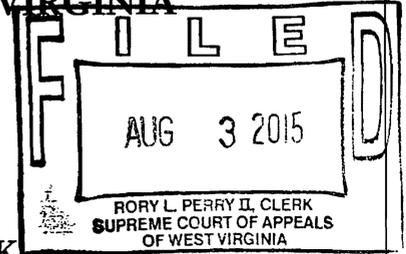


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-0376



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

Defendants Below/Petitioners

v.

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

Plaintiffs Below, Respondents

Hon. Mark Karl, Judge
Circuit Court of Wetzel County
Civil Action No. 08-C-108

BRIEF OF PETITIONER

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I. ASSIGNMENT OF ERROR

The Circuit Court erred in awarding attorney fees and costs against Petitioner, Anandhi Murthy, M.D. [“Dr. Murthy”], where (a) neither the Rules of Civil Procedure nor the decisions of this Court support an award of sanctions; (b) the Circuit Court exceeded the scope of this Court’s remand; (c) the Circuit Court had dismissed a third-party bad faith suit against Petitioner, Woodbrook Casualty Insurance Company [“Woodbrook”], prior to entry of the order; (d) some of the allegations against Woodbrook relied upon by the Circuit Court involved separate litigation; (e) no evidentiary hearing was conducted regarding the allegations against Woodbrook; and (f) the Circuit Court effectively awarded the Respondent, Andrea Karpacs-Brown, individually and as Administratrix of her late mother’s and father’s estates [“Ms. Karpacs-Brown”], damages for third-party bad faith even though such cause of action has been legislatively abolished and her direct claims against Woodbrook were dismissed.

II. STATEMENT OF CASE

Almost six years ago, on November 19, 2009, this Court issued its opinion in *Karpacs-Brown v. Murthy*, 224 W. Va. 516, 686 S.E.2d 746 (2009) [“*Karpacs-Brown I*”], in which it affirmed in part and reversed in part a judgment of the Circuit Court of Wetzel County.

First, this Court reversed the Circuit Court’s ruling that Ms. Karpacs-Brown’s damages were not limited to the statutory cap under the Medical Professional Liability Act: “Applying this rule to the instant facts, we find that the maximum amount recoverable in this case is \$1 million. Therefore, we conclude that the circuit court erred in denying Dr. Murthy’s motion to reduce the verdict accordingly.” *Id.* at 524, 686 S.E.2d at 754.

Second, this Court reversed the Circuit Court's ruling that Ms. Karpacs-Brown was entitled to pre-judgment interest on her economic damages award: "Because there is no ascertainable pecuniary loss in the instant case, prejudgment interest is not available. Accordingly, we conclude that the circuit court erred in awarding prejudgment interest to the appellee." *Id.* at 525, 686 S.E.2d at 755.

Finally, this Court reversed the Circuit Court's ruling that Ms. Karpacs-Brown was entitled to an award of attorney fees and costs:

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 identified 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. at 526-527, 686 S.E.2d at 756-757. [Emphasis supplied] Upon remand, however, what the Circuit Court did was anything but consistent with this Court's opinion.

On February 5, 2008, Ms. Karpacs-Brown had filed a motion for leave to file an amended complaint and on July 26, 2008, that motion was granted. [App. 412 and 727] On November 24, 2008, Woodbrook filed its motion to dismiss the amended complaint. [App. 1826] Because the first appeal of this case was pending, an order was entered on January 14, 2009, staying Woodbrook's motion to dismiss "until after the appeal is resolved." [App. 2007] Following this Court's opinion on November 19, 2009, the case was remanded for further proceedings consistent with that opinion, but what occurred was anything but consistent therewith.

First, on April 1, 2010, Ms. Karpacs-Brown filed a renewed motion for attorney's fees and costs [App. 2195] that ignored this Court's directive that any sanctions be limited pursuant to Rules 11, 16, and 37 as a result of any misconduct by Dr. Murthy:

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.

Karpacs-Brown I at 526-527, 686 S.E.2d at 756-757. (Emphasis added).

Instead, Ms. Karpacs-Brown persisted in her arguments, rejected by this Court that matters other than those limited to Dr. Murthy's conduct in this case should be relied upon in imposing sanctions on Dr. Murthy:

[M]ention was made of activities in other cases in order to make clear that the conduct in this case was not as the result of accident, mistake or some isolated coincidence. The evidence regarding *Roberts v. Murthy* further served to negate the defense Dr. Murthy offered of her conduct in discovery and on the stand in this case. . . .

In March of 2007, Dr. Murthy was the defendant in a separate Wetzel County medical malpractice suit styled *Roberts v. Murthy*, Civil Action No. 02-C-14-M. That trial resulted in a verdict of \$5,764,214.75. . . .

Additionally, Dr. Murthy filed suit against her medical liability insurance company, Woodbrook, for its bad faith handling of the Roberts matter. . . . During the proceedings held in connection with Dr. Murthy's request for a continuance . . . 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 when they come in and don't do anything 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. . . .

The mediation was also attended by a representative of Woodbrook, Dr. Murthy's medical liability carrier. . . . Although this was a wrongful death case, Woodbrook made serial offers in approximately \$25,000 increments until making an offer of \$150,000. The plaintiff responded to the offer of \$150,000 by reducing her demand to \$725,000. The defense refused to respond with a revised offer and mediation failed. . . .

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 by her insurance carrier. As the letter confirming that conversation reads

When I asked you about Woodbrook's posture, you told me that as far as you know, Woodbrook's position remains unchanged . . . I have the continuing understanding that from Woodbrook's perspective, no more will be authorized to settle this case. Instead, I know understand that Dr. Murthy is interested in hearing a renewed offer from our client out of her desire to see if the case is settled – independent of the position taken by her carrier. . . .

Thereafter, and despite the conversation of January 4, 2008, the defense refused to enter into further negotiation . . .

The plaintiff made one final effort to settle the case by reducing her demand to \$600,000, but that effort was completely ignored by Dr. Murthy. . . .

The present case is 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. . . .

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. . . .

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. . . .

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. The statute said nothing, however, about abolishing the common law doctrines of *Suzuki*, *Sally-Mike* or *Shamblin*. Likewise, nothing in the MPLA affects the inherent power of the court to control the litigants before it through the use of the sanctioning power.

Though this point is elementary, it is important to keep in mind that **§ 55-7B-5 is not an immunity for health care providers or their insurers.** . . .

As documented in the attached affidavit, the doctor, likely controlled by her carrier, refused to negotiate reasonably at the Court-ordered mediation. Not only was the behavior unreasonable in offering nuisance amounts for a serious wrongful death case in which the doctor's actions were wholly without justification, the Defendant's insurance representative behaved rudely and in an unseemly manner in slamming shut her briefcase and walking out of the mediation while it remained in progress. But more significant than merely rude conduct is the failure to engage in mediation in good faith as ordered by the Court. . . .

As shown through the facts of this case, the defendant's conduct is egregious, vexatious, and sanctionable standing alone: However, to the extent that Dr. Murthy plans to argue that these facts have an innocent explanation, it is worth remembering the history of the Roberts case as well as Medical Assurance/Woodbrook's track record. Woodbrook's 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 (attached as Ex J). This strategy seeks to capitalize on the poisoning of the jury pool against medical negligence cases that this Court has recognized on multiple occasions.

Whatever the merits of this strategy as a matter of business judgment, it unambiguously violates the law and serves to explain the defendant's conduct here. An insurer in West Virginia owes a duty of good faith and fair dealing to its insured and must also accord its insureds interests at least the same regard it holds for its own. Moreover, the law requires insurers to establish reasonable procedures for investigation of claims, to in fact conduct such investigations and to make reasonable and fair offers to settle when liability is reasonably clear. All of this is based on the venerable principle that a person who buys insurance buys insurance and not a lot of time-consuming, vexatious litigation. The strategy of Murthy/Woodbrook as seen in this case and as verified by the Roberts violates these commands of West Virginia law.

Just because this law-breaking strategy of Murthy/Woodbrook cannot be addressed through the *Jenkins v. J.C. Penney Casualty Ins. Co.*, cause of action does not mean it cannot be addressed. In evaluating whether the Defendant and

Woodbrook's conduct is vexatious and oppressive under *Suzuki* and *Sally-Mike* this Court can look to the law

[App. 2127 - 2152] [Emphasis in original]

It was as if this Court's opinion in *Karpacs-Brown I* had never happened; rather, Ms. Karpacs-Brown simply hit the reset button and make the very same arguments based upon the very same evidence, primarily directed to Woodbrook and not Dr. Murthy, that this Court previously held were improper.

In addition to seeking to impose sanctions on Dr. Murthy based upon general allegations against Woodbrook, Ms. Karpacs-Murthy also sought to impose sanctions on Woodbrook based upon the very same allegations through her direct complaint against Woodbrook:

On numerous occasions prior to the trial of this action, plaintiff provided Woodbrook with an opportunity to resolve the claims made against Dr. Murthy within the \$1,000,000 policy limit provided for under her medical professional liability policy issued by Woodbrook

Prior to the trial of the underlying action Dr. Murthy consented to settlement and specifically requested Woodbrook to resolve the claims of the plaintiffs within her policy limit in order to avoid exposure to liability for a verdict in excess of her policy limit, and the stress, mental anguish, and potential damage to her reputation associated with a trial

Woodbrook behaved in a similar fashion in *Roberts v. Murthy*, lately pending in this Court, in obstructing settlement and behaving vexatiously, contumaciously and oppressively toward the Plaintiff therein

Woodbrook failed to settle within the policy limit of Dr. Murthy when there existed the opportunity to do so and such settlement would have released Dr. Murthy from any and all personal liability. Such failure to settle prima facie constitutes bad faith conduct

As a result of the bad faith vexatious, wanton and oppressive conduct of Woodbrook, Plaintiff is entitled to be awarded all of their reasonable attorney fees, costs and expenses incurred in the prosecution of the underlying case and further are entitled to recover from Woodbrook the full amount of the verdict returned by the jury in this action

[App. 1845 - 1847]

In other words, even though Woodbrook paid the entire ultimate judgment [App. 2052] and, at one point, the parties were separated only by an offer of \$150,000 and a demand of \$600,000, Woodbrook should also be required to pay Ms. Karpacs-Brown's attorney fees, costs, and litigation expenses because it did not increase its offer by \$450,000. Clearly, however, this argument is a thinly-disguised effort to maintain a third-party bad faith action by Ms. Karpacs-Brown against Woodbrook.

Consequently, on May 31, 2013, the Circuit Court granted Woodbrook's motion to dismiss Ms. Karpacs-Murthy's direct action against Woodbrook holding as follows:

The amended complaint is predicated upon allegations that Woodbrook failed to settle plaintiff's claims against Dr. Murthy within her policy limits prior to trial despite an opportunity and Dr. Murthy's request to do so. *Id.* at ¶¶ 21-33. . . .

The amended complaint also alleges that Woodbrook's defense of plaintiff's suit against Dr. Murthy "was vexatious, wanton, in bad faith and/or undertaken for oppressive reasons." *Id.* at ¶ 30. . . .

With respect to any common law bad faith claim, the Court held in the single Syllabus of *Elmore v. State Farm Mut. Ins. Co.*, 202 W. Va. 430, 504 S.E.2d 893 (1998), "A third party has no cause of action against an insurance carrier for common law breach of the implied covenant of good faith and fair dealing or for common law breach of fiduciary duty." . . .

Thus, any common law "bad faith" claim against Woodbrook is barred by *Elmore* and its progeny. See Syl. pt. 2, *Goff v. Penn Mut. Life Ins. Co.*, 229 W. Va. 568, 729 S.E.2d 890 (2012) ("A first-party bad faith action is one wherein the insured sues his/her own insurer for failing to use good faith in settling a claim filed by the insured."); Syl. pt. 2, *Loudin v. Nat. Liability & Fire Ins. Co.*, 228 W. Va. 34, 716 S.E.2d 696 (2011)(same); *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W. Va. 457, 471 n.14, 583 S.E.2d 80, 94 n.14 (2003) ("The instant case, however, concerns a third-party bad faith claim, and this Court has indicated that there is a substantial difference in the duties owed by an insurer to policyholders as opposed to third parties. For example, insurers owe no common law duty of good faith and fair dealing and no fiduciary duty to third parties."); *Eastern Steel*

Constructors, Inc. v. City of Salem, 209 W. Va. 392, 549 S.E.2d 266 (2001); *Klettner v. State Farm Mut. Auto. Ins. Co.*, 205 W. Va. 587, 519 S.E.2d 870 (1999); *State ex rel. Allstate Ins. Co. v. Bedell*, 203 W. Va. 37, 506 S.E.2d 74 (1998). . . .

With respect to any statutory bad faith claim, the Court held in *Elam v. Medical Assurance of West Virginia, Inc.*, 216 W. Va. 459, 463, 607 S.E.2d 788, 792 (2004), the Court held, “Regardless of when a medical professional liability action was filed, absent privity of contract, any bad faith claim against the health care providers’ insurer is barred if it is filed on or after March 1, 2002. See W. Va. Code § 55-7B-10 (2002).” . . .

Moreover, W. Va. Code § 33-11-4a(a) states, “a third-party claimant may not bring a private cause of action or any other action against any person for an unfair claims settlement practice.” . . .

Thus, any statutory “bad faith” claim against Woodbrook is barred by W. Va. Code § 55-7B-10; *Elam*; and W. Va. Code § 33-11-4a(a). . . .

With respect to any claim arising from Woodbrook’s alleged failure to settle within policy limits despite a demand by Dr. Murthy, the Court held in Syllabus Point 2 of *Shamblin v. Nationwide Mut. Ins. Co.*, 216 W. Va. 459, 463, 607 S.E.2d 788, 792 (2004), that, “Wherever there is a failure on the part of an insurer to settle within policy limits where there exists the opportunity to settle and where such settlement within policy limits would release the insured from any and all personal liability, the insurer has prima facie failed to act in its insured’s best interest and such failure to so settle prima facie constitutes bad faith toward its insured,” but has held that such remedy does not extend to third parties prosecuting claims against the insured. . . .

Thus, no matter how vexatious, wanton, oppressive, or unreasonable Woodbrook may have been in the eyes of plaintiff regarding the defense of Dr. Murthy, as the Court explained in *Elmore*, she has no cause of action . . .

Rather, only where the policyholder, like Dr. Murthy, assigns his or her first-party *Shamblin* claim to a plaintiff after there is an excess verdict the insurer refuses to pay can a plaintiff pursue a cause of action against an insurer, like Woodbrook, under *Shamblin*. See Syl. pt. 9, *Strahin v. Sullivan*, 220 W. Va. 329, 647 S.E.2d 765 (2007)(“In order for an insured or an assignee of an insured to recover the amount of a verdict in excess of the applicable insurance policy limits from an insurer pursuant to this Court’s decision in *Shamblin v. Nationwide Mutual Insurance Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990), the insured must be actually exposed to personal liability in excess of the policy limits at the time the excess verdict is rendered.”). . . .

Here, not only has there been no assignment of any *Shamblin* claim by Dr. Murthy to plaintiff, Dr. Murthy was never actually exposed to personal liability in excess of policy limits because Woodbrook paid the excess verdict. . . .

Finally, the Court notes that when plaintiff's counsel filed a nearly identical suit against Woodbrook arising from another excess verdict against Dr. Murthy in another malpractice case, that suit was dismissed by the Honorable John T. Madden ("Judge Madden"). . . .

In Roberts v. Murthy, Wetzel County Civil Action No. 02-C-14-M, plaintiffs, represented by the same law firm as in this case, amended their complaint, as in this case, in an attempt to state a cause of action for bad faith against Woodbrook after prevailing against Dr. Murthy at trial.

As noted in Woodbrook's motion to dismiss, much of the amended complaint in *Roberts* is verbatim of the amended complaint in this case. . . .

In an order entered in *Roberts* on September 20, 2007, Judge Madden dismissed plaintiffs' claims against Woodbrook. . . .

[App. 2525 - 2529]

So, even though the dismissal of the very same claims against Woodbrook were dismissed in *Roberts* and no appeal was ever taken, Ms. Karpacs-Brown not only re-filed those same claims in her case, but essentially asserted those same claims against Dr. Murthy.

Eventually, on February 20, 2015, a hearing was conducted on Ms. Karpacs-Brown's motion for sanctions against Dr. Murthy. At the conclusion of the hearing, both sides were directed to submit proposed findings of fact and conclusions of law within thirty days from the entry of an order on March 24, 2015, or April 23, 2015. [App. 2663]

Pursuant to Rule and Trial Court Rule 24.01, a copy of any proposed order should have been served on opposing counsel, but on April 2, 2015, prior to expiration of the thirty-day period for submitting proposed orders, an order was entered by the Circuit, which represents that it was prepared by counsel for Ms. Karpacs-Brown, but is unsigned and which was not served on Dr.

Murthy or Woodbrook, granting Ms. Karpacs-Brown's motion for attorney fees and costs. [App. 2665] The order, again, is contrary to this Court's opinion in *Karpacs-Brown I* and otherwise contrary to law.

Indeed, the Circuit Court's order was taken essentially verbatim from Ms. Karpacs-Brown's motion:

In March of 2007, Dr. Murthy was the defendant in a separate Wetzel County medical malpractice suit styled *Roberts v. Murthy*, Civil Action No. 02-C-14-M. That trial resulted in a verdict of \$5,764,214.75. . . .

Additionally, Dr. Murthy filed suit against her medical liability insurance company, Woodbrook, for its bad faith handling of the Roberts matter. . . . During the proceedings held in connection with Dr. Murthy's request for a continuance . . . 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 when they come in and don't do anything 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. . . .

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. . . .

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 by her insurance carrier**. As the letter confirming that conversation reads

When I asked you about Woodbrook's posture, you told me that as far as you know, Woodbrook's position remains unchanged . . . I have the continuing understanding that from Woodbrook's perspective, no more will be authorized to settle this case. Instead, I know understand that Dr. Murthy is interested in hearing a

renewed offer from our client out of her desire to see if the case is settled – independent of the position taken by her carrier. . . .

Thereafter, and despite the conversation of January 4, 2008, the defense refused to enter into further negotiation . . .

The present case is 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. . . .

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. . . .

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. . . .

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 insured is more trouble than it's worth. . . . This strategy seeks to capitalize on the poisoning of the jury pool against medical negligence cases that the Court has recognized on multiple occasions. . . .

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

While not every violation of the UTPA¹ would be sufficient to trigger the common-law remedies of Suzuki and Sally-Mike 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. . . .

[App. 2669 - 2684]

¹ Ms. Karpacs-Murthy's inclusion and the Circuit Court's adoption of the Unfair Trade Practices Act as the test for imposing sanctions on an insured or insured renders disingenuous any argument that what is being asserted here is not a suit for third-party bad faith.

Although the order also includes language recognizing that this Court held in *Karpacs-Brown I* that a “relationship” must exist “between the sanctioned party’s misconduct and the matters in controversy such that the transgression threatens to interfere with the respect decision of the case,” and claims that “as to conduct that occurred outside of this Civil Action, this Court will not consider and has not considered the evidence unless it relates to an identifiable harm suffered by the plaintiff” [App. 2685], the order speaks for itself – discussing, at length, complaints regarding Woodbrook.

As to whether a party may be sanctioned by the award of attorney fees, litigation expenses, and court costs incurred in the prosecution of an entire case because either no or an allegedly inadequate settlement offer is made at mediation; as to whether a party may be similarly sanctioned because a party’s expert witness is excluded; and as to whether a party may be similarly sanctioned because the party recalls a conversation at trial that the party did not recall at a previous deposition or disclose in a discovery response, Woodbrook defers to the brief of Dr. Murthy, but where (1) the Circuit Court had dismissed a third-party bad faith suit against Woodbrook prior to entry of the order awarding attorney fees and costs; (2) some of the allegations against Woodbrook relied upon by the Circuit Court involved separate litigation; (3) no evidentiary hearing was conducted in which Woodbrook participated; and (4) the Circuit Court effectively awarded Ms. Karpacs-Brown damages for third-party bad faith even though such cause of action has been legislatively abolished and her direct claims against Woodbrook were dismissed by the Circuit Court, Woodbrook respectfully submits that the order of the Circuit Court should be reversed.

III. SUMMARY OF ARGUMENT

In this case, the Circuit Court erred in awarding attorney fees, litigation expenses, and court costs where the scope of this Court's remand was exceeded; where the Rules of Civil Procedure do not support the imposition of sanctions; where the decisions of this Court do not support the imposition of sanctions; where the Circuit Court relied upon alleged misconduct by in separate, unrelated litigation; where no evidentiary hearing was conducted regarding alleged misconduct in separate, unrelated litigation; where the Circuit Court had previously dismissed third-party bad faith claims; and where third-party bad faith causes of action have been judicially-rejected and legislatively abolished.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the Circuit Court's decision is the functional equivalent of restoring third-party bad faith causes of action, this appeal presents issues of first impression and involves issues of fundamental public importance, warranting argument under R. App. P. 20.

V. ARGUMENT

A. STANDARD OF REVIEW

"Where the issue on an appeal from the circuit court is clearly a question of law," this Court has held, "we apply a *de novo* standard of review."² "The decision to award or not to award attorney's fees," this Court has noted, "rests in the sound discretion of the circuit court."³

² Syl. Pt. 1, in part, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

³ *Beto v. Stewart*, 213 W. Va. 355, 359, 582 S.E.2d 802, 806 (2003).

With respect sanctions, it has been observed that, “We review the circuit court’s imposition of sanctions under an abuse of discretion standard.”⁴ Finally, this Court has held:

On the appeal of sanctions, the question is not whether we would have imposed a more lenient penalty had we been the trial court, but whether the trial court abused its discretion in imposing the sanction. It does not mean, however, that we will rubber stamp the sanction decisions of a trial court. Both Rule 16(f) and 37(b) of the Rules of Civil Procedure allow the imposition of only those sanctions that are “just.”⁵

Here, the Circuit Court not only abused its discretion by imposing sanctions on Dr. Murthy, but erred as a matter of law by exceeding the scope of this Court’s remand; by considering evidence of alleged misconduct outside this case; by considering alleged misconduct by Woodbrook; and by otherwise ignoring the standards applicable to the imposition of sanctions and the legislative abolition of third-party bad faith.

B. THE CIRCUIT COURT ERRED IN AWARDING ATTORNEY FEES, LITIGATION EXPENSES, AND COURT COSTS WHERE THE SCOPE OF THIS COURT’S REMAND WAS EXCEEDED; WHERE THE RULES OF CIVIL PROCEDURE DO NOT SUPPORT THE IMPOSITION OF SANCTIONS; WHERE THE DECISIONS OF THIS COURT DO NOT SUPPORT THE IMPOSITION OF SANCTIONS; WHERE THE CIRCUIT COURT RELIED UPON ALLEGED MISCONDUCT IN SEPARATE, UNRELATED LITIGATION; WHERE NO EVIDENTIARY HEARING WAS CONDUCTED REGARDING THE ALLEGED MISCONDUCT IN SEPARATE, UNRELATED LITIGATION; WHERE THE CIRCUIT COURT HAD PREVIOUSLY DISMISSED THIRD-PARTY BAD FAITH CLAIMS; AND WHERE THIRD-PARTY BAD FAITH CAUSES OF ACTION HAVE BEEN JUDICIALLY-REJECTED AND LEGISLATIVELY ABOLISHED.

1. The Circuit Court’s Imposition of Sanctions is Not Supported by the Rules of Civil Procedure.

In *Karpacs-Brown I*, this Court discussed the Rules of Civil Procedure as a predicate for the imposition of sanctions in this case:

⁴ *Cox v. Department of Natural Resources*, 194 W. Va. 210, 218 n.3, 460 S.E.2d 25, 33 n.3 (1995) (Cleckley, J., concurring) (citations omitted).

⁵ *Bartles v. Hinkle*, 196 W. Va. 381, 389-390, 472 S.E.2d 827, 835-836 (1996).

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 identified 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.

Karpacs-Brown I at 526-527, 686 S.E.2d at 756-757.

The Court will search in vain, however, for any reference to Rule 11, Rule 16, or Rule 37 in the Circuit Court's order and, for good reason, as none of them apply in this case.

First, none of the provisions of Rule 11 – including relationship to a pleading, motion, or other paper or the “safe harbor” notice⁶ – have any application to this case. Ms. Karpacs-

⁶ R. Davis, F. Cleckley & L. Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 4TH at §§ 11[1] and [2] (2012) (“The ultimate purpose of Rule 11 is to protect the integrity of the judicial system. Rule 11 fulfills its purpose by granting judges explicit authority to impose sanctions on parties or attorneys who tender pleadings, motions or other written documents in violation of the rule. . . . In general, Rule 11 sanctions may only be imposed after the attorney, law firm, or party receives notice and a reasonable opportunity to respond.”) (footnotes omitted); *id.* at § 11(c)(1)(A)[1]

Brown's motion for sanctions is not predicated upon the filing of any pleading, motion, or other paper and she never provided any "safe harbor" notice to Dr. Murthy. For this reason, Rule 11 is not referenced in the Circuit Court's order.

Second, none of the provisions of Rule 16 – involving failure to obey a scheduling or pretrial order; failure to appear at a scheduling or pretrial conference; failing to appear substantially prepared to participate in a scheduling or pretrial conference; or failing to participate in good faith in a scheduling or pretrial conference⁷ – have any application to this case. For this reason, Rule 16 is not referenced in the Circuit Court's order.

Finally, none of the provisions of Rule 37 – involving the involuntary compulsion of discovery responses; the failure to comply with a discovery order; the failure of a party to respond affirmatively to a request for admission; the failure to attend a deposition, to answer interrogatories, or respond to a request for production; or the failure to participate in the framing of a discovery plan⁸ – have any application to this case. Moreover, just as Ms. Karpacs-Brown complied with none of the "safe harbor" provisions of Rule 11, her motion was unaccompanied by the "certification" required by Rule 37 that she had in "good faith conferred or attempted to confer" with Dr. Murthy prior to filing her motion.⁹ Accordingly, although Rule 37 is referenced

("The motion . . . cannot be filed . . . unless, within 21 days after service of the motion . . . the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.").

⁷ *Id.* at § 16(f)[2][a] ("The circumstances in which Rule 16(f) sanctions may be imposed are limited to [these] four situations . . .") (Footnote omitted).

⁸ *Id.* at § 37[1] ("The areas addressed under the rule include: (a) motion for order compelling discovery, (b) failure to comply with order, (c) expenses for failure to admit, (d) sanctions involving deposition, interrogatories or request to inspect, and (e) failure to participate in the framing of a discovery plan.").

⁹ *Id.* at § 37(a)(2)[3] ("A party bringing a motion to compel must include with the motion a 'certification' that the movant has in 'good faith conferred or attempted to confer' with the

in passing in the Circuit Court's order, it could not have formed the basis for the imposition of any sanctions against Dr. Murthy.¹⁰

The only Rule of Civil Procedure substantively discussed in the Circuit Court's order is Rule 26(e) which provides as follows:

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

- (1) A party is under a duty seasonably to supplement that party's response with respect to any question directly addressed to:
 - (A) The identity and location of persons having knowledge of discoverable matters, and
 - (B) The identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony.
- (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.

nonresponsive party. . . . [T]he certification must include, inter alia, the names of the parties who conferred or attempted to confer, the manner by which they communicated, the dispute at issue, as well as the dates, times, and results of their discussions."') (Footnotes omitted).

¹⁰ See, e.g., *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 226 W. Va. 103, 110, 697 S.E.2d 139, 146 (2010) ("It is established law in this state that striking of pleadings and rendering a default judgment for a discovery violation pursuant to Rule 37(b) of the Rules of Civil Procedure will only be upheld if willfulness, bad faith or fault of the party disobeying the order to compel is established through an evidentiary hearing and in light of the full record before the trial court. Syl. Pt. 2, *Bell v. Inland Mut. Ins. Co.*, 175 W. Va. 165, 332 S.E.2d 127 (1985). Those prerequisites can not be satisfied in this case as there existed no order compelling discovery on which willfulness, bad faith or fault could be established."').

- (3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

If supplementation is not made as required by this Rule, the court, upon motion or upon its own initiative, may impose upon the person who failed to make the supplementation an appropriate sanction as provided for under Rule 37.

Here, there was no issue regarding the identities or locations of persons with knowledge of discoverable matters; the identity of expert witnesses or the subject matter or substance of their testimony;¹¹ the obtaining of information subsequent to a discovery response providing

¹¹ See *State ex rel. Tallman v. Tucker*, 234 W. Va. 713, 769 S.E.2d 502 (2015) (physician seasonably supplemented expert disclosure and sanction of excluding expert was unwarranted); *West Virginia Dept. of Transp., Div. of Highways v. Parkersburg Inn, Inc.*, 222 W. Va. 688, 699, 671 S.E.2d 693, 704 (2008) (“Here, the Inn failed to supplement its discovery responses by timely informing DOH that Mr. Cochrane would testify as an expert.”); *Jenkins v. CSX Transp., Inc.*, 220 W. Va. 721, 727, 649 S.E.2d 294, 300 (2007) (“In this case, it is undisputed that Mr. Jenkins failed to comply with Rule 26(e) because he did not notify CSX that Dr. Ducatman had reviewed Dr. Phifer’s report and intended to rely upon it to give his opinion at trial regarding the cause of Mr. Jenkins’ injury.”); *Anderson v. Kunduru*, 215 W. Va. 484, 489, 600 S.E.2d 196, 201 (2004) (reversing imposition of sanctions under Rule 26(e) for late expert disclosure where “Fairness dictates that any sanction should have been directed against the actor-or, in this case, the ‘in-actor’-and the sanction imposed in a manner that would best dispel any cost or prejudice to the opposing parties. For instance, the circuit court could have postponed the trial date, giving the appellees greater time to depose Dr. Cox and prepare their evidence in rebuttal, and impose the costs of the delay (like in the form of rescheduled plane tickets for appellees’ experts, appellees’ attorney costs in compelling the appellant to produce her evidence, supplemental expert reports that had to be prepared as a result of the delayed production, and so on) upon counsel for the appellant. Justice compels that the offending attorney should suffer for his actions, not the litigants/”); *Graham v. Wallace*, 214 W. Va. 178, 185, 588 S.E.2d 167, 174 (2003) (“After carefully considering the arguments of the parties, we agree with Mr. Graham that he was unfairly surprised by Dr. Hutt’s testimony concerning the proper way for a radiologist to perform an arthrogram. We can find nothing in Dr. Wallace’s pre-trial disclosures that puts Mr. Graham on notice that Dr. Hutt was going to opine as to the proper way for a radiologist to perform an arthrogram. Rather, the obvious import of Dr. Wallace’s disclosures was that Dr. Hutt was going to testify as to the radiographic studies as these related to Dr. Wallace’s diagnosis.”); *Martin v. Smith*, 190 W. Va. 286, 291, 438 S.E.2d 318, 323 (1993) (“Dr. Smith offered no evidence to support a finding of bad faith or willfulness on the part of Mrs. Martin in failing to disclose Dr. Adams at an earlier time. Nor do we find any evidence in the record that the admission of Dr. Adams’ testimony disrupted the orderly disposition of the trial. Finally, even given that the admission of Dr. Adams’ testimony prejudiced Dr. Smith’s case, we find such prejudice far from incurable. Dr. Smith could have easily moved for a continuance in order to secure a comparable expert witness. We therefore find that the court did not abuse its discretion in admitting Dr. Adams’ testimony.”).

knowledge that it was incorrect when made;¹² the obtaining of information subsequent to a discovery response rendering the previous response, although correct when made, incorrect if “a failure to amend the response is in substance a knowing concealment;”¹³ or after Dr. Murthy had been ordered to supplement her responses and/or had entered into an agreement with Karpacs-Brown that she would supplement her discovery responses.

Indeed, in *Prager v. Meckling*, 172 W. Va. 785, 790, 310 S.E.2d 852, 857 (1983), the seminal case in West Virginia regarding the imposition of sanctions under Rule 26(e), this Court affirmed the refusal to impose sanctions where “the facts were known before trial” and “There is no factual development to show willfulness or bad faith on the part of the defendant. Although the record indicates the defense attorney had been given the document a week or so prior to trial,

¹² See *Ohio Power Co. v. Pullman Power, LLC*, 230 W. Va. 605, 607-608, 741 S.E.2d 830, 832-833 (2013) (affirming dismissal of cross-claims where “approximately a month and a half before trial was to begin, counsel for the Petitioners contacted counsel for all other parties and advised them that the Petitioners had just discovered the existence of 750,000 to 1,500,000 pages of electronic information on a hard drive that had never been previously reviewed by the Petitioners for discovery purposes.”); *Beto*, *supra* at 363, 582 S.E.2d at 810 (“After finding that Attorney Haddad’s conduct was deficient in many ways, the court explained that the deficiencies were not aimed at the court or its processes. The court also explained that the deficient conduct did not warrant additional sanctions because Ms. Beto was not prejudiced by Attorney Haddad’s actions. No prejudice occurred because the letters were produced prior to trial and were used by Ms. Beto during trial. The court found no proof that Attorney Haddad intentionally concealed the existence of the correspondence.”); *First Nat. Bank in Marlinton v. Blackhurst*, 176 W. Va. 472, 478, 345 S.E.2d 567, 573-574 (1986) (“The documents that Mr. Blackhurst claims were improperly introduced are documents that he personally signed. Furthermore, they are notes for the benefit of a corporation of which he was vice president and a major stockholder. Accordingly, the prejudice or surprise Mr. Blackhurst experienced must have been minimal. The bank did not introduce these notes in a deliberate effort to achieve surprise; rather Mr. Blackhurst raised the issue of his liability on the notes and the genuineness of his signature. Additionally the defendants had the ability to minimize the prejudice by asking for a continuance. But they did not. Finally, there is no evidence of bad faith on the part of the bank. It was within the trial court’s discretion to admit the three notes and the testimony regarding them.”).

¹³ See *JWCF, LP v. Farruggia*, 232 W. Va. 417, 752 S.E.2d 571 (2013) (affirming responding expert’s additional charges of \$1,800 to recalculate damages based upon untimely disclosure of plaintiff’s re-employment three weeks prior to trial); *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995) (failure to disclose surveillance videotape of plaintiff may have violated Rule 26(e), but its admission was harmless because it was highly-probative).

we are left with the impression that the trial court ascribed his failure to turn over the document to inadvertence rather than willfulness or bad faith.”

Obviously, it is common practice for discovery responses to be used for purposes of cross-examination at trial. Indeed, R. Civ. P. 33(b) provides that interrogatories “shall be answered . . . under oath” in order to permit their use for purposes of cross-examination. The idea, however, advocated by Mr. Karpacs-Brown and adopted by the Circuit Court that any deviation between a party’s interrogatory responses and their trial testimony warrants the award of all of the opposing party’s attorney fees, litigation expenses, and court costs is ridiculous:

Under Rule 33(c) answers to interrogatories may be used at trial to the extent permitted by the rules of evidence. Answers to interrogatories must often be supplied before investigation is complete and can rest only upon knowledge which is available at the time. **When there is conflict between answers supplied in response to interrogatories and answers obtained through other questioning, either in deposition or trial, it is up to the finder of fact to weigh all the answers and resolve the conflict.**¹⁴

Here, the Circuit Court’s order describes Dr. Murthy’s alleged violation of Rule 26(e) as follows:

[T]he 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.” . . .

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

¹⁴ LITIGATION HANDBOOK, *supra* at § 33(c)[5] (Emphasis supplied and footnotes omitted).

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. . . .

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."

[App. 2678 - 2679]

In the Circuit Court's order, as a means of justifying awarding Ms. Karpacs-Brown all of her attorney fees, litigation expenses, and court costs, this alleged failure to Dr. Murthy to include in her interrogatory answer a complete recitation of every "conversation" she could "recall" at the time she interacted with the patient and/or the failure to supplement her answer prior to being ask a more specific question on cross-examination to which she provided a more specific answer, Dr. Murthy is described as having "altered her testimony," "recanted," and made a "mockery of the oath and discovery process" [App. 2679 and 2682], but with all due respect, Ms. Karpacs-Brown's arguments make a mockery of the Rules of Civil Procedure and the Rules of Evidence.

Ms. Karpacs-Brown did not rely solely on Dr. Murthy's discovery responses in preparing for trial; indeed, as noted in the Circuit Court's order, she also deposed Dr. Murthy. [App. 2679] The Circuit Court concludes that Dr. Murthy's deposition testimony during which she could not remember any specific conversations with any members of the Karpacs family on June 1 or 2, 2001 [App. 2678 - 2679], but the trial testimony upon which Ms. Karpacs-Brown relies did not involve a conversation with "the Karpacs family," but with Ms. Karpacs, the patient. Moreover,

Rule 26(e) deals exclusively with the duty to supplement written discovery responses, not deposition testimony, and its inclusion is nothing more than an effort to bootstrap nothing with regard to Dr. Murthy's discovery responses into the appearance of something in light of her deposition testimony.

Perhaps the Circuit Court's error can best be illustrated by its statement that, "It is particularly relevant that Dr. Murthy never honored her legal duty to supplement her discovery responses or deposition testimony when her memory changed" [App. 2682] as if it can now be justified to impose upon Dr. Murthy the obligation to reimburse Ms. Karpacs-Brown all of her attorney fees, litigation expenses, and court costs because Dr. Murthy did not call time-out during her cross-examination at trial and ask to first supplement her written discovery responses to include a detail that was elicited in response to a different and more specific question.

Unless this Court intends to adopt a rule that if a party fails to miss any detail in response to the interrogatory "Please describe with particularity each and every conversation you claim to have had" and/or fails to supplement a general response to such an interrogatory prior to answering a different and more specific question at trial, that party is subject to sanctions in the form of reimbursing the opposing party all of the attorney fees, litigation expenses, and court costs incurred in the litigation if the party's trial answer departs in any measure from the party's discovery response. Accordingly, Woodbrook submits that this Court reverse the Circuit Court's order to the extent that it purports to be predicated on the Rules of Civil Procedure.

2. The Circuit Court's Imposition of Sanctions is Not Supported by *Pritt* or *Sally-Mike*.

Lacking any support under the Rules of Civil Procedure, the Circuit Court referenced this Court's decisions in *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):

The statute did not, however, abolish the common law doctrines set forth in *Suzuki v. Pritt*, 204 W. Va. 388 (1988), *Sally-Mike Properties v. Yokum*, 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 Rules of Civil Procedure.

[App. 2680] Plainly, neither *Pritt* nor *Sally-Mike* provides any support for the imposition of sanctions against Dr. Murthy in this case.

In *Pritt*, this Court reiterated its holding in the single Syllabus of *Daily Gazette Co. v. Canady*, 175 W.Va. 249, 332 S.E.2d 262 (1985) that, "A court may order payment by an attorney to a prevailing party reasonable attorney fees and costs incurred as the result of his or her vexatious, wanton, or oppressive assertion of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law."

In *Sally-Mike*, this Court held in Syllabus Point 3 that, "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."

In *Pritt*, where a plaintiff, a successful podiatrist, was caught on surveillance videotape "climbing into and out of boats; positioning a boat trailer at the bottom of a boat ramp; climbing up a grassy slope; walking quickly up and down a flight of steps within a short span of time; carrying bags of charcoal to a grill; removing and emptying a large metal ash container from the

grill; throwing objects overhand; helping to carry a boat and a ladder; carrying a pump motor; attempting to start the boat motor with his right hand; and lying on a boat dock while reaching underneath to spray off the underside of the dock” and had “failed to disclose that he had been treated for psychological problems for years” even though he claimed in an ATV suit that he had “suffered back and neck injuries which rendered him disabled and forced him to walk in a stooped-over fashion with the assistance of a cane” rendering him “no longer able to work,” this Court affirmed a trial court’s award of attorney to both the defendant and to plaintiff’s counsel finding that the plaintiff had perpetrated a fraud upon the court:

This Court has long-recognized the inherent authority of trial courts to award attorney’s fees as a sanction for fraud. In *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 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 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.’” *Id.* at 474, 425 S.E.2d at 150 (quoting *Nelson v. West Virginia Public Employees Ins. Bd.*, 171 W. Va. 445, 451, 300 S.E.2d 86, 92 (1982)). Based on our determination that “fraud falls within the ‘bad faith’ exception to the American rule[,]” we concluded in *Bowling* that findings of fraud demonstrated by clear and convincing evidence permit attorney’s fees to be awarded against a defendant. 188 W. Va. at 475, 425 S.E.2d at 151; accord *Yost v. Fuscaldo*, 185 W. Va. 493, 499–500, 408 S.E.2d 72, 78–79 (1991) (reversing trial court’s decision not to award attorney’s fees against defendants who had fraudulently induced plaintiff to sign release settling his personal injury claim). The trial court’s award of attorneys’ fees in this case was based both on violations of specific rules of civil procedure, as well the court’s inherent sanctioning power.

Id. at 392-393, 513 S.E.2d at 165-166.

Obviously, such extreme fraud upon the court justifies the imposition of appropriate sanctions, but any comparison between the *Pritt* case and this case is absurd. Plainly, this Court’s decision in *Pritt* provides no legitimate basis for the imposition of sanctions on Dr. Murthy.

The Circuit Court's reliance on *Sally-Mike* is even more inexplicable as this Court held that sanctions were inappropriate in that case because: "Bringing or defending an action to promote or protect one's economic or property interests does not per se constitute bad faith, vexatious, wanton or oppressive conduct within the meaning of the exceptional rule in equity authorizing an award to the prevailing litigant of his or her reasonable attorney's fees as "costs" of the action." Syl. pt. 4, *Sally-Mike, supra*. Indeed, this Court's analysis in *Sally-Mike* is equally applicable in the instant case:

The defendants alternatively suggest that this Court should abandon the "American" rule in favor of a general rule authorizing "fee shifting," whereby the losing litigant must pay the prevailing litigant's reasonable attorney's fees.

In support of the American rule, one should not be penalized for merely prosecuting or defending a lawsuit, as litigation is at best uncertain. The primary justification for the American rule is, however, that the poor would be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S. Ct. 1404, 1407, 18 L.Ed.2d 475, 478 (1967)....

The American practice of generally not including attorney's fees in costs was a deliberate departure from the English practice, stemming initially from the colonies' distrust of lawyers and continued because of a belief that the English system favored the wealthy and unduly penalized the losing party. *Conte v. Flota Mercante Del Estado*, 277 F.2d 664, 672 (2d Cir.1960).

While the American rule of nonrecovery of reasonable attorney's fees as "costs" of an action, absent a contrary agreement of the parties or express allowance under a statute or rule of court, is subject to some criticism, the existing equitable exceptions, such as the "bad faith" exception, alleviate much of the criticism of the general rule. Moreover, the American rule promotes equal access to the courts for the resolution of bona fide disputes. See *Mighty Midgets, Inc. v. Centennial Insurance Co.*, 47 N.Y.2d 12, 22, 416 N.Y.S.2d 559, 564, 389 N.E.2d 1080, 1085 (1979).

Id. at 51-52, 365 S.E.2d at 249-250. (Footnotes omitted).

Here, there is nothing to suggest that Dr. Murthy did not have legitimate defenses to the suit against her and, indeed, Ms. Karpacs-Brown's demand of \$600,000 reflects that she and her attorneys understood the risk of an adverse verdict. As this Court observed in *Sally-Mike*:

[A]n eventual loser's refusal to recognize the validity of the eventual winner's position, and his insistence on taking the winner to court, do not necessarily imply wrongful conduct on the part of the loser. After all, the loser calculated his chances of winning as sufficiently promising to put up his own attorneys' fees. And even where lawyers take a case on a contingent fee, the lawyer has usually calculated the chance of winning as sufficiently strong to warrant his time and effort.

Id. at 51 n.5, 365 S.E.2d at 249 n.5. (Citation omitted).

Of course, that is exactly what the Circuit Court has done in this case – punish Dr. Murthy and by extension her insurer because she exercised her constitutional right to have Ms. Karpacs-Brown's claims against her adjudicated by a jury rather than agreeing to settle the case for Ms. Karpacs-Brown's demand of \$600,000. Indeed, the Circuit Court's imposition of attorney fees, litigation expenses, and court costs on Dr. Murthy, under the circumstances of this case which are completely unlike *Pritt*, but similar to *Sally-Mike*, would violate her constitutional right to a jury trial which this Court referenced in *Karpacs-Brown I*. Plainly, *Sally-Mike* contradicts and does not support the imposition of sanctions in this case.

The Circuit Court's reliance upon the rules permitting sanctions for the “vexatious, wanton, or oppressive assertion of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law” or for acting “bad faith, vexatiously, wantonly or for oppressive reasons” was misplaced as the alleged misconduct of Dr. Murthy – involving a dispute over mediation; settlement negotiations in which the parties were ultimately only \$450,000 apart; the exclusion of an expert witness; and the

failure to disclose in a general discovery response more specific information elicited at trial – plainly did not involve the “vexatious, wanton, or oppressive assertion of a . . . defense” that could not “be supported by a good faith argument for the application, extension, modification, or reversal of existing law” nor did it involve acting “in bad faith, vexatiously, wantonly or for oppressive reasons.” Rather, it involved “defending an action to . . . protect one’s economic or property interests,” which is protected under the Constitution and by this Court.

3. The Circuit Court’s Imposition of Sanctions Exceeded the Scope of this Court’s Remand; Violated Dr. Murthy’s and Woodbrook’s Constitutional Rights; and Effectively Constitutes Reinstatement of a Cause of Action for Third-Party Bad Faith.

“We have long held,” this Court recently observed, “that due process dictates that a party receive meaningful notice of hearings and be given an opportunity to respond to potential sanctions.” *Bowyer v. Dozier*, 2015 WL 3672337 at *4 (W. Va.) (memorandum). Similarly, in *Davis v. Rutherford*, 2015 WL 1740930 at *3 (W. Va.) (memorandum), this Court recently stated, “While we do not question the court’s ability to sanction a party for the failure to participate in good faith in the discovery process, this power is subject to the requirements of due process.”

For example, in Syllabus Point 1, in part, of *Bartles*, *supra*, this Court made plain:

[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 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 the party’s misconduct.

As to these due process limitations applicable to the instant case, this Court’s decision in *Karpacs-Brown I* could not have been clearer – quoting verbatim from Syllabus Point 1 of *Bartles*.

Karpacs-Brown I at 526-527, 686 S.E.2d at 756-757. Yet, on remand, the Circuit Court went well beyond the instant case; litigation misconduct; the “misconduct” of the “sanctioned party,” Dr. Murthy; any act or omission by Dr. Murthy that “threaten[ed] to interfere with the rightful decision of the case;” and/or “ensur[ing] any sanction imposed is fashioned to address the identified harm caused by the party’s misconduct,” and imposed sanctions on Dr. Murthy as if Ms. Karpacs-Brown had filed a third-party bad faith suit against Woodbrook:

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. . . .

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. . . .

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. . . .

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. . . .

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*

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. . . .

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. . . .

The Court has also reviewed the sworn declaration of physician Michael Austin, who was a Woodbrook insured who was sued for medical malpractice. . . .

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. . . .

In *Roberts*, Dr. Murthy claimed she had been intimidated into admitting facts conclusively establishing her liability. . . .

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. . . .

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

While not every violation of the UTPA would be sufficient to trigger the common-law remedies . . . the negotiation behavior of the insurer was vexatious and unreasonable. Under such circumstances, the shifting of attorney's fees is entirely proper. . . .

The defendant shall be responsible for the attorney's fees, expenses, and costs that would normally be borne by the Plaintiff and Plaintiffs fees, expenses and costs shall be borne by the Defendant or the Defendant's insurer. . . .

[App. 2669 - 286]

In other words, largely based not upon the litigation conduct of Dr. Murthy, but based upon the course of settlement negotiations; based upon Dr. Murthy's alleged misconduct in a

completely different case; and based upon what are essentially third-party bad faith allegations against Woodbrook largely arising from Woodbrook's alleged policy of making inadequate settlement offers in favor of exercising the right of its insureds to a jury trial, the Circuit Court has ordered Dr. Murthy to reimburse all of Ms. Karpacs-Brown's attorney fees, litigation expenses, and court costs even though the parties were separated by only \$450,000 prior to trial and Dr. Murthy's insurer, Woodbrook, promptly paid the entire judgment upon remand.

As previously noted, the Circuit Court dismissed Ms. Karpacs-Brown's third-party bad faith suit against Woodbrook, correctly concluding that (1) this Court held in *Elmore*¹⁵ there is no common law cause of action for third-party bad faith; (2) this Court held in *Elam*¹⁶ that any bad faith claim against a medical malpractice insurer is barred by W. Va. Code § 55-7B-10; (3) the Legislature, through the enactment of W. Va. Code § 33-11-4(a) abolished the statutory cause of action of third-party bad faith;¹⁷ and (4) this Court held in *Strahin* that only the policyholder has a cause of action under *Shamblin*.¹⁸ [App. 2524-2532] The Circuit Court's dismissal of Woodbrook occurred well before the evidentiary hearing in this case. Yet, despite the fact that the Circuit Court had dismissed Woodbrook – recognizing that Ms. Karpacs-Brown had no cause

¹⁵ *Elmore v. State Farm Mut. Ins. Co.*, 202 W. Va. 430, 504 S.E.2d 893 (1998)

¹⁶ *Elam v. Medical Assurance of West Virginia, Inc.*, 216 W. Va. 459, 607 S.E.2d 788 (2004).

¹⁷ See also *Salmons v. State Farm Mut. Auto. Ins. Co.*, 2013 WL 2462190 at *1 (W. Va.) (memorandum) (“Pursuant to West Virginia Code § 33-11-4a, a third-party claimant may not bring a private cause of action for an alleged unfair claims settlement practice in violation of the UTPA.”); *Goff v. Penn Mut. Life Ins. Co.*, 229 W. Va. 568, 570 n.10, 729 S.E.2d 890, 892 n.10 (2012) (“Through its enactment of West Virginia Code § 33-11-4a in 2005, the Legislature expressly abolished the right of third-party claimants to bring statutory bad faith actions pursuant to West Virginia Code § 33-11-4(9).”); *State ex rel. Nationwide Mut. Ins. Co. v. Kaufman*, 222 W. Va. 37, 44 n.8, 658 S.E.2d 728, 735 n.8 (2008) (“All the parties agree that pursuant to W. Va. Code § 33-11-4a (2005) (Repl.Vol.2006), the Legislature abolished a third-party bad faith cause of action against insurers.”).

¹⁸ *Shamblin v. Nationwide Mut. Ins. Co.*, 216 W. Va. 459, 463, 607 S.E.2d 788, 792 (2004)

of action against Woodbrook – it nevertheless predicated its order sanctioning Dr. Murthy, not solely upon the acts or omissions by Dr. Murthy in this case, but upon the alleged acts, omissions, and “business judgment” of Woodbrook.

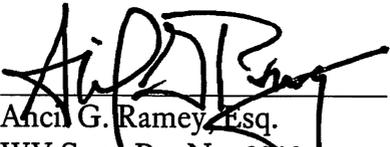
This clearly violated this Court’s decisions in *Karpacs-Brown I*, *Elmore*, and *Elam* and the Legislature’s abolition of statutory bad faith through the enactment of W. Va. Code § 33-11-4(a). Neither the UTPA nor the Rules of Civil Procedure nor equitable principles regarding acting “in bad faith, vexatiously, wantonly or for oppressive reasons” have any application to this case. Rather, it involved “defending an action to . . . protect one’s economic or property interests,” which is protected under the Constitution and by this Court.

VI. CONCLUSION

The Petitioner, Woodbrook Casualty Company, respectfully requests that this Court reverse the judgment of the Circuit Court of Wetzel County and remand with directions to enter judgment for the Petitioners, Woodbrook Casualty Company and Anandi Murthy, M.D.

**WOODBROOK CASUALTY
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioners,

vs.) No. 15-0376

ANDREA KARPACS-BROWN, individually
and as Administratrix of the Estate of Elizabeth
Karpacs, and the Estate of Andrew Karpacs,

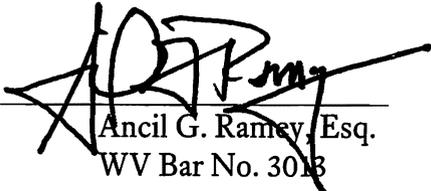
Respondents.

CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do hereby certify that on August 3, 2015, I served the foregoing "BRIEF OF PETITIONER" on counsel of record by causing to be deposited a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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