served Responses to Murthy's Requests for Admission on or about August 25, 2010, (Appendix pp. A 2349 - A 2351); and Karpacs served Answers and Responses to Murthy's Supplemental Interrogatories and Requests for Production of Documents on or about May 6, 2011, (Appendix pp. A 2352 - A 2457).

The Circuit Court entered an Order on February 7, 2012, providing that the parties submit proposed Findings of Fact and Conclusions of Law on the various of Motions of Limine by February 24, 2012. (Appendix pp. A 2509 - A 2511).

On February 24, 2012, both Dr. Murthy and Mrs. Karpacs submitted their proposed Findings of Fact and Conclusions of Law on the various Motions in Limine.

Before setting an evidentiary hearing, the Circuit Court held numerous Status Conferences on the following dates: January 18, 2013 (Appendix pp. A 2512 - A 2515); April 19, 2013 (Appendix pp. A 2516 - A 2518); and July 18, 2014 (Appendix pp. A 2537 - A 2540).

At the Status Conference on July 18, 2014, the Circuit Court granted Murthy's Motion in Limine No. 3 Motion to Preclude Plaintiff from Offering Any Testimony, Evidence or Argument Regarding Settlement Negotiations and/or Attempts to Start Settlement Negotiations. (Appendix pp. A 2660 - A 2661). Thereafter, an Order reflecting the oral ruling was submitted to the Circuit Court, signed by counsel for both parties, but never signed by Judge Karl. (Appendix pp. A 2660 - A 2661).

On 20th day of February, 2015, the Circuit Court conducted an evidentiary hearing wherein the parties offered a number of documents into evidence.²

² At the hearing, Karpacs offered the Mandatory Status Conference and Scheduling Order; June 14, 2004, correspondence from Attorney Brown to Attorney Vaglianti; June 21, 2004, correspondence from Attorney Vaglianti to Attorney Brown; July 30, 2004, correspondence from Attorney Brown to Judge McCarthy regarding mediation; January 10, 2008, correspondence from Attorney James to Attorney Brown; January 7, 2008, correspondence from Attorney Brown to Attorney James; newspaper article, "Physician Insurer Told to Reveal Info," The Charleston Gazette, Page 10A, October 26, 2001; Sworn Declarations of Physician Michael Austin; Affidavit of Anandhi Murthy, M.D.. (Appendix pp. A 422 - A 493). At the hearing, Murthy had numerous exhibits to offer and the Circuit Court indicated that the exhibits should simply be submitted via correspondence. As such on February 23, 2015, Murthy submitted the following evidence into the record: (1) May 7, 2004, correspondence from Geoffrey Brown to Christine Vaglianti; (2) May 17, 2004, correspondence from Geoffrey Brown to Christine Vaglianti; (3) June 14, 2004, correspondence from Geoffrey Brown to Christine Vaglianti; (4) June 21, 2004, correspondence from Christine Vaglianti to Geoffrey Brown; (5) June 23, 2004, correspondence from Geoffrey Brown to Christine Vaglianti; (6) June 25, 2004, correspondence from Stephen R. Brooks to

On March 24, 2015, an Order was entered by the Circuit Court which set the deadline for the parties to file Findings of Fact and Conclusions of Law regarding Karpacs's pending Motion for Attorney's Fees and Costs as being 30 days from the entry of the Order. (Appendix pp. A 2662 - A 2664).

On April 2, 2015, well before the 30 day deadline established by the Circuit Court had passed, the Circuit Court issued an Order and Findings of Fact and Conclusions of Law. (Appendix pp. A 2665 - A 2687). It is from this Order that Murthy files her appeal.

SUMMARY OF ARGUMENT

In this case, the Circuit Court improperly exceeded the scope of this Court's previous decision, impermissibly imposed sanctions on Murthy for the alleged misconduct of her insurance carrier even though it had properly dismissed the insurance carrier as a defendant, inappropriately went outside the record in this case, without any evidentiary hearing, to consider allegations of misconduct by the insurance carrier in other cases, including a case in which Karpacs's attorneys had unsuccessfully sued Murthy's insurance carrier for third-party bad faith, incorrectly went outside the provisions of West Virginia Rules of Civil Procedure 11, 16, and 37 to impose sanctions on Murthy that are the functional equivalent of a third-party bad faith suit, and incorrectly predicated the award of sanctions on settlement negotiations, an unsuccessful mediation, the exclusion of expert testimony, and a relatively insignificant discrepancy in trial

Geoffrey Brown; (7) August 3, 2004, correspondence from Christine Vaglianti to Judge McCarthy; (8) June 5, 2004, Agreed Order; (9) Plaintiff's Motion to Compel Mediation Before the Court; (10) Defendants' Response to Plaintiff's Motion to Compel Mediation Before the Court; (11) Order for mediation and Scheduling Trial; (12) Deposition of Dr. Abrahams; (13) Hearing Transcript of December 21, 2007; (14) State ex rel. Jones v. Recht, 221 W.Va. 380; 655 S.E.2d 126 (2007); and (15) Plaintiff's Response to Defendant Anandhi Murthy, M.D.'s Request for Admissions. (Appendix pp. A 2553 - A 2659).

testimony. Unless this Court is going to overrule its previous decision in this same case limiting the permissible scope of litigation sanctions, permit the imposition of sanctions on an insured for the alleged misconduct of an insurer in unrelated matters and following the dismissal of the insurer as a party defendant, ignore the Legislature's abolition of third-party bad faith, and abandon the American Rule in favor of the British Rule permitting plaintiffs, like Karpacs, to recover her fees if she wins, but also permitting defendants to recover their fees in the event of a defense verdict, the Circuit Court's Order should be reversed and this case remanded for entry of an Order dismissing Karpacs's Motion for Attorney Fees and Costs.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary pursuant to the criteria in West Virginia Rules of Appellate Procedure 18(a). Murthy respectfully submits this matter presents sufficiently unique and procedural issues to merit oral argument. Therefore, Murthy requests that the case be set for Rule 19 oral argument.

ARGUMENT

Standard of Review.

The review of the Circuit Court's Decision to Award Penalties and Costs is based on abuse of discretion. This Court has held:

The imposition of sanctions by a circuit court W.Va. R. Civ. P. 37(b) for the failure of a party to obey the court's order to provide or permit discovery is within the sound discretion of the court and will not be disturbed upon appeal unless there has been an abuse of that discretion.

Syllabus Point 1, Bell v. Inland Mut. Ins. Co., 175 W. Va. 165, 332 S.E.2d 127 (1985).

The case at bar was previously appealed on the issue of awarding attorney fees and costs with this Court in Karpacs-Brown v. Murthy, 224 W. Va. 516, 686 S.E.2d. 746 (2009), providing the following guidance:

This Court finds that there are several problems with the circuit court's order awarding attorney fees. First, we are unable to properly review whether the award of fees and costs herein was an abuse of discretion. While the record indicates that a hearing was held in which the parties argued post-trial motions including the motion for fees and costs, evidence was not taken at this hearing. In the absence of an evidentiary hearing, this Court is unable to undertake a meaningful review of the court's factual findings on which it based its ruling. We are also unable to determine whether the award of all fees and costs is necessary to compensate the appellee for actual harm suffered as a result of Dr. Murthy's and/or her insurer's alleged misconduct.

Further, in finding misconduct on the part of Dr. Murthy and/or her insurer, the court indicated that the insurer has shown a pattern of engaging in vexatious settlement strategy in other cases before the circuit court and in other states. The court also found that Dr. Murthy engaged in similar misconduct in a previous medical malpractice case before the Wetzel County Circuit Court. It is improper, however, to impose sanctions on a party for general misconduct which is unrelated to any identifiable harm suffered by the other party in the case. This Court has held:

Although Rules 11, 16, and 37 of the West Virginia Rules of Civil Procedure do not formally require any particular procedure, before issuing a sanction, a court must ensure it has an adequate foundation either pursuant to the rules or by virtue of its inherent powers to exercise its authority. The *Due Process Clause of Section 10 of Article III of the West Virginia Constitution* requires that there

exist a relationship between the sanctioned party's misconduct and the matters in controversy such that the transgression threatens to interfere with the rightful decision of the case. Thus, a court must ensure any sanction imposed is fashioned to address the identical harm caused by the party's misconduct.

Syllabus Point 1, *Bartles v. Hinkle*, *supra*. Under our law, awards of fees and costs against a party should be designed to pay the reasonable expenses caused by the party's failure to cooperate in discovery. Accordingly, we remand this matter to the circuit court for proceedings consistent with this opinion. Id.

As such, this case has specific law of the case applicable to this appeal.

I. The Circuit Court erred in exceeding the scope of this Court's remand.

This Court was very clear on its remand in Karpacs-Brown that, "It is improper, however, to impose sanctions on a party for general misconduct which is unrelated to any identifiable harm suffered by the other party in the case." Id.

In spite of very clear instructions to the Circuit Court, the Circuit Court's Order continued to refer to outside matters stating the following in its Findings of Fact and Conclusions of Law:

- "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." (Findings of Fact, paragraph 20). (Appendix pp. A 2671 - A 2672).
- "When Medical Assurance (now known as Woodbrook) was contacted about its behavior in the case, it actually seemed proud of what it had done..." (Findings of Fact, paragraph 21). (Appendix p. A 2672).
- "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." (Findings of Fact, paragraph 22). (Appendix p. A 2672).

- “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...”(Findings of Fact, paragraph 23). (Appendix p. A 2672).
- “When the doctor refused to conspire with his insurer to defend the indefensible, Woodbrook threatened the doctor with loss of coverage....” (Findings of Fact, paragraph 24). (Appendix pp. A 2672 – A 2673).
- “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...” (Findings of Fact, paragraph 25). (Appendix p. A 2673).
- “Woodbrook’s no-settlement scenario played itself out during the course of litigation in the recently concluded Roberts v. Murthy trial. In that case...” (Findings of Fact, paragraph 26). (Appendix p. A 2673).
- “In Roberts, Dr. Murthy claimed she had been intimidated into admitting facts conclusively establishing her liability.” (Conclusions of Law, paragraph 62). (Appendix p. A 2682).
- “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.” (Conclusions of Law, paragraph 67). (Appendix pp. A 2683 - A 2684).
- “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.” (Conclusions of Law, paragraph 73). (Appendix p. A 2685).

The above quotes make clear that the Circuit Court was very much considering conduct beyond this case, in direct violation of this Court’s Remand Order. (Appendix pp. A 2048 – A 2049). The Circuit Court directly ignored this Court’s directive and went about assessing

attorney fees for the conduct outside the case and for conduct unrelated to identifiable harm to Karpacs.

Not only does this violate this Court's directive given on the remand of this case, but it violates the Defendants' Due Process rights. As this Court quoted in Karpacs-Brown, the Syllabus Point 1, in part, of Bartles v. Hinkley, 196 W. Va. 381, 472 S.E. 2d 827 (1996) provides as follows:

[B]efore issuing a sanction, a court must ensure it has an adequate foundation either pursuant to the rules or by virtue of its inherent powers to exercise its authority. The Due Process Clause of Section 10 of the Article III of the West Virginia Constitution requires that there exist a relationship between the sanctioned party's misconduct and the matters in controversy such that the transgression threatens to interfere with the rightful decision of the case. Thus, a court must ensure any sanction imposed is fashioned to address the identified harm caused by a party's misconduct.

Not only does the above cited provision from the court's Order reflect the Circuit Court failed to appropriately consider Murthy's Due Process rights, but the Circuit Court is referencing and relying on misconduct of Murthy's insurance carrier, who the Circuit Court dismissed from the case. Due Process does not allow for punishing this party for alleged conduct of a third party that was dismissed from the case.

Thus, the Circuit Court directly ignored this Court's directive and the fundamental rights of Murthy in assessing attorney fees for conduct outside of the case and for conduct unrelated to identifiable harm to Karpacs. As such, the Court's award of attorney fees should be reversed.

II. The Circuit Court erred in awarding attorney fees and costs outside the provisions of Rules 11, 16, and 37 of the Rules of Civil Procedure by effectively holding Dr. Murthy personally liable for third-party bad faith.

In Karpacs-Brown v. Murthy, 224 W. Va. 516, 686 S.E.2d. 746 (2009), this Court stated in Syllabus Point 7, "Although Rules 11, 16, and 37 of the West Virginia Rules of Civil Procedure do not formally require any particular procedure, before issuing a sanction, a court

must ensure it has an adequate foundation...,” Id. The implication is that any award for attorney fees and costs must be limited to Rules 11, 16 and 37.

While Rule 11(c) provides for assessing attorney fees for pleadings, motions and other papers which contain misrepresentations to the court, there were no allegations raised in Karpacs’s Motion for Attorney Fees and Costs that any pleadings violated Rule 11. However, Karpacs’s Motion and the Circuit Court’s findings reference violating Rule 16(f) of the West Virginia Rules of Civil Procedure, which provides sanctions for violating a court order. Those findings are erroneous in that they overlook that the Order alleged to have been violated was actually amended and in its amended form was not violated. (*See* West Virginia Rules of Civil Procedure 16(f); and **Section III Infra.**)

Then, West Virginia Rules of Civil Procedure 37, involving failure to cooperate in discovery, provides that once there is a discovery order in place and a violation of that order, sanctions may be imposed. While there is an accusation about offering trial testimony inconsistent with an interrogatory answer, Rule 37 limits imposition of sanctions to:

- (1) violating court orders on discovery; (Rule 37(b))
- (2) failure to answer interrogatories and failure to respond to request for documents, after there has been a meet and confer and a certification that the movant attempted to resolve the dispute in good faith; (Rule 37(d)) and
- (3) for failure to participate in framing a discovery plan. (Rule 37(e))

None of these provisions apply to the circumstances here – i.e. an allegation of offering testimony at trial inconsistent with an interrogatory answer.

To the extent the trial testimony materially differs from the interrogatory, a duty to supplement the discovery response cannot exist where there has been no opportunity to amend

the discovery. Here, Dr. Murthy's at-issue trial testimony resulted from Dr. Murthy's memory being joggled at trial while she was in the middle of testifying. (Appendix pp. A 1060 – A 1061), and *See* also **Section IV Infra.**).

Outside of these three Rules of Civil Procedure, which have little to no application here, there is no authority to impose attorney fees and costs. Therefore, the Circuit Court is in essence circumventing the “American Rule” on Attorney Fees and Costs and shifting the costs to Dr. Murthy. It does this by relying on the exception to the American Rule under Pritt v. Suzuki Motor Co., Ltd., 204 W. Va. 388, 513 S.E.2d 161 (1998) and Sally-Mike Properties v. Yokum, 179 W. Va. 48, 365 S.E.2d 246 (1986).

In Pritt v. Suzuki Motor Co., Ltd., 204 W. Va. 388, 513 S.E.2d 161 (1998), this Court stated as follows:

“This court has long-recognized the inherit authority of trial courts who award attorney's fees as a sanction for fraud. In Bowling v. Ansted Chrysler-Plymouth-Dodge, 188 W. Va. 468, 425 S.E.2d 144 (1992), we discussed the issue of attorney's fees in the context of an action for fraud: “A well-established exception to the general rule prohibiting the award of attorney's fees in the absence of statutory authorization, allows the assessment of fees against a losing party who acted in bad faith, vexatiously, wantonly or for oppressive reasons.” Id. At 474, 425 S.E. 2d at 150 (quoting Nelson v. West Va. Pub. Employees Ins. Bd., 171 W. Va. 445, 451, 300 S.E.2d 86 (1982)). Based on our determination that “fraud falls within the ‘bad faith’ exception to the American rule [,] “We conclude in Bowling that findings of fraud demonstrated by clear and convincing evidence permit attorney fees to be awarded against the defendant....”

Thus, there must be fraud or conduct establishing bad faith, vexatious, wanton, and oppressive reasons.

In Pritt, the party was actually the plaintiff prosecuting a horribly fraudulent claim, while here there was simply a physician trying to defend against an allegation of negligence. The Plaintiff in Pritt was caught on camera climbing into and out of boats, climbing a grassy slope, carrying charcoal bags, throwing objects overhand, etc. even though he claimed that from the

ATV accident he was disabled and forced to walk in a stooped-over fashion. Obviously, such fraud justifies imposing sanctions. However, there is no comparison between Pritt and this case. Simply put, Pritt is not analogous or applicable here.

As such, the Circuit Court's award of attorney fees under this line of cases should be reversed as there is no basis for attorney fees under West Virginia Rules of Civil Procedure 11, 16, or 37 or otherwise.

III. The Circuit Court erred in basing its award of attorney fees and costs, in part, on a claim that its Order mandating mediation was violated when the Court had actually amended the Order regarding mediation.

In Findings of Fact, paragraph 6, the Circuit Court referenced that there was an October 7, 2003, scheduling order that mandated mediation.³ (Appendix p. A 2668). The Circuit Court noted in Findings of Fact, paragraph 10, that the mediation that was scheduled was cancelled. (Appendix p. A 2669). The Circuit Court provided in Conclusions of Law, paragraph 60, that one of the three prongs for awarding attorney fees was for misconduct in violating the Court's Orders regarding mediation. (Appendix p. A 2681). Although this makes reference to "orders," in the plural, it appears to only be a reference back to a claim of violating a single order, the October 2003 Order, which mandated mediation. Then, in Conclusions of Law, paragraph 77, the Circuit Court stated, "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..." (Appendix p. A 2686). Thus, the Circuit Court is basing, in a major part, its assessing attorney fees on a finding of a violation of the October 2003 Court Order mandating mediation.

However, the Circuit Court erred in overlooking two major facts. First, the October 2003 Order calling for mediation was modified by a June 7, 2004, Order, which no longer mandated

³ The Order references October 7, 2003, but it appears to actually be dated October 4, 2003, and that this date is just a minor typographical error.

mediation, before anyone cancelled mediation. (Appendix p. A 36). And second, it was Karpacs that actually cancelled the mediation, not Murthy.

Specifically, the October 2003 Order mandated mediation. However, on June 7, 2004, an Order was entered stating, “the parties be permitted to engage in mediation...” (Appendix p. A 36). The new Order actually uses “permitted” in two locations referring to mediation. (Appendix p. A 36). It modifies the prior Order’s mandatory language into permissive language. With the implementation of a revised Order which does not mandate mediation, there was no violation of the October 2003 Order as it had been effectively modified.⁴

Second, the Circuit Court ignored evidence of key correspondences reflecting on the activity leading up to the “cancelled” mediation. (Appendix pp. A 2555 - A 2561). Specifically, Karpacs’s counsel in correspondence dated June 23, 2004, was the one advocating cancelling mediation, not Murthy. (Appendix p. A 2559). On June 25, 2004, Murthy responded to Karpacs’s counsel making it clear that she was still open minded about having mediation. Murthy specifically indicated a preference though to wait until the depositions of Dr. Battle and Dr. Tallman were completed. (Appendix p. A 2560). Then on August 3, 2004, Murthy sent a correspondence to the mediator, Judge McCarthy, indicating that Dr. Murthy was still prepared to attend mediation. (Appendix p. A 2561).

For one reason or another, the Circuit Court did not even acknowledge the existence of this evidence. Moreover, it fails to explain how this fits into the supposed violation of the Circuit Court’s Order.

⁴ At the very least, the new Order creates reasonable ambiguity that certainly does not open the door for attorney fees or sanctions on a claim of a violation of the Court’s Order.

For the foregoing reasons, Murthy submits that the Circuit Court erred in asserting that the Order for mediation was violated and/or relying on this situation as a basis for awarding attorney fees or costs.

IV. The Circuit Court erred in basing its award of attorney fees and costs on a claim of changing testimony at trial when it was not a material issue and the jury ultimately addressed the situation through its verdict.

In Findings of Fact, paragraphs 49 through 54, the Circuit Court addressed a situation involving Murthy's testimony at trial and an interrogatory answer of hers. Murthy stated at trial that she was told by Elizabeth Karpacs, "Please don't tell me I need surgery." (Appendix p. A 2679). The Circuit Court found that this was inconsistent with her Answers to Interrogatories wherein she was asked about conversations with Elizabeth Karpacs and her family members and provided an answer that did not include the statement by Elizabeth Karpacs of not wanting surgery. (Appendix pp. A 2678 – A 2679).

First, it should be appreciated that there was an issue in the medical malpractice case as to whether Elizabeth Karpacs needed surgery and whether Murthy was negligent in failing to perform surgery. However, it is not particularly relevant that Elizabeth Karpacs hoped she would not need surgery. In fact, one can assume that most people, under most circumstances, are hoping they do not need surgery. Thus, Murthy's testimony about such a statement from Mrs. Karpacs is not particularly relevant or material to the case.

Second, the Circuit Court did not consider the full scope of the testimony from trial. For the record, Murthy, on this issue, testified as follows:

"Q. (By Mr. Brown) You told me Mrs. Karpacs told you something - -"Please don't tell me that I am going to have surgery." Is that what you told me?

A. With the specific recollection of something to aid my memory, I did recollect this conversation.

Q. You had - -

A. But the general conversation that I attested to was from the memory of recollections without - - there are things that we - - certain things trigger your memory to recall a conversation. That's exactly what I did now.

Q. And what triggered your recollection about that conversation with Mrs. Karpacs?

A. About - - about you're asking me about a question about whether I was honest with her about without surgery she was going to die or with surgery she was going to die. That particular conversation triggered my memory about her knowing about her condition and about not having - - not being able to tolerate anesthesia.

Q. I asked you in 2004 to remember for me everything about the conversations you had with Mrs. Karpacs, but you didn't tell me any of that then, did you?

A. But there was no specific answer or no specific memory to rekindle that conversation that I had." (Appendix pp. A 1060 - A 1061).

Thus, Murthy explained why she did not previously offer this tangential conversation. And this reason was completely ignored in the Circuit Court's Order. See Conclusions of Law, paragraphs 63 through 66. (Appendix pp. A 2682 - A 2683).

Parties can have refreshed recollection from seeing something or being told something. In fact, our Rules of Evidence allow for use of writings at trial to refresh or jog a recollection. See West Virginia Rules of Evidence 612. This is what Murthy claimed happened here.

Moreover, Murthy and her counsel were not in a position to be amending interrogatory answers made approximately 5 years earlier when the refreshed recollection occurred while she was on the stand under cross-examination. Therefore, West Virginia Rules of Civil Procedure 26(e) has no application here.

It should also be noted that Murthy was subject to being impeached on the issue that would have potentially undermined her credibility in the eyes of the jury. Given that the jury returned a verdict against her, this issue has more than sufficiently been addressed by the jury.

For the foregoing reasons, Murthy submits that the Circuit Court erred in considering and allowing the alleged change in testimony of Murthy to be a grounds for awarding attorney fees or costs.

V. The Circuit Court erred in basing an award of attorney fees and costs in part on conduct during settlement negotiations.

Paragraphs 6 through 27 of the Circuit Court's Findings of Fact and Conclusions of Law address settlement negotiations. (Appendix pp. A 2668 - A 2673). The Circuit Court spent a considerable portion of its Order discussing settlement negotiation and thus, appears to base its' award of attorney fees, or at least, places substantial weight on this. However, not only is there no legal support for this being a basis for attorney fees, such action violates public policy on settlement negotiation, and most troubling violates the Circuit Court's own Order precluding evidence and argument of this issue.

West Virginia Rules of Evidence 408 provides in pertinent part that:

The evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not inadmissible.

And West Virginia Rules of Evidence 408 mirrors the Federal Rule of Evidence 408, which is grounded on the policy of encouraging settlement of disputed claims without litigation. In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 27 Fed. R. Serv. 2d (Callaghan) 89 (7th Cir. Ill. 1979) cert. denied, 444 US 870, 100 S Ct. 146, 62 L. Ed. 2d 95

(1979). Public policy favoring out of court settlement necessitates inadmissibility of negotiations in order to foster frank discussion. United States v. Contra Costa Country Water Dist., 678 F.2d 90 (9th Cir. Cal. 1982).

Thus, there is a policy to protect settlement negotiations from scrutiny. Parsing the nuances of specific settlement negotiations so this sensitive and otherwise confidential communication is put on public display for dissection will have a chilling effect on any negotiations in matters before the courts of this state.

The Circuit Court seemed to recognize the need to protect settlement discussions in that it properly granted Murthy's Motion in Limine No. 3: Re: Motion to Preclude Plaintiff from Offering Any Testimony, Evidence or Argument Regarding Settlement Negotiations and/or Attempts to Start Settlement Negotiations (Appendix pp. A 2108 - A 2112). This Motion sought to preclude evidence and argument on settlement negotiations when considering the issue of attorney fees and costs. On July 18, 2014, the parties came before the Circuit Court for a Status Conference and at that time the Circuit Court addressed the long pending Motion in Limine No. 3 filed by Murthy regarding settlement negotiations and specifically ruled "the parties are precluded from offering any testimony, evidence or oral argument regarding settlement negotiations or attempts to start negotiations in this case." (Appendix pp. A 2660 - A 2661). Shockingly, Paragraphs 6 through 27 of the Circuit Court's Findings of Fact and Conclusions of Law included consideration of evidence and argument on Settlement Negotiations.⁵ (Appendix pp. A 2668 - A 2673).

⁵ To the extent the Circuit Court is mentioning this but actually disregarding it, the Circuit Court never said it was striking or disregarding this from consideration pursuant to its own Order.

And, of course, aggressively defending one's self, even declining to settle, is not a basis for making an award. E.g., Sally-Mike Properties v. Yokum, 179 W. Va. 48, 365 S.E.2d 246 (1986).

Here the Circuit Court erred in considering settlement negotiations, when it should not have even been part of the evidence and even argument pursuant to the Circuit Court's own prior ruling.

VI. The Circuit Court erred in basing its award of attorney fees and costs, in part, on conduct involving Dr. Abrahams, when the Plaintiff simply conducted a successful deposition which resulted in his testimony being excluded and the Defendant sought reconsideration and to preserve the record on this issue.

The Circuit Court based, in part, its award of attorney fees based on a situation involving Dr. Abrahams. Dr. Abrahams was deposed on April 4, 2004, as an expert on behalf of Dr. Murthy. (Appendix pp. A 336 - A 406). He was offering, among other things, opinions regarding Elizabeth Karpacs' COPD and its effect on her life expectancy. (Appendix pp. A 336 - A 406). At his deposition, he offered testimony on life expectancy that was not specific in that he used phrases such as "in the ballpark" and gave an analogy regarding a boat sitting low in the water and rocking, while never giving a defined period of time for the life expectancy. (Appendix pp. A 345 - A 361). This resulted in Karpacs filing a Motion in Limine to exclude the testimony of Roger Abrahams, M.D., which initially Dr. Murthy did not contest, and the Circuit Court granted. (Appendix pp. A 48 - A 84).

However, in November of 2007, this Court issued an Opinion in another case, which held that while an expert may be properly excluded on a number of topics, if there are items he can still discuss, accommodations must be made to allow him to discuss those items. See State ex rel. Jones v. Recht, 221 W. Va. 380, 655 S.E.2d 126 (2007). Upon review of this case, Murthy prepared and filed a Motion to Reconsider on December 11, 2007, (Appendix pp. A 203 - A

211), which was heard by the Circuit Court on December 21, 2007. At the December 21, 2007, Hearing, counsel for Murthy argued:

“We filed this because we want to argue several points about what Dr. Abrahams is going to testify at trial and clarify some key points that were not raised before the Court.

I would like to make as part of the record a recent ruling. This is the case of Lambert Turner Jones versus Arthur Recht, George Naum, and I’ll offer a copy for the Court. ... This is a case that was just - - just came to the Supreme Court in November of this year. ... in this decision, remanded it and said that you have to look and see if there are aspects of his testimony that are salvageable and allow those aspects of the testimony. In the same light I’d ask this Court to reconsider and allow us to clarify some of the key points that we think Dr. Abrahams can testify to.”

(Appendix pp. A 2636 – A 2637)

And so, Dr. Murthy, which had originally not contested excluding Dr. Abrahams testimony on life expectancy, asked the Circuit Court to reconsider because of a new ruling which would allow him to still testify on other issues he discussed in his deposition.

The Circuit Court emphasized in Findings of Fact paragraphs 28 through 48 this incident and in basing the award of attorney fees for this situation, while completely ignoring the details of when and why a Motion for Reconsideration was filed. (Appendix pp. A 2673 - A 2678).

Moreover, the mere fact that a witness is successfully cross-examined at his deposition is not a basis for sanctions. Nor is filing a motion to reconsider a basis for sanctions, particularly when there has been new case law allowing for a colorable argument to be made for reconsideration. Finally, preserving one’s right to make and protect the record is again not a basis for imposition of sanctions in the form of attorney fees and costs.

As such Murthy submits that the Circuit Court erred in considering this issue and situation as a basis or part of a basis for awarding attorney fees and costs.

CONCLUSION

For the reasons detailed above, the Appellant, Anandhi Murthy, M.D., respectfully asks that this Court reverse the Order entered by the Circuit Court and remand this matter with directions to the Circuit Court to enter an order denying the Plaintiff's Motion for Attorney's Fees and Costs.

Respectfully submitted,

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on behalf of Robert C. James*

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 15-0376

ANANDHI MURTHY, M.D. and
WOODBROOK CASUALTY INSURANCE
COMPANY,

Appellants,

v.

ANDREA KARPACS-BROWN, individually and
as ADMINISTRATRIX OF THE ESTATE OF
HER MOTHER, ELIZABETH KARPACS, and the
ESTATE OF HER FATHER, ANDREW KARPACS,

Appellee.

CERTIFICATE OF SERVICE

Service of the *APPELLANT, ANANDHI MURTHY'S BRIEF* was had upon the parties herein by regular U.S. mail, postage prepaid, to the following counsel of record this 3rd day of August, 2015:

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