IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0685

STATE OF WEST VIRGINIA ex rel. CHRISTOPHER CHAFIN, M.D. and CHEAT LAKE URGENT CARE, PLLC,

Petitioners,

v.

THE HONORABLE SUSAN B. TUCKER, Judge of the Circuit Court of the Seventeenth Judicial Circuit, **DAVID ANDERSON, BRIAN BOAL, BOAL & ASSOCIATES, P.C., GILLEN ENTERPRISES, LLC, AFFORDABLE CONTRACTORS, LLC, and BUILD IT, LLC,**

Respondents.

FROM THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 16-C-547

PETITION FOR WRIT OF PROHIBITION

Counsel for Petitioners,

Jason Wingfield (WV Bar #12582)
James A. Gianola (WV Bar #1378)
Counsel of Record

Gianola, Barnum, Bechtel & Jecklin L.C.
1714 Mileground Rd.
Morgantown, WV
(304) 291-6300
jwingfield @gbbjlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitution

ASSIGNMENTS OF ERROR

1. The Circuit Court clearly erred when it presumed that Plaintiff violated the West Virginia Rules of Civil Procedure by not producing an expert report during discovery.

2. The Circuit Court exceeded its legitimate powers by summarily barring Plaintiff's expert from trial without any evidence of prejudice to Defendant.

3. The Circuit Court exceeded its legitimate powers by summarily barring Plaintiff's expert from trial without any finding that Plaintiff had violated a Court order.

4. The Circuit Court exceeded its legitimate powers by summarily striking Plaintiff's expert disclosure before a date for trial was even set.

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 "Plaintiffs.") 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 "Defendants.")

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.

The underlying case focuses both on Respondent David Anderson's embezzlement as well as Respondent Boal and Boal & Associates P.C.'s deviation from

the industry standard of care in providing accounting and tax services for Cheat Lake Urgent Care, PLLC in addition to those Defendants' failure to property file and pay withheld taxes for benefit of Plaintiff Chafin.

Filed in late 2016, the underlying case has been marred by a series of extensive delays. For example, the original Circuit Court judge recused himself more than six months into the matter. Other delays include the Circuit Court not entering an Agreed Order amending the Complaint in the underlying matter for more than a year. [A.R. 442-443, 474-475] Despite numerous requests and a subpoena years ago, records which Defendants consider vital have still not been produced by the Internal Revenue Service. [A.R. 60-61]

This petition, however, deals solely with the issue of Plaintiffs' expert disclosures.

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. [A.R. 3-14]

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. [A.R. 31-33]

On June 4, 2019, Defendants provided their own expert witness disclosures, which consisted of a single paragraph and largely mirrored Plaintiffs'. [A.R. 16-29]

On June 19, 2019, the Court entered an Amended Scheduling Order stating, in part, that deadline for the "Party with burden of proof to supplement trial experts' opinion" as August 9, 2019. [A.R. 50-52] On August 8, 2019, a hearing was held in this matter to discuss various discovery disputes.[1] 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." [A.R. 200:15-21] 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. [A.R. 54-56] On August 15, 2019, a subpoena was issued to the Internal Revenue Service in an attempt to retrieve records Defendants say were vital to this case. [A.R. 60, 194] This subpoena was issued pursuant to Respondent Tucker's *sua sponte* directive. This directive is clearly in contravention of the supremacy clause of the Constitution of the United States of America. Furthermore, this directive came immediately after Respondent Tucker required the Plaintiffs to disclose correspondence to the Internal Revenue Service,

[1] At this hearing, based solely upon the fact Plaintiffs' had produced newly discovered documents previously hidden by Respondent Anderson, Respondent Tucker insinuated in open court that colleagues of Petitioners' counsel had acted inappropriately. [A.R. 194:22 – 195:3] Similarly, Jason E. Wingfield, Esq. was admonished for providing said documents to the Defendants even though, while numerous, these documents were relevant to the requests made in discovery and not disclosed as a means of gamesmanship as accused by the Court. [A.R. 191:17 – 192:20]

essentially work product, with the intent that Plaintiffs' Counsel demonstrate it had not been dilatory. [A.R. 364-379]

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. [A.R. 523-527] On November 7, 2019, Counsel for the Boal Defendants wrote in response that the report was untimely. [A.R. 703]

On March 2, 2020, counsel for the Plaintiff, 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. [A.R. 704-712] 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.[2]

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

On March 17, 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, Defendants filed a Motion in Limine to Strike Plaintiffs' Experts. [A.R. 34-129] On March 11, 2020, Defendants filed their Motion for Summary

[2] Boal Defendants produced Quickbooks files for Cheat Lake Urgent Care, PLLC and also indicated it possessed the same for Defendant Affordable Contractors, LLC. Affordable Contractor, LLC has objected to the disclosure and Respondent Tucker has refused to compel production.

Judgment, based on their assumption that the Respondent Tucker would strike the Plaintiffs' experts. On March 12, 2020, Defendants filed their Preliminary Fact Witness List in this case.

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 Defendant Anderson's Motion to be Released from Home Confinement. [A.R. 212 – 266] 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. [A.R. 213:8 – 214:1, 217:20-218:7] Immediately upon court being called into session, Mr. Jecklin became a proxy "punching bag" for Mr. Wingfield. [A.R. 215:1 – 216:19] Respondent Tucker eventually sent Mr. Jecklin away from the hearing, without ever hearing the Petition filed by the victim, to ascertain the status of certain facts from the Circuit Clerk. [A.R. 215:16-19, 217:2-14, 218:9-10] Thereafter, Respondent Tucker and Raymond Yackel, Esq., (counsel for Respondent Anderson in both cases) engaged in an *ex parte* discussion regarding Defendants' belief that there were statute of limitations issues with this instant matter and at which time Respondent Tucker repeatedly opined that she would ensure that the victim—who "wanted money"—became inclined to resolve this suit.[3] [A.R. 225:20-21, 227:23-228:8, 228:22 – 233:20]

On August 3, 2020, the Circuit Court held a hearing in this matter on Defendants' various motions to strike and to exclude Plaintiffs' experts. [A.R. 130-177] At that hearing, Defendants did not provide any evidence of prejudice, nor did they explain why they had

[3] As shown below, this was not the only time the Circuit Court questioned the motivations or character of Petitioners in open court.

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 mostly of the Court's interpersonal relationships with Counsel. *Id.* In fact, Respondent Tucker did not want to address the disingenuous averments made by defense Counsel in written motions, unless she was asserting negativity towards Mr. Wingfield. 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 mere "money."[4]

The next day (not days later; merely hours), the Court issued its Order, summarily granting Defendants' Motion to Strike Plaintiffs' Expert Charles Russo, which Plaintiffs now contend is in excess of her legitimate authority. [A.R. 1-2]

SUMMARY OF ARGUMENT

Despite its age, due to numerous delays, this case is still not ready for trial. Not a single deposition has been taken. Important IRS records, requested and subpoenaed years ago, have still not been provided by the Internal Revenue Service. The trial and pretrial conference in this case have been continued generally and not yet set. A scheduling conference is presently set to establish these on September 20, 2020. There can be no argument, then, that Defendants have suffered any incurable prejudice by the alleged deficiencies in Plaintiffs' discovery disclosures.

Moreover, Defendants and the Circuit Court have operated under some vague notion that the West Virginia Rules of Civil Procedure require Plaintiff to provide a

[4] This comment echoed the sentiment that she shared during the *ex parte* communication she engaged in with Mr. Yackel. [A.R. 227:23 – 228:8, 232:19 – 233:20]

detailed expert report. But the rules do not have such a requirement and if the Circuit Court wished to impose one on Plaintiffs, it must do so in an Order stating so.

Essentially, Respondent Tucker has denied the Plaintiffs due process as guaranteed by the West Virginia Constitution and the Constitution of the United States of America.

Finally, the lower court's ruling was not based on law or equity, but rather personal animus towards Plaintiffs' counsel and Plaintiffs.

For those reasons, the Circuit Court has exceeded its legitimate authority when it summarily excluded Plaintiffs' expert from trial.

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.

ARGUMENT

A. Standard for Issuance of Writ

"The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code §53-1-1.

In determining whether to entertain and issue a writ of prohibition for cases not involving an absence of jurisdiction but only where the lower tribunal exceeds its legitimate powers, the Court should examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief;

(2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. *State ex rel. Tallman v. Tucker,* 234 W. Va. 713, 716 (2015) (quoting *State ex rel. Hoover v. Berger,* 199 W. Va. 12, Syl. Pt. 4 (1996)).

These factors are guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. *Id.* Although all five factors need not be satisfied; it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight. *Id.* Also, these factors may help guide this Court in determining whether to grant an interlocutory appeal. *State ex rel. Krivchenia v. Karl,* 215 W. Va. 603, 607 (2004).

The application of these factors to the matter at hand reveals that this Court has the authority, indeed the purview, to issue a writ prohibiting the enforcement of Respondent Tucker's August 4, 2020 Order.

B. 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 (Workman, C.J. concurring). 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. For example, Defendants' Motion in Limine to preclude Plaintiffs' 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 [Plaintiffs] intend to introduce through one or more experts." [A.R. 40] 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. [A.R. 138:6-14] Plaintiffs note the 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.

[A.R. 142:7-143:2]

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. *State ex rel. W. Va. DOT v. Reed*, 228 W. Va. 716, 722-23 n.7 (2012) Likewise, there is no order from the Circuit Court in this matter mandating an expert report. *See Gentry v. Mangum,* 195 W. Va. 512, 522-23 (1995) To exclude Plaintiffs' witnesses because they have failed to meet a vague, unknown standard for an unrequired report exceeds the purview of the Circuit Court.

For that reason, this Court should enter a writ prohibiting the Circuit Court from excluding any of Plaintiffs' experts.

C. There Is No Evidence Defendants Have Been Prejudiced

Because Defendants have not, and cannot, show that they have been prejudiced by Plaintiffs' expert disclosures, it is inappropriate for the Circuit Court to summarily strike Plaintiff's proposed expert from trial.

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).

For these reasons, this Court has held that the prejudice against a party and its ability to cure such prejudice are primary factors when considering whether to exclude evidence:

> 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).

Here, the Circuit Court below has not provided any analysis into any of the above-mentioned factors to be considered when excluding evidence. Defendants' Motion to Strike has generally alleged prejudice and surprise, arguing that Plaintiffs' report is "untimely" and "deficient." But even assuming that Defendants' allegations meet the first *Prager* factor, Defendants have not alleged, *and cannot reasonably allege,* that such a prejudice cannot be easily and completely cured. Plaintiffs' disclosure was more than two months prior to the filing of this brief and a date for trial has not even been set in this matter. As for bad faith, though Defendants have suggested as much, Plaintiffs initially provided Defendants with the names, backgrounds, and brief summaries of the experts in May of 2019 and though Defendants have not deposed these experts, Plaintiffs supplemented their disclosures to try to ameliorate Defendants claims and have invited Defendants to depose these experts. Such facts show that any bad faith alleged by Defendants', even if conceded by Plaintiffs, is *de minimis* 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 is self-evident.

Simply put, neither Defendants nor the Circuit Court has ever bothered to address how Defendants have been prejudiced by expert disclosure months prior to trial while Defendants are allowed to provide late witness lists, while IRS records Defendants (and the Court) deemed absolutely vital to this case have not been produced, and while Defendants' expert disclosures to-date are substantially less detailed than Plaintiff's. Neither the Court below nor Defendants have bothered to address why amending

Defendants' Answer, raising new, fact-based, defenses in August 2020 is acceptable and non-prejudicial to Plaintiffs while expert disclosures in June 2020 are somehow beyond the pale. These nuances and equities are washed away in a terse "GRANTED," leaving Plaintiffs little recourse but to file this petition.

Therefore, because the Circuit Court has not found—and Defendant cannot show—that they have suffered any irreparable harm, the Court exceeded its legitimate powers when it summarily excluded Plaintiffs' expert.

For that reason, this Court should enter a writ prohibiting the Circuit Court from excluding any of Plaintiffs' experts.

D. The Circuit Court's Ruling Is Based on Personal Animus

The Circuit Court has a long history of prejudicial conduct towards the law firm representing the Plaintiffs, Gianola, Barnum, Bechtel & Jecklin, L.C., which has now culminated in this biased decision. This is not the first time Respondent Tucker has issued an adverse ruling that exceeds her legitimate authority.

In *Rice Rentals, Inc. v. Accelerated Construction*, Respondent Tucker dismissed, WITH PREJUDICE, a complaint based upon a simple Rule 12 motion to dismiss. It was not until after her law clerk was confronted regarding the illegality of the decision that Respondent Tucker "sua sponte" amended the dismissal order to reflect WITHOUT PREJUDICE. [A.R. 380-382]

Similarly, concurrent with the instant matter, Respondent Tucker terminated Petitioners' counsel's firm's role in administering the Court Receivership, without cause. A game played every time Respondent Tucker becomes the Chief Judge of this Circuit: she terminates this firm's title as Court Receiver with a litany of complaints, then, while

having technically terminated the firm as receiver, she continued to demand the firm continue administering the accounts and funds for the Court receiver, all without providing any guidance to the firm.[5] [A.R. 383 – 386]

Such animus is reflected in Petitioners prior recusal request [A.R. 267 – 272] and throughout the transcripts of this matter and the companion criminal matter. For example, during the August 8, 2019, hearing, the Court baselessly inquired whether the firm's leadership was the influence behind a discovery production. [A.R. 194:22-195:3] A similar game is played by—regardless of who appears at a hearing—questioning why a certain attorney is present and not another. [*Compare* A.R. 213:8-9 (wondering why Mr. Wingfield was not present at a hearing) with A.R. 131:6-7 (at hearing less than two months later, wondering why Mr. Wingfield *was* present)]

This animus is translated from the firm to its clients. Early on, Respondent Tucker alleged, without any proof having been presented or claims made, that Petitioners, the victims of Respondent Anderson's embezzlement, had "unclean hands"; an embarrassing comment that was republished by the Dominion Post. [A.R. 275 – 276] Even then, she refused to recuse herself when asked to do so. [A.R. 267 – 272]

Examples, both on and off the record, would easily exceed the page limit established by the Rules of Appellate Procedure.

The ultimate display of non-judicial animus lies in the obvious discrepancies between how the Parties are treated: it is far too late for Plaintiffs' expert disclosures,

[5] Petitioners' note Respondent Tucker has appointed Raymond Yackel, Esq. as replacement. Raymond Yackel, Esq. is the attorney for the Anderson Defendants and the attorney with whom Respondent Tucker engaged in *ex parte* communications with regarding the merits of this matter.

but not too late for Defendants to raise new defenses; likewise Defendants have not been compelled to produce reports or even reply to discovery. [A.R. 133:4-134:13, 161:13-15] The missing IRS records that were so vital to this case (and for which Plaintiffs were unfairly excoriated) are now no longer germane. Such animus should neither preclude justice for litigants or a fair business opportunity for law firms. Use of personal bias and animus as the basis in which she grounds legal decisions is a departure from professional decorum established by judicial canons on ethics and is an obvious use of illegitimate authority.

E. The Circuit Court's Ruling Lacks Basic Fairness

As noted previously, there are five factors to consider in determining whether Respondent Tucker exceeded her legitimate authority such that a writ prohibiting enforcement of her order will lie:

(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief;

(2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;

(3) whether the lower tribunal's order is clearly erroneous as a matter of law;

(4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and

(5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Working somewhat out of order, this Court can be confident that the issue presented is neither new nor an issue of first impression. In fact, this Court has issued a

writ and granted the SAME relief sought here against the SAME Respondent for the SAME transgression about five (5) years ago. [A.R. 515-522] Accordingly, the fourth factor is triggered because Respondent Tucker's orders collectively manifest a persistent disregard for procedural law.

Without this Court's relief and intervention, a direct appeal will likely cure the error complained of, but by then at what cost and delay? The cost and delay likely to result may be prohibitively excessive for the Petitioner. Thus, this Court's immediate attention to Respondent Tucker's error is necessary.

Finally, the third factor is present and likely controlling. As the recitation of law above clearly demonstrates, Respondent Tucker's ruling was erroneous on its face. There are no findings that support the conclusion that the Plaintiffs' experts should be excluded. Substantively, the order is erroneous because there was no prejudice and no basis for exclusion, other than because the experts expressed an opinion that conflicted with the Defendants' theory.

Respondent Tucker's erroneous ruling condemns the twenty-plus thousand dollars expended on expert reports and eviscerates a case with millions of dollars at stake. If the rules are here to prevent trial by ambush, who could have foreseen that Respondent Tucker would destroy such a controversy?[6] Such a result is not fair. Consequently, this Court should grant the writ prayed for, prohibit the enforcement of Respondent Tucker's order and allow this injured doctor to seek the relief he is entitled to.

[6] It is noted here that Respondent Tucker personally accepted Defendant Anderson's guilty plea in 14-F-49 and, thus, is aware of the general factual basis in the underlying matter.

F. The Circuit Court Ruling's Harm Is Not Correctable On Appeal

Plaintiffs will be prejudiced if they are forced to proceed without the benefit of their expert witness. Specifically, Defendants have already sought summary judgment based on Plaintiffs' supposed lack of expert opinions. [A.R. 416-420] Even if summary judgment is denied, Plaintiffs will be forced to incur the expense of a trial on accounting malpractice without the ability to properly establish the relevant standards of care.

Moreover, any successful appeal by Plaintiffs' would simply cause the matter to be remanded to circuit court for re-trial with the inclusion of testimony by Plaintiffs' experts. In order to avoid duplicative expenses, time, and inconvenience, Plaintiffs' submits that it would be most prudent for this matter to be resolved prior to trial.

G. Respondent Tucker has denied Due Process to the Plaintiffs.

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, Respondent Tucker repeatedly refused to allow the Petitioners to present their motions before the circuit court. Instead, Respondent Tucker begins each hearing with some insidious comment before peppering counsel with questions. 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), we 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 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*, we 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, Respondent Tucker exceeded her legitimate authority 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. By ignoring the mandates of our rules of procedure and denying Plaintiffs an opportunity to be heard at hearings, Respondent Tucker has exceeded her legitimate powers. Accordingly, this Court should reverse the Circuit Court's ruling that excluded the expert witnesses, 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. Granting the Writ of Prohibition and enjoining the enforcement of the Respondent Tucker's is the only relief that can undo the prejudice caused by the Circuit Court's illegitimate abuse of power.

H. The Circuit Court Should Be Stayed.

This matter goes to the heart of the underlying case, and, as such, and especially given the Circuit Court's sudden desire to resolve the matter, a stay pending this this Court's consideration of the Petition would be proper both to ensure fairness in the Circuit Court below and to ensure that the Parties and Court do not spend time and money litigating a case that may change based upon the ruling of this Court.

CONCLUSION

For the foregoing reasons, this Court should enter a writ prohibiting the Circuit Court from excluding any of Plaintiffs' experts.

Signed: _____

Jason Wingfield (WV Bar #12582)
Giarola, Barnum, Bechtel & Jecklin, L.C.
1714 Mileground Road
Morgantown, West Virginia 26505
(304) 291-6300
jwingfield@gbbjlaw.com

Counsel of Record for Petitioner

VERIFICATION

I, Jason Wingfield, swear that to the best of my knowledge, the allegations, averments, and statements contained within this Petition are true and correct to the best of my knowledge.

Signed: _____

Jason Wingfield (WV Bar #12582)

Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2020, true and accurate copies of the foregoing **Petitioner's 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:

Avrum Levicoff, Esq.
4 PPG Place
Suite 200
Pittsburgh, PA 15222

Counsel for Respondents Brian Boal, and Boal & Associates, P.C

Hon. Susan Tucker
75 High St.
Suite 32
Morgantown, WV 26505

Respondent

Raymond Yackel, Esq.
162 Chancery Row
Morgantown, WV 26505

Counsel for Respondents David Anderson, Gillen Enterprises, LLC, Affordable Contractors, LLC, and Build It, LLC

Signed: _____

Jason Wingfield (WV Bar #12582)

Counsel of Record for Petitioner