IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 22-0010

Christopher Chafin,
Cheat Lake Urgent Care, PLLC
Petitioners

v.

Appeal from a final order of the Circuit Court of Monongalia County (16-C-547)

David Anderson,
Build It, LLC
Affordable Contractors, LLC
Gillen Enterprises, LLC
Brian R. Boal, and
Boal & Associates, P.C.
Defendants.

PETITIONERS' BRIEF

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2. The Circuit Court clearly erred by granting summary judgment in favor of the Respondents when expert testimony on standard of care was not necessary.

3. The Circuit Court continuously abuses its discretion and displays obvious signs of prejudice towards Petitioners.

III. STATEMENT OF THE CASE

Petitioner Cheat Lake Urgent Care, PLLC is a now-dissolved Professional Limited Liability Company that formerly provided medical services in the Morgantown, West Virginia area. Petitioner Christopher Chafin is a medical doctor who was a member of Cheat Lake Urgent Care, PLLC. (Collectively Petitioners Chafin and Cheat Lake Urgent Care, PLLC are referred to herein as "Petitioners.") Respondent David Anderson is also a medical doctor and a former member of Cheat Lake Urgent Care, PLLC. He is the owner of Gillen Enterprises, LLC, Affordable Contractors, LLC, and Build It, LLC. Respondents Brian Boal and Boal & Associates P.C. formerly served as the accountants for Cheat Lake Urgent Care, PLLC. (Collectively Brian Boal and Boal & Associates P.C. are referred to herein as "Respondents.")

For some time leading up to 2013, Respondent David Anderson was embezzling from Cheat Lake Urgent Care, PLLC, a fact to which he has since pleaded guilty. Appendix 15.

The underlying case focuses both on Respondent David Anderson's embezzlement as well as Respondent Boal and Boal & Associates P.C.'s contractual relationship with the Petitioners that resulted in a deviation from the industry standard of care in providing accounting and tax services for Cheat Lake Urgent Care, PLLC in

addition to their failure to properly file and pay withheld taxes for the benefit of Petitioner Chafin.

Filed in late 2016, the underlying case has been marred by a series of extensive delays. For example, for nearly a year the Circuit Court did not enter an Agreed Order amending the Complaint. Additionally, there have been numerous continuances; nearly all of which were ordered sua sponte by the Circuit Court.

This petition, like the petition before it, addresses the Circuit Court's handling of the Petitioners' expert witness disclosure and the consequences faced by the Petitioners as a result of its exclusion.

On May 1, 2019, in accordance with the Circuit Court's December 2018 Scheduling Order, Plaintiff's disclosed two experts: Andrew Smith and Charles Russo. Appendix 724.

With regards to Andrew Smith, Plaintiff provided his CV and disclosed that:

> Plaintiffs believe that this expert will testify to the standard of care accounting professionals owe to client and industry practices. Further, it is anticipated that this expert will testify to a review of accounting practices performed in the subject matter and his opinions based upon that review.

With regards to Charles Russo, Plaintiff also provided his CV and disclosed that:

> Plaintiffs believe that this expert will testify to the standard of care accounting professionals owe to client and industry practices. Further, it is anticipated that this expert will testify to a review of accounting practices performed in the subject matter and his opinions based upon that review. Moreover, this expert will provide a value for the lost income and lost opportunity costs associated with the negligence and embezzlement and the effect on the Plaintiffs.

Almost immediately, Respondent David Anderson filed a Motion to Strike Plaintiffs expert disclosures. Appendix 775. On June 19, 2019, the Court entered an Amended

Scheduling Order stating, in part, that deadline for the "[p]arty with burden of proof to supplement trial experts' opinion" as August 9, 2019. Appendix 772. On August 8, 2019, a hearing was held in this matter to discuss various discovery disputes. However, at that hearing, Defendants forewent their arguments regarding Plaintiffs' expert disclosures after the Court advised them it had already ruled in their favor in other matters and to "stop when [Defendants are] ahead." Appendix 712. On August 14, 2019, the Court entered a Second Amended Scheduling Order which left the deadline for the "Party with burden of proof to supplement trial experts' opinion" as August 9, 2019—a date that had already passed. Appendix 769.

On June 4, 2019, Defendants provided their own expert witness disclosures, which consisted of a single paragraph and largely mirrored Plaintiffs'. Appendix 755.

On October 23, 2019, a preliminary report of Andrew Smith, CPA was disclosed to the Defendants along with the plan for obtaining additional necessary opinions. On November 7, 2019, Counsel for the Boal Respondents wrote in response that the report was untimely.

On March 2, 2020, counsel for the Petitioners, acting as counsel for the victim in the companion criminal case (14-F-49), filed a Petition for Release of Probation Records because counsel had learned (though it had not been disclosed by the State or Defendant) that Respondent Anderson was seeking release from home confinement. The purpose for asking for Probation Records was to assert Cheat Lake Urgent Care's rights pursuant to the Victim Protection Act of 1984. Additionally, a multitude of

subpoenas were issued based upon issues arising from the Boal Defendants' responses to requests for production of documents.[1]

On March 5, 2020, Plaintiffs made their NINTH supplement to the request for production of documents.

On March 17, 2020, a final report was provided to the Defendants from Andrew Smith, CPA. At least a portion of this delay was attributable to the Defendants' not timely producing discovery responses.

On March 10, 2020, Respondents filed a Motion in Limine to Preclude Expert Testimony seeking to strike Petitioners' experts. Appendix 736. On March 11, 2020, Respondents filed their Motion for Summary Judgment, based on their assumption that the Circuit Court would strike the Plaintiffs' experts. Appendix 668, 678. On March 12, 2020, Respondents filed their Preliminary Fact Witness List in this case. Appendix 7.

On April 17, 2020, trial and the pretrial conference in this matter were continued generally due to the COVID-19 Pandemic.

On June 4, 2020, the Circuit Court held a hearing in 14-F-49 to consider Respondent Anderson's Motion to be Released from Home Confinement. Appendix 525-579. Though Jason E. Wingfield, Esq. could not appear due to a hearing being called in the Court of Common Pleas for Fayette County, Pennsylvania, David M. Jecklin, Esq., a partner from the same firm, did appear. Immediately upon court being called into session, Mr. Jecklin became a proxy "punching bag" for Mr. Wingfield. Appendix 526-527. The Circuit Court eventually sent Mr. Jecklin away from the hearing, without ever hearing the

[1] Boal Defendants produced Quickbooks files for Cheat Lake Urgent Care, PLLC and also indicated it possessed the same for Defendant Affordable Contractors, LLC as well as several hundred pages of documents. Affordable Contractor, LLC has objected to the disclosure and the Circuit Court has refused to compel production.

Petition filed by the victim and leaving the victim without representation, to ascertain the status of certain facts from the Circuit Clerk. Appendix 526-530. Thereafter, Respondent Tucker and Raymond Yackel, Esq., (counsel for Respondent Anderson in both cases) engaged in an ***ex parte*** discussion with counsel for the Anderson Defendants regarding his belief that there were statute of limitations issues with this instant matter. The Circuit Court repeatedly opined that she would ensure that the victim—who she alleges "wanted money"—became inclined to resolve this suit. Appendix 540-552.

On August 3, 2020, the Circuit Court held a hearing in this matter on Respondents' various motions to strike and to exclude Plaintiffs' experts. Appendix 318-365. At that hearing, Defendants did not provide any evidence of prejudice, nor did they explain why they had failed to depose Plaintiffs' experts, why Defendants' expert disclosures were sufficient while Plaintiffs' were not, nor did the Court inquire. *Id.* As shown in the transcript, the hearing consisted largely of the Court's interpersonal relationships with Counsel for the Defendants. *Id*. The Court barely acknowledged that the IRS never produced the records Respondents considered vital to the case (and which surely Petitioners' experts would be required to opine upon). *Id*. Inexplicably to anyone unaware of the Court's prior ex parte discussions with Defense counsel, the Court allowed Defendants to amend their pleadings to include a statute of limitations defense even while the case was nominally too far along for additional expert disclosures. *Id*.

In fact, the Circuit Court studiously avoided the disingenuous averments made by defense Counsel in written motions, unless she was asserting negativity towards Petitioners' Counsel. Petitioners note the Circuit Court openly acknowledged that it

deemed Plaintiffs' disclosures inadequate and too "convoluted" without so much as bothering to read them:

MR. LEVICOFF: He served an expert report, which incidentally, I commend a reading of it to the court. If the court can figure out what it says the court is a lot better than I am. It is so convoluted.

THE COURT: Well, I have trouble figuring out most of the pleadings from plaintiff in this case, so, I would just agree with you without reading it.

* * *

THE COURT: okay. so, 29 pages based on nothing.

MR. LEVICOFF: Based on nothing.

Id. Instead, the Circuit Court indicated it was inclined to grant the Defendants' Motions and encouraged settlement over the next few days, since this was about "only money."[2]

The next day (not days later as suggested; merely hours), the Court issued its Order, summarily granting Defendants' Motion to Strike Plaintiffs' Expert Charles Russo. Appendix 366.

A petition for writ of prohibition followed. Appendix 802. This Court, concerned that it could not render a decision without a detailed order from below, denied the writ.

[2] This comment echoed the sentiment that she shared during the *ex parte* communication she engaged in with Mr. Yackel.

The Respondents then filed an amended motion for summary judgment alleging that without expert testimony, the Petitioners could not make a prima facie case on malpractice. Appendix 263-300. On July 8, 2021, the Petitioners provided the Court and counsel with their Response in Opposition to the Amended Motion for Summary Judgment. A hearing was held on July 12, 2021. The Circuit Court granted summary judgment in favor of the Respondents. The Petitioners noted their objections to the Order and filed their Proposed Order. Appendix 179. The Circuit Court ignored that proposed Order.

After the Respondents' Order was entered, the Petitioners then timely filed their Motion for Relief from Judgment and Motion to Alter or Amend Judgment. Appendix 49-69. The Respondents filed a response. The Circuit Court then scheduled a hearing on the Motions. Appendix 10-11. Without the consideration of argument, the Circuit Court denied the Petitioners' Motions.

Meanwhile, in the criminal proceeding, no restitution has been Ordered. Though the Circuit Court set several hearings to determine a restitution amount, no evidence has ever been taken. Appendix 17. Instead, the Circuit Court ignored its responsibility to Order restitution and instead appointed a discovery commissioner. *Id*.

The Petitioners now appeal the Circuit Court's rulings regarding the exclusion of their expert and the resultant grant of summary judgment.

IV. SUMMARY OF ARGUMENT

The Circuit Court seemingly has endeavored to prevent this matter from seeing the light of justice. To understand why requires a look at where the problems began: the Circuit Court abused its discretion in striking the Petitioners' experts. Though several

intervening issues prevented Petitioners' expert disclosures from meeting the Circuit Court and Respondents vague standards, the Respondents never endured actual prejudice from the supposedly late disclosures. Importantly, Rules of Civil Procedure don't require a report to be produced at the time of identifying the experts. This resulted in an avalanche of following litigation.

Since the exclusion of expert testimony was improper, so too was the summary judgment awarded to the Respondents. The Circuit Court ignored jurisprudence regarding the individual claims raised in the Second Amended Complaint. Consequently, the Circuit Court granted summary judgment on Counts of the Complaint that did not require expert testimony. The Circuit Court has abused its discretion to the continuous detriment of the Petitioners. Thus, this Court should reverse the Orders of the Circuit Court of Monongalia County striking the Petitioners' experts and granting summary judgment.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioners respectfully request oral argument before the West Virginia Supreme Court of Appeals pursuant to West Virginia Rules of Appellate Procedure 19.

VI. ARGUMENT

A. Standard of Review

This Court will need to arm itself with two Standards of Review to adjudicate the arguments herein. The oft stated Standard of Review for Summary Judgment includes: "A circuit court's entry of summary judgment is reviewed de novo." Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). This Court has repeatedly held that under Rule 56(c) of the West Virginia Rules of Civil Procedure, """[a] motion for summary

judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).' Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992)." Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

Additionally, since the Petitioners are asking this Court to reverse the Circuit Court's Order striking the Petitioners' expert, the standard of review for adjudication of motions in limine is provided:

"A trial court's ruling on a motion in limine is reviewed on appeal for an abuse of discretion." Syl. Pt. 1, *McKenzie v. Carroll Int'l Corp.*, 216 W. Va. 686, 688, 610 S.E.2d 341, 343 (2004).

B. The Circuit Court abused its discretion by barring Plaintiffs' expert from trial.

This appeal centers on a Judge that has expressed disdain for the Petitioners from the outset of this matter. Appendix 895-983. Indeed, the Circuit Court, by virtue of striking the Petitioners' experts has declared that the $2,179,000.00 embezzled by Defendant Anderson with the assistance of the Respondents is utterly worthless. Instead, the Circuit Court has made this case about "unclean hands", "games [that] have been played in [14-F-49]" and the Petitioner medical practice not being "worth its salt". *Id.* Now, nearly five (5) years after the Petitioners sought to recuse this Judge for her apparent and obvious prejudice, we are here to discuss what was foretold in that Motion.

The genesis of this three (3) year war on expert disclosures begins with the Circuit Court's folly in striking the Plaintiffs' expert witness, Charles Russo, C.P.A. Hence, this should be the embarkation point for this Court to begin its consideration in reversing the Circuit Court's Orders striking the Petitioners' expert and granting summary judgment against the Petitioners.

The purpose of discovery and disclosure requirements in West Virginia Circuit Courts is to prevent surprise and otherwise stop the fabled "trial by ambush." *McDougal v. McCammon,* 192 W. Va. 229, 237 (1995); *Graham v. Wallace,* 214 W. Va. 178, 184-85 (2003) (citing *McDougal*, 192 W. Va. at 795-96). This general principle, and the attendant rules of West Virginia Civil Procedure, are not meant, however, to arbitrarily foreclose development of a Plaintiff's case. As this Court has pointed out, discovery and disclosure of an expert opinion and the basis for that opinion may continue up until a reasonable amount of time before trial. *See, e.g. Tallman,* 234 W. Va. at 719 (allowing the supplementation of expert disclosures six weeks prior to trial); *see also Michael v. Henry,* 177 W. Va. 494, 498 (1987) ("...[t]he great majority of courts that have construed this rule agree that expert witnesses need not be identified until the later stages of discovery."); *see also Krivchenia,* 215 W. Va. at 603 (allowing expert testimony regarding the standard of care following that witness's deposition in which he stated he would not testify on the standard of care).

1. The Respondents were not Prejudiced by the Petitioners' expert disclosures.

With the basis for discovery and its purpose in mind, this Court should next consider its holding that the primary factors when considering whether to exclude

evidence are whether and to what extent a party may suffer prejudice and the ability of the offending party to cure such prejudice:

> The factors to be considered in determining whether the failure to supplement discovery requests under Rule 26(e)([1]) of the Rules of Civil Procedure should require exclusion of evidence related to the supplementary material include: (1) the prejudice or surprise in fact of the party against whom the evidence is to be admitted; (2) the ability of that party to cure the prejudice; (3) the bad faith or willfulness of the party who failed to supplement discovery requests; and (4) the practical importance of the evidence excluded.

W. Va. DOT v. Parkersburg Inn, Inc., 222 W. Va. 688, 699 (2008) (quoting *Prager v. Meckling*, 172 W. Va. 785, Syl. Pt. 5 (1983)); *JWCF, LP v. Farruggia,* 232 W. Va. 417, 429 (2013) (citing *Prager,* 222 W. Va. at 785). And even where there is prejudice and surprise to opposing party, the ability of that party to effectively cure the prejudice should lead a court away from excluding the evidence. *See, e.g., Tallman,* 234 W.Va. at 718-19; *see also JWCF,* 232 W. Va. at 429-30; *c.f. Parsons v. Consol. Gas Supply Corp.,* 163 W.Va. 464 (1979) (***this Court's policy is that cases should be decided on the merits***). Emphasis added.

Though the Respondents' Motion to Strike and Motion in Limine has generally alleged prejudice and surprise, arguing that Plaintiffs' report is "untimely" and "deficient", the Respondents have never identified actual prejudice or surprise. Even assuming that Defendants' allegations meet the first *Prager* factor, Defendants have not alleged, *and cannot reasonably allege,* that such prejudice escapes simple, satisfactory and complete cure. In fact, the Petitioner's expert disclosure that included reports from both experts

was received more than two months prior to the entry of the Circuit Court's Order striking the experts. Appendix 476. Prior to that, all Defendants had received an expert report in November 2017 detailing the embezzlement engaged in by Defendant Anderson during 2012. Appendix 593. Further, all Defendants had received a preliminary report in October of 2019. Appendix 644-648, generally. The Defendants were further on notice that their cooperation in discovery was necessary for the Petitioners' experts to produce reports detailing their opinion, yet each of the Defendants delayed production of discovery responses. *Id.* Interestingly, Counsel for Defendant Anderson and his associated entities still has not responded to discovery as of the filing of this brief.

The party that has been prejudiced is the Petitioners. The Respondents spent a great deal of effort in emphasizing their need for the Petitioners' Internal Revenue Service file. Appendix 705-708. Those records, though requested by the Petitioners, were never produced by the IRS. Furthermore, without those records, the Petitioners' experts were slowed by having to retrace money through Quickbooks files provided by the Respondents. The Respondents were prohibited from providing everything, however. Counsel for the Anderson Defendants, which includes Affordable Contractors, LLC, has never allowed the Petitioners access to its accounting information possessed by the Respondents. Appendix 521. The Circuit Court refused to compel the Anderson Defendants to comply with discovery requirements. Appendix 366. Thus, the accuracy of the expert reports and the time within which they were produced was directly affected by factors outside the province of the Petitioner. There was no way to appease the opposing parties or the Circuit Court.

At the time the Circuit Court entered its Order striking the Petitioners' experts, a date for trial had not even been set in this matter.

As for bad faith, though Respondents have suggested as much, Petitioners initially provided Defendants with the names, backgrounds, and brief summaries of the experts on May 1, 2019 and though Defendants have not deposed these experts, Petitioners supplemented their disclosures to try to ameliorate Defendants' claims and have invited Respondents to depose these experts. Such facts show that any bad faith alleged by Respondents is of *de minimis* significance in a sophisticated case with multiple extensive delays. Finally, with regards to the last *Prager* factor, the absence of an expert on accounting standards in a trial on accounting malpractice can be fatal. Such fatality was predicted, and now has come to blossom, in the Petitioners' first endeavor to enlist this Court's assistance. Appendix 802.

Accordingly, because the Circuit Court has not found—and Respondents cannot show—that they have suffered any actual irreparable harm, the Circuit Court abused its discretion in striking the Petitioner's expert witness.

2. Expert Reports are Not Required Under the West Virginia Rules of Civil Procedure.

This Court has been clear that though the West Virginia Rules of Civil Procedure are modeled after, and are similar to, the Federal Rules of Civil Procedure, one of the areas in which they specifically differ is expert disclosure under Rule 26. While the Federal Rules require "a written report, prepared and signed by the witness, and must contain 'a complete statement of all opinions the witness will express and the basis and reasons for them' as well as 'the facts or data considered by the witness in forming them,' among other information," the West Virginia Rules require a far less detailed disclosure.

Tallman, 234 W. Va. at 719 n.1. The West Virginia Rules of Civil Procedure do *not* require an exhaustive recitation of an expert's testimony such as that found in an expert report. *Tallman,* 234 W. Va. at 719 (Workman, C.J. concurring).

Though the Circuit Court's ruling is a terse "[u]pon further consideration and review of the court file, this Court hereby **GRANTS** the Motion to Strike," it appears that both it and opposing counsel have based this decision upon an erroneous belief that expert reports are required under the West Virginia Rules of Civil Procedure. Appendix 366. For example, Respondents' Motion in Limine to preclude Petitioners' experts, which is incorporated by reference into their Motion to Strike, complains that Plaintiffs' expert disclosures fail to "delineate[] the scope and substance of the opinions that [Petitioners] intend to introduce through one or more experts." Appendix 736. Similarly, the hearing on the Motion to Strike in question centered mostly on whether Plaintiff's expert report met some imagined standard for expert reports that is not present under the West Virginia Rules of Civil Procedure nor explained by the Court. Appendix 326.

However, there is no requirement under the West Virginia Rules of Civil Procedure for Plaintiffs to have prepared and disclosed an expert report in this matter. Likewise, there is no Order from the Circuit Court in this matter mandating an expert report. To exclude Plaintiffs' witnesses because they have failed to meet a vague, unknown standard for an unrequired report exceeds the discretion granted to the Circuit Court.

The Respondents wanted reports that were not required, to supposedly prepare its defense. After having the reports it's asked for, the Respondents have focused their diligence (and, consequently, everyone else's) on seeking to exclude the Petitioners' expert testimony. The Circuit Court, ignoring the Defendants' conduct in creating this

situation, have rewarded the Respondents for their obfuscation. Because Defendants have not, and cannot, show that they have suffered actual prejudice by Petitioners' alleged deficient disclosures, it is inappropriate for the Circuit Court to summarily strike their proposed expert from trial. Simply, this Court must reverse the Circuit Court's Order striking Petitioners' experts.

C. The Circuit Court clearly erred by granting summary judgment in favor of the Respondents when expert testimony on standard of care was not necessary.

Previously stated for the benefit of the Circuit Court, the claims made against the Respondents in the Second Amended Complaint include:[3]

1. Count I—Malpractice by Defendants Boal and Boal & Associates;
2. Count II—Breach of the CLUC Contract by Defendants Boal and Boal & Associates;
3. Count III—Breach of the Chafin Contract by Defendants Boal and Boal & Associates;
4. Count IV—Negligence by Defendants Boal and Boal & Associates;
5. Count V—Negligent Representation by Defendants Boal and Boal & Associates; and
6. Count VI—Breach of Defendant Boal's Fiduciary Duty.

Of these six causes of action, the Respondents only identified "accounting malpractice" as requiring expert testimony to establish a standard of care. The remaining counts alleged in the Second Amended Complaint do not require the Petitioners to prove a standard of care.

[3] Appendix 51-53.

Indeed, the elements of a contract claim have been well settled in this state: "A claim for breach of contract requires proof of the formation of a contract, a breach of the terms of that contract, and resulting damages." *Sneberger v. Morrison*, 235 W. Va. 654, 669, 776 S.E.2d 156, 171 (2015). A standard of care owed to another party is not a part of a contract claim. Ultimately, the performance required, professional or otherwise, is the substance of a contract and is defined therein.

Breach of fiduciary duty, likewise, does not require an expert to establish a standard of care. Breach of fiduciary duty, as alleged in the Second Amended Complaint, is defined both by statute and by common law. The elements required to be proven include there be a fiduciary duty, such as that of a bailee or an authorized negotiator of instruments, a breach of the duty, such as not reasonably caring for the bailment or improperly paying invoices not attributable to a principal, and damages. Significant evidence of all these elements exists and cannot be discounted by the Boal Defendants.

Finally, common law negligence and negligent misrepresentation are both claims that can proceed in the absence of expert testimony and are claims that are routinely adjudicated without such evidence.

Undeterred, the Circuit Court ignored these points and granted summary judgment in favor of the Respondents and denied the relief sought by the Petitioners in their Motion to Alter or Amend Judgment. Appendix 18. The Circuit Court erroneously held that:

> "While Plaintiffs argue that the malpractice count is the only cause of action requiring expert testimony to establish the standard of care, Plaintiffs fail to properly address this Court's prior findings in the July 30, 2021 summary judgment order, where the Court opined, and held, that all of Plaintiffs' claims against Boal and Boal & Associates stem from the alleged failure to perform professional duties owed to the clients, and the alleged failure to perform such obligations in accordance with the applicable standard of professional care and conduct. Plaintiffs seemingly echo their argument

> previously filed with, and argued in front of, this Court, and resolved through the July 30, 2021 summary judgment order. However, this Court found that, when whittled down to their core, all counts of Plaintiffs' Second Amended Complaint are claims of professional liability, where Plaintiff alleges a failure by Boal and Boal & Associates to discover the embezzlement of funds and to ensure payment of personal income taxes. Appendix 21.

In so holding, the Circuit Court ignored decades of jurisprudence that distinguishes claims of breach of contract from negligence. This Court has held that there are legal distinctions between causes of actions sounding in tort versus those arising from purely contractual relations:

"In seeking to prevent the recasting of a contract claim as a tort claim, courts often apply the "gist of the action" doctrine. Under this doctrine, recovery in tort will be barred when any of the following factors is demonstrated:

> (1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim.

"Star v. Rosenthal, 884 F.Supp.2d 319, 328-29 (E.D. Pa. 2012); accord *Backwater Props., LLC* v. *Range Resources Appalachia*, LLC, No. 1:10CV103, 2011 U.S. Dist. LEXIS 48496, 2011 WL 1706521 at 6 (N.D. W.Va. 2011) (recognizing that "[u]nder the 'gist of the action' doctrine, a tort claim arising from a breach of contract may be pursued only if the action in tort would arise independent of the existence of the contract") (internal citations omitted and quoting Syl. Pt. 9, in part, *Lockhart v. Airco Heating & Cooling, Inc.*, 211 W.Va. 609, 567 S.E.2d 619 (2002)); *Cochran v. Appalachian Power Co.*. 162 W.Va. 86, 92-93, 246 S.E.2d 624, 628 (1978) (stating that "where the gist of the action is the

breach of contract . . . additional averments . . . will not convert the cause of action into one for tort") (quoting 1 Am. Jur. 2d Actions § 8 (1962)).

"Succinctly stated, whether a tort claim can coexist with a contract claim is determined by examining whether the parties' obligations are defined by the terms of the contract." *Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W. Va. 577, 586, 746 S.E.2d 568, 577 (2013) citing *Goldstein v. Elk Lighting, Inc.*, No. 3:12-CV-168, 2013 U.S. Dist. LEXIS 30569, 2013 WL 790765 at 3 (M.D. Pa. 2013).

The Circuit Court should be barred from determining that the Respondents' liability for breach of a fiduciary duty arises from any professional negligence where the Respondents paid the obvious personal expenses of their codefendants with the funds belonging to the Petitioners. Unlawful conduct was not bargained for in the engagement and is not a part of the professional duties of an accountant. Likewise, only the parties' contractual relationship can determine the performance owed by each. Similarly, the representations made by the Respondents regarding performances allegedly provided (though not actually provided) are not governed by professional standards.

Count IV of the Second Amended Complaint that alleges negligence, distinguished from accounting malpractice, is supported by the doctrine of res ipsa loquitur regardless of expert testimony.

The evidentiary doctrine of "Res Ipsa Loquitor" operates as an exception to the general rule that negligence cannot be presumed. *See Foster v. City of Keyser*, 202 W.Va. 1, 14 (1997) (quoting 16 Am. & Eng. Enc. Law, p.448). Its application arises in circumstances where the very occurrences of certain events in and of themselves suggest negligence, barring other plausible explanations. *Id.* at 15.

The application of res ipsa loquitor is appropriate where:

(a) the event is of a kind which ordinarily does not occur in the absence of negligence;

(b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and

(c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

Foster, 202 W. Va. at 4, Syl. Pt. 4.

Res ipsa loquitor requires a Plaintiff to present "...circumstantial evidence that will lead to reasonable inferences by the jury..." that the Defendant was negligent. *Kyle v. Dana Transp., Inc.*, 220 W. Va. 714, 718 (2007)(internal quotations omitted). Indeed, "[t]he doctrine applies only in cases where defendant's negligence is the only inference that can reasonably and legitimately be drawn from the circumstances." *Davidson's, Inc. v. Scott*, 149 W. Va. 470, Syl. Pt. 5 (1965).

Res ipsa loquitor is generally unavailable where a plaintiff must show that their case rests on a want of professional skill. *C.f. Farley v. Meadows*, 185 W. Va. 48, 50 (1991). However, the Court has recognized that in certain unique circumstances, res ipsa loquitor may be available where the Defendant is a professional. *Id.* Indeed, the West Virginia Supreme Court has repeatedly emphasized that expert testimony is not needed if the matter is within the common knowledge of the jurors. *See, e.g., Totten v. Adongay*, 175 W. Va. 634, Syl. Pt. 4 (1985).

Here, the negligence claim against the Respondents rests on them being "tasked with paying taxes on behalf of [Petitioners]," his "duty to ensure Plaintiff Chafin's taxes

were filed and paid in a timely and accurate fashion," and his "duty to ensure that money withheld from [Plaintiff Chafin's] paycheck for the payment of taxes went towards the payment of taxes." Appendix 827. Forwarding tax withholdings does not depend on any professional skill or acumen. It is well within the ken of the average juror, who in all likelihood has been an employee at some point in their life, that if money is withheld from someone's paycheck in order to pay their taxes—and then those taxes are not paid—the employee has been harmed.

The failure of the Respondents to forward tax withholdings on behalf of Petitioner Chafin—with which they were specifically tasked—would not normally occur absence some negligence on the Respondents' part. Moreover, Petitioner has evidence—in the form of an internal email between Boal and his employee—that the Respondents withheld money from Petitioner Chafin, that it was the Respondents' duty to pay taxes on Petitioner Chafin's behalf, and that the Respondents had failed to do so:

> My biggest concern is the $110,939.04 withheld for taxes from Chris in 2012.... Only a small portion of this was paid on the estimated 2012 taxes. This should all be paid in or Chris should receive the difference as it is withheld from his hourly rate. Chris should also have received any difference in taxes owed compared to what was withheld in 2011 as he was to be paid $120.00 per hour. If he doesn't get the difference (if any) he is being shorted.

Appendix 262.

This evidence clearly meets the last two prongs of the doctrine of res ipsa loquitor: that there are no other causes and that the indicated negligence was within the scope of the Respondents. Moreover, this document overcomes the arguments of the

Respondents that (1) there is no genuine issue as to any material fact and (2) that the totality of the evidence (here, Appendix 262) suggests that a rational trier of fact could find for the Petitioners. Simply, this document, from an employee of the of the Respondents, demonstrates concern that the duty owed the Petitioner had already been breached. Thus, even without an expert on the standard of care, Petitioners' negligence claims with regards to paying taxes should have been allowed to be put before a jury. For the same reasons, Petitioners' claims based upon Respondents' failure to "ensure money withheld from Plaintiff Chafin's paychecks was actually paid to the IRS and the state of West Virginia" and Defendant Boal's failure to notify Plaintiffs of his failure, which are part of Plaintiffs' Malpractice Claim, Breach of Contract Claims, and misrepresentation claims regarding Defendant Boal's failure "to notify Plaintiff [sic] that money withheld from Plaintiff's paychecks was not paid to the IRS or the state of West Virginia" does not require any expert testimony. Appendix 827. Indeed, there is no need for an expert to explain to a jury that an accountant should not represent that taxes had been paid when they actually had not.

Such logical inconsistencies can be attributed to each of the Counts for which the Circuit Court granted summary judgment. The Circuit Court's reasoning would require expert testimony in every breach of contract, negligence and fraud case if extrapolated, which is nonsensical and seeks to arbitrarily inflate the cost of litigation and tax the capabilities of the judicial system.

Since the Circuit Court refused to apply the doctrine of res ipsa loquitor, shrugged off the Petitioners' fraud and breach of fiduciary duty arguments, and misapplied the gist

of the action doctrine to the present case, it has abused its discretion. Consequently, this Court must reverse the Circuit Court's Order granting Summary Judgment.

D. The Circuit Court continuously abuses its discretion and displays obvious signs of prejudice towards Petitioners.

Is it really a surprise that in a case where a Judge denigrates and publicly humiliates the victims of a criminal enterprise that profited in the millions of dollars that we are discussing abuse of discretion? Appendix 895-983. The only thing that makes such a proposition more absurd is the fact that the same Judge accepted the guilty plea of the leader of the criminal enterprise. Appendix 15.

""Abuse of discretion" is a strict legal term synonymous with a failure to exercise a sound, reasonable and legal discretion, a clearly erroneous conclusion and judgment — one clearly against logic and the reasonable and probable deductions to be drawn from the facts disclosed." 21A Michie's Jurisprudence of Virginia and West Virginia, WORDS AND PHRASES, Abuse of Discretion (2021).

The Petitioners have come to anticipate the Circuit Court's abuse of discretion any time matters requiring adjudication arise. Consider these examples:

The Circuit Court has complained about the aging nature of this case yet has not considered its own hand in delay. Appendix 319. During the August 3, 2020, hearing, the Circuit Court spoke of ruining management statistics yet:

1. entered an Order canceling a hearing scheduled March 20, 2020;
2. entered an Order canceling a hearing scheduled June 22, 2020;
3. entered an Order canceling a hearing scheduled for July 20, 2020;
4. entered an Order canceling a hearing scheduled for September 30, 2020;
5. entered an Order canceling a hearing scheduled for December 2, 2020;

6. entered an Order canceling a hearing scheduled for January 15, 2021;

7. entered an Order canceling a hearing scheduled for April 27, 2021; and

8. delayed the entry of an Agreed Order Amending Complaint by 364 days.

Appendix 007-011.

From February 5, 2020 when hearing on the Respondents' Motion for Summary Judgment was initially scheduled until it was heard July 12, 2021, five hundred twenty three days elapsed. ***Combined with the delay of the Agreed Order, the Circuit Court is responsible for 887 days of delay***. An Order awarding restitution in the companion criminal case (indicted in 2014) still has not been entered! The Circuit Court has abused its discretion in delaying recompense for the Petitioners as plaintiffs ***and*** victims!

Time was a part of the Circuit Court's reasoning when denying the Petitioners the ability to conduct further discovery by awarding summary judgment and time was a factor when the Court granted the Motion to Strike and Motion to Amend Answer. Appendix 168, 345-346.

The Circuit Court even complained of the Petitioners' use of time in its Order denying their Motion to Alter or Amend Judgment by erroneously finding that the Petitioners had not filed their Motion within ten (10) days. Appendix 22. The Circuit Court failed to exercise to exercise a sound, reasonable and legal discretion when applying the rules for time computation. The Order identified was entered July 30, 2021; a Friday. Though Rule 59(e) of the West Virginia Rules of Civil Procedure requires the Motion to be filed within ten (10) days, Rule 6(a) recognizes "[w]hen the period of time prescribed or allowed is fewer than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Thus, the first day following the entry of the Order

was August 2, 2021. Adding ten days, while excluding the intervening weekend, results in a due date of August 14, 2021. The Motion was timely filed; the Circuit Court abused its discretion by ignoring the Rules, clearly against logic and the reasonable and probable deductions to be drawn from the facts disclosed.

The Circuit Court has abused its discretion by commingling criminal and civil duties and requirements. The Petitioners filed a motion seeking to review the probation records of Defendant Anderson for the purpose of determining whether he had ever deposited a sum of money as Ordered by the Circuit Court. If the funds were there, it was the Petitioners' desire to then petition the Circuit Court for access to some of the funds so that they could then retain the experts necessary in the civil matter. At the hearing on the Motion, the Circuit Court berated counsel for the Petitioners/victims and forced counsel to leave. At that point, the Circuit Court engaged in ex parte communication regarding the civil matter with counsel for Defendant Anderson. Additionally, she suggested that prosecuting attorneys should not be concerned with restitution issues when a civil matter is concurrently be progressed. The Circuit Court then suggested resolving the restitution issue through mediation. The Circuit Court then, during a hearing held on September 30, 2021, appointed a local attorney as the discovery commissioner in the criminal case. The Petitioners are unaware of any authority that allows the Circuit Court to make such an appointment but nonetheless it did so without regard to limitations of authority or separation of powers. Such is certainly an abuse of discretion.

The Circuit Court denied the Petitioners' Motion to Compel which sought identification of an expert, documents and tax records related to Defendant Affordable Contractors, LLC. The Circuit Court announced that the issue was moot since counsel

for the Anderson Defendants acknowledged they would not be using one. The Circuit Court failed to recognize that the documents sought in the Motion to Compel directly related to the accounting issues and conduct of all Defendants by their use of the embezzled funds, however. Thus, the Petitioners' experts did not have all the information they needed to produce their opinion. Moreover, the manner in which the Circuit Court did so was devoid of respect for counsel; though the Circuit Court indicates the filing was unclear, the Motion clearly states the material sought. Compare Appendix 322 with Appendix 522-523. Denying the Petitioners the ability to compel necessary information when they have complied with the requirements of the Rules of Civil Procedure is an abuse of discretion. Doing so with a lack of respect for members of the Bar is something worse. Accordingly, this Court must rectify the continued abuse engaged in by the Circuit Court and reverse the Orders striking the Petitioners' expert and granting summary judgment to the Respondents. Allowing these abuses to stand constitutes a deprivation of due process.

The Fifth Amendment to the Constitution of the United States of America declares that no one shall "be deprived of life, liberty, or property, without due process of law." The West Virginia Constitution similarly demands the same adherence: "No person shall be deprived of life, liberty, or property, without due process of law." Constitution of West Virginia, Article 3, Section 10. Despite these fundamental pillars of our legal system, the Circuit Court repeatedly refused to allow the Petitioners to present their motions. Appendix 85 and Appendix 18. Instead, the Circuit Court begins each hearing with some

insidious comment before peppering counsel with questions. Appendix 199,[4] 319, and 526. Many of the Petitioners' requests for court intervention or action and even responses to opposing motions have met similar fate—they have been ignored.

This Court, when considering whether the dismissal of a complaint without a hearing was appropriate, embarked on a thorough discussion of due process requirements:

"As we stated in *Litten v. Peer*, 156 W.Va. 791, 797, 197 S.E.2d 322, 328 (1973), "[i]t has always been the policy of this Court to protect each litigant's day in court." It is equally true, of course, that "the fundamental requirement of due process is an ***opportunity to be heard*** upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." *Anderson Nat. Bank v. Luckett*, 321 U.S. 233, 246, 64 S. Ct. 599, 88 L. Ed. 692 (1944). Moreover, W.Va. Const. Art. III, § 10, provides: "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." In Syllabus Point 1 of *Simpson v. Stanton*, 119 W.Va. 235, 193 S.E. 64 (1937), the West Virginia Supreme Court of Appeals held that:

"Section 10, article 3, of the Constitution of West Virginia, properly applied, secures to a litigant a reasonable opportunity to be heard when the processes of the courts are invoked against him; and where that opportunity has been denied by the refusal to grant a reasonable time in which to prepare and file pleadings setting up his defense, this court

[4] The Circuit Court belabors an issue regarding filing of the Petitioners' responsive Motion though the Circuit Clerk entered it on the day of the hearing and a successful facsimile was provided to the Court and Counsel on July 8, 2021—that was the response upon which the Respondents' Reply was based.

will not pass on the merits of the case until opportunity is given to file such pleadings in the court of original jurisdiction, and a hearing had thereon in said court.

In Syllabus Point 2 of *Stanton*, this Court further explained, "The due process of law guaranteed by the State and Federal Constitutions, when applied to procedure in the courts of the land, requires both notice and ***the right to be heard***."

"The idea that due process of law prohibits all courts from denying a defendant the right to present a defense to a cause of action is something firmly rooted in our jurisprudence. In *State ex rel. Graves v. Daugherty*, 164 W.Va. 726, 727, 266 S.E.2d 142, 143 (1980), we stated that '[i]t is fundamental to our constitutional structure that parties will be treated fairly by government and courts.'" *In re Gazette FOIA Request*, 222 W. Va. 771, 777-78, 671 S.E.2d 776, 782-83 (2008), emphasis added.

Presumably, the same right to be heard extends to a Plaintiff's ability to defend a motion brought against it. If so, the Circuit Court has abused its discretion by summarily revoking that opportunity from the Plaintiffs and victims. Such conduct acts to annihilate an expectation for the fundamental rights constitutionally protected by the Fifth and Fourteenth Amendments to the Constitution of the United States of America and Article III, Section Ten of the Constitution of West Virginia.

Consider counsel's plea for due process:

"Judge, we are only asking this Court to listen. That is all. We're asking this Court to hear this matter. We are not asking the Court to do anything crazy, anything weird, anything like that. All we want is this Court to hear the case on its merits. We are tired of being in here, fighting, wasting everybody's time over procedural issues. We want the Court to hear the evidence in this matter, we want the jury to hear the evidence in this

matter, and we want to move on. Nobody wants that more than I do, even though Mr. Levicoff has indicated otherwise. I'd like this case to be behind us and we can't move on until this Court hears the facts. Thank you, Judge." Appendix 212.

By ignoring the mandates of our rules of procedure and refusing to listen to the Petitioners, this matter has been made excruciatingly more difficult and infinitely unfair. Accordingly, this Court should reverse the Circuit Court's ruling that excluded the expert witnesses, reverse the improper grant of summary judgment, allow the Plaintiffs to pursue their claim for justice by remanding the case for proceedings consistent with our laws, and provide any other relief that this honorable Court deem necessary.

CONCLUSION

For the foregoing reasons, this Court should reverse the Circuit Court of Monongalia County, West Virginia and remand the matter for proceedings consistent with the laws of this State.

Signed:
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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 2022, true and accurate copies of the foregoing **Petitioners' Brief** and the accompanying Appendix were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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