



APPEAL NO. 15-0376

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

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

*Appellants/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,

*Appellee/Respondent.*

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

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**APPELLANT/PETITIONER, ANANDHI MURTHY, M.D.'S REPLY BRIEF**

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Stephen R. Brooks, Esq. (WV Bar ID 472)  
Robert C. James, Esq. (WV Bar ID 7651)  
FLAHERTY SENSABAUGH BONASSO PLLC  
1225 Market Street  
P.O. Box 6545  
Wheeling, WV 26003  
T: (304) 230-6600  
F: (304) 230-6610  
[sbrooks@flahertylegal.com](mailto:sbrooks@flahertylegal.com)  
[rjames@flahertylegal.com](mailto:rjames@flahertylegal.com)

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## SUMMARY OF ARGUMENT

In awarding attorney fees, the Circuit Court went beyond the Remand Order of this Court, erroneously basing its award on unrelated matters and looking beyond Rules of Civil Procedure 11, 16, and 37 to base its award. The Circuit Court justified its award (1) by erroneously claiming a violation of an Order that the Circuit Court had amended; (2) by distorting the context and nature of Appellant/Petitioner's trial testimony; (3) by referencing extensive settlement negotiations; and (4) by turning the Respondent's success in excluding one of Appellant/Petitioner's experts into grounds for punishing Appellant/Petitioner.

For the reasons set forth in the subsequent arguments and original arguments advanced in Appellant/Petitioner's Brief, the Circuit Court committed errors in awarding attorney fees and costs and should be reversed.

## ARGUMENT

### **Preliminary Matters.**

As the preliminary matter, Respondent's Brief references a statement regarding an evidentiary hearing, which Respondent submits needs to be corrected. As was stated by Appellant/Petitioner in her Brief, on page 5, an evidentiary hearing was conducted on February 20, 2015.<sup>1</sup>

While on the topic of correcting and clarifying briefs, it should be noted that Respondent's Brief incompletely states, "all of Ms. Karpacs-Brown's evidence was admitted without objection from either Dr. Murthy or Woodbrook." (Respondent's Brief pp. 4 - 5). In reality, after the Respondent offered exhibits, counsel for Appellant, Dr. Murthy stated, *inter alia*, "We would object, obviously, to any of the evidence they've proffered to the extent it conflicts with that [the motion in limine] and move to strike the consideration of such evidence." (emphasis added). (Hearing Transcript pp. 7 - 8; Appendix pp. A 2707 - A 2708). And, Respondent's counsel acknowledged that he was submitting his various exhibits subject to the court evaluating and determining their admissibility in light of the pending Motions in Limine. (Hearing Transcript pp. 9 - 10; Appendix pp. A 2709 - A 2710).

Respondent's Brief further indicates, "Dr. Murthy declined to offer evidence at the hearing, requesting instead to submit her evidentiary submissions at a later date." To be precise, Appellant/Petitioner, Dr. Murthy's counsel actually offered to submit her evidence at the hearing

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<sup>11</sup> "Without an evidentiary hearing. . ." in Appellant/Petitioner's Brief p. 6 was simply a reference to the point that the sanctions on Dr. Murthy included misconduct of her insurance carrier who had been dismissed and who had not had an evidentiary hearing on the matters against it such as those found in Finding of Fact, paragraph 20 (i.e. that the insurance carrier has a history of doing various unsavory acts according to an article in The Charleston Gazette. (See Finding of Fact, paragraph 20, Appendix pp A 2671-A 2672).

or in the alternative by mail, and was requested by the Court to submit it by letter. (Hearing transcript pp. 8 – 9; Appendix pp. A 2708 – A 2709).

**I. The Circuit Court erred in exceeding the scope of this Court’s remand and Respondent has failed to sufficiently rebut this.**

As provided in the Appellant/Petitioner, Dr. Murthy’s Brief, there are numerous Findings of Fact and Conclusions of Law which considered conduct outside of this case and are thus in direct violation of this Court’s Remand Order, including Findings of Fact, paragraphs 20 - 26, and Conclusions of Law, paragraphs 62, 67 and 73. (Appendix pp. A 2671 – A 2673; A 2682 – A 2683; and A 2685). Respondent argues that it was acceptable to reference the outside conduct and asserts that there was no error because it was not the basis for sanctions. This view is preposterous. The various paragraphs do form the basis for sanctions; otherwise, they would not have been included in the Circuit Court’s Order. If such outside conduct is not relevant, as this Court already found and instructed in its Remand Order, then such material should have never been considered by the Circuit Court for any purpose or matter.

The Circuit Court’s creation of some caveat in how the Court was considering the evidence on a limited basis still does not correct the error. The Circuit Court still considered it. The Circuit Court still evaluated it. And, and it still carried sufficient weight to make its way into the Circuit Court’s Findings of Fact and Conclusions of Law, to serve as a basis behind its rationale in assessing sanctions.

To illustrate, in Finding of Fact, paragraph 20, the Circuit Court includes anecdotal hearsay evidence from a newspaper article that is an article about the Appellant/Petitioner, Dr. Murthy’s insurance carrier, not Dr. Murthy. (Appendix pp. A 2671 – A 2672). In Finding of Fact, paragraphs 22 and 23, the Circuit Court considers an affidavit from some unrelated case about a claim of conduct by an insurance carrier and its executive, which has nothing to do with

the case at bar or the Appellant/Petitioner, Dr. Murthy. (Appendix p. A 2672). Yet, the Circuit Court does not completely disavow these as being unworthy of consideration. Instead, the Circuit Court tries to justify its consideration of such extraneous items.

In short, the Respondent has failed adequately to rebut the Appellant/Petitioner, Dr. Murthy's assertion of error, as the Circuit Court did exceed the scope of this Court's Remand Order and as such the 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 and Respondent has failed to sufficiently rebut this.**

Respondent's Brief asserts that the Circuit Court relied on its inherent power under the 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), and on Rules 26(e) and 37. However, the Circuit Court's reliance on Pritt and Sally-Mike are misplaced for the reasons already briefed.

Likewise, the Circuit Court's reliance on Rule 37 is also misplaced, as set forth in the Appellant/Petitioner, Dr. Murthy's Brief.

The Respondent's reference to Rule 26(e) is equally misplaced. This Rule applies to the issue of supplementing responses. Its application to this matter is a reference to the claim that the Appellant/Petitioner, Dr. Murthy's testimony at trial was inconsistent with her previous deposition and interrogatory answers and as such the prior discovery should have been supplemented. However, as noted in the Appellant/Petitioner's Brief, Dr. Murthy explained her testimony noting that a recollection had been triggered while in the midst of being questioned during trial. (Appendix pp. A 1060 - A 1061). Under the circumstances, it was not feasible or

possible for a party to supplement prior discovery given a triggered recollection in the midst of testifying, and as such, the application of this Rule is equally erroneous.<sup>2</sup>

Therefore, for the reasons set forth in the Appellant/Petitioner, Dr. Murthy's Brief and the Respondent's failure to rebut the same, the Appellant/Petitioner, Dr. Murthy submits that the Circuit Court committed error in awarding sanctions.

**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 and Respondent has failed to sufficiently rebut this.**

Respondent's position that the Circuit Court correctly concluded that the Appellant/Petitioner, Dr. Murthy violated the mediation orders is based on the Respondent putting a spin on the Amended Order to the effect of claiming it was "*permitting* the parties to conduct the mandatory mediation. . ." (Respondent's Brief, p. 29). However, to be clear, the Agreed Order prepared by the Respondent's counsel does not say, as Respondent's Brief argues, that the Circuit Court was "permitting the parties to conduct the mandatory mediation." The key sentence from the Order reads in its entirety as follows:

"The Court further ORDERS that the parties be permitted to engage in mediation on August 5, 2004." (Appendix p. A 36).

The language of the Agreed Order added "permitted," but also drops the word "mandatory" when describing the mediation. The Agreed Order is completely void of the word "mandatory." (Appendix pp. A 36 –A 37).

Respondent also argues that the Appellant/Petitioner, Dr. Murthy's failure to consent to settlement constitutes a refusal to mediate. This argument is flawed. While the Appellant/Petitioner, Dr. Murthy personally did not provide her insurance carrier with her

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<sup>2</sup> To the extent the "recollection" is viewed as not credible, the jury gets to decide this and they ultimately sided for the Respondent, which addresses the issue and eliminates the need for further court action.

consent to settle, a contractual right she had with her insurance carrier, this was disclosed to the Respondent's counsel in advance of mediation and had the Respondent not cancelled mediation, the Appellant/Petitioner, Dr. Murthy could potentially have been persuaded at mediation to provide consent to settle. In addition, mediation could have proceeded with the Appellant/Petitioner, Dr. Murthy's insurance carrier expressing and exchanging settlement figures and proposals with the Respondent subject to ultimately getting the Appellant/Petitioner, Dr. Murthy's consent. Instead, it was the Respondent that officially cancelled the mediation.

There is no basis for awarding attorney fees and costs. The Appellant/Petitioner, Dr. Murthy cannot be and should not be sanctioned for violating an Order when the Order is, at the very least, ambiguous, or for exercising a contractual right with and against her insurance carrier, or for conduct joined in by, if not done completely by, the Respondent.

**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 a material issue and the jury ultimately addressed the situation through its verdict and Respondent has failed to sufficiently rebut this.**

The Circuit Court's Order for attorney fees was based on the issue of the allegation of changing testimony at trial. The testimony at issue is that Appellant/Petitioner, Dr. Murthy stated at trial that she was told by Elizabeth Karpacs, "please don't tell me I need surgery." (Appendix p. A 2679). Appellant/Petitioner, Dr. Murthy argued, as she testified in trial, that her recollection of this statement was triggered by the questions directed at her in the middle of testifying at trial. The Respondent, however, argues that this was critical testimony on a major issue. However, in reality this was simply a tangential statement that was barely, if at all, relevant to the case.

The Appellant/Petitioner's statement was no major revelation that changed the case. One can imagine and expect many patients' think or state when confronting possible surgery

something such as “please don’t tell me I need surgery.” So what if Ms. Karpacs too had such a hope. Does not everyone facing surgery at least think this? It does not change the issue of whether surgery was necessary and whether the Appellant/Petitioner committed malpractice in her treatment and treatment recommendations.

As set forth in the Appellant/Petitioner’s Brief, the situation does not rise to a level of forming a basis for attorney fees and costs in that (1) it was merely a tangential remark; (2) the Appellant/Petitioner explained right on the stand how and why her memory was triggered; (3) a party is allowed under the Rules of Evidence to have refreshed recollections; (4) the Appellant/Petitioner and her counsel were not in a position to amend her interrogatory answers in the middle of cross-examination at trial thus, making Rule 26(e) inapplicable; and (5) the Appellant/Petitioner was subject to impeachment on this peripheral issue that potentially undermined her credibility in the eyes of the jury, while not really advancing any of her defenses in any meaningful way in the case.

**V. The Circuit Court erred in basing an award of attorney fees and costs in part on conduct during settlement negotiations and Respondent has failed to sufficiently rebut this.**

Respondent’s Brief cites to the following language in the Circuit Court’s Order:

“No part of these conclusions of law rests on specific offers and demands exchanged by the parties during settlement negotiations. Rather, the Court’s consideration of sanctions considers matters related to settlement only insofar as they relate to violations of the Court Order on mediation...” (Appendix p. A 2686).

Respondent argues that in spite of paragraphs 6 through 27 of the Circuit Court’s Findings of Fact addressing various settlement negotiations, these findings on settlement negotiations do not form a basis for attorney fees due to the above language.

Nevertheless, a fair reading of the Circuit Court's Order seems to indicate that since it devoted so many paragraphs to discuss settlement negotiations it is also basing sanctions on more than just the claim of violating an Order for mediation which was amended to drop the word "mandatory" and add "permitted." To the extent the Circuit Court was only addressing the issue of its Order on mediation, the Appellant/Petitioner's cross references Section III of her Brief and Section III of her Reply Brief, above.

To the extent the Circuit Court is basing any aspect its award for attorney fees and costs on conduct occurring during settlement negotiations, it erred. To the extent the Respondent is conceding that the settlement negotiations should not be a basis for attorney fees and costs as their Response Brief seems to assert, the Appellant/Petitioner is in agreement.

Settlement negotiations and how they were conducted provide no basis to award attorney fees and thus, the Circuit Court erred, to the extent that it did rely on this as a basis for awarding attorney fees and costs.

**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 and Respondent has failed to sufficiently rebut this.**

Respondent's Brief asserts that issues surrounding Dr. Abrahams, "prejudiced Ms. Karpacs-Brown's ability to prepare her case and unjustifiably delayed the trial of this matter." (Respondent's Brief p. 31). However, to the contrary there was no delay of the trial due to this issue and the Respondent was in no way prejudiced in their ability to prepare the case.

Dr. Abrahams was successfully impeached at his deposition in 2004 which resulted in a motion to preclude him from testifying. (Appendix pp. A 48 – A 84) The Appellant/Petitioner did not contest this. Not contesting a motion in no way delays a trial. As noted in the

Respondent's Brief, the Appellant/Petitioner did file a Motion to Reconsider. (Appendix pp. A 203 – A 211). However, the Appellant/Petitioner's Motion to Reconsider was filed only after the West Virginia Supreme Court of Appeals issued the decision of State ex rel. Jones v. Recht, 221 W. Va. 380, 655 S.E.2d 126 (2007) in November of 2007 which opened the door to allow experts who would otherwise be properly excluded on a number of topics, to be allowed to testify on limited other topics.

Even then when the Motion to Reconsider was filed, it was scheduled for argument in an already pending Pre-Trial Conference and was quickly addressed and disposed of by the Circuit Court at that hearing. Therefore, it had no delay on the trial.

Likewise, the Motion to Reconsider did not affect Respondent's preparation of the case. Respondent successfully impeached Dr. Abrahams in April 2004. The Respondent moved to exclude him which the Appellant/Petitioner did not contest. The Appellant/Petitioner's Motion to Reconsider was denied, and therefore preparing for the trial was not affected.

Respondent's assertion and argument that they were somehow ambushed at trial with a proffer about Dr. Abrahams is nonsensical. Proffers are how parties preserve the record on an issue that has already been addressed and ruled against them. The Appellant/Petitioner was simply trying to preserve the record, which is her right to do, and is not a basis for awarding attorney fees and costs.

As such the Appellant/Petitioner submits to this Court that the Circuit Court erred on this issue and that the Respondent has failed to rebut the assertion of error.

## CONCLUSION

The Circuit Court of Wetzel County abused its discretion for the reasons detailed in the Appellant/Petitioner's Brief and for the reasons set forth above in this Reply Brief. The Respondent has failed to adequately and sufficiently rebut the assertions of error and as such as the Appellant/Petitioner respectfully requests this Honorable Court to reverse the Order entered by the Circuit Court and remand this matter with directions to the Circuit Court to enter an Order denying the Respondent's Motion for Attorney Fees and Costs.

Respectfully submitted,

*Shereen S. Compton (12252) for Robert C. James w permission*  
Stephen R. Brooks, Esq. (WV Bar ID 472)  
Robert C. James, Esq. (WV Bar ID 7651)  
FLAHERTY SENSABAUGH BONASSO PLLC  
1225 Market Street  
P.O. Box 6545  
Wheeling, WV 26003  
(304) 230-6600  
(304) 230-6610 fax  
[sbrooks@flahertylegal.com](mailto:sbrooks@flahertylegal.com)  
[rjames@flahertylegal.com](mailto:rjames@flahertylegal.com)

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Appellee/Respondent.

**CERTIFICATE OF SERVICE**

Service of the *APPELLANT/PETITIONER, ANANDHI MURTHY, M.D.'S REPLY BRIEF* was had upon the parties herein by regular U.S. mail, postage prepaid, to the following counsel of record this 6<sup>th</sup> day of October, 2015:

Christopher J. Regan, Esq.  
BORDAS & BORDAS, PLLC  
1358 National Road  
Wheeling, WV 26003  
*Counsel for Appellee*

Ancil G. Ramey, Esq.  
STEPTOE & JOHNSON, PLLC  
P.O. Box 2195  
Huntington, WV 25722-2195  
*Counsel for Appellant, Woodbrook Casualty Insurance Co.*

By: Shereen S. Compton (12282) for Robert E. Jahn  
Counsel for Appellant/Petitioner, *w/ permission*  
Anandhi Murthy, M.D.

Stephen R. Brooks, Esq. (WV Bar ID 472)  
Robert C. James, Esq. (WV Bar ID 7651)  
FLAHERTY SENSABAUGH BONASSO PLLC  
1225 Market Street  
P.O. Box 6545  
Wheeling, WV 26003  
(304) 230-6600  
(304) 230-6610 fax  
[sbrooks@flahertylegal.com](mailto:sbrooks@flahertylegal.com)  
[rjames@flahertylegal.com](mailto:rjames@flahertylegal.com)