

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

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

Plaintiff Below, Respondent.

RESPONDENT'S BRIEF AND CROSS-ASSIGNMENT OF ERROR

FROM THE CIRCUIT COURT OF WETZEL COUNTY
CIVIL ACTION NO. 03-C-36-K

CHRISTOPHER J. REGAN #8593
GEOFFREY C. BROWN #9045
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
304-242-8410
Counsel for Plaintiff Below, Respondent

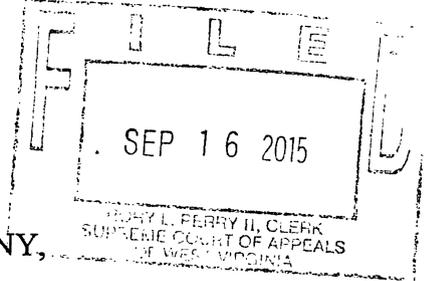


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ASSIGNMENT OF ERROR

Contrary to the assignments of error set forth by Petitioners¹, the Circuit Court of Wetzel County complied with this Court's mandate in *Karpacs –Brown v. Murthy*, 224 W.Va. 516, 686 S.E.2d 746 (2009), by allowing Petitioners² to engage in nearly five years-worth of additional motion and discovery practice on the discrete issue of whether sanctions should be assessed against Petitioner Anandhi Murthy, M.D., for her severe litigation misconduct occurring prior to and during the January 2008 trial of this medical malpractice wrongful death action before conducting a February 20, 2015 evidentiary hearing as directed by this Court. The Circuit Court of Wetzel County neither erred nor abused its discretion when invoking its inherent power to sanction Anandhi Murthy, M.D. for her demonstrated, repeated and admitted litigation misconduct and directing Anandhi Murthy, M.D. to pay the Respondent Andrea Karpacs-Brown's attorney's fees, expenses and costs in an amount to be determined upon further proceedings.

STATEMENT OF THE CASE

On January 25, 2008, a Wetzel County West Virginia jury rendered a Four Million Dollar verdict after finding that Petitioner Anandhi Murthy, M.D. [hereinafter "Dr. Murthy"] was negligent in the treatment of Respondent Andrea Karpacs-Brown's³ [hereinafter "Ms. Karpacs-

¹ Although Petitioner Woodbrook Casualty Insurance Company [hereinafter "Woodbrook"], Petitioner Anandhi Murthy, M.D.'s medical professional liability insurer, was dismissed as a party-defendant prior to entry of the April 2, 2015 Sanctions Order and was not subject thereto, Woodbrook has instituted its own appeal of Sanctions Order, asserting error separate and distinct from that asserted by Petitioner Murthy. As further explained in Respondent's Motion to Dismiss Appeal and Brief of Petitioner Woodbrook Casualty Insurance Company, filed contemporaneously herewith, Woodbrook does not have standing to institute and prosecute an independent appeal of the Sanctions Order entered against its insured. However, Woodbrook's continued improper interjection of itself into this litigation serves only to underscore the circuit court's error in dismissing Woodbrook as a party-defendant addressed *infra* in connection with Respondent's cross assignment of error. Woodbrook cannot have it both ways. Equity demands that if Woodbrook is entitled to take direct, independent action to attempt to defeat Respondent's claims, it must also be required to face direct consequences for its own litigation misconduct.

² As discussed, *infra*, Woodbrook actively opposed Respondent's Motion for Attorney's Fees and Costs in proceedings occurring after this Court's 2009 remand until the time the circuit court entered its May 31, 2013 Order of Partial Dismissal dismissing Woodbrook as a party-defendant. *See*, A2236-A2294, A2299-A2313, A 2524-2532.

³ Respondent Andrea Karpacs-Brown's claims were brought in her individual capacity and as Administrator of the Estate of her Mother, Elizabeth Karpacs, and the Estate of her Father, Andrew Karpacs.

Brown”] decedent, Elizabeth Karpacs, and that Dr. Murthy’s negligence caused or substantially contributed to Elizabeth Karpacs’ death. A409-A411. Due to the pervasive litigation misconduct engaged in by Dr. Murthy over a four year period which culminated at trial in January 2008 when she drastically changed her prior testimony regarding material facts and sought to introduce previously undisclosed opinions of a previously-excluded expert, Ms. Karpacs-Brown asked the circuit court to invoke its inherent power and sanction Dr. Murthy for her serious litigation misconduct after the jury rendered its verdict. Specifically, Ms. Karpacs-Brown sought an order directing Dr. Murthy to pay the attorney’s fees and costs she incurred while litigating her claims in the face of Dr. Murthy’s obstructions of fact and expert discovery and delay tactics.⁴ A422-A493. On March 31, 2008, a hearing was held on post-trial motions, including Ms. Karpacs-Brown’s motion for sanctions. A2018-A2047.

On July 29, 2008, the Circuit Court of Wetzel County entered an order sanctioning Dr. Murthy for her litigation misconduct, some of which appeared to have occurred at the direction of Woodbrook, and finding “[t]he defendant [Dr. Murthy] shall be responsible for the attorney’s fees, expenses and costs that would normally be borne by the Plaintiff [Ms. Karpacs-Brown.]” A728-A746. Dr. Murthy appealed both the jury’s verdict and the circuit court’s sanctions order.⁵ In *Karpacs-Brown v. Murthy, M.D.*, 224 W.Va. 516, 686 S.E.2d 746 (2009), this Court definitively disposed of all issues with the exception of the sanctions ruling. As to the circuit court’s sanctions ruling, this Court found:

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

⁴ Dr. Murthy’s pervasive litigation misconduct forming the basis of Ms. Karpacs-Brown’s motion is discussed in further detail *infra*.

⁵ Prior to Dr. Murthy’s appeal being perfected, the circuit court permitted Ms. Karpacs-Brown to amend her Complaint to add Woodbrook as a party-defendant. The circuit court’s subsequent dismissal of the direct claims against Woodbrook is discussed, *infra*, in connection with Respondent’s Cross Assignment of Error.

compensate the appellee for actual harm suffered as a result of Dr. Murthy's and/or her insurer's alleged misconduct.

Karpacs-Brown, 224 W.Va. at 526, 686 S.E.2d at 756. Thus, this Court reversed the July 29, 2009 attorney fee order and remanded it for further proceedings, including an evidentiary hearing.

Upon remand, the circuit court, consistent with this Court's directive, promptly scheduled an evidentiary hearing on Ms. Karpacs-Brown's motion to take place on March 19, 2010. A2054. After receiving the Notice of Evidentiary Hearing, Dr. Murthy filed a Request for Rule 16 Status Conference. A2087-A2090. Therein, Dr. Murthy specifically asserted that "an evidentiary hearing is premature" and that proceeding with the March 19, 2010 evidentiary hearing "seems ill-advised." A2088. Woodbrook then also sought to postpone the scheduled evidentiary hearing due to a purported scheduling conflict. A2094-A2095. In light of Dr. Murthy's and Woodbrook's protests, the evidentiary hearing did not proceed on March 19, 2010; instead, a telephonic status conference was held on March 26, 2010. A2299.

Prior to the March 26, 2010 status conference, Dr. Murthy served various discovery requests upon Ms. Karpacs-Brown seeking specific information regarding how she calculated the attorney's fees and costs at issue on remand. A2056-A2063. Dr. Murthy also filed four (4) motions in limine seeking to prohibit the introduction of evidence relied upon by the circuit court in its prior attorney fee order. A2097-A2118. The evidence sought to be excluded by Dr. Murthy included: evidence of the *Roberts v. Murthy* case; evidence regarding Woodbrook's actions and conduct; evidence relating to settlement negotiations/mediation; and any other evidence not previously relied upon in Ms. Karpacs-Brown's February 2008 motion. A2097-A2118.

At the March 26, 2010 status conference, Dr. Murthy took the position that with Woodbrook in the case as a named defendant, it was inappropriate for Ms. Karpacs-Brown to continue proceeding against Dr. Murthy. A2304-A2305. Woodbrook, however, appeared and

took the opposite position asserting that it was “really not a party” to matters to be resolved at the evidentiary hearing. A2302. At the status conference, the circuit court announced that the evidentiary hearing required by this Court’s remand order would commence on April 29, 2010. A2308-A2309.

Despite having taken the position that it was not a party to the evidentiary hearing proceedings, Woodbrook filed a direct response to Ms. Karpacs-Brown’s Renewed Motion for Attorney’s Fees and Costs [hereinafter “Sanctions Motion”]. A302; A2236-A2283. Therein, Woodbrook again admitted that it was not a party to Ms. Karpacs-Brown’s Sanctions Motion. A2236. Nevertheless, Woodbrook affirmatively opposed the Sanctions Motion and Ms. Karpacs-Brown’s related motions in limine. A2284-A2294. As it had done throughout this litigation, Woodbrook sought to direct the course of proceedings but claim immunity for its misconduct.⁶ The April 29, 2010 evidentiary hearing did not occur as scheduled and, on May 31, 2013, the circuit court dismissed Woodbrook as a party-defendant. A2524-A2532. *Despite having previously been dismissed* as a party defendant, Woodbrook continued to appear on the record at all proceedings relating to the Sanctions Motion, including evidentiary hearing that was ultimately held on February 20, 2015. A2662; A2665.

At the February 20, 2015 evidentiary hearing, Ms. Karpacs-Brown offered into evidence each of the exhibits previously submitted to the circuit court with her Sanctions Motion,⁷ the deposition and trial testimony of Dr. Murthy and the deposition testimony of Roger Abrahams, M.D. A2662-A2663; A2665-A2666. All of Ms. Karpacs-Brown’s evidence was admitted without

⁶ Woodbrook’s attempt to control the legal arguments and evidence presented in opposition to Ms. Karpacs-Brown’s claims for relief continue to this day as evidenced by its attempt to institute its own independent appeal of the Circuit Court of Wetzel County’s April 2, 2015 Sanctions Order despite not being subject to the Sanctions Order having been dismissed as a party defendant on May 31, 2013. A2524-A2532.

⁷ This evidence included correspondence exchanged between the parties relating to the misconduct at issue, Dr. Murthy’s own affidavit and the affidavit of Ms. Karpacs-Brown’s counsel, Geoffrey C. Brown. A2665.

objection from either Dr. Murthy or Woodbrook. A2662-A2663; A2666. Additionally, Ms. Karpacs-Brown's counsel, Geoffrey C. Brown, offered to submit to examination by counsel for the defense. A2663; A2666. Dr. Murthy declined to take any evidence from Geoffrey C. Brown or to cross-examine him on any issue. A2663; A2666. Dr. Murthy declined to offer evidence at the hearing, requesting instead to submit her evidentiary submissions at a later date. The circuit court granted Dr. Murthy's request and directed the parties to submit proposed orders within thirty (30) days.⁸ On February 23, 2010, Dr. Murthy submitted fifteen (15) exhibits for consideration in conjunction with the issues raised at the February 20, 2015 evidentiary hearing. A2553-A2659.

On April 2, 2015, the Circuit Court of Wetzel County entered its Order and Findings of Fact and Conclusions of Law Regarding Plaintiff's Motion for Attorney Fees and Costs on April 2, 2015 [hereinafter "Sanctions Order"]. A2665-A2687. After considering the evidence before it, including that submitted at and after the February 20, 2015 evidentiary hearing, and expressly acknowledging that it was not considering factors precluded by this Court's prior opinion, the circuit court invoked its inherent power to sanction *Dr. Murthy* for her serious litigation misconduct holding:

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

⁸ Consistent with the Circuit Court of Wetzel County's established practice, Ms. Karpacs-Brown understood the time period for submission of proposed orders to commence on the date of the hearing and submitted her proposal within that time frame. However, the circuit court's March 24, 2015 order, entered after the initial thirty (30) day time period had expired, indicated that the submission should be made within thirty (30) days of entry of the order. A2662-A2664. Although both Dr. Murthy and Woodbrook take issue with the circuit court's entry of its April 2, 2015 Sanctions Order before Dr. Murthy (and, perhaps, Woodbrook) submitted proposed findings of fact and conclusions of law, it appears the circuit court understood its directive as submissions within thirty (30) days of the evidentiary hearing, not within thirty (30) days of entry of the order memorializing the rulings made at the evidentiary hearing submitted to it for entry by Dr. Murthy. *See*, Murthy Brief, p. 6; Woodbrook Brief, pp. 10-11; A 2662-A2664.

A2684-A2686. The Sanctions Order did not fix the amount of attorney's fees and costs to be awarded. Rather, the circuit court left that issue open pending further proceedings. A2686.

In finding sanctions in the form of attorney's fees and costs to be appropriate, the circuit court made the following conclusions of law:

59. The defendant's aggregated misconduct in this case rises to the level of bad faith, vexatious and oppressive conduct . . .

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

76. The defendant's financial decision to deliberately under-prepare an expert for deposition only to persist for years in trying to tender that expert for further testimony is a serious discovery violation. The evidence of the defendant's disregard of this Court's Orders regarding mediation and the deliberate financial calculations underpinning this entire approach to litigation demonstrates the complete disregard this defendant had for legitimate process in this case.

A2681; A2685-A2686. The majority of circuit court's findings relative to these categories of litigation misconduct are supported by the undisputed record before the circuit court, *including Dr. Murthy's own admissions.*

1. Dr. Murthy Disregarded Court Orders Regarding Mediation

Consistent with the requirements of W. Va. Code § 55-7B-6b(b), on October 4, 2003, the circuit court ordered mediation to be completed no later than July 16, 2014. W. Va. Code § 55-7B-6b(b) (2001) ("The court shall also order the parties to participate in mandatory mediation. The mediation shall be conducted pursuant to the provisions of trial court rule 25."); A19-A20; A441-A443. At the request of the parties, the circuit court entered a second order permitting the parties to mediate on August 5, 2004; however, all other provisions of the October 4, 2003 Order remained in effect, including the mandatory nature of the mediation. A36-A37; A2561-A2563. Dr. Murthy,

however, has **admitted** that she refused to consent to engage in settlement negotiations at the August 5, 2004 mediation. A2170 (Answer to RFA 8 “mediation was canceled . . . in light of Dr. Murthy’s decision not to provide consent to her carrier to settle.”; Answer to RFA 9 “It is admitted that Dr. Murthy, who had a provision requiring her to consent to settle under her insurance agreement, had taken the position prior to the mediation of August 5, 2004 that she was not, at that time, willing to provide consent to settle.)”

Indeed, the very exhibits offered by Dr. Murthy to oppose Ms. Karpacs-Brown’s Sanctions Motion confirm that Dr. Murthy violated W.Va. Code § 55-7B-6b(b)’s requirement of mandatory mediation and the circuit court’s orders mandating mediation:

- June 21, 2014 letter authored by Dr. Murthy’s counsel: “In response to your correspondence dated June 14, 2004 wherein you set forth your client’s settlement demand of \$1,000,000 (One Million dollars), please be advised that Dr. Murthy adamantly opposes the settlement of this matter . . . the carrier may not settle a claim without the insured’s consent. Because Dr. Murthy has not given her consent, her liability carrier must reject Plaintiff’s settlement demand and has no authority to make any counter offer at this time.” A2558.
- June 23, 2004 letter authored by Ms. Karpacs-Brown’s counsel: “Given your client’s adamant opposition to settlement, I assume her liability carrier will never be in a position to make a counter offer. If my assumption is correct, I suggest you initiate contact with Judge Karl to advise him that Dr. Murthy will refuse to settle under any circumstances making Court-ordered mediation pointless.” A2559.

- June 25, 2004 letter authored by Dr. Murthy's counsel: "Although we appreciate your suggestions on the manner in which we should handle the defense of this case, we would prefer to wait ... before making any decisions whether to carry out those suggestions." A2560.
- August 3, 2004 letter authored by Dr. Murthy's counsel: "our client, Dr. Murthy, has not consented to settle this matter and is unlikely to change her mind before mediation. . . .We have informed the Court and plaintiff's counsel of Dr. Murthy's position. . . . I wanted you to be aware that mediation is unlikely to result in settlement". A2561.

Accordingly, the circuit court correctly found that Dr. Murthy's pre-mediation position "made it clear that no settlement offer would be forthcoming" and "in light of the defense's position that there would be no negotiation on her part, mediation was cancelled." A2669.

After cancellation of the August 5, 2004 mediation, Dr. Murthy engaged in various delay tactics, including failing to appear at hearings and failing to respond to pending motions. Dr. Murthy has **admitted** to this conduct which spanned the period from January 2005 through March 2007. A2184-A2187 (Answers to RFA Nos. 47-56). On March 28, 2007, the day after the circuit court entered an order granting Ms. Karpacs-Brown's motion to exclude Dr. Murthy's expert, Roger Abrahams, Dr. Murthy sought a continuance of the scheduled April 2, 2007 trial citing the publicity and emotional distress from the recent verdict rendered against her in Wetzel County in the *Roberts* case, including submitting an affidavit in support of her request. A116-A121; A176-A177; A471-A472; A2669. Thereafter, on April 16, 2007, Ms. Karpacs-Brown moved for an order compelling Dr. Murthy to comply with the circuit court's prior mediation orders and W.Va. Code §55-7B-6b(b)'s mandatory mediation provisions. A122-A167. On July 9, 2007, the circuit

court once again entered an order mandating mediation. A178-179; A2573-A2574. Dr. Murthy appeared at the ordered July 30, 2007 mediation which was unsuccessful. A180; A2670.

No further settlement negotiations took place prior to a December 21, 2007 hearing at which time Ms. Karpacs-Brown confirmed to the circuit court that she had informed Dr. Murthy that she had substantial room for movement below her last demand at mediation and was advised that Dr. Murthy would not move from her last offer. A2643. Dr. Murthy did not refute this representation in any manner. A2643. Thereafter, Dr. Murthy expressed interest in renewed settlement discussions; but on January 10, 2008, Dr. Murthy's counsel informed Ms. Karpacs-Brown that the last offer made at mediation six months earlier would be withdrawn if not accepted by close of business on January 14, 2008 and was not guaranteed to ever be back on the table. A448-A449.

All of the above facts are undisputed, were in the record before the circuit court when it issued its Sanctions Order and demonstrate that the circuit court did not err when finding that Dr. Murthy's conduct surrounding mediation and her violation of circuit court orders mandating meditation warranted sanctions and justified an award of Ms. Karpacs-Browns' attorney's fees and costs. A2668-A2671; A 2681; A2685-A2686.

2. Dr. Murthy Materially Changed Her Testimony At Trial After Failing To Supplement Prior Discovery Responses, Including Deposition Testimony, To Disclose Her New Memory Of Significant Events

Dr. Murthy **admitted** the essential facts demonstrating her negligence causing the death of Elizabeth Karpacs during her December 11, 2003 deposition. A251-253; A256; A263-A264; A267-268; A2666-A2667. A critical issue to be resolved at trial, however, was whether Dr. Murthy adequately and appropriately informed Elizabeth Karpacs and the Karpacs family of Elizabeth Karpacs's diagnosis and the treatment options. Accordingly, Dr. Murthy was asked

during her December 11, 2003 deposition whether she recalled any specific conversations with members of the Karpacs family during Elizabeth Karpacs' hospitalization or whether she attempted to obtain Elizabeth Karpacs' informed consent for any type of surgical procedure. A268-A269. Dr. Murthy unequivocally testified that she did not. A268-A269. Dr. Murthy did not complete and return an errata sheet to the court reporting modifying her testimony. A473-A474. Additionally, the only conversation with Elizabeth Karpacs that Dr. Murthy disclosed in written discovery was a June 1, 2001 conversation occurring in the emergency room, a conversation limited to taking Elizabeth Karpacs history and needing to wait for test results. A1058-A1059; A2678-A2679. In light of her testimony regarding previously undisclosed material facts at the March 2007 *Roberts v. Murthy* trial, on November 19, 2007, the circuit court ordered Dr. Murthy to submit to a second deposition and supplement her prior deposition testimony. A197-A200.

On January 14, 2008, a mere ten days before her testimony at trial, Dr. Murthy was redeposed. A306; A1050. During her deposition, she acknowledged that she had read her prior deposition testimony the day before and she was asked if there was any part of her December 13, 2003 testimony that she wanted to change, edit or modify. A318; A332. In response, she testified "No." A332. Ten days later, during her trial testimony Dr. Murthy suddenly "remembered" a supposedly exculpatory conversation with Elizabeth Karpacs – a conversation she did not recall during the intervening six and a half years. A1055-A1061; A1329-A1330. Now-retired Judge Karl, the same judge who ordered her to be redeposed and supplement her prior testimony, presided at trial and was able to view Dr. Murthy's demeanor when she changed her testimony and assess the credibility of her claim that her memory was suddenly "refreshed" to remember a previously undisclosed conversation when she was asked if she had been honest with Elizabeth

Karpacs. A1060-A1061. The evidentiary record, coupled with the circuit court's own observations at trial, underlie the circuit court's findings that Dr. Murthy engaged in serious litigation misconduct warranting sanctions by failing to supplement her prior deposition testimony and written discovery responses to disclose a previously undisclosed material conversation before offering testimony of the same at trial. A2678-A2679; A2685.

3. Dr. Murthy's Litigation Misconduct Relative To Her Disclosed Expert, Roger A. Abrahams, M.D.

On April 15, 2004, Dr. Murthy disclosed Roger A. Abrahams, M.D., F.C.C.P., as an expert anticipated to "offer opinions regarding Elizabeth Karpacs COPD and its effect on her life expectancy." A24. Dr. Murthy's disclosure also provided that "Dr. Abrahams will be made available for deposition so that plaintiff's counsel may more fully explore his opinions and the bases thereof." A25. Dr. Abrahams was deposed on August 4, 2004, at which time he admitted the following: (1) his opinion on life expectancy rates came from an abstract of a single piece of medical literature; (2) plenty of other articles existed with relevant statistics which he did not consult; (3) he could only provide a "ballpark" estimate of Elizabeth Karpacs life expectancy, one that was dependent upon a lot of variables; (4) he intentionally underprepared for his deposition to save Dr. Murthy litigation expenses; and (5) "if things progressed and it looks like its going to trial, I might actually try to pull some other articles and other things to assist". A2584-A2586.

On December 11, 2004, within the time frame established by the circuit court for pre-trial motions, Ms. Karpacs-Brown filed her Motion in Limine to Exclude the Testimony of Roger Abrahams, M.D. A48-A84. Dr. Murthy did not file a response to Ms. Karpacs-Brown's motion and **admitted** that she did not contest it when it was filed. A2185. Dr. Murthy **admitted** she did not appear at the January 21, 2015 hearing on Ms. Karpacs-Brown's Motion to Exclude the Testimony of Roger Abrahams, M.D. A2185. Dr. Murthy **admitted** that she was served with Ms.

Karpacs-Brown's proposed findings of fact and conclusions of law regarding the motion on February 10, 2005. A2185. Dr. Murthy **admitted** that she did not respond to Ms. Karpacs-Brown's submission or file a competing order because "[b]ased on the deposition testimony of Dr. Abrahams, a good faith, convincing response could not be formulated." A2185-A2186. Dr. Murthy also **admitted** that she did not submit anything in opposition to the motion after the circuit court established, *at her request*, new deadlines for pre-trial motion practice because "[b]ased on the deposition testimony of Dr. Abrahams, a good faith, convincing response could not be formulated." A2186.

Dr. Murthy likewise **admitted** that she did not respond to the January 24, 2006 motion for entry of Ms. Karpacs-Brown's proposed order because "[b]ased on the deposition testimony of Dr. Abrahams, a good faith, convincing response could not be formulated." A2186. Dr. Murthy also **admitted** that the circuit court's March 24, 2007 order excluding the testimony of Dr. Abrahams was entered without objection from her. A2186-A2187. The circuit court record reflects that as of mid-December 2007, Dr. Murthy never attempted to supplement Dr. Abrahams' opinions. A2689-A2694.

Nevertheless, on December 11, 2007, approximately six weeks prior to trial, Dr. Murthy moved the circuit court to reconsider its order excluding the testimony of Dr. Abrahams. A203-A211. Dr. Murthy's motion was not accompanied by any new or different opinions to be offered by Dr. Abrahams. A203-A211. In light of Dr. Murthy's admissions that she could not formulate a good faith, convincing opposition to the motion to exclude Dr. Abrahams based upon his own deposition testimony and no proffer of new opinions had been made, Dr. Murthy's motion for reconsideration was a frivolous motion. Despite no legitimate basis for Dr. Murthy's motion for reconsideration, it was addressed at a December 21, 2007 hearing. At that hearing, Dr. Murthy

admitted that she filed the motion for reconsideration because she had failed to previously oppose the motion to exclude Dr. Abrahams:

With regards to the Motion in Limine Number Four that was filed to exclude – exclude Roger Abrahams, we did not make a record contesting that motion when it was originally filed. . . . We filed this because we want to . . . clarify some key points that were not raised before the Court.

A2636. On January 14, 2008, the circuit court denied Dr. Murthy’s motion for reconsideration. A239-A240. Dr. Murthy never filed a supplemental disclosure of Dr. Abrahams’ opinions prior to trial. A2689-A2694. Dr. Murthy’s first proffer of Dr. Abrahams’ opinions was made on the fourth day of trial, *after* Ms. Karpacs-Brown rested her case. Each of the circuit court’s findings of fact relative to Dr. Murthy’s litigation misconduct surrounding her disclosure of Dr. Abrahams is based upon the undisputed matters of record and Dr. Murthy’s **own admissions**. A2673-A2678.

4. What The Circuit Court DID NOT Do.

To be clear, contrary to the representations of both Dr. Murthy and Woodbrook in their respective briefs, the circuit court **DID NOT** consider specific offers of settlement, outside conduct or Woodbrook’s reputation for aggressive litigation tactics and refusal to negotiate settlements when issuing its Sanctions Order. Murthy Brief, pp. 7, 9-11, 18-20; Woodbrook Brief, pp. 11-13, 29-31. Specifically, the circuit court found:

15. . . . While the exact nature of offers and demands is irrelevant to the Court’s decision, the Court simply notes that mediation failed.
18. Again, the Court notes that the specifics of the offers and demands exchanged do not form a basis for this decision. Rather, it is the abusive nature of the entire approach to the Court’s orders that is relevant, along with the egregious circumstances evidenced by the efforts to obstruct the Court’s orders regardless of Dr. Murthy’s personal feelings on the matter.
72. Accordingly, as to conduct that occurred outside of this Civil Action, this Court will not consider and has not considered that evidence unless it relates to an identifiable harm suffered by the plaintiff such that the transgression threatened to interfere with the respectfully decisions of the case.

73. To that end, evidence of the conduct of Dr. Murthy's carrier in other matters and Dr. Murthy's own conduct in Roberts is relevant to the Court's consideration only insofar as it disproves an innocent or good-faith explanation for the egregious discovery abuses of Dr. Murthy in this very case.
77. No part of these conclusions of law rests on specific offers and demands exchanged by the parties during settlement negotiations. Rather, the Court's consideration of sanctions considers matters related to settlement only insofar as they relate to violations of the Court Orders on mediation and on the dramatic events just before trial where Dr. Murthy attempted to negotiate this matter despite her carrier's position.

A2670-A2671; A2685-A2686.

In its Sanctions Order, the circuit court also **DID NOT** determine the method by which the attorney's fees and costs would be calculated (hourly rate vs. contingent fee), the appropriate hourly rate if hourly, the scope of fees to be awarded or the amount of attorney's fees and costs which would be assessed as a sanction for Dr. Murthy's litigation misconduct. A2686. Instead, the circuit court issued the following directive:

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

A2686. Despite the non-finality of the circuit court's Sanctions Order, Dr. Murthy and Woodbrook filed a Notice of Appeal with this Court on April 28, 2015 and, on August 3, 2015, filed their respective appeal briefs.

SUMMARY OF ARGUMENT

The Circuit Court of Wetzel County did not abuse its discretion nor clearly err when invoking its inherent authority to sanction Dr. Murthy for her serious, repeated and admitted litigation misconduct, misconduct that interfered with the timely and fair disposition of this matter. This Court has long recognized the inherent, discretionary authority of a circuit court to issue

sanctions for serious, bad faith, vexatious, wanton and/or oppressive litigation misconduct in addition to sanctions authorized by the *Rules of Civil Procedure*. See, e.g., syl. pts. 4, 6 & 7, *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 226 W.Va. 103, 697 S.E.2d 139 (2010); syl. pt. 4, *Bartles v. Hinkle*, 196 W.Va. 381, 472 S.E.2d 837 (1996); Syl. pt. 3, *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986); syl. Pt. 1, *Bell v. Inland Mut. Ins. Co.*, 175 W.Va. 165, 332 S.E.2d 127 (1985); *Ohio Power Co. v. Pullman Power, LLC*, 230 W.Va. 605, 741 S.E.2d 830 (2013). A circuit court's decision to impose sanctions upon a party for litigation misconduct is reviewed under an abuse of discretion standard and will not be disturbed on appeal absent a clear error of judgment or exceeding the bounds of permissible choices under the circumstances. *Gribben v. Kirk*, 195 W.Va. 488, 500, 466 S.E.2d 147, 159 (1995).

Dr. Murthy admittedly refused to consent to settlement negotiations despite being subject to mandatory mediation orders and a statutory, mandatory mediation requirement. Dr. Murthy repeated conduct she had engaged in less than a year prior in separate litigation when she changed her testimony regarding material facts at trial when she "suddenly" remembered in detail a conversation with Elizabeth Karpacs which had allegedly occurred over six years prior to trial despite being ordered to supplement her prior testimony through a deposition which was conducted a mere ten (10) days she testified at trial. While the circuit court did not sanction Dr. Murthy for her conduct in the unrelated case, it did consider the prior conduct when assessing the credibility of Dr. Murthy's claim of a sudden refreshed recollection. Dr. Murthy admittedly failed to respond to motions seeking to exclude the testimony of her disclosed expert, Dr. Abrahams, causing a delay in pre-trial motion practice, never supplemented his anticipated opinions and then, on the fourth day of trial, after Ms. Karpacs-Brown rested her case, sought to offer into evidence new, previously undisclosed opinions allegedly held by Dr. Abrahams. The circuit court did not clearly err when

finding Dr. Murthy's litigation misconduct, including admitted misconduct, violated multiple court orders, constituted an effort to obstruct the circuit court's orders, needlessly expanded the litigation, delayed the resolution of this case, and drained the Court's and Ms. Karpacs-Brown's resources. *Bartles* 196 W.Va. at 389, 472 S.E.2d at 835; A2668-A2671, A2674-A2679. Nor did the circuit court abuse its discretion by finding this misconduct constituted serious, bad faith, vexatious and oppressive litigation misconduct warranting the imposition of sanctions in the form of attorney's fees and costs. A2680-A2686. Accordingly, the Sanctions Order should be affirmed and the case remanded for a determination of the amount of attorney's fees and costs to be awarded.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary for this Court to affirm the discretionary decision of the circuit court in this premature appeal. Pursuant to Rule 18 (a) of the Rules of Appellate Procedure, oral argument is unnecessary where the appeal is frivolous, the dispositive issues have been authoritatively decided or the facts and legal argument are adequately presented in the briefs and record on appeal and the decisional process would not be significantly aided by oral argument. Ms. Karpacs-Brown respectfully submits that the criteria of Rule 18 (a) have been met herein.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN SANCTIONING DR. MURTHY FOR HER SERIOUS LITIGATION MISCONDUCT⁹

In syllabus point seven of *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 226 W.Va. 103, 697 S.E.2d 139 (2010), this Court held:

Imposition of sanctions of dismissal and default judgment for serious litigation misconduct pursuant to the inherent powers of the court to regulate its proceedings will be upheld upon review as a proper exercise of discretion when trial court

⁹ The fundamental premise of both Dr. Murthy's appeal and Woodbrook's appeal is that the circuit court erred in sanctioning Dr. Murthy for her serious litigation misconduct and directing Dr. Murthy to pay Ms. Karpacs-Brown's attorney fees. Ms. Karpacs-Brown will address this overriding, dispositive issue first and will then address the distinct assignments of error asserted by Dr. Murthy and Woodbrook in turn.

findings adequately demonstrate and establish willfulness, bad faith or fault of the offending party.

Syl. pt. 7, *SER Richmond American Homes*. While *State ex rel. Richmond American Homes* involved the ultimate sanction of default, the standard of review for lesser sanctions, such as an award of attorney's fees, is not different. See, syl. pt. 4, *Bartles v. Hinkle*, 196 W.Va. 381, 472 S.E.2d 837 (1996) (sanctions in the form of an attorney's fee award "rests in the sound discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal except in cases of abuse"); syl. Pt. 1, *Bell v. Inland Mut. Ins. Co.*, 175 W.Va. 165, 332 S.E.2d 127 (1985) ("The imposition of sanctions by a circuit court under *W. Va. R. Civ. P.* 37(b) for the failure of a party to obey the court's order to provide or permit discovery is within the sound discretion of the court and will not be disturbed upon appeal unless there has been an abuse of that discretion.").

Under an abuse of discretion review, this Court will not substitute its judgment for that of the circuit court. *Shafer v. Kings Tire Service, Inc.*, 215 W.Va. 169, 177, 597 S.E.2d 302, 310 (2004); see also *Jordache Enters., Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 204 W.Va. 465, 473, 513 S.E.2d 692, 700 (1998) ("Where the law commits a determination to a trial judge and his discretion is exercised with judicial balance, the decision should not be overruled unless the reviewing court is actuated, not by a desire to reach a different result, but by a firm conviction that an abuse of discretion has been committed."); *Gribben v. Kirk*, 195 W.Va. 488, 500, 466 S.E.2d 147, 159 (1995) ("Under the abuse of discretion standard, we will not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances."). Moreover, the circuit court's factual findings are reviewed under the "clearly erroneous" standard:

Mindful that case management is a fact-specific matter within the ken of the trial court, reviewing courts have reversed only for a clear abuse of discretion. A trial

court's factual findings may not be set aside unless they are clearly erroneous. In particular, a trial court's credibility determinations are entitled to special deference.

Bartles 196 W.Va. at 389; 472 S.E.2d at 835. Applying this review standard to the facts of this case, including Dr. Murthy's admissions, demonstrates that the circuit court's Sanctions Order should be affirmed because it is based on a pattern of misconduct by Dr. Murthy *in this case*, including disobeying court orders regarding mediation, ignoring the court's scheduling orders, deliberately wasting the Ms. Karpacs-Browns's time by presenting under-prepared experts, attempting to mislead the court by proffering previously undisclosed opinions on the fourth day of trial and by proffering false testimony and/or false and incomplete discovery responses.

Since this Court's 2009 opinion was issued and the sanctions issue remanded to the circuit court for further proceedings, this Court has issued three published opinions directly addressing a circuit court's discretion in sanctioning a party for serious litigation misconduct and/or discovery violations in the civil litigation context: *State ex rel. Richmond American Homes; Drumheller v. Fillinger*, 230 W.Va. 26, 736 S.E.2d 26 (2012); and *Ohio Power Co. v. Pullman Power, LLC*, 230 W.Va. 605, 741 S.E.2d 830 (2013). Dr. Murthy does not acknowledge any of these cases in her brief. Although Woodbrook includes a single citation to *State ex rel. Richmond American Homes* in a footnote and similarly mentions *Ohio Power* in a string cite in a different footnote, Woodbrook does not address these cases in any substantive way perhaps to avoid admitting that the circuit court did not abuse its discretion in issuing the Sanctions Order.

This Court has long held that a West Virginia court has the "inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction." 14 Am. Juris., Courts, section 171.' Syl. Pt. 3, *Shields v. Romine*, 122 W.Va. 639, 13 S.E.2d 16 (1940)." Syl. pt. 3, *SER Richmond American Homes*. This inherent power includes imposing a wide range of sanctions, up to and including dismissal and default judgment, where the "trial court findings

adequately demonstrate and establish willfulness, bad faith or fault of the offending party.” Syl. pt. 7, *SER Richmond American Homes*. Where, as here, a jury verdict has already been rendered at the time of the sanctions order, an award of attorney’s fees and costs is appropriate. Syl. pt. 3, *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986) (a court has authority in equity to award attorney’s fees “when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.”); syl., *Daily Gazette Co., Inc. v. Canady*, 175 W.Va. 249, 332 S.E.2d 262 (1985) (a court may order payment of attorney fees and costs as the result of vexatious, wanton, or oppressive assertion of a claim or defense); *Nelson v. West Virginia Public Employees Ins. Bd.*, 171 W.Va. 445, 451, 300 S.E.2d 86, 92 (1982) (“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.”). It is within the circuit court’s inherent authority to award attorney’s fees as a sanction for fraud as fraud fails within the “bad faith” exception to the prohibition of shifting attorney fees to a losing party. *Pritt v. Suzuki Motor Co. Ltd.*, 204 W.Va. 388, 392-93, 513 S.E.2d 161, 165-66 (1998).

Our law provides that a circuit court determining an appropriate sanction “shall be guided by equitable principles” and “may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.” Syl. pt. 6, *SER Richmond American Homes*, quoting syl. pt. 2, *Bartles*. The circuit court’s findings of serious litigation misconduct on the part of Dr. Murthy were based, in large part, on conduct in which Dr. Murthy **admits** to have engaged, the **exhibits Dr. Murthy introduced** into the record for the February 20, 2015 evidentiary hearing and the **circuit court’s own observations** of Dr. Murthy and her defense. A1060-A1061; A2170; A2184-A2187; A2558-A2561; A2636; A2643; A2669-A2671;

A2673; A2675-A2679; A2681-A2683. Dr. Murthy offered no legitimate evidence of mitigating circumstances for the circuit court's consideration. To the contrary, the evidence Dr. Murthy submitted in connection with the February 20, 2015 evidentiary hearing actually demonstrates the misconduct for which sanctions were imposed. A2557-A2561; A2636; A2643. In this case, the circuit court's award of sanctions was based on a pattern of misconduct by Dr. Murthy, including disobeying court orders regarding mediation, ignoring the circuit court's scheduling orders, deliberately wasting the Ms. Karpacs-Brown's time by presenting under-prepared experts, wasting both the circuit court's and Ms. Karpacs-Brown's time and resources by failing to respond to motions and appear at hearings, attempting to mislead the court by proffering previously undisclosed opinions on the fourth day of trial and by proffering false testimony or false and incomplete discovery responses during the litigation, all of which delayed the resolution of Ms. Karpacs-Brown's claims, forcing her to litigate her claims for nearly five years culminating in a jury trial and verdict.

A. Dr. Murthy's Serious Litigation Misconduct Involving Mediation

On separate occasions, the circuit court ordered Dr. Murthy to engage in mediation consistent with the mandates of W. Va. Code § 55-7B-6b(b). A19-A20; A36-A37; A2573-A2574. The documentary evidence submitted by Dr. Murthy in connection with the evidentiary hearing and her own admissions clearly demonstrate that the mediation mandated by the circuit court's October 4, 2003 Order and its June 7, 2004 Order did not occur because *Dr. Murthy* refused to provide consent to engage in settlement negotiations. A2170; A2558-A2561. In light of these undisputed facts, the circuit court did not clearly err in finding that mediation did not occur because Dr. Murthy refused to negotiate and made clear that no settlement offer would be forthcoming at mediation. A2669. As a direct and proximate result of Dr. Murthy's refusal to participate in the mandatory mediation process, any chance of a timely resolution of Ms. Karpacs-Brown's claims

was lost and Ms. Karpacs-Brown was forced to engage in an additional three and a half years of litigation and a jury trial. In those three and a half years of additional litigation, Ms. Karpacs-Brown was forced to endure Dr. Murthy's other delay tactics which included **admitted** failures to respond to pending motions, an **admitted** failure to appear at a hearing and moving for a continuance the day after the circuit court entered its order excluding her expert witness after over two years of litigating that issue. A116-A121; A176-A177; A471-A472; A2184-A2187.

Dr. Murthy also blatantly violated the circuit court's July 9, 2007 Order mandating mediation in accordance with *Trial Court Rule 25.11* by failing to engage in good faith settlement negotiations during (and after) the mediation. A2573-A2574. *Trial Court Rule 25.11* requires parties to participate in mediation "fully, openly and knowledgably in a mutual effort to examine and resolve the issues." While this Court has not directly addressed what constitutes good faith participation in mediation fulfilling the requirements of *Trial Court Rule 25.11*, this Court has implied that a bad faith offer may form the basis for a sanctions order. *See, Casaccio v. Curtiss*, 218 W.Va. 156, 165, 718 S.E.2d 506, 515 (2011) (finding a \$350,000 offer made without knowledge of a prior \$700,000 offer cannot be deemed to have been made in bad faith providing grounds for sanctions). The circuit court expressly noted that it was not considering the specifics of the settlement offers made at the July 30, 2007 mediation and later withdrawn when finding Dr. Murthy's conduct surrounding mediation constituted bad faith conduct in violation of the circuit court's orders. A2670-A2671. Rather, the circuit court's consideration of the status of settlement discussions was limited to placing the Dr. Murthy's actions in context and ascertaining the egregiousness of her violation of its orders. A2671. Specifically, the circuit court expressly recognized that its "consideration of sanctions considers matters related to settlement only insofar as they relate to violations of the Court Orders on mediation". A2686. After due consideration,

the circuit court properly found that evidence of Dr. Murthy's disregard of its orders regarding mediation "demonstrates the complete disregard [she] had for legitimate process in this case." A2686. The circuit court's factual findings regarding Dr. Murthy's serious litigation misconduct surrounding mediation and its mediation orders are not clearly erroneous and its decision to award sanctions on this basis was not an abuse of discretion. *See, Bartles* 196 W.Va. at 389; 472 S.E.2d at 835; syl. pts. 6 & 7, *SER Richmond American Homes*.

B. Dr. Murthy's Abusive Trial Conduct/Bad Faith Refusal To Supplement Discovery

At the trial of this case, and despite detailed examination in two depositions and written interrogatories regarding specific conversations, Dr. Murthy, described for the first time in four years of litigation a completely undisclosed, purportedly exculpatory, conversation that she alleged occurred approximately six years prior while she was alone with the decedent, in an effort to evade the theretofore well-established claim of Ms. Karpacs-Brown that Dr. Murthy had failed to inform the family of her diagnosis and the treatment options. A306; A318; A332; A268-A269; A1050; A1055-A1061; A1329-A1330; A2678-A2679. These radical, material changes in Dr. Murthy's answers were never disclosed under Rule 26(e), which *requires* a party to supplement prior inaccurate discovery response or pursuant to the circuit court's November 2007 order that she supplement her prior deposition testimony. A198. These violations subject Dr. Murthy to sanctions under Rule 37 upon the motion of a party on the Court *sua sponti*. Recently, in *Ohio Power*, this Court upheld the dismissal of cross-claims as a sanction for failing to supplement discovery responses within the time frame set forth within the scheduling order for completion of discovery. *Ohio Power*, 230 W.Va. at 611-12; 741 S.E.2d at 836-37. In so doing, this Court rejected an argument that a separate order compelling discovery was required before sanctions could be imposed. *Id.* Instead, this Court emphasized the inherent power of the circuit court to

sanction intentional or *grossly negligent* violations of its orders in addition to the authority to sanction under Rules 26 and 37 of the *Rules of Civil Procedure*. *Id.*

In this matter, although discovery period set forth in circuit court's scheduling order had expired, the circuit court ordered Dr. Murthy be redeposed to confirm and/or supplement her prior deposition testimony. A197-A200. This deposition order was based, in part, upon Dr. Murthy's attempt to change her testimony at trial in another case by arguing she was intimidated by counsel during her deposition in the other case and the same counsel represented Ms. Karpacs-Brown. A198. Thus, the circuit court gave Dr. Murthy a final opportunity to inform Ms. Karpacs-Brown that she had memory of a critical conversation that she had failed to disclose during the proceeding four years a mere ten (10) days before trial. A306; A318; A332; A1050. Dr. Murthy failed to do so. *Id.* Instead, she changed her testimony *at trial* violating the circuit court's November 17, 2007 order to sit for a second deposition and supplement her prior testimony. A197-A200.

The circuit court was present and able to assess Dr. Murthy's demeanor when this sudden change in testimony occurred and makes its own credibility determination. Whether the change was intentional or grossly negligent, the circuit court deemed the change in testimony to be serious misconduct in violation of its orders when awarding sanctions. A2678-A2679; A2682; A2685; *see also Bartles* 196 W.Va. at 389; 472 S.E.2d at 835 (circuit court's credibility determinations are entitled to special deference and factual findings will not be reversed unless clearly erroneous). In making its credibility assessment, the circuit court noted that this was not the first time Dr. Murthy materially changed her testimony at trial. A2685. Consistent with this Court's directive in its prior opinion in this matter, the circuit court did not impose sanctions based upon Dr. Murthy's prior conduct; rather, the circuit court found the prior conduct to be relevant to the extent "it disproves an innocent or good-faith explanation for the egregious discovery abuses" in this case

and is relevant to the circuit court's determination that the materially altered testimony was not "the product of an innocent recollection of the new facts." A2685; *Karpacs Brown*, 224 W.Va. at 526, 686 S.E.2d at 756. The circuit court's did not abuse its discretion by invoking its inherent power to sanction Dr. Murthy for her abusive trial conduct and did not clearly err by finding Dr. Murthy's offering of materially altered, previously undisclosed testimony at trial constituted serious litigation misconduct. *See, Bartles* 196 W.Va. at 389; 472 S.E.2d at 835; syl. pts. 6 & 7, *SER Richmond American Homes*.

C. Dr. Murthy's Serious Litigation Misconduct Of Intentionally Under-Preparing An Expert Witness, Failing To Respond To Motions, Failing To Appear At A Hearing And Attempted Trial By Ambush

The circuit court did not clearly err nor abuse its discretion when finding that Dr. Murthy engaged in serious litigation misconduct warranting sanctions when she offered an intentionally unprepared expert witness for deposition, **admitted** she repeatedly failed to participate in motion practice relating to a motion to exclude his testimony, admittedly failed to appear at a hearing on the matter, sought reconsideration of the exclusion order on the eve of trial, never sought to supplement his opinions prior to trial and then proffered previously undisclosed opinions *on the fourth day of trial*. A24-A25; A48-A84; A203-A211; A2185- A2186; A2584-A2586; A2636; A2689-A2694. The specific details of Dr. Murthy's misconduct relative to her offering of Dr. Abrahams as an expert witness at trial, abuse of the discovery process and abuse of the court process are set forth in detail *supra* in Ms. Karpacs-Brown's Statement of the Case at Section 3 and are not repeated herein. As this Court recognized in *SER Richmond American Homes, Ohio Power and Drumheller*, the circuit court has inherent power to issue sanctions for a party's failure to comply with discovery requests, failure to appear at noticed hearings and failure to supplement discovery responses within the time frame established by the pertinent scheduling order. *SER*

Richmond American Homes, 226 W.Va. at 108, 110-11, 697 S.E.2d at 144, 146-47; *Ohio Power*, 230 W.Va. at 611-12; 741 S.E.2d at 836-37; *Drumheller*, 230 W.Va. at 31; 736 S.E.2d at 31. Dr. Murthy has **admitted** to engaging in all of this conduct with respect to the offering of Dr. Abrahams as an expert witness. A2185-A2186; A2636.

“Trial by ambush is not contemplated by the Rules of Civil Procedure” nor otherwise permitted under West Virginia law. *McDougal v. McCammon*, 193 W.Va. 229, 237, 455 S.E.2d 788, 796 (1995). As this Court recently held in syllabus point 2 of *State ex rel. Tallman v. Tucker*, 234 W.Va. 713, 769 S.E.2d 502 (2015):

Under Rule 26(e)(1) of the West Virginia Rules of Civil Procedure, a party responding to a discovery request is under a continuing duty to make a seasonable supplementation to its original answers to any question asking for the identity of an expert witness expected to be called at trial, the subject matter on which the expert will testify, and the substance of his or her testimony.

Dr. Murthy had *years* to supplement discovery relating to Dr. Abrahams opinions. She **chose** not to do so and further **admittedly chose** to not respond to *any* motion practice relating to Ms. Karpacs-Brown’s motion to exclude his testimony at trial because “[b]ased on the deposition testimony of Dr. Abrahams, a good faith, convincing response could not be formulated.” A2185-A2186. Instead, *on the fourth day of trial after Ms. Karpacs-Brown had rested her case*, Dr. Murthy proffered new opinions she sought to offer at trial through the testimony of Dr. Abrahams.

As explained by this Court in *Graham v. Wallace*, 214 W.Va. 178, 588 S.E.2d 167 (2003), when it reversed a jury verdict and remanded a medical malpractice case because the physician defendant offered previously undisclosed expert opinions at trial:

The discovery process is the manner in which each party in a dispute learns what evidence the opposing party is planning to present at trial. Each party has a duty to disclose its evidence upon proper inquiry. The discovery rules are based on the belief that each party is more likely to get a fair hearing when it knows beforehand what evidence the other party will present at trial. This allows for each party to respond to the other party's evidence, and it provides the jury with the best

opportunity to hear and evaluate all of the relevant evidence, thus increasing the chances of a fair verdict.

Graham, 214 W.Va. at 184-85, 588 S.E.2d at 173-74. Dr. Murthy **admitted** to violating these fundamental principles of West Virginia law, preventing Ms. Karpacs-Brown from discovering and preparing to meet Dr. Abrahams' testimony prior to trial. While Dr. Abrahams ultimately did not testify at trial, Dr. Murthy forced Ms. Karpacs-Brown to endure years of motion practice and Dr. Murthy's attempts to re-visit the issue of whether Dr. Abrahams could testify at trial; all of which could have been avoided had Dr. Abrahams been fully prepared at his deposition, a deposition which occurred nearly four years before Dr. Murthy first disclosed his opinions on the fourth day of trial. A2584-A2586. In light of the facts, the circuit court neither clearly erred nor abused its discretion in finding Dr. Murthy's decision to underprepare Dr. Abrahams "for deposition only to persist for years in trying to tender that expert for further testimony is a serious discovery violation" constituting serious misconduct. A2685.

Nor did the circuit court clearly err or abuse its discretion when it found that Dr. Murthy's aggregated litigation misconduct throughout the defense of Ms. Karpacs-Brown's claims was pervasive, vexatious, oppressive, willful and done in bad faith such that sanctions should be awarded under established principles of West Virginia law. A2680-A2681; A2684-A2686. *See* syl. pt. 7, *SER Richmond American Homes; Pritt*, 204 W.Va. at 392-93, 513 S.E.2d at 165-66; syl. pt. 3, *Sally-Mike*. This Court has long shown its intolerance for the litigation abuses Dr. Murthy has engaged in herein, previously stating:

defenses asserted for vexatious, wanton, or oppressive purposes place an unconscionable burden upon precious judicial resources already stretched to their limits in an increasingly litigious society. In reality, to the extent that these claims or defenses increase delay or divert attention from valid claims or defenses asserted in good faith, they serve to deny the very access to the judicial system they would claim as justification for their immunity from sanction

Daily Gazette Co., 175 W.Va. at 252, 332 S.E.2d at 265. By shifting attorney's fees to a litigant acting in bad faith, the fair, good faith prosecution and defense of claims is encouraged. *Sally-Mike*, 179 W.Va. at 52, 365 S.E.2d at 250. In light of the entire body of Dr. Murthy's misconduct, the circuit court did not clearly err nor abuse its discretion in issuing the Sanctions Order. As such, the Sanctions Order should be affirmed.

II. DR. MURTHY'S ASSIGNMENTS OF ERROR

Before discussing Dr. Murthy's specific assignments of error, her Summary of Argument statement that the circuit court ruled "without any evidentiary hearing" must be corrected. Murthy Brief, p. 6. The circuit court held an evidentiary hearing on February 20, 2015 as Dr. Murthy acknowledged the same in her post-hearing letter forwarding her evidentiary submissions. A2553.

A. The Circuit Court Did Not Exceed The Scope Of This Court's Remand

In arguing that the circuit court exceeded the scope of this Court's remand order and imposed sanctions upon her for conduct occurring outside this litigation, Dr. Murthy conveniently omits acknowledgment of the circuit court's express findings that it was not issuing sanctions for the outside conduct. Instead, it simply observed the outside conduct disproves any innocent or good-faith explanation Dr. Murthy may put forth for her litigation misconduct in this case because it shows a pattern of similar conduct. A2685. Specifically, the circuit court held:

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

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

A2685. There is a critical difference between observing prior, similar behavior to assess the credibility of the explanation being offered for the misconduct at issue and punishing for the prior behavior. As the circuit court was simply observing the outside behavior to justify its credibility determination and was not clearly erroneous in its factual findings, reversible error does not exist. *See Bartles* 196 W.Va. at 389; 472 S.E.2d at 835.

Further, to the extent Dr. Murthy argues that the circuit court erred and violated her constitutional due process rights by issuing sanctions against her for the misconduct of her insurance carrier, as discussed above, Dr. Murthy *admitted* to engaging in much of the conduct relied upon the circuit court to impose sanctions. Whether the conduct was Dr. Murthy's independent conduct or conduct engaged in at the direction of her insurer is of no moment in ascertaining whether sanctions are appropriate. The misconduct seriously interfered with the judicial process and delayed the just resolution of this matter. Dr. Murthy was the party-litigant and the misconduct which was done in her name and on her behalf. Who pays the sanction is between Dr. Murthy and her insurer and is not of concern to this Court when determining if the circuit court abused its discretion by sanctioning Dr. Murthy for admitted litigation misconduct.

B. The Circuit Court Properly Invoked Its Inherent Power And The Provisions Of W.Va. Civ. Pro.R. 26 (e) And 37 To Assess Sanctions In The Form Of Attorney's Fees And Costs

Dr. Murthy's second assignment of error fails on its face to the extent it asserts that the circuit court erred in awarding attorney's fees and costs pursuant to Rules 11 and 16 of the *West Virginia Rules of Civil Procedure*. The circuit court did not rely upon either Rule 11 or Rule 16 in issuing its April 2, 2015 Sanctions Order. Instead, the circuit court invoked its "inherent power, Suzuki and Sally-Mike, as well as ...Rules 26(e) and 37" to grant Ms. Karpacs-Brown's Sanctions Motion. A2686. As set forth in detail in Section I, *supra*, which is incorporated by reference

herein in its entirety, the circuit court did not err and was in full compliance with governing law for the issuance of sanctions in accordance with its inherent power and Rules 26(e) and 37.

C. The Circuit Court Correctly Found Dr. Murthy Violated Mediation Orders

Dr. Murthy takes great liberty in attempting to create an illusion that she did not violate the mandatory mediation orders issued in compliance with the mandates of W. Va. Code §55-7B-6b(b). A19-A20; A36-A37. While the June 7, 2004 order did use the word “permitted” with respect to mediation, any fair reading of the order reveals that the term was used in conjunction with the circuit court *permitting* the parties to conduct the mandatory mediation *after* the deadline established in the October 3, 2003 order. A19-A20; A36-A37. The June 7, 2004 order directed that mandatory mediation “should be completed no later than July 16, 2004”. A20. The June 7, 2004 order simply modified the dates in the prior order in light of delays resulting from the death of Andrew Karpacs to permit the mandatory mediation to occur on the specific date of August 5, 2004, a date *beyond* the original deadline. A36. When permitting this slight deadline extension, the circuit court also specifically directed “[t]he remainder of the October 3, 2003 [sic] Scheduling order remains in effect”; thus, indicating the mediation was still mandatory. A36.

As explained in detail in section I.A. above, Dr. Murthy violated the orders and W.Va. Code §55-7B-6b(b) by refusing to consent to settlement negotiations and, thus, effectively cancelling the mediation. For Dr. Murthy to now argue the mediation was cancelled at the request of Ms. Karpacs-Brown is a distortion of reality. The mediation was cancelled because Dr. Murthy refused to engage in settlement negotiations and Ms. Karpacs-Brown recognized the ridiculous waste of time and resources that would occur by convening the mediation and paying a mediator to appear only to have Dr. Murthy say, consistent with her repeated prior representations and subsequent admissions, that she refused consent to engage in settlement negotiations at the August

5, 2004 mediation. A2170; A2558-A2561. The circuit court was interpreting and enforcing its own orders when finding that Dr. Murthy violated the same. A2681. The circuit court's determination that Dr. Murthy's mediation conduct warranted sanctions is entitled to deference.

D. The Circuit Court Did Not Abuse Its Discretion In Finding That Dr. Murthy's Change Of Testimony On A Material Issue At Trial Warranted Sanctions

As explained above in section I.B., which is incorporated by reference herein in its entirety, the circuit court correctly found that Dr. Murthy's change in testimony at trial regarding the highly material issue of whether Elizabeth Karpacs would have consented to surgery in a case where the primary allegation of medical malpractice against Dr. Murthy was her failure to do surgery was severe litigation misconduct that violated Rules 26 and 37 of the *Rules of Civil Procedure* and warranted sanctions. To accept Dr. Murthy's argument that she can have a refreshed recollection of a critical fact at trial, after nearly 5 years of discovery and two depositions, one of which occurred only ten (10) days prior, renders the provisions of Rule 26(e), which require a party to supplement discovery responses to disclose material facts, meaningless and creates a win-win scenario for liars. A party can choose to withhold critical facts and testimony during discovery and then claim a sudden refreshed memory at trial and escape without consequence. The circuit court was in the best position to observe Dr. Murthy's demeanor and assess her credibility when she claimed to have suddenly recalled a memory of a critical fact while testifying at trial. The circuit court did not abuse its discretion by rejecting Dr. Murthy's claim of refreshed memory (a tactic she had used less than a year before in a separate trial before the same circuit court judge) and finding that she had engaged in serious litigation misconduct warranting sanctions.

E. Dr. Murthy Was Not Sanctioned For Her Settlement Negotiation Conduct

Dr. Murthy's Fifth Assignment of Error ignores the express findings made by the circuit court in the Sanctions Order. The circuit court's findings of fact noted that "the exact nature of

offers and demands is irrelevant to the Court's decision" and that "that the specifics of the offers and demands exchanged do not form a basis for this decision." A2670-A2671. Instead, the court considered "the abusive nature of the entire approach to the Court's orders [to be] relevant, along with the egregious circumstances evidenced by the efforts to obstruct the Court's orders". A2671

The circuit court specifically held:

No part of these conclusions of law rests on specific offers and demands exchanged by the parties during settlement negotiations. Rather, the Court's consideration of sanctions considers matters related to settlement only insofar as they relate to violations of the Court Orders on mediation . . .

A2686. As the circuit court expressly *did not* consider settlement negotiations, Dr. Murthy's Fifth Assignment of Error fails on its face.

F. The Circuit Court Did Not Err When Sanctioning Dr. Murthy For Her Admitted Litigation Misconduct Regarding Dr. Abrahams

The circuit court did not abuse its discretion when it invoked its inherent power to control litigation pending before it to sanction Dr. Murthy for her serious litigation misconduct surrounding the offering of Dr. Abrahams as an expert witness at trial. Dr. Murthy omits from her argument her admissions of misconduct and acknowledgments that she did not have a legitimate basis to challenge the exclusion of Dr. Abrahams as an expert and instead characterizes her conduct as merely an attempt to preserve the record. Murthy Brief p. 21; A2185-A2187; A2636. Dr. Murthy's serious litigation misconduct regarding Dr. Abrahams spanned years and prejudiced Ms. Karpacs-Browns ability to prepare her case and unjustifiably delayed the trial of this matter. This misconduct is set forth in detail in section I.C. above, which argument is incorporated herein by reference in its entirety. The circuit court did not abuse its discretion in sanctioning Dr. Murthy for her serious litigation misconduct and did so in compliance with established West Virginia law.

See Syl. pt. 7, *SER Richmond American Homes; Pritt*, 204 W.Va. at 392-93, 513 S.E.2d at 165-66; Syl. pt. 3, *Sally-Mike*. Accordingly, the circuit court's Sanctions Order should be affirmed.

III. WOODBROOK'S ASSIGNMENTS OF ERROR

Though not a party to the litigation at the time the circuit court issued its April 2, 2015 Sanctions Order not subject to the April 2, 2015 Sanctions Order, Dr. Murthy's insurer, Woodbrook, filed an independent appeal brief asserting error separate and distinct from that asserted by Dr. Murthy. Accordingly, Ms. Karpacs-Brown is bound to address those issues separately. Like Woodbrook's overriding assignment of error, Woodbrook's sub-assignments of error ignore facts and the express holdings of the circuit court. As did Dr. Murthy, Woodbrook falsely asserts that the circuit court did not conduct an evidentiary hearing. Woodbrook Brief, pp. 1, 15. Woodbrook was present at the February 20, 2015 evidentiary hearing and declined to participate or offer evidence. A2665-A2666. Also like Dr. Murthy, Woodbrook ignores the circuit court's express findings that it was not basing its sanctions order on conduct occurring in separate unrelated order and argues the circuit court erred by issuing sanctions for unrelated conduct. Woodbrook Brief, p. 15; A2685 (outside conduct not being considered). As with Dr. Murthy's assignments of error, each of Woodbrook's assignments of error fail under the facts and the law.

A. The Circuit Court Properly Invoked Rule 26(e), Rule 37 And Its Inherent Power To Sanction Dr. Murthy

Woodbrook's first and second sub-assignments of error argue that the circuit court was without authority under the *Rules of Civil Procedure, Pritt* and *Sally-Mike* to sanction Dr. Murthy for her litigation misconduct are without basis in law or fact. Initially, Woodbrook focus pages of its argument upon *Rules of Civil Procedure* 11 and 16 – neither of which were invoked by the circuit court. Woodbrook Brief, pp. 16-18; A2686 (“pursuant to this Court's inherent power, Suzuki and Sally-Mike, as well as West Virginia Civil Procedure Rules 26(e) and 37 ...). More

importantly, however, Woodbrook ignores established West Virginia law recognizing the circuit court's inherent authority to issue sanctions apart from the authority vested by the *Rules of Civil Procedure*, including the discretion to issue sanctions for failing to supplement discovery responses within the time frame set forth within the scheduling order and absent violation of an additional order directing supplementation be made. Syl. pts. 3 and 7, *SER Richmond American Homes; Ohio Power*, 230 W.Va. at 611-12; 741 S.E.2d at 836-37. Woodbrook also ignores the fact that Dr. Murthy was ordered to supplement her prior deposition testimony *and violated that order as well* by failing to disclose the testimony she ultimately gave at trial. A197-A200.

Amazingly, Woodbrook also attempts to assert a violation of *Dr. Murthy's* constitutional rights to a jury trial by sanctioning her for refusing to settle. Woodbrook Brief, p. 27. Not only did *Dr. Murthy* not make this argument on her own behalf; but Woodbrook does not have standing to assert it for her. Syl. pt. 5, *Kanawha County Public Library Bd. v. Board of Ed. of County of Kanawha*, 231 W.Va. 386, 745 S.E.2d 424 (2013) (“To establish *jus tertii* standing to vindicate the constitutional rights of a third party, a litigant must (1) have suffered an injury in fact; (2) have a close relation to the third party; and (3) demonstrate some hindrance to the third party's ability to protect his or her own interests”). Woodbrook's argument in this regard also fails to acknowledge the circuit court's express findings that it was not sanctioning Dr. Murthy for her failure to settle the claims prior to trial. A2670-A2671; A2686.

Dr. Murthy's repeated violations of Rule 26(e) justifying Rule 37 sanctions and her serious litigation misconduct were set forth in detail in Sections I, II.B., II.C., II.D. and II.F. above. Rather than repeating the arguments made therein, all are incorporated by reference and demonstrate that Dr. Murthy acted in bad faith, vexatiously, wantonly and for oppressive reasons throughout the litigation of this matter. *See*, syl. pt. 3, *Sally-Mike*. They also demonstrate that Dr. Murthy

repeatedly violated her duties under the *Rules of Civil Procedure*, repeatedly violated orders issued by the circuit court and engaged in serious litigation misconduct. As such, Woodbrook's second and third assignments of error fail. Woodbrook's disagreement with the circuit court's discretionary credibility determinations, resolutions of questions of fact and application of the law does not constitute reversible error by the circuit court.

B. The Circuit Court Did Not Exceed The Scope Of The Remand; Did Not Violate Dr. Murthy's Or Woodbrook's Constitutional Rights; And Did Not Reinstate Third-Party Bad Faith

Woodbrook starts this third sub-assignment of error by arguing a due process violation alleging the circuit court failed to provide a reasonable notice of hearing and opportunity to present evidence. This argument flies in the face of the facts. Post-remand, the circuit court permitted the parties to engage in *nearly five years* of discovery and motion practice on the discrete issues raised by the Sanctions Motion at the request of Dr. Murthy. A2054; A2087-A2090; A2094-A2095; A2299; A2308-A2309; A2056-A2063; A2097-A2118 Though Woodbrook chose to engage in motion practice relative to the evidentiary hearing; it consistently took the position that it was not a party to that proceeding and chose not to participate in the February 20, 2015 evidentiary hearing or offer evidence. A2236-A2283; A2284-A2294; A2302; A2662; A2665. Woodbrook's decision to not participate in the February 20, 2015 evidentiary hearing does not magically translate into a violation of its constitutional rights by the circuit court. Nor does Woodbrook have standing to assert any alleged violation of Dr. Murthy's constitutional rights. Syl. pt. 5, *Kanawha County Public Library Bd.* The circuit court did not exceed the scope of the remand nor violate any party's constitutional rights. An evidentiary hearing was held. All parties were provided an opportunity to participate. Reversible error did not occur. Likewise, the circuit court did not commit reversible error by issuing sanctions for unrelated conduct; rather, the outside conduct was mentioned solely

to explain and provide support for the circuit court's discretionary credibility determinations and resolutions of disputed questions of fact. A2670-A2671; A2684-A2686.

Nor does the imposition of sanctions against Dr. Murthy for her serious litigation misconduct translate into a resurrection of third-party bad faith. Whether at the direction of Dr. Murthy or her insurer, serious litigation misconduct occurred throughout the course of this litigation that "led to the needless expansion of this litigation process and has been a completely unnecessary drain on the resources of the Court and the parties." A2678. It is precisely this type of conduct that this Court has recognized as constituting serious litigation misconduct subject to sanctions not only through the provisions of the *Rules of Civil Procedure*, but also through a court's inherent power to control litigation before it. See syl. pts. 6 & 7, *SER Richmond American Homes; Pritt*, 204 W.Va. at 392-93, 513 S.E.2d at 165-66; syl. pt. 3, *Sally-Mike; Drumheller*, 230 W.Va. 26, 736 S.E.2d 26; *Ohio Power Co.*, 230 W.Va. 605, 741 S.E.2d 830; syl., *Daily Gazette Co., Inc.*, 175 W.Va. 249, 332 S.E.2d 262; *Nelson*, 171 W.Va. at 451, 300 S.E.2d at 92; syl. pt. 2, *Bartles*.

To accept Woodbrook's argument that imposition of sanctions for litigation misconduct constitutes a resurrection of third-party bad faith would require this Court to abandon its long-standing recognition of a court's inherent power to control the conduct of the parties before it and eviscerate and overrule numerous of its prior decisions including, but not limited to, *SER Richmond American Homes, Pritt, Sally-Mike, Ohio Power Co., Drumheller, Daily Gazette Co., Inc., Nelson* and *Bartles*. The circuit court distinguished its decision to issue sanctions for litigation misconduct from a previously recognized third-party bad faith claim. A2684. Sanctions were issued against *Dr. Murthy*, not *Woodbrook*, her insurer. That the circuit court recognized that the issue of who pays the sanctions – Dr. Murthy or Woodbrook as her insurer contractually obligated to pay for her defense – is of no

moment to the issues before this Court and does not magically convert the Sanction Order to liability for a claim of third party bad faith. *See* A2686.

CONCLUSION

The Circuit Court of Wetzel County did not abuse its discretion when finding that Dr. Murthy's repeated litigation misconduct, much of which was *admitted* misconduct, was done in bad faith, vexatiously and wantonly, interfered with the litigation process, needlessly expanded the litigation, violated court orders, violated the rules of civil procedure, compromised the integrity of judicial process, made a mockery of the judicial system and constituted a drain on the resources of the circuit court and Ms. Karpacs-Brown. A2678, A2681-A2686. The circuit court's Sanctions Order was issued in compliance with numerous decisions of this Court recognizing the inherent powers of the Court to sanction parties for litigation misconduct, including discovery violations. *See SER Richmond American Homes; Pritt*, 204 W.Va. at 392-93, 513 S.E.2d at 165-66; syl. pt. 3, *Sally-Mike; Drumheller*, 230 W.Va. 26, 736 S.E.2d 26; *Ohio Power Co.*, 230 W.Va. 605, 741 S.E.2d 830; syl., *Daily Gazette Co., Inc.*, 175 W.Va. 249, 332 S.E.2d 262; *Nelson*, 171 W.Va. at 451, 300 S.E.2d at 92; syl. pt. 2, *Bartles*. Neither Dr. Murthy nor Woodbrook have met their burden of demonstrating an abuse of discretion or clear error by the circuit court. Accordingly, the Sanctions Order should be affirmed and this matter remanded to the Circuit Court of Wetzel County, West Virginia for a final order setting for the amount of attorneys' fees and costs to be awarded.

CROSS-ASSIGNMENT OF ERROR

The Circuit Court of Wetzel County erred by granting Woodbrook's Motion to Dismiss the direct claims asserted against Woodbrook in Ms. Karpacs-Brown's Amended Complaint.

STATEMENT OF THE CASE

In light of the litigation misconduct set forth in her Statement of the Case, *supra*, which is incorporated by reference herein in its entirety, Ms. Karpacs-Brown was granted leave to file an Amended Complaint asserting direct claims against Woodbrook. The Amended Complaint asserted direct claims against Woodbrook for its independent, vexatious and oppressive litigation misconduct in directing all aspects Dr. Murthy's defense of Ms. Karpacs-Brown's claims. Woodbrook's misconduct included: encouraging Dr. Murthy's change in testimony at trial, obstructing the discovery process, under-preparing of Dr. Abrahams to save money and avoid disclosing the full extent of his opinions, failing to participate in motion practice and noticed court hearings, and attempting to introduce previously undisclosed opinions and testimony at trial, all of which delayed the timely, fair and efficient resolution of Ms. Karpacs-Brown's claims. A1396-1397. Woodbrook moved to dismiss the claims against it pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure*. A1826-A1835. On May 31, 2013, the circuit court granted Woodbrook's Motion to Dismiss finding the claims constituted third party insurance bad faith claims which fail under West Virginia law; *Trial Court Rule* 25.10 does not provide a basis for sanctioning an insurer for oppressive or bad faith conduct; and collateral estoppel barred the claim because a similar suit against Woodbrook arising from the manner in which it defended the *Roberts v. Murthy* action was dismissed and not appealed. A2524-A2531.

The partial dismissal order was an interlocutory order which did not contain language permitting an immediate appeal under Rule 54 of the *West Virginia Rules of Civil Procedure*. Thus,

this cross assignment of error is timely in light of Dr. Murthy’s and Woodbrook’s current appeal of the Sanctions Order. *See*, Syl. Pt. 2, *Durm v. Heck’s, Inc.*, 184 W.Va. 562, 401 S.E.2d 908 (1991); *Hubbard v. State Farm Indem. Co.*, 213 W.Va. 542, 550, 584 S.E.2d 176, 184 (2003).

SUMMARY OF ARGUMENT

The circuit court erred by dismissing Ms. Karpacs-Brown’s direct claims against Woodbrook for the serious litigation misconduct it directed. In syllabus point three of *State ex rel. Rose v. St. Paul Fire and Marine Ins. Co.*, 215 W.Va. 250, 599 S.E.2d 673 (2004), this Court held that an insurer may be held liable for “knowingly encouraging, directing, participating in, relying upon, or ratifying wrongful litigation conduct of a defense attorney hired by the insurance company to represent an insured.” *See also*, syl. pt. 10, *Barefield v. DPIC Companies, Inc.*, 215 W.Va. 544, 600 S.E.2d 256 (2004). While *Rose* and *Barefield* were decided in the context of Unfair Trade Practices Act [hereinafter “UTPA”] claims, their principles are not so limited. The underlying premise of each case is that an insurer may be held liable for serious litigation misconduct which it ratifies or directs.

Nothing in *Rose*, *Barefield* or the legislative elimination of third party UTPA claims by the enactment of W.Va. Code §33-11-4a, negates a court’s inherent authority to impose consequences upon a person or entity who engages in serious, bad faith and vexatious litigation misconduct. As this Court recognized in *Michael v. Appalachian Heating, LLC*, 226 W.Va. 394, 701 S.E.2d 116 (2010), the Legislature’s decision to statutorily eliminate third-party actions for an insurer’s violation of the Unfair Trade Practices Act does not immunize an insurer from liability under other laws and rules. To the extent Woodbrook argues that an insurer is not a “party” subject to a circuit court’s inherent authority, Trial Court Rule 25.10 and *Casaccio v. Curtiss*, 228 W.Va. 156, 718

S.E.2d 506 (2011), demonstrate that an insurer may be held liable for its own misconduct in defense of an insured.

The circuit court likewise erred in invoking principles of collateral estoppel to dismiss Ms. Karpacs-Brown's claims where Ms. Karpacs-Brown was not a party nor in privity with a party in the *Roberts* action, and Ms. Karpacs-Brown did not have a full and fair opportunity to litigate the issue in the *Roberts* action. See syl. pt. 1, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). "A fundamental due process point relating to the utilization of collateral estoppel is that any person against whom collateral estoppel is asserted must have had a prior opportunity to have litigated [her] claim." Syl. pt. 8, *Conley v. Spillers*, 171 W.Va. 584, 301 S.E.2d 216 (1983). The circuit court violated the fundamental principles of collateral estoppel and Ms. Karpacs-Brown's due process rights when it found her claims against Woodbrook were collaterally estopped and entered its partial dismissal order. The Circuit Court's May 31, 2013 Partial Dismissal Order should be reversed and this matter remanded for further proceedings.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary for this Court to reverse the circuit court's partial dismissal order and remand Ms. Karpacs-Brown's claims against Woodbrook for further proceedings, including discovery. This Court has already definitively decided that the legislative elimination of third-party UTPA claims does not impact a claimant's ability to pursue other theories of recovery against insurers. Moreover, the principles of collateral estoppel are not in flux in this jurisdiction. Accordingly, under Rule 18 (a) of the Rules of Appellate Procedure, oral argument is unnecessary because the dispositive issues have been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record on appeal and the decisional process would not be significantly aided by oral argument.

ARGUMENT

Ms. Karpacs-Brown's cross-assignment of error involves dismissal of her claims on a Rule 12(b)(6) motion. "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. pt. 2, *State ex rel. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995). "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. pt. 2, *Evans v. United Bank, Inc.*, -- W.Va. --, 775 S.E.2d 500 (2015) (internal citations omitted). Motions to dismiss under Rule 12(b)(6) are "viewed with disfavor and [should be] rarely granted." *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 606, 245 S.E.2d 157, 159 (1978). In reviewing dismissal of a complaint on a motion to dismiss, the complaint is to be construed in the light most favorable to the non-moving party, Ms. Karpacs-Brown, meaning that her factual allegations are to be accepted as true and all reasonable inferences therefrom are to be drawn to her advantage. *See Conrad v. ARA Szabo*, 198 W. Va. 362, 369-70, 480 S.E.2d 801, 808-09 (1996) (citing *Murphy v. Smallridge*, 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1996)). Applying these standards to the allegations set forth in Ms. Karpacs-Brown's Amended Complaint demonstrates that the circuit court erred in dismissing her claims against Woodbrook.

The circuit court's first error was in characterizing Ms. Karpacs-Brown's claims as an attempt to resurrect third-party bad faith in violation of legislative enactments. A2525-A2528. Ms. Karpacs-Brown's claims against Woodbrook were based upon its obstruction of the litigation process. A1396. Indeed, Ms. Karpacs-Brown framed her claims as seeking sanctions for Woodbrook's litigation misconduct, claims which fall within a circuit court's inherent authority to control matters before it, alleging: "Woodbrook's defense of the claims of Mrs. Karpacs-Brown

was vexatious, wanton, in bad faith and/or undertaken for oppressive reasons within the meaning of *Suzuki v. Pritt*” and “[a]s a result of the bad faith vexatious, wanton and oppressive conduct of Woodbrook, Plaintiff is entitled to be awarded all of their [sic] reasonable attorney fees, costs and expenses incurred in prosecution of the underlying case”. A1397. Ms. Karpacs-Brown does not assert claims against Woodbrook for its violation of the UTPA. Rather, her asserted claims fall precisely within the parameters of *SER Richmond American Homes, Shields, Bartles, Bell, Pritt, Sally-Mike, Daily Gazette Co. Inc.*, and *Ohio Power*.

In *Rose*, this Court held that an insurer may be held liable for “knowingly encouraging, directing, participating in, relying upon, or ratifying wrongful litigation conduct of a defense attorney hired by the insurance company to represent an insured.” Syl. pt. 3, *Rose*, 215 W.Va. 250, 599 S.E.2d 673; *see also*, syl. pt. 10, *Barefield*, 215 W.Va. 544, 600 S.E.2d 256. While *Rose* and *Barefield* were decided in the context of UTPA claims, their principles are not so limited. *Rose* and *Barefield* make clear that an insurer may be held liable for serious litigation misconduct which it ratifies or directs. That is the precise issue before this Court – whether Woodbrook may be held liable for serious litigation misconduct that it not only ratified but actually directed.

The ability to control matters pending before it and issue sanctions for misconduct which interferes with the fair, efficient and effective administration of the judicial process has *always* been squarely a part of West Virginia court’s inherent powers. *See* syl. pt. 3, *Shields*, 122 W.Va. 639, 13 S.E.2d 16; syl. pts. 3, 4, 6 & 7, *SER Richmond American Homes*, 226 W.Va. 103, 697 S.E.2d 139; syl. pt. 3, *Sally-Mike*, 179 W.Va. 48, 365 S.E.2d 246; syl., *Daily Gazette Co., Inc.*, 175 W.Va. 249, 332 S.E.2d 262; *Nelson*, 171 W.Va. 445, 451, 300 S.E.2d 86; syl. pt. 2, *Bartles*, 196 W.Va. 381, 472 S.E.2d 827. Nothing in *Rose*, *Barefield*, the legislative elimination of third party UTPA claims in W.Va. Code §33-11-4a, or any other case negates a court’s inherent authority to impose

consequences upon a person or entity who engages in serious, bad faith and vexatious litigation misconduct. Indeed, this Court recognized in *Michael* that the Legislature's decision to statutorily eliminate third-party actions for an insurer's violation of the UTPA does not immunize an insurer from liability under other laws and rules. Syl. pt. 8, *Michael*, 226 W.Va. 394, 701 S.E.2d 116 (recognizing elimination of third party UTPA claims does not preclude claim against insurer for violation of the Human Rights Act when handling a third party claim). In *Michael*, this Court noted that where a claim seeks to remedy a different harm than that intended to be remedied by the UTPA, the W.Va. Code §33-11-4a(a)'s prohibition of a third-party suit for an insurer's violation of the UTPA does not preclude a suit against the insurer under the different theory of recovery. *Michael*, 226 W.Va. at 403, 701 S.E.2d at 125. When dismissing Ms. Karpacs-Brown's claims against Woodbrook as UTPA claims in disguise, the circuit court did not even look to the UTPA to ascertain whether the claims could be remedied under the UTPA if third-party UTPA claims were not statutorily barred. A2525-A2528. Instead, it assumed the claims were UTPA claims and dismissed them.

Ms. Karpacs-Brown *did not* assert claims that may be remedied solely by the provisions of UTPA. Instead, as discussed above, Ms. Karpacs-Brown invoked the circuit court's inherent authority to address misconduct occurring before it. To the extent Woodbrook argues that an insurer is not a "party" subject to a circuit court's inherent authority, Trial Court Rule 25.10 and *Casaccio v. Curtiss*, 228 W.Va. 156, 718 S.E.2d 506 (2011), refute that argument. In *Casaccio*, this Court recognized that an insurer may be deemed a party to a circuit court proceeding involving the defense of its insured for the purpose of addressing the insurer's own misconduct and violation of court rules. Syl. pt. 3, *Casaccio*. While *Casaccio* involved an insurer's alleged violation of Trial Court Rule 25.10, its principles can be extended to include a court's inherent authority to

sanction misconduct occurring in proceedings before it. The circuit court erred by narrowly construing Ms. Karpacs-Brown's claims as only seeking sanctions against Woodbrook for its offers at mediation (conduct which falls outside the scope of *Casaccio* and Rules 25.10 and 25.11) and dismissing her claims as not falling within its narrow interpretation of *Casaccio*. A2528-A2529. The circuit court further erred by not recognizing that Ms. Karpacs-Brown's claims were much broader and encompassed vexatious, bad faith, wanton and oppressive conduct which occurred throughout the litigation, conduct which the circuit court has always had the inherent power to address.

The circuit court further erred by finding Ms. Karpacs-Brown's claims against Woodbrook were barred by collateral estoppel because similar claims filed by the *Roberts* claimants were dismissed and the *Roberts* claimants did not appeal the dismissal order. A2530-A2531. In *Miller*, this Court held:

Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Syl. pt. 3, *Miller*, 194 W.Va. 3, 459 S.E.2d 114. The circuit court's fundamental error in this regard was equating Ms. Karpacs-Brown with her counsel because her counsel also represented the *Roberts* claimants. The circuit court did not find *Ms. Karpacs-Brown* was in privity with the *Roberts* claimants. The circuit court found *Ms. Karpacs-Brown's counsel* was in privity with the *Roberts* claimants. A2531. Further, the circuit court did not find that *Ms. Karpacs-Brown* had a full and fair opportunity to litigate the issue in the prior action. Instead, the circuit court found *Ms. Karpacs-Brown's counsel* had a full and fair opportunity to litigate the issue in the *Roberts* action. A2531. To accept the circuit court's reasoning in this regard would require this Court to find that

once an attorney in this state has lost a claim on behalf of one client, that same claim or theory of defense may never be pursued on behalf of another client. That is not and has never been the law of this State or anywhere in the United States.

To the extent that Woodbrook will argue *Beahm v. 7 Eleven, Inc.*, 223 W.Va. 269, 672 S.E.2d 269 (2008), supports the circuit court's privity findings, Woodbrook is mistaken. In *Beahm*, the claims of the various parties arose from the same incident and, at one point, had sought to consolidate their claims until an adverse ruling was issued. *Beahm*, 223 W.Va. at 271-274, 672 S.E.2d at 600-603. As explained in *Beahm*:

the concept of privity with regard to the issue of claim preclusion is difficult to define precisely but the key consideration for its existence is the sharing of the same legal right by parties allegedly in privity, so as to ensure that the interests of the party again whom preclusion is asserted have been adequately represented. It has been recognized that "[p]rivity ... 'is merely a word used to say that the relationship between one who is a party on the record and another is close enough to include that other within the res judicata. In other words, preclusion is fair so long as the relationship between the nonparty and a party was such that the nonparty had the same practical opportunity to control the course of the proceedings that would be available to a party.'"

In determining whether privity exists, we have previously utilized the doctrine of "virtual representation." Virtual representation, a variety of privity, precludes relitigation of any issue that [has] once been adequately tried by a person sharing a substantial identity of interests with a nonparty. In *Galanos*, we offered various examples of circumstances of when the doctrine of virtual representation can be applied in accord with due process principles. One such example was when a nonparty's actions involve deliberate maneuvering or manipulation in an effort to avoid the preclusive effects of a prior judgment, he may be deemed to be bound by such judgment. . . .

Id. at 273-274, 672 S.E.2d at 602-03 (internal quotations and citations omitted). "[M]ore than a common interest between the prior and present litigants is required for privity to be established."

Id. at 274, 672 S.E.2d at 603.

By equating Ms. Karpacs-Brown with her counsel for its collateral estoppel analysis, the circuit court also violated Ms. Karpacs-Brown's constitutional right to due process. As this Court

recognized in *Conley*, “[a] fundamental due process point relating to the utilization of collateral estoppel is that any person against whom collateral estoppel is asserted must have had a prior opportunity to have litigated [her] claim.” Syl. pt. 8, *Conley*, 171 W.Va. 584, 301 S.E.2d 216. By equating Ms. Karpacs-Brown with her counsel, the circuit court denied Ms. Karpacs-Brown a full and fair opportunity to litigate her claim thus violating her due process rights. When the circuit court’s erroneous substitution of Ms. Karpacs-Brown’s counsel for Ms. Karpacs-Brown in its privity analysis is corrected, it is clear that the second and fourth requirements for application of collateral estoppel have not been met and the circuit court erred in dismissing Ms. Karpacs-Brown’s claims against Woodbrook as barred by collateral estoppel.

CONCLUSION

The Circuit Court of Wetzel County fundamentally erred and violated Ms. Karpacs-Brown’s constitutional right to due process when it dismissed her claims against Woodbrook on a Rule 12(b)(6) motion. Accordingly, Ms. Karpacs-Brown, respectfully requests that the circuit court’s May 31, 2013 Partial Dismissal Order be reversed and Ms. Karpacs-Brown’s claims against Woodbrook be remanded to the circuit court for further proceedings.

Respectfully submitted,



CHRISTOPHER J. REGAN #8593
GEOFFREY C. BROWN #9045
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
304-242-8410
Counsel for Plaintiff Below, Respondent

CERTIFICATE OF SERVICE

Service of the foregoing **RESPONDENT'S BRIEF AND CROSS-ASSIGNMENT OF ERROR** was had upon counsel of record by sending true and correct copies thereof in properly addressed envelopes and depositing the same in the United States Mail, postage prepaid, this 15th day of September, 2015:

Stephen R. Brooks, Esq.
Robert C. James, Esq.
Flaherty Sensabaugh Bonasso PLLC
P.O. Box 6545
1225 Market Street
Wheeling, WV 26003

Ancil G. Ramey, Esq.
Steptoe & Johnson, PLLC
P.O. Box 2195
Huntington, WV 25722-2195

By:



CHRISTOPHER J. REGAN #8593

BORDAS & BORDAS, PLLC

1358 National Road

Wheeling, WV 26003

Telephone: 304/242-8410

Counsel for Plaintiff Below. Respondent