IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0311

(Underlying Mingo County Civil Action No. 18-C-142*)*

MINGO COUNTY BOARD OF EDUCATION,

Petitioner/Defendant,

v.

HONORABLE MIKI THOMPSON, Judge of the Circuit Court of Mingo County, West Virginia

Respondent.

VERIFIED PETITION FOR WRITS OF PROHIBITION AND MANDAMUS

PREPARED BY:

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I. QUESTION PRESENTED

Whether the Respondent Circuit Court (Judge Miki Thompson presiding) abused its discretion and committed clear error when it declined to enter an order addressing Defendant's dispositive motions raising immunity, and instead reopened discovery for Plaintiff to depose fact and expert witnesses, required a second mediation, and required Defendant to pay the costs of mediation and depositions, while providing an implausible and inaccurate explanation for imposition of said sanctions, after Defendant timely disclosed fact witnesses in accordance with the Court's *Time Frame Order*, and after Plaintiff neglected and declined to depose any fact and expert witnesses during the case's pendency.

II. STATEMENT OF THE CASE

Petitioner/Defendant (hereinafter Defendant) posits that the following chronology is pertinent to answering the question presented. Plaintiff filed his *Complaint* on November 2, 2018, alleging a negligence claim against the Defendant Mingo County Board of Education. Compl., App. 1–4. Plaintiff alleges he fell in a parking area outside the football stadium at Mingo Central High School on November 26, 2016.

Defendant sent Plaintiff its first set of discovery requests on December 13, 2018. App. 14. Plaintiff served his responses to Defendant's discovery requests on February 4, 2019, three weeks after the responses were due. App. 17; *see* App. 16. In response to Defendant's request for "the name, address and telephone number of every person known to Plaintiff to have any knowledge of the events surrounding the incident on November 26, 2016, and the related events prior and subsequent thereto as alleged in the *Complaint*," Plaintiff's responses listed six individuals (Jessica Cooper, Tara Smith, Linda Curry, Mark Curry, Diana Owens, David Owens). Pl's Resp. to Int. No. 2, App. 17–18. Plaintiff's interrogatory responses also included

the following:

> 16. State the name, address and telephone number of every witness Plaintiff intends to call for testimony at trial.
> ANSWER: OBJECTION. This Interrogatory is premature. Plaintiff reserves his right to supplement his response hereto as discovery progresses and according to the Court's Scheduling Order in this matter. Without waiving said objection, see Plaintiff's response to Interrogatory No. 2.
>
> 17. Please state, with particularity, the sum and substance of testimony expected of the witnesses identified in the answer to the preceding interrogatory.
> ANSWER: OBJECTION. This Interrogatory is premature. Plaintiff reserves his right to supplement his response hereto as discovery progresses and according to the Court's Scheduling Order in this matter.

App. 24. Defendant also objected to Plaintiff's similar request on the same grounds. Def's Ans. to Int. No. 29, App. 40–41.

Defendant deposed the persons with knowledge identified in Plaintiff's discovery responses. On September 5, 2019, Defendant deposed Plaintiff; on May 15, 2020, Defendant deposed Dana Owens, Eric Curry, Jessica Cooper, Linda Curry, and Mark Curry. Defendant also deposed two of Plaintiff's treating doctors: on February 17, 2020, Defendant deposed Dr. Jack Steel; on October 8, 2020, Defendant deposed Dr. James Jensen. App. 45–47, 52–76, 79–80.

By letter dated October 21, 2019, Plaintiff sent Defendant a *Notice of Rule 30(b)(7) Deposition of Designated Agent of Defendant and Requests for Production of Documents* (hereinafter *Rule 30(b)(7) Notice*). App. 48–52. Defendant remained in touch with Plaintiff's counsel's office through December 2019 and advised Plaintiff's counsel on December 23, 2019, that Defendant was struggling to identify an individual who could serve as a Rule 30(b)(7) representative, considering the football stadium was built so long ago (it opened in 2011 and the property it sits on was gifted to the Board in 2006). Plaintiff never followed up and never sought

any dates for the 30(b)(7) deposition. Plaintiff submitted no good faith letter; and filed no motion to compel. Defendant was left to presume that Plaintiff was no longer pursuing the deposition.

The Court entered its *Time Frame* Order on August 11, 2020, setting discovery to be complete and mediation to occur 60 days before trial, or December 3, 2020, and setting dispositive motions to be filed 45 days before trial, or December 18, 2020. App. 78–79.

The *Time Frame Order* also required Plaintiff to provide Defendant a witness list and an expert witness list 120 days before trial and Defendant to provide Plaintiff with its witness list and expert witness list 10 days after that. App. 78–79. Defendant received Plaintiff's *Fact Witness List* and Plaintiff's *Expert Witness List* on October 8, 2020, and Defendant served its *Fact Witness Disclosures* and *Expert Witness Disclosures* within ten days, on October 16, 2020. App. 82–92. Defendant supplemented its *Expert Witness Disclosures* on January 8, 2021, producing Dr. David Soulsby's expert report. App. 219.

Before and after the discovery deadline, Plaintiff never sought to depose any of Defendant's fact witnesses, and Plaintiff never sought to depose Defendant's expert witness.

Defendant filed a *Motion for Summary Judgment on Liability* and a *Motion for Summary Judgment on Damages* on December 14, 2020, raising immunities under W. Va. Code §§ 29-12A-4 and 29-12A-5 that bar Plaintiff's claims, and demonstrating Plaintiff's lack of evidence to (1) overcome Defendant's immunities and (2) support the elements of his claims. Plaintiff filed a *Motion for Partial Summary Judgment* on January 5, 2021. App. 120–155. The Circuit Court indicated during a pretrial conference on January 14, 2021, that it would deny the dispositive motions. However, the Circuit Court has entered no order, and the parties have submitted proposed orders. Prop. Orders, App. 286–337.

Despite discovery having closed, the parties agreed that Defendant could depose Plaintiff's expert, Ronald Eck, on December 21, 2020, at 10 a.m. App. 185. Plaintiff did not produce Eck's expert report until the afternoon December 18, 2020, the Friday before the deposition. App. 188–201. Despite the mediation deadline having passed, the parties agreed to and did mediate on January 11, 2021.

At the January 14, 2021, pre-trial conference in this matter, Plaintiff's counsel indicated Plaintiff wished to depose person(s) with knowledge of the items listed in the *Rule 30(b)(7) Notice*, despite never mentioning or inquiring into the status of the *Notice* for over a year. Undersigned counsel contacted Plaintiff's counsel on January 28, 2021, January 29, 2021, and February 1, 2021, to arrange for the deposition(s). Plaintiff responded, "I am a bit perplexed by your email. Are you somehow contending that discovery has not ended?"—despite the fact that the trial date had been canceled and despite the previous agreement to allow Dr. Eck's deposition after the discovery deadline.

The Court scheduled a hearing on pending motions in limine on March 23, 2021. App. 338–339. At the hearing, the Court declined to hear any of Defendant's *Motions in Limine* and opted only to hear Plaintiff's motions, which included Plaintiff's *Motion to Strike Defendant's Expert Witness*, Plaintiff's *Motion in Limine to Exclude the Testimony of any Mingo County Board of Education Agent/Employee Regarding the Parking Area of the Football Facility at MCHS*, and Plaintiff's *Motion to Strike Defendant's Fact Witnesses*.

Plaintiff argued in his *Motion to Strike Defendant's Expert* that Defendant's *Expert Disclosures* were late. App. 216–218. They were not late per the *Time Frame Order*, but were submitted within ten days of Plaintiff's disclosures. *See* Def's Resp. to Pl's Mot. to Strike Def's Expert, App. 263–266; Hr'g Tr., March 23, 2021, App. 352–354. And Plaintiff was no more

prejudiced by receiving Dr. Soulsby's report on January 8, 2021, than Defendant was prejudiced when Plaintiff provided Dr. Eck's report less than a business day before Dr. Eck's deposition. Again, Plaintiff never sought to depose Dr. Soulsby. Nonetheless, the Court ordered,

> THE COURT: Well, I think there's even an administrative order from the Supreme Court to extend deadlines. You know, we're in crazy times right now. I'm going to let them use the expert, but if you choose to depose them I'm going to make the Defendants [sic] pay for all costs and expenses.

Hr'g Tr., March 23, 2021, App. 353–354.

Plaintiff argued in his *Motion in Limine to Exclude the Testimony of any Mingo County Board of Education Agent/Employee Regarding the Parking Area of the Football Facility at MCHS* that Defendant failed to produce any Rule 30(b)(7) representative(s) and therefore should be prohibited from producing any testimony about the parking area. App. 251–253. Again, after abandoning the *Rule 30(b)(7) Notice* for a year and after being presented with opportunity for said deposition, Plaintiff declined. *See* Def's Resp., App. 340–343; Hr'g Tr., March 23, 2021, App. 356–364. Nonetheless, the Court ordered:

> THE COURT: Again, I think the problem is the Supreme Court Orders. They have been very generous with extending deadlines and even Statute of Limitations have been extended, which I didn't think they would do that but they have. But since this is out of the time line - and I've always felt like this is a case that could be mediated and resolved, but, obviously, that's not going to happen. I will allow the Plaintiffs [sic], though, if they want to do the 30(b)6 - 30(b)7 motions - if they want to do any depositions in that regard that they can do so at the Defendant's expense, cost and expenses.

App. R. 358; *see* Order Appointing Mediator, March 25, 2021, App. 371.

Plaintiff argued in his *Motion to Strike Defendant's Fact Witnesses,* that Defendant had previously objected to providing trial witnesses in Defendant's February 20, 2019, discovery responses and that Defendant's fact witnesses were late. App. 259–261. Indeed, Defendant

objected to providing trial witnesses, deferring to a scheduling order, just as Plaintiff had. And Defendant's fact witnesses were not late. Def's Resp., App. 344–347; Hr'g Tr., March 23, 2021, App. 356–364. Plaintiff simply did not pursue any deposition. Nonetheless, the Court ordered:

> THE COURT: I'm going to let them testify, but I'm also going to let you depose them if you want to and the Defendant is going to pay for that and also - well, let's go on and let me hear the other motions. What else?

Hr'g Tr., App. 364. When Defendant attempted to argue its pre-trial motions, which had been set for hearing by the Court, the Court declined to hear Defendant's argument, instead ordering that the parties mediate again and that Defendant pay the costs of mediation:

> THE COURT: - Let me say this. There's probably, after these depositions, if Ms. Chafin [Plaintiff's counsel] decides to do those, there's probably going to be more motions, I would suspect, so let's address all of these at a later date. We have a little bit of time until July, and I'm also going to order after these depositions that - you know, there's probably going to be new information and I'm going to order mediation again at the Defendant's expense.

Hr'g Tr., App. 364–365. In response, Defendant noted his objections for the record and inquired into the Court's reasoning:

> MR. OLDS: Your Honor, I appreciate the ruling of the Court, but with the Defendant having timely disclosed fact witnesses, timely disclosed expert witnesses, I don't see why Defendant would need to pay for these depositions when we've shown in our responses to these motions in limine which we've filed which are before the Court, we've showed that our disclosures were timely. I don't know why Defendant would be sanctioned, or whatever word you want to use.

Hr'g Tr., App. 365. The Court responded:

> THE COURT: I'm just directing you to pay for the mediation and for the depositions. They weren't disclosed timely and I believe that there's a good possibility that that failure to disclose timely could have affected the results of mediation. It needs to be mediated again, so that's what we're going to do and we'll set another hearing.

Id.; Order Appointing Mediator, March 25, 2021, App. 371. Not only did the Court order that Defendant pay for any depositions the Plaintiff elects to pursue, but also, the Court ordered that that second mediation occur before the end of April, that Plaintiff's depositions be had by the middle of May, and that Defendant's motions in limine be heard on June 22, 2021, for the first time. Hr'g Tr., App. 366.

Defendant received the transcript of the March 23, 2021, hearing on April 8, 2021. *See* Hr'g Tr., App. 368. No order from the hearing has yet been entered. *But see* Pl's Prop. Order, App. 369–370.

III. SUMMARY OF ARGUMENT

Despite the baselessness of Plaintiff's pre-trial motions, despite Plaintiff's failure to pursue any deposition in this matter, despite Defendant's timely disclosures and willingness to work with Plaintiff in accommodating depositions, despite there being no motion before the Court to (1) reopen and compel discovery, (2) require a second mediation, and (3) require Defendant to pay for the same, despite numerous mitigating circumstances that warrant sanctions against Plaintiff, and despite Defendant's pending and supported dispositive motions on immunity, the Court *sua sponte* sanctioned Defendant on March 23, 2021, by reopening discovery, ordering that the parties mediate the case again with Defendant paying all mediation costs, ordering that Defendant pay all costs of any deposition that Plaintiff elects to pursue, and refusing to consider or hear Defendant's pre-trial motions—all the while declining to enter an order addressing Defendant's dispositive motions and immunity defenses. The Circuit Court has neglected its duty to enter an order addressing Defendant's immunity. The Court's oral order imposing sanctions is a severe abuse of discretion, clearly erroneous, and damaging to Petitioner in a way that is not correctable on appeal. Absent relief in mandamus and prohibition, Defendant

has no avenue for relief.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the criteria set forth in Rule 19 of the Rules of Appellate Procedure, Petitioner believes that the decisional process would be significantly aided by oral argument, as it would allow the parties to further address the arguments presented in this matter and to respond to questions of the Court regarding issues related to the Circuit Court's clear error, substantial abuse, and overstep of power.

V. STANDARDS OF REVIEW

"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 no jurisdiction of the subject-matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W.Va. Code § 53-1-1; *see also* syl. pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953). In that regard, this Honorable Court, speaking through Justice Cleckley, has held:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will 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 impressions.

Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199, W. Va. 12, 483 S. E. 2d 12 (1996); syl. pt. 2, *State ex rel. State v. Sims*, 240 W. Va. 18, 807 S.E.2d 266 (2017). "These factors are general guidelines that serve as a useful starting point for determining whether a

discretionary writ of prohibition should issue." Syl. pt. 4, *Hoover*, 199, W. Va. 12, 483 S.E.2d 12; syl. pt. 2, *Sims*, 240 W. Va. 18, 268, 807 S.E.2d 266.

The party seeking the writ is not required to satisfy all five factors but "it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syl. pt. 4, *Hoover*, 199, W. Va. 12, 483 S. E. 2d 12; syl. pt. 2, *Sims*, 240 W. Va. 18, 268, 807 S.E.2d 266. Although "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court," in situations where a trial court has exceeded its legitimate powers and there is "no plain, speedy, and adequate remedy in the ordinary course of law" then "the remedy by appeal is usually deemed inadequate" and "prohibition is allowed." *See* syl. pt. 1, *State ex rel. Thrasher Eng'g, Inc. v. Fox*, 218 W. Va. 134, 624 S.E.2d 481 (2005)(holding: "A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court."); *see also Hoover*, 199 W. Va. at 21, 483 S.E.2d at 21 (holding prohibition appropriate where "petitioner has no plain, speedy, and adequate remedy in the ordinary course of law.").

"To entitle one to a writ of mandamus, the party seeking the writ must show a clear legal right thereto and a corresponding duty on the respondent to perform the act demanded." Syl. pt. 1, *Dadisman v. Moore*, 181 W. Va. 779, 384 S.E.2d 816 (1989); syl. pt. 2, *State ex rel. Cooke v. Jarrell*, 154 W. Va. 542, 177 S.E.2d 214 (1970). Traditional use of mandamus has been "to confine an administrative agency or inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *State ex rel. Billings v. City of Point Pleasant*, 194 W.Va. 301, 303, 460 S.E.2d 436, 438 (1995); *State ex rel. McGraw v. W. Va. Ethics Comm'n*, 200 W. Va. 723, 728, 490 S.E.2d 812, 817 (1997). "A writ of mandamus will not issue unless three elements coexist -- (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner

seeks to compel; and (3) the absence of another adequate remedy." Syl. pt. 1, *State ex rel. Billy Ray C. v. Skaff*, 190 W. Va. 504, 438 S.E.2d 847 (1993); Syl. pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969). "When a duty is imposed by law upon a court, a mandamus from a higher court is the proper means to compel the discharge of such duty. When such duty is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance, such duty is ministerial, and a writ of mandamus to compel the performance of such duty will specify the exact mode of performance." *State ex rel. Judy v. Kiger*, 153 W. Va. 764, 767–68, 172 S.E.2d 579, 581 (1970) (quoting S. Merrill, Law of Mandamus § 186 (1892)).

VI. ARGUMENT

A. THIS HONORABLE COURT SHOULD GRANT THE REQUESTED WRITS AS THE CIRCUIT COURT NEGLECTED ITS DUTY TO ENTER AN ORDER ADDRESSING DEFENDANT'S IMMUNITY AND WAS CLEARLY ERRONEOUS AND ABUSED ITS DISCRETION BY SANCTIONING DEFENDANT AND REOPENING DISCOVERY

This Honorable Court should issue the writs because the Circuit Court has a nondiscretionary, ministerial duty to enter a detailed order(s) addressing immunity when it is raised; and the Circuit Court has failed to do so. Instead, the Court *sua sponte* reopened discovery to allow Plaintiff to conduct depositions, required a second mediation at Defendant's expense, and required Defendant to pay for whatever depositions Plaintiff decides to pursue. The Court abused its discretion and was clearly erroneous when it reopened discovery and required a second mediation as (1) no party had requested that discovery be reopened or that a second mediation be had; (2) Defendant timely disclosed its fact and expert witnesses; (3) Plaintiff neglected and declined to depose any of Defendant's witnesses; (4) the Court declined to hear Defendant's pre-trial motions; and (5) the Circuit Court's reasons for these sanctions are

unsupported, inaccurate, and implausible.

i. A Writ Of Mandamus Should Issue Because (1) The Defendant Has A Clear Legal Right To Have Its Immunities Determined And Have Any Improper Denial Of Immunity Addressed On Appeal, (2) The Circuit Court Has A Clear Legal Duty To Enter A Detailed Order Addressing Said Immunities, And (3) Defendant Has No Other Remedy

On December 14, 2020, Defendant filed a *Motion for Summary Judgment on Liability* and a *Motion for Summary Judgment on Damages*, each with supporting memoranda, invoking immunities set forth under the West Virginia Governmental Tort Claims and Insurance Reform Act, specifically at W. Va. Code §§ 29-12A-4, 29-12A-5(a)(1), and 29-12A-5(a)(7). App. 120–155. Plaintiff filed a late response to Defendant's *Motion for Summary Judgment on Damages* on January 8, 2021. App. 239–244. Plaintiff filed a *Motion for Partial Summary Judgment* on January 6, 2021, weeks after the dispositive motion deadline. App. 206–215. Defendant responded to Plaintiff's *Motion for Partial Summary Judgment* on January 8, 2021. App. 226–238. Defendant filed a *Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment on Damages* on January 11, 2021. App. 245–250.

At the January 12, 2021, pretrial hearing, the Court conceded that it had not reviewed Defendant's dispositive motions and therefore moved the hearing to January 14, 2021. On January 13, 2021, Defendant filed *Supplemental Authorities in Support of Summary Judgment per the Open and Obvious Doctrine*. App. 268–275. On January 14, 2021, the Court heard argument on the parties' dispositive motions and indicated that the Court would deny the motions. Thereafter, Defendant submitted proposed orders to the Court addressing the dispositive motions on January 28, 2021. App. 286–327. Plaintiff submitted proposed orders addressing the dispositive motions on February 23, 2021. App. 328–337. The Circuit Court has not entered any order.

This Court has stated in syllabus:

> 2. "A circuit court's denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine." Syl. Pt. 2, *Robinson v. Pack*, 223 W. Va. 828, 679 S.E.2d 660 (2009).
>
> 3. "Although our standard of review for summary judgment remains de novo, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed." Syl. Pt. 3, *Fayette County National Bank v. Lilly*, 199 W. Va. 349, 484 S.E.2d 232 (1997).
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> 4. A circuit court's order denying summary judgment on qualified immunity grounds on the basis of disputed issues of material fact must contain sufficient detail to permit meaningful appellate review. In particular, the court must identify those material facts which are disputed by competent evidence and must provide a description of the competing evidence or inferences therefrom giving rise to the dispute which preclude summary disposition.

Syl. pts. 2–4, *W. Va. Dep't of Health & Human Res. v. Payne*, 231 W. Va. 563, 565–66, 746 S.E.2d 554, 556–57 (2013). Accordingly, the Circuit Court has a clear duty to enter an order deciding a Defendant's immunity, and the Defendant has a clear right to said order so that it may seek appellate relief.

The duty of the Circuit Court and the rights of Defendant are important because immunity must be decided as early as possible; otherwise, immunity is lost if the case is erroneously permitted to go to trial. *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985)); *Nevada v. Hicks*, 533 U.S. 353, 401, 121 S. Ct. 2304, 2332 (2001) (O'Connor, J., Stevens, J., and Breyer, J., concurring); *see Omega v. Davis*, No. 19-0349, 2021 W. Va. LEXIS 145, at 4–53 (Mar. 26, 2021).

Here, the discovery deadline passed, and Defendant's timely motions for summary judgment have been heard by the Circuit Court. In response to Defendant's motions, Plaintiff has submitted no affidavit or other request for additional discovery. *See* W. Va. R. Civ. P. 56(f); *see* syl. pt. 1, *Powderidge Unit Owners Association v. Highland Properties*, 196 W.Va. 692, 474 S.E.2d 872 (1996); *see* Pl's Resps. to Def's Mots. for Summ. J., App. 239–244, 276–283. Likewise, the Circuit Court articulated no reason for additional discovery when it heard the parties' dispositive motions at the January 14, 2021, pretrial hearing. Additional discovery was never mentioned or advocated for at the pre-trial hearing. The issue of immunity is ripe for consideration. Under *Payne*, the Defendant is entitled to an order addressing its immunities so that the Defendant may seek appellate relief. The Court has failed to enter any order addressing Defendant's dispositive motions, which *Payne* clearly requires. Rather, the Court, at a subsequent hearing on motions in limine, reopened and compelled discovery, required a second mediation, and sanctioned Defendant. Hr'g Tr., March 23, 2021, App. 348–368. Defendant has no other adequate relief. A writ of mandamus is proper.

ii. A WRIT OF PROHIBITION SHOULD ISSUE BECAUSE (1) DEFENDANT'S WITNESS DISCLOSURES DID NOT VIOLATE THE COURT'S *TIME FRAME ORDER*, (2) DEFENDANT'S WITNESS DISCLOSURES DID NOT NEGATIVELY IMPACT THE CASE OR JUSTIFY PLAINTIFF'S FAILURE TO PURSUE ANY DEPOSITIONS, AND (3) THE COURT FAILED TO CONSIDER NUMEROUS MITIGATING FACTORS AND EQUITABLE CONSIDERATIONS

Under West Virginia law, "A writ of prohibition is available to correct a clear legal error resulting from a trial court's substantial abuse of its discretion in regard to discovery orders." Syl. pt. 1, *State Farm Mutual Automobile Insurance Co. v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992). Rule 16 of the West Virginia Rules of Civil Procedure indicates that one of the purposes of a scheduling order is to limit the time to complete discovery. W. Va. R. Civ. P. 16(b)(3); *Hinerman v. Rodriguez*, 230 W. Va. 118, 126 n.11, 736 S.E.2d 351, 359 (2012).

Here, the Court substantially abused its discretion and committed clear error by reopening discovery for Plaintiff to conduct depositions at Defendant's expense after Plaintiff did not request this relief and after Plaintiff provided no good reason for his failure to pursue depositions. The Court also substantially abused its discretion and committed clear error by requiring a second mediation at Defendant's expense and refusing to hear or consider mitigating factors as laid out in Defendant's motions in limine, while committing the clear error of failing to enter an order addressing Defendant's immunities. The Circuit Court imposed these sanctions because the Court reasoned that the four-days-late witness disclosures prejudiced Plaintiff at mediation. As explained *infra*, the Circuit Court's explanation is unsupported, implausible, and clearly wrong.

The Circuit Court's sanctions, and reasons for said sanctions, do not comport with West Virginia law. This Court has stated in syllabus:

> 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.

Syl. pt. 1, *Bartles v. Hinkle*, 196 W. Va. 381, 385, 472 S.E.2d 827, 831 (1996). In addition:

> 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.

Syl. pt. 2, *Bartles v. Hinkle*, 196 W.Va. 381, 472 S.E.2d 827 (1996); *State ex rel. Richmond Am. Homes of W. Va. v. Sanders*, 226 W. Va. 103, 106, 697 S.E.2d 139, 142 (2010). Similarly,

> a circuit court must be guided by equitable considerations in formulating appropriate sanctions. First, the circuit court must consider the conduct at issue and explain why the conduct warrants sanction. Obviously, a pattern of wrongdoing may require a stiffer sanction than an isolated incident. . . . Wrongdoing that actually prejudices the wrongdoer's opponent or hinders the administration of justice may demand a stronger response than wrongdoing that, through good fortune or diligence of the court or counsel, fails to achieve its untoward object. Furthermore, there may be mitigating factors that must be accounted for in shaping a circuit court's response.

Hadox v. Martin, 209 W. Va. 180, 186, 544 S.E.2d 395, 401 (2001) (quoting *Cox v. State*, 194 W. Va. 210, 218–219, 460 S.E.2d 25, 33–34 (1995)) (internal quotations omitted). Lastly, this Court has explained:

> we review imposition of sanctions under an abuse of discretion standard. However, as made clear in *Bartles*, this does not mean that we rubber stamp the sanction decisions of trial courts. Instead, we determine whether the trial court acted within its discretion by examining the factual situation in each case to determine if the sanction imposed is fashioned to address the identified harm caused by the party's misconduct.

State ex rel. Richmond Am. Homes of W. Va. v. Sanders, 226 W. Va. 103, 112, 697 S.E.2d 139, 148 (2010) (internal citations and quotations omitted).

Here, despite Defendant's timely witness disclosures, the Court sanctioned Defendant. The Court's broad, sweeping, and unsupported reason for said sanctions was articulated as follows, and only after Defendant respectfully requested an explanation:

> THE COURT: I'm just directing you to pay for the mediation and for the depositions. They weren't disclosed timely and I believe that there's a good possibility that that failure to disclose timely

> could have affected the results of mediation. It needs to be mediated again, so that's what we're going to do and we'll set another hearing.

Hr'g Tr., March 23, 2021, App. 365.

Here, the Circuit Court failed to articulate any sound basis for the issuance of its sanctions. Rather, the Circuit Court speculated that the disclosures prejudiced Plaintiff at mediation, but Plaintiff never asserted as much in any motion or at the March 23, 2021, hearing. The mediation occurred on January 11, 2021—three months after Defendant served its witness disclosures. Plaintiff never argued that receiving the disclosures on October 16, 2020, rather than October 12, 2020, hindered Plaintiff from deposing any witnesses between October 2020 and January 2021. *See* Pl's Mots., App. 216–218, 251–253, 259–262. Plaintiff never argued that Defendant's disclosures prejudiced Plaintiff at mediation. *See id.*; Hr'g Tr., App. 348–368. Thus, the Court's sanctions were not fashioned to address any actual, identified harm.

Equally erroneous, the Circuit Court accepted Plaintiff's inaccurate argument that Defendant's *Witness Disclosures* were four days late; Plaintiff argued that Defendant's *Witness Disclosures* should have been filed on October 16, 2020, rather than October 12, 2020, and Plaintiff failed to account for the fact that Defendant received Plaintiff's disclosures October 8, 2020—within ten days prior of filing Defendant's disclosures. *See* Pl's Mots., App. 216–218, 251–253, 259–262; Def's Resps., App. 263–267, 340–347. Defendant's fact and expert witness disclosures were timely, and submitted within ten days of receiving Plaintiff's disclosures, which is what the *Time Frame Order* required.

Under Rule 37 of the West Virginia Rules of Civil Procedure, sanctions are allowed only if a motion to compel is granted or a party fails to comply with a court order. Under Rule 37(a), a party whose motion to compel is granted may be awarded sanctions in the form of attorney fees

related to said motion. W. Va. R. Civ. P. 37(a)(4)(A). Under Rule 37(b), sanctions may be warranted for a party's failure to comply with a court's order or for a counsel's egregious pattern of neglect. *See, e.g.*, *Woolwine v. Raleigh Gen. Hosp.*, 194 W. Va. 322, 328 n.8, 460 S.E.2d 457, 463 (1995). However, "[c]onsiderations of fair play may dictate that courts eschew the harshest sanctions provided by Rule 37 where failure to comply is due to a mere oversight of counsel amounting to no more than simple negligence." *Bell v. Inland Mut. Ins. Co.*, 175 W. Va. 165, 173, 332 S.E.2d 127, 135 (1985) (internal citation omitted). In all cases, "[b]oth Rule 16(f) and 37(b) of the Rules of Civil Procedure allow the imposition of only those sanctions that are 'just.'" *Bartles v. Hinkle*, 196 W. Va. 381, 390, 472 S.E.2d 827, 836 (1996).

Here, no motion before the Circuit Court sought to compel any discovery; no motion before the Circuit Court sought any of the sanctions imposed by the Court; and Defendant's disclosures did not violate any order. As discussed, Defendant's disclosures were timely. Nonetheless, accepting Plaintiff's allegation that the disclosures were four days late, the *de minimus* delay did not evince a pattern of any wrongdoing, and did not negatively impact the case. Moreover, the Court failed to consider prevalent mitigating circumstances. Plaintiff offered no reason why Plaintiff could have only pursued depositions if Defendant's disclosures were made four days earlier on October 12, 2020. Plaintiff neglected to pursue any depositions since the case was filed in 2018. Plaintiff never filed any motion to compel and never requested leave to pursue depositions.

After discovery closed and as few as one day before and one day after the January 12, 2021, pretrial hearing date, Plaintiff filed motions to strike all Defendant's witnesses and testimony. *See* Pl's Mots., App. 216–218, 251–253, 259–262. At the pretrial hearing, the Court canceled the trial date, and Plaintiff indicated that Plaintiff intended to pursue a Rule 30(b)(7)

deposition. Defendant thereafter contacted Plaintiff's counsel to arrange for the Rule 30(b)(7) deposition as Defendant had no previous indication that Plaintiff was pursuing its October 2019 *Rule 30(b)(7) Notice*. For instance, after December 2019, Plaintiff never inquired about or moved to compel the Rule 30(b)(7) deposition, and when the parties discussed setting Plaintiff's expert deposition after the discovery deadline in December 2020, Plaintiff never mentioned wanting to pursue any deposition. After the pretrial hearing, with the trial having been cancelled and with the parties having previously agreed to allow a late deposition and set mediation after the *Time Frame Order* deadlines, Plaintiff declined Defendant's offer to accommodate a 30(b)(7) deposition and continued to neglect pursuing the Rule 30(b)(7) deposition. *See* Hr'g Tr., App. 356–358. Then, on March 23, 2021, Plaintiff argued that Defendant's witnesses should be stricken because Defendant failed to allow a 30(b)(7) and Defendant's witness disclosure was late. Hr'g Tr., App. 354–355. As discussed, the Court then sanctioned Defendant by compelling discovery and a second mediation and requiring Defendant to pay for it all, while refusing to hear, consider, or rule on any of Defendant's pre-trial motions and without entry of any order addressing Defendant's immunities. The sanctions are severely unjust, a substantial abuse of discretion, and issued without consideration of numerous mitigating circumstances.

In addition to the aforesaid mitigating circumstances, the Court refused to consider other mitigating circumstances as laid out and supported in Defendant's motions in limine. Defendant's motions chronicle the following: Plaintiff produced his expert's report less than one business day before the expert's deposition despite having received it from said expert days before; Plaintiff, his counsel, and his expert inspected Defendant's property without any notice or request to Defendant in violation of Rule 34; Plaintiff's expert's opinions rely on said unnoticed inspection; Plaintiff produced materials that Plaintiff's expert relied on *after*

Defendant deposed Plaintiff's expert; Plaintiff produced photos of Plaintiff's alleged injury two years after Defendant requested the same and after the discovery deadline; Plaintiff disclosed treating doctors two years after Defendant requested the same and after the discovery deadline; Plaintiff failed to depose any of Defendant's witnesses; Plaintiff failed to disclose and/or supplement discovery with other falls and injuries; and Plaintiff falsely answered in a discovery response that he had never been injured outside the subject injury, despite numerous falls and injuries noted in his medical and employment records, some close in time to the subject fall. Def's Mots. in Limine, App. 162–170, 202–205. The Circuit Court refused to hear or consider Defendant's pre-trial motions covering these subjects and more. Therefore, the Court failed to consider numerous equitable considerations and mitigating circumstances that would weigh in favor of sanctioning Plaintiff—not Defendant.

The Circuit Court's sanctions are therefore (1) not warranted, (2) not explained with any plausible justification, (3) not fashioned to address any identified harm, (4) issued without Defendant's conduct having any negative impact in the case, (5) issued without considering mitigating circumstances and equitable considerations, and (6) therefore, a substantial abuse of discretion and clearly erroneous.

VII. CONCLUSION

The Circuit Court has deprived Defendant of any ruling on immunity, and has therefore deprived Defendant opportunity to seek any appellate relief on the issue. All the while, the Circuit Court has required Defendant to pay for a second mediation that no one asked for and pay for depositions that Plaintiff never asked for and previously declined and neglected to pursue for no good reason. Writs of mandamus and prohibition should issue.

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VERIFICATION

I, Evan S. Olds, being first duly sworn, state that I have read the foregoing VERIFIED PETITION FOR WRITS OF PROHIBITION AND MANDAMUS; that the factual representations contained therein are true, except so far as they are stated to be on information and belief; and that insofar as they are stated to be on information and belief, I believe them to be true.

EVAN S. OLDS

Taken, subscribed, and sworn to before me this 15h day of April, 2021.

My Commission expires: July 24, 2023.

OFFICIAL SEAL - NOTARY PUBLIC
STATE OF WEST VIRGINIA
Vanessa Ferrebee
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261 Aikens Center, Suite 301
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My Commission Expires July 24, 2023

Vanessa R. Ferrebee
Notary Public

CERTIFICATE OF SERVICE

The undersigned, counsel of record, does hereby certify that I served this "***Verified Petition for Writs of Prohibition and Mandamus***" on April 15, 2021, consistent with Rule 37 of the West Virginia Rules of Appellate Procedure, by having deposited a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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