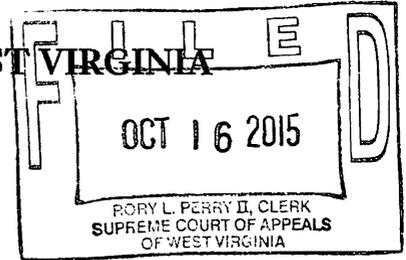


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 15-0376

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

*Defendants Below/Petitioners*

v.

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

*Plaintiff Below, Respondent*

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

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**REPLY BRIEF OF PETITIONER**

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## **I. ASSIGNMENT OF ERROR AND RESPONSE TO CROSS-ASSIGNMENT OF ERROR**

The Circuit Court erred by imposing sanctions against Petitioner, Anandhi Murthy, M.D. [“Dr. Murthy”], where (1) neither the Rules of Civil Procedure nor the decisions of this Court support an award of sanctions; (2) the Circuit Court exceeded the scope of this Court’s remand; (3) the Circuit Court had dismissed a third-party bad faith suit against Petitioner, Woodbrook Casualty Insurance Company [“Woodbrook”], prior to entry of the order; (4) some of the allegations against Woodbrook relied upon by the Circuit Court involved separate litigation; (5) no evidentiary hearing was conducted regarding the allegations against Woodbrook; and (6) the Circuit Court effectively awarded the Respondent, Andrea Karpacs-Brown, individually and as Administratrix of her late mother’s and father’s estates [“Respondent”], damages for third-party bad faith even though her direct claims against Woodbrook were properly dismissed.

The Circuit Court did not err in dismissing Respondent’s direct suit against Woodbrook where (1) the Legislature has abolished third-party statutory bad faith causes of action both against medical professional liability insurance companies and generally; (2) this Court has held there is no third-party common bad faith cause of action; (3) this Court has held that a claimant has no cause of action under *Shamblin v. Nationwide Mutual Insurance Company*, 183 W. Va. 585, 396 S.E.2d 766 (1990), without an assignment by the policyholder, Dr. Murthy, and where Dr. Murthy was never exposed to any personal liability; and (4) Woodbrook participated in mediation under *Casaccio v. Curtiss*, 228 W. Va. 156, 718 S.E.2d 506 (2011).

## **II. STATEMENT OF CASE**

In her response, Respondent complains about “five years-worth of additional motion and discovery practice” [Respondent’s Brief at 1], but the final judgment was promptly paid and it

has been solely her efforts – first to seek damages in excess of that to which she was legally entitled necessitating an opinion by this Court reversing the “denial of Dr. Murthy’s motion to reduce the \$4 million jury award to conform to the \$1 million limit on non-economic damages” and second to seek attorney fees and litigation expenses, despite the American Rule, without an adequate legal or evidentiary basis necessitating an opinion by this Court reversing “the circuit court’s order awarding attorney fees and costs to the appellee,” in *Karpacs-Brown v. Murthy*, 224 W. Va. 515, 527, 686 S.E.2d 746, 757 (2009) [*“Karpacs I”*]. Certainly, no one would be happier than Petitioners if this Court’s decision in *Karpacs I* would have concluded the litigation, but it was Respondent, not Petitioners, who has elected to continue to litigate the issue of sanctions.

Respondent also complains about “Woodbrook’s improper interjection of itself into this litigation” [Respondent’s Brief at 1, note 1], but it was Respondent, after this Court remanded the case, who amended her complaint to assert a direct claim against Woodbrook. [App. 1392]

Moreover, she states that “Woodbrook does not have standing to institute and prosecute a separate appeal of the Sanctions Order” [Respondent’s Brief at 1, note 1], but her attorneys submitted a sanctions order, entered by the Circuit Court, that references Woodbrook, directly or indirectly, no fewer than 30 times in its Findings of Fact and 5 times in its Conclusions of Law sections. [App. 2665-2687] Indeed, as Respondent acknowledges, once she amended her complaint to assert direct claims against Woodbrook, “Woodbrook actively opposed Respondent’s Motion for Attorney Fees and Costs.” [Respondent’s Brief at 1, note 2]<sup>1</sup>

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<sup>1</sup> A good deal of Respondent’s brief concerns the procedural history of the case on remand implying that Petitioners engaged in delay tactics. For example, Respondent’s brief states, “Woodbrook then also sought to postpone the scheduled evidentiary hearing due to a purported scheduling conflict” [Respondent’s Brief at 3], but there was nothing “purported” about the conflict and, indeed, Woodbrook’s Trial Court Rule 5.04 notice complained that counsel in another case – not Respondent’s

Respondent also complains about Dr. Murthy's filing motions in limine, but describes those motions as seeking to exclude "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" [Id.] – all of which were not only well-founded in the law, but consistent with this Court's opinion in *Karpacs I*.

Respondent complains that "Woodbrook sought to direct the course of the proceedings but claim immunity for its misconduct" [Respondent's Brief at 4], but again, Respondent named Woodbrook as a party; actively sought to impose sanctions on Dr. Murthy for Woodbrook's alleged misconduct not only in this litigation, but other litigation; and of course it "continued to appear on the record" after its partial dismissal, of which Respondent complains [Id.], when Respondent persisted in ignoring this Court's remand order.

Respondent acknowledges that the Circuit Court's sanctions order was entered prior to expiration of the 30-day period set forth in the Circuit Court's scheduling order, but maintains that "Consistent with the Circuit Court of Wetzel County's established practice," she submitted her proposed order within thirty days of the evidentiary hearing. [Respondent's Brief at 5, note 8] What Respondent does not address is her failure to serve either Dr. Murthy or Woodbrook with a copy of that unsigned proposed order. [App. 2687] It is still unclear to Petitioners how this order was submitted to the Circuit Court by Respondent as it was unsigned, contains two signature blocks, and was never received by Petitioners until it was entered by the Circuit Court.

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case – had scheduled a non-evidentiary matter after an evidentiary hearing had previously been scheduled in Respondent's case – hardly an effort to seek delay of the evidentiary hearing in Respondent's case. [App. 2095-2096] Moreover, describing Woodbrook's notice of a scheduling conflict as a "protest" to conducting the evidentiary hearing [Respondent's Brief at 3] is both inaccurate and unfair.

Although Respondent uses the phrases “serious litigation misconduct,” “pervasive litigation misconduct,” “vexatious litigation misconduct,” and “litigation misconduct” throughout her brief on more than sixty occasions, her actual discussion of the alleged misconduct by Dr. Murthy covers only three points and about seven full pages of her brief. [Respondent’s Brief at 6-13] An examination of Respondent’s discussion of the evidence in support her three arguments in support of the award of sanctions will amply demonstrate why an imposition of sanctions is inappropriate.

**A. DR. MURTHY DID NOT DISREGARD ORDERS REGARDING MEDIATION**

Respondent’s first argument in support of the award of sanctions is that “Dr. Murthy Disregarded Court Orders Regarding Mediation.” [Respondent’s Brief at 6-9]

*First*, it is unclear as to why Respondent references the first court-ordered mediation [Respondent’s Brief at 6], because, as Respondent acknowledges, that mediation deadline was changed “At the request of the parties,” including Respondent.

*Second*, Respondent’s description of “a second order” as “mandatory in nature” [Respondent’s Brief at 6] is simply incorrect: “The parties be permitted to engage on mediation on August 5, 2004.” [App. 36] Respondent’s counsel signed off on this “Agreed Order” and “permitted” is not mandatory, but voluntary.

*Third*, whether the mediation was not conducted because Dr. Murthy “refused to consent” to a settlement [Respondent’s Brief at 7] is irrelevant as (1) Respondent had agreed that the mediation was not mandatory; (2) Dr. Murthy had a contractual right to withhold her consent to settle; (3) it was Respondent’s decision not to proceed with the mediation based upon Dr. Murthy’s settlement position, not Dr. Murthy’s refusal to attend the mediation, which resulted

in its being postponed; and (4) Respondent has cited no authority for the proposition that merely because a party refuses to make a settlement demand or a settlement offer at a relatively early stage of litigation and the adversary decides that early mediation will not be productive, that party can be made to pay his or her adversary's entire attorney fees and litigation expenses as a result.

*Fourth*, the rest of Respondent's brief devoted to this issue<sup>2</sup> discusses not Dr. Murthy's refusal to attend mediation – because she did not refuse – but rather discusses what ultimately produced Respondent's decision not to proceed with mediation on August 5, 2004. [Respondent's Brief at 7-8] Again, Respondent has presented no authority for the proposition that a party's preliminary decision not to make a settlement offer at a proposed mediation warrants sanctions in the form of an award of all of the attorney fees and litigation expenses incurred in the mediation. Of course, Respondent incurred no attorney fees or expenses relative to mediation on August 5, 2004, which never took place.

*Finally*, Respondent's brief acknowledges that when mediation was eventually ordered, “Dr. Murthy appeared at the ordered July 20, 2007 mediation . . . .” [Id. at 9]

Plainly, this “mediation” issue does not support an award of any sanctions.

**B. DR. MURTHY DID NOT VIOLATE RULE 26(E) RELATIVE TO HER TRIAL TESTIMONY**

Respondent's second argument in support of the award of sanctions is that “Dr. Murthy Materially Changed Her Testimony After Failing to Supplement Her Prior Discovery Responses.” [Respondent's Brief at 9-11]

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<sup>2</sup> In this section of Respondent's brief, she also has a discussion of Dr. Murthy's alleged “delay tactics” wholly unrelated to whether Dr. Murthy violated any mandatory mediation order. [Respondent's Brief at 8] Because those issues are unrelated, Woodbrook does not address them.

Although Respondent claims that “Dr. Murthy **admitted** the essential facts demonstrating her negligence . . . during her deposition,” she states that, “A critical issue to be resolved at trial . . . was whether Dr. Murthy adequately and appropriately informed Elizabeth Karpacs and the Karpacs Family of Elizabeth Karpac’s [sic] diagnosis and treatment options.” [Id. at 9] [Emphasis in original] Respondent claims that “Dr. Murthy unequivocally testified that she did not” “obtain Elizabeth Karpacs’ informed consent for any type of surgical procedure.” [Id. at 10] The appendix references in Respondent’s brief, however, which are Pages 268 and 269, do not support this statement.

On Page 103 of the transcript, Dr. Murthy is asked about a medical notation in which Ms. Karpacs’ daughters were asking Dr. Murthy about whether surgery would be conducted. [App. 268] The notation states, “Talked with them.” Dr. Murthy’s answer was “I don’t remember.” [Id.] Then, when asked, “Did you ever attempt to obtain Elizabeth Karpacs’ informed consent for any type of surgical procedure on June 1<sup>st</sup> or June 2<sup>nd</sup>, 2001?,” to which she responded, “No.” [Id. at 269] So, Dr. Murthy’s deposition testimony was that she did not remember discussing surgery with the patient’s daughters, but did not obtain the patient’s informed consent for a surgical procedure on June 1 or 2, 2001. In her brief, Respondent then describes Dr. Murthy’s trial testimony as if she “suddenly ‘remembered’” testimony contrary to the above deposition testimony, citing pages 1055-1061 and 1329-1330 of the appendix.

On Page 1055 of the appendix, Dr. Murthy first testified in general terms about what details to share with patients with grave prognoses. [App. 1055] When asked, “Did you tell her that she was probably going to die without surgery?,” she responded, “[S]he was afraid that I was going to tell her she was going to have surgery.” [App. 1056] She was then asked, “Did you tell

Mrs. Karpacs that she was probably going to die without surgery the morning of June 1<sup>st</sup>?” to which she responded, “No, I did not tell her without surgery she was going to die at that particular time in the morning, no.” [Id.] Respondent’s counsel then takes testimony that was consistent with Dr. Murthy’s deposition testimony and cross-examined her with written discovery responses in which she stated that she could recall some general conversations with the patient and her family, but not other conversations. [App. 1056-1059] When Respondent’s counsel then complained that the patient’s statement, “I hope you’re not going to tell me I’m going to have surgery,” which has absolutely nothing to do with informed consent or what Dr. Murthy related or did not relate to the patient, Dr. Murthy’s counsel objected and the trial court sustained the objection. [App. 1059] Moreover, when Respondent’s counsel then misstated Dr. Murthy’s testimony as being something Dr. Murthy said she related to the patient, Dr. Murthy’s counsel again objected and the trial court sustained the objection. [App. 1060] When Respondent’s counsel pressed Dr. Murthy on her ability to recall the patient’s expression of concern about possible surgery, Dr. Murthy explained that the nature of the question – which is completely different than the question about “informed consent” propounded in the deposition – caused her to recall the patient’s concerns about possible surgery. [App. 1060-1061] Moreover, Dr. Murthy went on to explain that despite the patient’s concerns, surgery was not a foregone conclusion when she had that conversation with the patient. [App. 1061]

On page 1329 of the appendix, Dr. Murthy reiterated that a decision regarding surgery had not been made on June 1 or 2, 2001. [App. 1329] Nowhere on pages 1329 or 1330 of the appendix is there trial testimony by Dr. Murthy that she provided “informed consent” to the patient regarding surgery on June 1 or 2, 2001. Rather, Dr. Murthy merely testified that her

patient was alert and communicative; that she communicated with her patient regarding her condition; that she did not withhold any information; and that in her opinion she had complied with the standard of care. [App. 1329-1330]

In various forms, Respondent repeatedly alleges Dr. Murthy “violat[ed] the circuit court’s . . . order to . . . supplement her prior testimony” [Respondent’s Brief at 23, 10, 33] citing pages 197-200] of the appendix, but the reasons stated in that order for her re-deposition were (1) this was a “vigorously contested medical-malpractice wrongful-death case;” (2) “it will have been over four years since Dr. Murthy’s original deposition;” and (3) “Dr. Murthy has left the practice of medicine in West Virginia,” not any “order to . . . supplement her prior testimony.”

Plainly, the evidence cited in Respondent’s brief regarding Dr. Murthy’s alleged failure to supplement her deposition testimony in no measure supports the award of any sanctions.

**C. SUCCESSFUL CROSS-EXAMINATION AND EXCLUSION OF DR. MURTHY’S EXPERT DOES NOT SUPPORT THE AWARD OF ANY SANCTIONS**

Respondent’s final argument in support of the award of sanctions is that “Dr. Murthy’s Litigation Misconduct Relative to Her Disclosed Expert.” [Respondent’s Brief at 11-13]

*First*, other than the fact that a defense expert was involved, none of Respondent’s argument has anything to do directly with Dr. Murthy except not personally attending certain hearings [Respondent’s Brief at 11-12], but parties are not required to attend procedural hearings.

*Second*, the issues identified in Respondent’s brief – the expert used a single source for his life expectancy calculations; there were other sources that the expert did not consult; the patient’s life expectancy calculation by the expert was an estimate; and the expert reserved the right to consult additional resources [Respondent’s Brief at 11] involve (1) a tangential matter and (2) typical cross-examination subjects for any disclosed expert.

For example, on the pages of the deposition transcript referenced in Respondent’s brief, the expert testified with respect to other literature: “And there are probably plenty of other articles out there . . . Some might be a little higher, some might be a little lower . . . .” [App. 2584] Moreover, the expert did not testify that he “intentionally underprepared,” but instead testified, “I was sort of not trying to put hours and hours of billing in for them.” [Id.] In response to the issue of whether the expert might rely on additional resources, as often happens in civil litigation, and Respondent’s counsel merely asked, “as soon as you do that, you’ve got to let Ms. Vaglianti know that she can let me know.” [Id.]

*Finally*, Respondent argues that because Dr. Murthy’s expert was eventually excluded, Dr. Murthy should somehow be ordered to pay Respondent’s fees and costs – not associated with the expert’s deposition, which under the circumstances would not be warranted – but for the entire case. Obviously, Respondent cites no authority for the proposition that if a party’s expert is excluded, the American Rule does not apply.

**D. NEITHER THE “MEDIATION,” “DISCOVERY SUPPLEMENTATION,” OR “EXCLUDED EXPERT” ISSUES CONSTITUTE “PERVASIVE LITIGATION MISCONDUCT” WARRANT ABANDONMENT OF THE AMERICAN RULE**

The evidence relied upon by Respondent in support of her charge of “pervasive litigation misconduct” against Dr. Murthy simply does not support that charge as discussed, which explains why the Circuit Court’s order contained extensive findings of fact and conclusions of law related to Woodbrook in this and other cases; related to Dr. Murthy in a separate case; and related to the history of settlement negotiations in this case – none of which are proper considerations under this Court’s decision in *Karpacs I*. The Respondent’s brief relies upon certain disclaimers in the order [Respondent’s Brief at 13-14], but the order speaks for itself.

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

With respect to the cross-assignment of error, where (1) there is no common law third-party bad faith pursuant to *Elmore v. State Farm Mut. Ins. Co.*, 202 W. Va. 430, 504 S.E.2d 893 (1998); (2) the Legislature abolished statutory third-party bad faith actions against medical malpractice insurance companies as recognized in *Elam v. Medical Assurance of West Virginia, Inc.*, 216 W. Va. 459, 607 S.E.2d 788 (2004); (3) the Legislature abolished statutory third-party bad faith actions generally as recognized in *Noland v. Virginia Ins. Reciprocal*, 224 W. Va. 372, 384 n. 33, 686 S.E.2d 23, 35 n. 33 (2009); (4) a claimant has no cause of action under *Shamblin*, without an assignment of the claim by the policyholder and the policyholder's exposure to personal liability, in accordance with this Court's decision in *Strahin v. Sullivan*, 220 W. Va. 329, 647 S.E.2d 765 (2007); and (5) Woodbrook attended mediation proceedings as required in *Casaccio*, the Circuit Court properly dismissed Respondent's direct claims against Woodbrook.

### III. SUMMARY OF ARGUMENT

In this case, the Circuit Court erred in awarding attorney fees, litigation expenses, and court costs where (1) the scope of this Court's remand was exceeded; (2) the Rules of Civil Procedure do not support the imposition of sanctions; (3) the decisions of this Court do not support the imposition of sanctions; (4) the Circuit Court relied upon alleged misconduct by in separate, unrelated litigation; (5) no evidentiary hearing was conducted regarding alleged misconduct in separate, unrelated litigation; (6) the Circuit Court had previously dismissed third-party bad faith claims; and (7) third-party bad faith causes of action have been judicially-rejected and legislatively abolished.

With respect to Ms. Karpacs-Brown's cross-assignment, the Circuit Court correctly held (1) there is no common law claim for third-party bad faith pursuant to this Court's decision in *Elmore*; (2) the Legislature abolished statutory third-party bad faith actions against medical professional liability insurance companies as recognized by this Court in *Elam*; (3) the Legislature abolished statutory third-party bad faith actions against other insurance companies as recognized by this Court in *Noland*; (4) a claimant has no cause of action under *Shamblin* without an assignment of the claim by the policyholder and the policyholder's exposure to personal liability, in accordance with this Court's decision in *Strahin*; and (5) Woodbrook attended scheduled mediation proceedings as required in *Casaccio*.

### IV. ARGUMENT

#### A. STANDARD OF REVIEW

Because this Court's precedent regarding the award of attorney fees and litigation expenses does not support the imposition of sanctions in this case, the Respondent extensively

relies upon this Court's decision in *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 226 W. Va. 103, 697 S.E.2d 139 (2010). [Respondent's Brief at 16-19]

The *Richmond* case, however, involved the sanction of default judgment, not the award of attorney fees and litigation expenses and, more importantly, this Court granted a writ of prohibition against the award of sanctions in that case.

*First*, the two new Syllabus Points in *Richmond* both reference the "sanction" of "default," not the award of attorney fees. Syl. pts. 4 and 7, *Richmond*, supra.

*Second*, the areas of misconduct identified – contacting customers represented by counsel who had objected to the contacts; attempting to hire the customers' counsel to create a conflict of interest; and ignoring discovery requests for over a year – are nothing like the Respondent's decision not to engage in mediation; Dr. Murthy's trial testimony which was not directly contrary to her deposition testimony; and the exclusion of Dr. Murthy's expert. *Richmond*, supra at 107-109, 697 S.E.2d at 143-145.

*Finally*, this Court reversed the imposition of sanctions in *Richmond*, noting that although trial courts have certain inherent power to impose sanctions, that authority is limited:

The essential parameters governing the imposition of sanctions for misconduct of a party were formulated by Justice Cleckley in syllabus points one and two of *Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d 827 (1996). In Syllabus point one of *Bartles*, the general considerations applicable to sanctions are set forth as follows:

Although Rules 11, 16, and 37 of the West Virginia Rules of Civil Procedure do not formally require any particular procedure, before issuing a sanction, a court must ensure it has an adequate foundation either pursuant to the rules or by virtue of its inherent powers to exercise its authority. **The Due Process Clause of Section 10 of Article III of the West Virginia Constitution requires that there exist a relationship between the sanctioned party's misconduct and the matters in controversy such that the transgression threatens to interfere with the rightful**

decision of the case. Thus, a court must ensure any sanction imposed is fashioned to address the identified harm caused by the party's misconduct.

The process trial courts follow in determining the appropriate sanction within the contours of a given case is addressed in syllabus point two of *Bartles*:

In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court 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.

196 W.Va. at 384, 472 S.E.2d at 830. . . . The same general process regarding imposition of sanctions applies whether a trial court is proceeding under the authority of rule, statute or its inherent authority.

*Richmond*, supra at 111-112, 697 S.E.2d at 147-148. [Emphasis supplied]

Plainly, applying these principles to the instant case – particularly the requirements that the sanctioned party's conduct threatened to interfere with the rightful decision of the case and that any sanction be proportionate to the party's misconduct – it is clear that the Circuit Court erred by awarding sanctions against Dr. Murthy.

**B. THE CIRCUIT COURT ERRED IN IMPOSING SANCTIONS IN THIS CASE.**

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

In *Karpacs-Brown I*, this Court discussed the Rules of Civil Procedure as a predicate for the imposition of sanctions in this case. *Karpacs I* at 526-527, 686 S.E.2d at 756-757. The Court will search in vain, however, for any reference to Rule 11, Rule 16, or Rule 37 in the Circuit Court's order and, for good reason, as none of them apply in this case. Rather, the only Rule of

Civil Procedure substantively discussed in the Circuit Court's order is Rule 26(e). Here, however, neither the Circuit Court's order nor the Respondent's brief identifies any case in which any court has imposed sanctions under Rule 26(e) under the circumstances relied upon by Respondent in this case. Indeed, in *Prager v. Meckling*, 172 W. Va. 785, 790, 310 S.E.2d 852, 857 (1983), the seminal case in West Virginia regarding the imposition of sanctions under Rule 26(e), this Court affirmed the refusal to impose sanctions where "the facts were known before trial" and "There is no factual development to show willfulness or bad faith on the part of the defendant. Although the record indicates the defense attorney had been given the document a week or so prior to trial, we are left with the impression that the trial court ascribed his failure to turn over the document to inadvertence rather than willfulness or bad faith."

There is a good reason that only eight lines of Respondent's brief address this issue [Respondent's Brief at 28-29] It is because none of the Rules of Civil Procedure, which this Court directed the Circuit Court to consider on remand in *Karpacs I*, support the imposition of attorney fees and litigation expenses on Dr. Murthy because a voluntary mediation did not go forward when Respondent decided it would not be productive; Dr. Murthy offered trial testimony that did not directly contradict her deposition testimony; and an expert was excluded.

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

Lacking any support under the Rules of Civil Procedure, the Circuit Court referenced this Court's decisions in *Pritt v. Suzuki Motor Co., Ltd.*, 204 W. Va. 388, 513 S.E.2d 161 (1998) and *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986):

The statute did not, however, abolish the common law doctrines set forth in *Suzuki v. Pritt*, 204 W. Va. 388 (1988), *Sally-Mike Properties v. Yokum*, 179 W. Va. 48 (1986) and the inherent power of the court to control the litigants before it

through the use of the sanctioning power under Rules 26(e) and 37 of the Rules of Civil Procedure.

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

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

In Syllabus Point 3 of *Sally-Mike*, this Court held, “There is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as ‘costs,’ without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.”

As discussed in Woodbrook’s initial brief, neither *Pritt* involving an award of attorney fees and litigation expenses where a plaintiff attempted to perpetrate a fraud upon the court or *Sally-Mike* where this Court held, “Bringing or defending an action to promote or protect one’s economic or property interests does not per se constitute bad faith, vexatious, wanton or oppressive conduct within the meaning of the exceptional rule in equity authorizing an award to the prevailing litigant of his or her reasonable attorney's fees as “costs” of the action,” Syl. pt. 4, *Sally-Mike*, supra, have any application to this case.

Again, Respondent’s brief, like the Circuit Court’s order, is heavy in its references to the phrase “inherent authority,” but both are devoid of any precedent in which a cancelled mediation, a party’s trial testimony, and/or an excluded expert was held to warrant any sanction,

let alone the award of the other party's attorney fees and litigation expenses incurred in the prosecution of a suit in which the verdict was substantially reduced on appeal. Just as Dr. Murthy is not entitled to her fees and expenses because the verdict was substantially reduced on appeal and Respondent's contrary arguments were rejected, or would not have been entitled to her fees and expenses if there had been a defense verdict, Respondent is not entitled to her fees and expenses because her ultimate judgment exceeded Dr. Murthy's best settlement offer.

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

With respect to the issue of the Circuit Court's exceeding the scope of remand of *Karpacs I*, Respondent's argument is that although the Circuit Court's order is replete with references to alleged misconduct that Respondent acknowledges is irrelevant, those references are permissible because "the outside conduct disproves any innocent or good-faith explanation." [Respondent's Brief at 27] Dr. Murthy acknowledged no litigation misconduct, however, and had no reason to offer any plea in mitigation. Moreover, Respondent offers no authority for the proposition that Rule 404(b) evidence can be considered – without observing any of the procedural requirements for the consideration of Rule 404(b) evidence – relative to a motion for sanctions. Plainly, the Circuit Court exceeded the scope of this Court's remand because if it had not, it could not have imposed sanctions on Dr. Murthy applying the standards elucidated in this Court's opinion.

With respect to the due process issues, Respondent argues that even though Woodbrook's conduct was the extensive subject matter of the Circuit Court's order and this Court's decisions in *Bartles* and its progeny acknowledge the due process protections afforded parties against whom sanctions are sought, "Woodbrook does not have standing . . . ."

[Respondent's Brief at 33] Obviously, if a trial court can impose sanction on a non-party insurance company which disobeys an order to appear at mediation, Syl. pt. 3, *Casaccio*, supra, Woodbrook has standing to raise due process issues on appeal.

With respect to the third-party bad faith issue, Respondent argues even though the Circuit Court's order extensively references Woodbrook and its conduct outside this litigation, "Sanctions were issued against *Dr. Murthy*, not *Woodbrook*, her insurer" and regardless of "who pays the sanctions," the Circuit Court's order is not the functional equivalent of third-party bad faith. [Respondent's Brief at 35] Obviously, a disclaimer is insufficient to establish that impermissible considerations had no bearing on a trial court's decision.<sup>3</sup> The Circuit Court's order speaks for itself.

## V. CROSS-ASSIGNMENT OF ERROR

### A. THE CIRCUIT COURT DID NOT ERR IN DISMISSING RESPONDENT'S COMPLAINT AGAINST WOODBROOK

For the reasons stated in the Circuit Court's dismissal order,<sup>4</sup> Respondent's assignment of error relative to her direct action against Woodbrook has no merit.

*First*, with respect to any common law bad faith claim, the Court held in the single Syllabus of *Elmore*, supra, "A third party has no cause of action against an insurance carrier for

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<sup>3</sup> See, e.g., *State v. Linsky*, 117 N.H. 866, 379 A.2d 813 (1977)(disclaimer of prejudgment by trial judge was insufficient itself to establish prejudgment); *People v. Sturm*, 637 Cal.4th 1218, 1232, n.2, 129 P.3d 1039, Cal.Rptr.3d 799, 809 n.2 (2009)("The trial court's disclaimer, however, was insufficient to mitigate the effect of his comments . . .").

<sup>4</sup> Woodbrook notes that Respondent never filed a written response to Woodbrook's motion to dismiss; no response in opposition to Woodbrook's motion appears in the appendix; and no transcript of the hearing on Woodbrook's motion appears in the record. Accordingly, Respondent has waived any error relative to such dismissal. See *State v. Trail*, 2015 WL 5928478 (W. Va.) ("Even before the adoption of Rule 10(c)(7), this Court required an error to be preserved on the record in order to avoid waiver.")(citations omitted).

common law breach of the implied covenant of good faith and fair dealing or for common law breach of fiduciary duty.”<sup>5</sup>

*Second*, this Court held in *Elam*, supra at 463, 607 S.E.2d at 792, the Court held, “Regardless of when a medical professional liability action was filed, absent privity of contract, any bad faith claim against the health care providers’ insurer is barred if it is filed on or after March 1, 2002. See W. Va. Code § 55-7B-10 (2002).”

*Third*, W. Va. Code § 33-11-4a(a) states, “a third-party claimant may not bring a private cause of action or any other action against any person for an unfair claims settlement practice” and this Court acknowledged the abolition of statutory third-party bad faith actions in *Noland*, supra at 384 n. 33, 686 S.E.2d at 35 n. 33.

*Fourth*, with respect to any claim arising from Woodbrook’s alleged failure to settle within policy limits despite a demand by Dr. Murthy, the Court held in Syllabus Point 2 of *Shamblin* that, “Wherever there is a failure on the part of an insurer to settle within policy limits where there exists the opportunity to settle and where such settlement within policy limits would release the insured from any and all personal liability, the insurer has prima facie failed to act in its insured’s best interest and such failure to so settle prima facie constitutes bad faith toward its insured,” but has held that such remedy does not extend to third parties prosecuting claims against the insured, unless the insured has been exposed to personal liability and post-verdict has assigned the claim to the third-party. See Syl. pt. 9, *Strahin*, supra.

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<sup>5</sup> *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W. Va. 457, 471 n.14, 583 S.E.2d 80, 94 n.14 (2003)(“The instant case, however, concerns a third-party bad faith claim, and this Court has indicated that there is a substantial difference in the duties owed by an insurer to policyholders as opposed to third parties. For example, insurers owe no common law duty of good faith and fair dealing and no fiduciary duty to third parties.”).

*Fifth*, in Syllabus Point 3 of *Casaccio*, supra, the Court held, “For purposes of West Virginia Trial Court Rule 25.10, the insurance carrier for an insured party is considered a party to court-ordered mediation and, thus, may be sanctioned by a trial court for its unauthorized failure to participate in said mediation through the presence of a representative who has full decision-making discretion to examine and resolve issues and make decisions in connection with the mediation.” Here, Woodbrook attended all mediations by a representative with full decision-making discretion and Respondent does not contend to the contrary.

*Finally*, this Court’s decisions in *State ex rel. Rose v. St. Paul Fire and Marine Ins. Co.*, 215 W. Va. 250, 599 S.E.2d 673 (2004); *Barefield v. DPIC Companies, Inc.*, 215 W. Va. 544, 600 S.E.2d 256 (2004); and *Michael v. Appalachian Heating, LLC*, 226 W. Va. 394, 701 S.E.2d 116 (2010), none of which were relied upon by Respondent in opposition to Woodbrook’s motion to dismiss or referenced in the Circuit Court’s order, have any application to this case.

In Syllabus Point 6 of *Rose*, this Court held, “claimant can establish a violation of the West Virginia Unfair Trade Practices Act, W. Va. Code, 33-11-1 to -10, by showing that an insurance company, through its own actions, breached its duties under the Act by 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,” but Respondent’s amended complaint asserts no claim against Woodbrook under the UTPA. [App. 1392-1398] Moreover, Respondent cannot argue to this Court and the Circuit Court that she did not sue Woodbrook under the UTPA – which has abolished a private cause of action – yet rely on the UTPA, under *Rose*, to assert claims against Woodbrook.

Similarly, in Syllabus Point 9 of *Barefield*, this Court held, “The conduct of an insurance company or other person in the business of insurance during the pendency of a lawsuit may support a cause of action under the West Virginia Unfair Trade Practices Act, W. Va. Code, 33-11-1 to -10,” but again, Respondent did not because she cannot sue Woodbrook under the UTPA.

*Finally*, in Syllabus Point 8 of *Michael*, this Court held, “The prohibition of a third-party law suit against an insurer under W. Va. Code § 33-11-4a(a) (2005) (Repl. Vol. 2006), does not preclude a third-party cause of action against an insurer under W. Va. Code § 5-11-9(7)(A) (1998) (2006) of the West Virginia Human Rights Act,” but Respondent’s amended complaint states no cause of action against Woodbrook under the Human Rights Act.

That the centerpieces of Respondent’s cross-assignment of error are *Rose* and *Barefield* – both UTPA cases – and *Michael* – a Human Rights case – amply illustrates that what Respondent is seeking to do in this case is exactly what this Court and the Legislature have prohibited.<sup>6</sup>

## VI. CONCLUSION

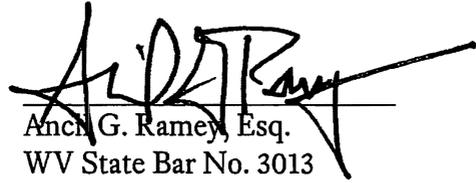
WHEREFORE, the Petitioner, Woodbrook Casualty Company, respectfully requests that this Court reverse the judgment of the Circuit Court of Wetzel County and remand with directions to enter judgment for the Petitioners, Woodbrook Casualty Company and Anandi Murthy, M.D., and affirm the judgment of the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

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<sup>6</sup> As to her allegation that Dr. Murthy’s alleged “litigation misconduct . . . appeared to have occurred at the direction of Woodbrook” [Respondent’s Brief at 2], the Court will notice the absence of any reference to the appendix and none of the three areas of alleged misconduct – Dr. Murthy’s decision to initially withhold her consent to settle; her trial testimony; or the exclusion of her expert – had anything to do with Woodbrook.

**WOODBROOK CASUALTY  
INSURANCE COMPANY**

By Counsel

A handwritten signature in black ink, appearing to read 'Ancil G. Ramey', is written over a horizontal line. The signature is stylized and cursive.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioners,

vs.) No. 15-0376

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

Respondents.

CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do hereby certify that on October 16, 2015, I served the foregoing "REPLY BRIEF OF PETITIONER" on counsel of record by causing to be deposited a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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