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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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NO. 25-ICA-285

ERNEST DALE COLLINS, JR., PETITIONER

v.

J. KEVIN KOCH, RESPONDENT

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PETITIONER'S OPENING BRIEF

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Circuit Court of Wood County West Virginia  
Civil Action No. CC-54-2022-C-222

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## INTRODUCTION

“[B]ecause of their very potency, . . . sanction powers must be exercised with restraint and discretion.” *Bartles v. Hinkle*, 196 W. Va. 381, 389, 472 S.E.2d 827, 835 (1996) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991)). Important to a circuit court’s “discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process.” *Id.* Here, the record establishes the inappropriateness of the circuit court’s order dismissing Petitioner’s case with prejudice. The order divorced the equitable sanction from the monetary sanction, without explanation. The order weighed the equities in Respondent’s favor, without explanation. And, without explanation, the order rejected the existence of any mitigating circumstances. The order below, lacking in analysis and legal authority alike, gave short shrift to the “equitable principles” that “shall . . . guide[]” a circuit court in “formulating the appropriate sanction[.]” Syl. Pt. 2, *Bartles, supra*.

Besides, not one of the orders that Petitioner’s trial counsel was sanctioned for violating were reduced to writing. As the attorney representing Petitioner’s trial counsel at the sanctions hearing put it: “I did not have the benefit of sitting in the courtroom . . . , but I got to sit and read for a couple of hours because I had to read [the transcripts] several times to try to make this movie up in my head.” This Court should vacate the order below and remand with instructions to set a new trial date.

## ASSIGNMENTS OF ERROR

- I. Whether the circuit court erred when it dismissed Petitioner’s case with prejudice because it found Petitioner’s trial counsel violated the court’s evidentiary rulings.
- II. Whether the circuit court erred when it found Petitioner’s trial counsel violated the court’s evidentiary ruling concerning Dr. Naum’s expert testimony.

## STATEMENT OF THE CASE

This case arises out of a medical malpractice action where the Plaintiff patient alleged that the Defendant doctor failed to meet the standard of care in providing informed consent regarding a right colectomy performed in September of 2020.<sup>1</sup> A colectomy “is a surgical procedure to remove all or part of your colon.”<sup>2</sup>

Mr. Collins (“Plaintiff” or “Petitioner”) alleged that Dr. Koch (“Defendant” or “Respondent”) did not properly inform him of the alternative treatments available, and the risks associated with the right colectomy.<sup>3</sup> Ever since Defendant performed the right colectomy, Plaintiff has endured constant mid-abdominal pain, postprandial vomiting, nausea, diarrhea, and significant weight loss, and he requires ongoing treatment, including surgical implantation of a TENS unit.<sup>4</sup>

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<sup>1</sup> JA0013.

<sup>2</sup> See Mayo Clinic, *Colectomy Overview*, available at: <https://www.mayoclinic.org/tests-procedures/colectomy/about/pac-20384631> (last visited, September 29, 2025) (defining a hemicolectomy as “removing the right or left portion of the colon”).

<sup>3</sup> JA0013.

<sup>4</sup> JA1048; JA1065; JA1108.

*Factual History*

In August of 2020, Plaintiff underwent a colonoscopy procedure, during which Dr. O'Brien removed a couple polyps but was unable to remove all of them.<sup>5</sup> To address the remaining polyp, Plaintiff was referred to Dr. John Kevin Koch.<sup>6</sup> During a September 3, 2020 consultation, Defendant advised Plaintiff that a right colectomy was required; and after discussing the procedure with the plaintiff, but not mentioning alternative treatment options, Defendant determined that he would proceed.<sup>7</sup> Defendant performed the right colectomy on Plaintiff on September 30, 2020.<sup>8</sup> Fortunately, the polyp showed no evidence of malignancy.<sup>9</sup>

Unfortunately, the right colectomy was not the least “obtrusive” or the least “dangerous” procedure available to treat Plaintiff.<sup>10</sup> Shortly after Defendant performed the right colectomy, Plaintiff started experiencing severe pain, and other serious complications.<sup>11</sup>

By December 9, 2020, the pain forced Plaintiff to schedule an appointment with Dr. Naum, during which Plaintiff was classified as a “Level 4” patient, indicating moderate complexity.<sup>12</sup> Dr. Naum’s initial impression was that the right

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<sup>5</sup> JA1205.

<sup>6</sup> JA1082.

<sup>7</sup> JA0901; JA0917.

<sup>8</sup> JA0901.

<sup>9</sup> JA0902.

<sup>10</sup> JA0728.

<sup>11</sup> JA0731–0732.

<sup>12</sup> JA0729.

hemicolectomy could be the possible cause of Plaintiff's symptoms.<sup>13</sup> On January 20, 2021, Dr. Naum and Plaintiff had a follow up visit, where an EGD was performed and Dr. Naum prescribed Plaintiff oxycodone for his "significant pain."<sup>14</sup>

On June 3, 2021, Dr. Naum documented his belief that the symptoms were related to an anastomotic stricture.<sup>15</sup> Later that month, Dr. Naum performed a colonoscopy on Plaintiff. He again noted the link to the right hemicolectomy, and documented that Plaintiff had lost approximately 59 pounds since September 2020.<sup>16</sup> Then, on July 1, 2021, Dr. Naum ordered a CT angiogram of the abdomen and pelvis but that also did not reveal a cause for Plaintiff's problems.<sup>17</sup> And on July 28, 2021, Dr. Naum referred Plaintiff to a colorectal surgeon in Morgantown, WV for evaluation for persistent pain related to Defendant's surgery.<sup>18</sup>

*Pre-Trial Procedural History*

Plaintiff filed his single count complaint in Wood County Circuit Court on October 5, 2022.<sup>19</sup> Alleging only a claim for negligence, the Complaint makes this case about whether "Defendant Koch breached his duties . . . when he failed to properly inform [Plaintiff] of other treatment options, including the option of not

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<sup>13</sup> JA0730.

<sup>14</sup> *Id.*

<sup>15</sup> JA0731.

<sup>16</sup> JA0732.

<sup>17</sup> JA0733.

<sup>18</sup> *Id.*

<sup>19</sup> JA0010.

doing anything to treat the condition.”<sup>20</sup> Plaintiff asserted his right to demand a jury trial and have his peers decide whether Defendant was responsible for his “past and future medical expenses, pain and suffering, mental anguish, and such other damages[.]”<sup>21</sup>

Discovery then commenced, including, the parties’ expert disclosures. Plaintiff disclosed the following experts: Ralph Silverman, M.D. FACS, FASCRS; Gabriella Olson, M.D.; Scott Naum, D.O.; Ryan Hostutler, M.D.; and Abdi Seyed Ghodsi, M.D.<sup>22</sup> Defendant disclosed himself and Julie K. M. Thacker, M.D. as his experts.<sup>23</sup> Depositions of the disclosed experts were noticed and taken; as relevant here, Dr. Naum provided extensive testimony about alternative treatment options.

For example: when asked whether “doing an EMR of a polyp at the ileocecal valve is less obtrusive and less dangerous than performing a right hemicolectomy,” he plainly answered “exactly.”<sup>24</sup> Dr. Naum also described his evaluation of Plaintiff after Defendant performed the right hemicolectomy and confirmed he “thought” that “the symptoms that Plaintiff was exhibiting were all associated with the right hemicolectomy.”<sup>25</sup> He explained the various tests he ordered for Plaintiff, including a CT scan, an EGD, lab work, a colonoscopy, and another CT scan.<sup>26</sup> Dr. Naum

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<sup>20</sup> JA0013.

<sup>21</sup> *Id.*

<sup>22</sup> JA0027–0029.

<sup>23</sup> JA0030–0033.

<sup>24</sup> JA0728.

<sup>25</sup> JA0730.

<sup>26</sup> JA00729–0733.

confirmed none of the testing could provide a definitive link between Defendant’s right hemicolectomy and Plaintiff’s subsequent symptoms, but Dr. Naum still maintained that it was his opinion that the symptoms “were the result of the surgery Defendant performed.”<sup>27</sup> In his words, “you know, he didn’t have symptoms before. He has them afterwards. You’d think they’re related.”<sup>28</sup>

Dr. Naum’s deposition testimony and his charts and records were reviewed by Defendant<sup>29</sup> and by Dr. Thacker.<sup>30</sup> And Dr. Thacker explicitly relied upon Dr. Naum’s deposition testimony in rendering her opinion.<sup>31</sup>

On August 2, 2024, the Court held a pre-trial conference where it disposed of Defendant’s motion for summary judgment, six plaintiff motions in limine, and six defense motions in limine.

Defendant argued for summary judgment on the basis that this is “not an informed consent case,” and expert opinion testimony was required on causation.<sup>32</sup> Plaintiff responded that “proximate cause is up to the jury to decide based upon . . . if a reasonably prudent person would’ve said no to the procedure had they been given the alternative treatments[.]”<sup>33</sup> The Court denied Defendant’s motion for summary

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<sup>27</sup> JA0737.

<sup>28</sup> JA0736–0737.

<sup>29</sup> JA1129–1132.

<sup>30</sup> JA 1223–1225.

<sup>31</sup> JA1195.

<sup>32</sup> JA0751–0752.

<sup>33</sup> JA0754.

judgment finding “the plaintiff has submitted sufficient evidence” and “[t]hat this is a question of fact for the jury to decide.”<sup>34</sup>

The court turned next to motions in limine. As relevant here, Plaintiff’s motion to “permit plaintiff’s evidence on causation” argued explicitly that such evidence is “going to be Dr. Naum.”<sup>35</sup> Plaintiff explained “I’ve got to be able to demonstrate to the jury, . . . that a reasonably prudent person would have said, no” and “it is my intention to put [Dr. Naum’s] evidence to the jury.”<sup>36</sup> Defendant responded by emphasizing that Plaintiff “mention[ed] Dr. Naum Specifically” and that “this is the subject of a motion we filed to preclude him from offering any testimony influence on causation because he does not have an opinion to a reasonable degree of medical certainty as to the cause of these problems.”<sup>37</sup> Plaintiff rebutted that this is “the summary judgment motion all over again. That you’ve denied.”<sup>38</sup> After initially finding that Plaintiff’s motion “has already been addressed through the motion for summary judgment” and granting Plaintiff’s motion, the Court, responding to protestations of Defendant, issued “a two-part ruling[.]” It ruled that “[t]he plaintiff is permitted to present their testimony, but [defense counsel] are not prohibited from your cross examination in the areas as indicated on the record.”<sup>39</sup>

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<sup>34</sup> JA0755.

<sup>35</sup> JA0769.

<sup>36</sup> *Id.*

<sup>37</sup> JA0769–0770.

<sup>38</sup> JA0771.

<sup>39</sup> JA0776.

Similarly, the Court denied Defendant’s motion to exclude “plaintiff’s treating physicians from testifying during the trial.”<sup>40</sup> Defendant argued that this motion “relates really to the issues of either standard of care or causation. None of the treating physicians have offered standard of care opinions, and although Dr. Naum has offered, you know, the intuitive opinion on something, we just would prefer and ask the court to preclude any of these.”<sup>41</sup> The Court denied the motion, without needing to hear from Plaintiff.<sup>42</sup> It ruled, asking “[h]ave I not kind of already addressed this through permitting the testimony regarding . . . the symptoms he was experiencing.”<sup>43</sup>

Finally, before adjourning, the Court asked, “[a]nything else?”<sup>44</sup> At this time, Defendant raised objections to Plaintiff’s exhibits, listing “all plaintiff’s medical records” expressing concern that “I’m not sure what all that entails and what he intends to offer.”<sup>45</sup> Plaintiff expressed willingness to work with Defendant “to figure out which records we can agree on.” The Court encouraged that and noted that “[g]iven some of the things that are in the medical records you might hurt yourself if you admitted all of them.” “That’s for certain[,]” Plaintiff responded.

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<sup>40</sup> JA0778.

<sup>41</sup> JA0778–0779.

<sup>42</sup> JA0779.

<sup>43</sup> *Id.*

<sup>44</sup> JA0784.

<sup>45</sup> JA0785.

Defendant then sought clarification, asking “I assume that we can agree that we will offer copies of medical records and that we can agree to both the authenticity and admissibility of those that’s related.”<sup>46</sup> Plaintiff agreed, reminding Defendant “that was one of [the] proposed stipulations.”<sup>47</sup>

*The Trial Below*

Trial began on July 30, 2024.<sup>48</sup> The first day of trial consisted of opening statements and the testimony of four witnesses: Jason Collins, Kinder Collins, Jenny Butler, and Vivian Willey.<sup>49</sup> Jason and Kinder Collins, are Plaintiff’s son and daughter-in-law.<sup>50</sup> Jenny Butler is Plaintiff’s girlfriend of four years,<sup>51</sup> and Vivian Willey is Jenny Butler’s daughter, who sees Plaintiff as “kind of like a father figure to me.”<sup>52</sup> All four witnesses provided testimony about the significant ways in which Plaintiff’s life has deteriorated since Defendant’s surgery.

Day two of the trial included testimony from Defendant and the following experts: Brian Hostutler, Gabriella Olson, and Ralph Silverman.<sup>53</sup> When Defendant was on the stand, during the plaintiff’s case, Plaintiff marked as “Plaintiff’s Exhibit

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<sup>46</sup> JA0785–0786.

<sup>47</sup> JA0786.

<sup>48</sup> JA0790.

<sup>49</sup> JA0802.

<sup>50</sup> JA0804; JA0812

<sup>51</sup> JA0815.

<sup>52</sup> JA0821.

<sup>53</sup> JA0829

10” the Camden-Clark Cornerstone gastroenterologist record from 10/5/22.”<sup>54</sup> Defendant, on the stand, read into the record, from Plaintiff’s Exhibit 10 Dr. Naum’s findings, including:

- “On-call general surgery saw the patient, but refused to do cholecystectomy because of issues with incisional hernia[;]”<sup>55</sup> and
- “I believe the main reason was due to surgery being done by a particular surgeon’s partner who would cause major problems for the patient.”<sup>56</sup>

Defendant objected, arguing “the questioning . . . relative to Dr. Naum’s records in essence is designed to offer Dr. Naum’s opinion testimony concerning causation.”<sup>57</sup> And because “Dr. Naum is not here[,] it is painfully unfair for [Plaintiff] to be introducing Dr. Naum’s opinion testimony without us having the opportunity to cross examine.”<sup>58</sup> Plaintiff responded that it was the Defendant that had suggested “that all the medical records be admitted as[sic] exhibits and [Plaintiff is] agreeable to doing that and part of those records are just what [was] read into the record.”<sup>59</sup> Plaintiff’s counsel asked defense counsel “[d]idn’t you ask me [if I had any objection to the records that you produced] this morning?”<sup>60</sup> Plaintiff’s counsel explained that

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<sup>54</sup> JA0980.

<sup>55</sup> JA0980–0981.

<sup>56</sup> JA0981.

<sup>57</sup> JA0983.

<sup>58</sup> *Id.*

<sup>59</sup> JA0984.

<sup>60</sup> JA0985.

he got Plaintiff's Exhibit 10 from the defense, which he knows because it has "[defense] Bates stamp numbers on it."<sup>61</sup> "Okay. So they do[,]" defense counsel conceded.<sup>62</sup> The court then took a recess, telling the parties that without an agreement "a proper foundation must be laid for every exhibit including medical records."<sup>63</sup>

After the recess, and still without an agreement, defense counsel explained how right before the first day of trial, he gave Plaintiff's counsel (Mr. Sims) a box of records and "an index of the records that we wanted and I have highlighted this in yellow."<sup>64</sup> Defense counsel further tried to explain that

So while we intended to use the record, and not any of the other records, in defense of Mr. Sims, I understand how he may have been confused by that. In point of fact we have as recently as this morning still been trying to figure out and correct the direction that we had because Mr. Sims pointed out to us that some of the records contained information about insurance and medical care and we wanted to make sure all of the things were omitted and redacted.

In fairness to Mr. Sims, he may well have understood that we had an agreement on the entirety of the record, but we were only focused on the imaging study. And frankly if Your Honor would look at the balance of that record you will see that Mr. Sims is attempting to offer opinion testimony of Dr. Naum from those records and that is what we object to.<sup>65</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> JA0986.

<sup>64</sup> JA0987.

<sup>65</sup> *Id.*

Plaintiff's counsel objected to that characterization, because he had only advised that he could not "agree to it because they have information about Medicare on them."<sup>66</sup> He noted how Defendant's counsel promised to fix the unredacted Medicare information.<sup>67</sup> And he explained how the next day, an employee of Defendant's counsel produced newly redacted exhibits, and the "Camden-Clark Cornerstone 10/5/22 [record] has 32 pages according to their own document [(defense's trial exhibit list)]."<sup>68</sup>

Plaintiff's counsel also protested that the defense counsel has "been reading medical all day that have not been admitted into evidence. [Defense counsel] read from the medical record when [defense counsel] was questioning Dr. Silverman, things not in the record."<sup>69</sup> In Plaintiff's view, questioning about the contents of a record that an expert does not have in front of them and that has not been admitted is a "distinction without a difference" compared to an expert witness reading from a document not in evidence.<sup>70</sup>

The Court maintained its ruling sustaining Defendant's objection and ordered "that the question and answer be stricken from the record."<sup>71</sup>

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<sup>66</sup> JA0988–0989.

<sup>67</sup> JA0989.

<sup>68</sup> *Id.*

<sup>69</sup> JA0990.

<sup>70</sup> *Id.*

<sup>71</sup> JA0994.

After a short recess, Plaintiff attempted to lay a foundation for Plaintiff's Exhibit 10 to admit it into evidence.<sup>72</sup> Defendant's testimony did not deny Dr. Naum's records were part of Mr. Collin's chart, only that he "just [had not] seen them."<sup>73</sup> The Court did not admit Plaintiff's Exhibit 10 into evidence.<sup>74</sup>

On day three, Plaintiff testified and then rested his case.<sup>75</sup> The Defense called Defendant, Dr. O'Brien, and Dr. Thacker as witnesses.<sup>76</sup> Much of Defendant's testimony on day three was the same as it was on day two. But with one exception, over plaintiff's counsel's objection,<sup>77</sup> the Court allowed Defendant on direct examination to "to testify concerning the content of a particular exhibit [a medical record of Dr. Naum's], but it is not admitted."<sup>78</sup> The Court further permitted Defendant to testify "as to whether or not the problems that Plaintiff complains of in front of the jury were caused by [his] right hemicolectomy."<sup>79</sup>

Q. We have a court reporter here taking down everything word for word and I asked you the question if you had an opinion and you started your answer with no and then you gave an explanation. My question, let me repeat it. Do you have an opinion to a reasonable degree of

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<sup>72</sup> JA0997.

<sup>73</sup> JA0998.

<sup>74</sup> *Id.*

<sup>75</sup> JA1075–1076.

<sup>76</sup> JA1038.

<sup>77</sup> JA1130.

<sup>78</sup> JA1131.

<sup>79</sup> JA1143.

medical probability as to whether or not the problems that Plaintiff complained of were caused by your surgery? Do you have an opinion?

A. Yes.

Q. What is that opinion?

A. You want me to say it again?

Q. Okay. Yes. Yes?

A. Yes, because once again this chart, if you look at what he has, his symptoms, and then you look at what a right colectomy long-term, the problems that you would expect long-term, there is almost none of his symptoms are related to that. Certainly you have to look at other things and that is kind of why we did the CAT scan, to rule out any problems with the surgery.<sup>80</sup>

Next, Dr. O'Brien's deposition testimony was read into the record.<sup>81</sup> Then Dr. Thacker's testified,<sup>82</sup> which included telling the jury that she reviewed Dr. Naum's deposition and records in rendering her opinion in this case.<sup>83</sup> Dr. Thacker also testified that Plaintiff's polyp could have been removed by EMR and been done in a

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<sup>80</sup> JA1143–1144.

<sup>81</sup> JA1181.

<sup>82</sup> While not dispositive to the issues most central to this appeal, Petitioner points this Court's attention to Dr. Thacker testifying as to whether Plaintiff's or Defendant's testimony about informed consent is more believable. Plaintiff's counsel objected, but circuit court rejected Plaintiff's argument that such testimony took the fact-finding role away from the jury. *See* JA1214–1216.

<sup>83</sup> JA1195.

piecemeal way.<sup>84</sup> While she noted reasons it may not be successful, she admitted piecemeal removal was a possible alternative treatment, when asked explicitly on direct examination.<sup>85</sup> Dr. Thacker also testified on direct examination about Defendant referring Plaintiff to Dr. Naum.<sup>86</sup> That testimony included affirming her opinion that Plaintiff's "symptoms are not related to the right colectomy" because "most of the complaints are very upper GI as in Dr. Naum's records . . ."<sup>87</sup> Specifically, his symptoms "were described as being GOO, gastric outlet obstruction type symptoms."<sup>88</sup>

On cross examination, Plaintiff asked if Dr. Naum's records "would have been pertinent to your review of the records and rendering the opinions that you have in this case," and Dr. Thacker confirmed that "[w]hat I am aware of is."<sup>89</sup> Plaintiff, one final time, then tried to introduce Plaintiff's Exhibit 10, but Dr. Thacker, like Defendant, said "I don't recognize this exhibit, no."<sup>90</sup> The Court also denied admission of the exhibit for impeachment purposes.<sup>91</sup> As for Dr. Naum's deposition:

Q. Dr. Thacker, you reviewed Dr. Naum's deposition?

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<sup>84</sup> JA1205–1206

<sup>85</sup> *Id.*

<sup>86</sup> JA1223. Dr. Thacker was also asked to testify as to whether

<sup>87</sup> JA1224.

<sup>88</sup> *Id.* Gastric outlet obstruction type symptoms was the same conclusion reached by Dr. Silverman after his review of Dr. Naum's records. *See* JA0027.

<sup>89</sup> JA1232–1233.

<sup>90</sup> JA1233–1235.

<sup>91</sup> JA1236.

A. Yes.

Q. You relied on it in rendering your opinions today?

A. Along with everything else, yes.

Q. Well, I hate to do this, but I want you to take a look at these records again and can you compare them to what you thought you had when you responded to my notice for deposition?<sup>92</sup>

...

Q. When you are reading Dr. Naum's deposition transcript you said that you relied upon it in rendering your opinions today?

A. Yes.

Q. Dr. Naum concluded that Defendant's surgery was the cause of --

MR. JONES: Objection.

THE COURT: Sustained. Please take the jury out.<sup>93</sup>

Without prompting, the Court asked defense counsel, “is there a motion for mistrial?”<sup>94</sup> Defense counsel declined to move for a mistrial because “my concern frankly, Your Honor, is this: maybe [plaintiff’s counsel] has invited this to get a mistrial so he can have another shot down the road.”<sup>95</sup> “That is not fair to Dr. Koch. That is not fair to Dr. Koch’s insurance carrier.”<sup>96</sup> Plaintiff rebutted that Dr. Thacker

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<sup>92</sup> *Id.*

<sup>93</sup> JA1244.

<sup>94</sup> *Id.*

<sup>95</sup> JA1245.

<sup>96</sup> *Id.*

“clearly testified that she reviewed Dr. Naum’s deposition.”<sup>97</sup> The Court concluded this trial because, in its words, “to be quite frank, . . . [Plaintiff’s counsel] I cannot believe those words came out of your mouth, but the way you conducted yourself in this trial I can believe it. I am granting a mistrial.”<sup>98</sup> The Court did so on its own motion because it did not “believe this bell can be unrung.”<sup>99</sup>

*Sanctions Hearing and Order Granting Dismissal*

The Court held a hearing on Defendant’s motion for sanctions on April 22, 2025, where he sought “*sanctions against Mr. Sims both in the form of monetary sanctions and a dismissal of the case.*”<sup>100</sup> Defendant argued “[i]t [was] patently unfair to Defendant and his carrier to have to pay a for a trial that was mistried by Mr. Sims” and requested that Plaintiff’s counsel “be ordered to pay all of the expenses, all of the attorneys’ fees and everything up through and including today’s hearing for his deliberate attempt to miss-try the case.”<sup>101</sup> Defendant additionally asked “that this case be dismissed with prejudice and if Plaintiff is prejudiced by that, his claim is against Mr. Sims for Mr. Sims’s behavior during the course of the trial.”<sup>102</sup>

In response, Mr. Merriman, Mr. Sims’s counsel, argued that Mr. Sims “has not once been sanctioned by a Court for misconduct” while “practicing law for over 35

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<sup>97</sup> JA1246.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> JA1254 (emphasis added).

<sup>101</sup> JA1258.

<sup>102</sup> *Id.*

years[.]” including “more than 100 jury verdicts in state court or federal court.”<sup>103</sup> “That shows a pattern.”<sup>104</sup> Mr. Merriman also recalled the details of the expert testimony at trial and focused on the difference in questioning of Dr. Thacker allowed by the plaintiff, as compared to the defense.<sup>105</sup> He highlighted how Mr. Sims asked Dr. Thacker about Dr. Naum’s deposition, after defense counsel asked Dr. Thacker about Dr. Naum’s deposition.<sup>106</sup> Mr. Merriman argued defense counsel opened the door to such questioning and that “West Virginia Rule of Evidence 703 allows an expert to base opinions on, number three, information otherwise inadmissible in evidence if this type of information is reasonably relied up by experts in the witness field.”<sup>107</sup>

Defendant rebutted that the door was not opened because Dr. Naum “doesn’t have an opinion to a reasonable degree of medical certainty.”<sup>108</sup> Adding, incorrectly and presumptively, that “Mr. Sims knew there was a valid basis for the exclusion of Dr. Naum's comments in his records.”<sup>109</sup> To conclude, Defendant framed “the question before the Court” as “is Mr. Sims going to be rewarded for his misconduct

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<sup>103</sup> JA1259.

<sup>104</sup> *Id.*

<sup>105</sup> JA1260–1264.

<sup>106</sup> JA1261 (“Therefore, there was [a] basis for that question and that answer to the leading of the mistrial.”); JA1263 (“So at that point [Plaintiff’s counsel] would be entitled to cross examine Dr. Thacker with regard to anything that she based her opinions on that she testified to.”).

<sup>107</sup> *Id.*

<sup>108</sup> JA1265.

<sup>109</sup> *Id.*

and allowed to slip always without paying monetary sanctions and without having his case dismissed which he purposely mistried.”<sup>110</sup>

After a short recess, the Court returned, and stated that “I think probably the part that sums up the most were my own comments on the record that Mr. Jones cited on page nine of his motion mentioned today where I indicated ‘Mr. Sims, the Court has ruled that the opinion of Dr. Naum was not admissible.”<sup>111</sup> “So the Court is dismissing the case with prejudice and ordering that Mr. Sims pay for all of the transcripts necessary for the preparation of this motion as well as the attorneys’ costs for preparation of the motion as well as the costs for the attorneys’ appearance at today’s motion.”<sup>112</sup> But the Court also made clear it “is not award all of the costs. I think in this instance to do so would place Defendant in a better position than had this case simply proceeded to trial and he prevailed.”<sup>113</sup> The hearing ended when the Court asked defense counsel to prepare the order.<sup>114</sup>

The order granted in part Defendant’s motion for sanctions and dismissed the case with prejudice. It found the following:

That Mr. Sims’ conduct repeatedly violated court orders;

That Mr. Sims’ conduct was deliberate, repeated and calculated misconduct;

That Mr. Sims’ invited and caused a mistrial;

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<sup>110</sup> JA1266.

<sup>111</sup> JA1267.

<sup>112</sup> *Id.*

<sup>113</sup> JA1268.

<sup>114</sup> *Id.*

That Defendant and his lawyers in no way invited, contributed to or ‘opened the door’ to any of the violations which forced the Court to declare a mistrial; and

That the overwhelming evidence demonstrates that Mr. Sims’ conduct was repeated, calculated and represents a pattern of misconduct, and went well beyond anything that might be expected of a ‘zealous’ advocate.<sup>115</sup>

The Court’s justification for those findings included:

That Mr. Sims knowingly:

- i. Clicked his pen during witness testimony to signal questioning and testimony he disapproved of.
- ii. Repeatedly interrupted witnesses, not letting them fully answer his questions.
- iii. Attempted to introduce an undisclosed alternative treatment opinion from his expert witness after the Court expressly prohibited it.
- iv. Sneaked in an “opinion” from Plaintiff’s treating physician, Dr. Naum. He did this knowing full well that Dr. Naum’s “opinion” was not expressed to a reasonable degree of probability. He also did this knowing full well that Defendant did not have an opportunity to cross examine Dr. Naum. Moreover, this was in direct violation of the Court’s order.
- v. Purposefully, deliberately and knowingly violated the Court’s order one last time by reading inadmissible statements into the record while cross-examining Defendant’s expert witness, Dr. Julie Thacker.<sup>116</sup>

The Court reasoned “that part of the sanctions against Mr. Sims should require him to pay all of the attorney’s fees, costs, and expenses in bringing this Motion for

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<sup>115</sup> JA0006.

<sup>116</sup> JA0006–0007.

Sanctions.”<sup>117</sup> And that “it would be unfair and inappropriate to allow Mr. Sims to benefit from his misconduct by forcing Defendant to retry this case.”<sup>118</sup> Neither Plaintiff, nor his interests at stake in this case, are mentioned in the order dismissing the case.<sup>119</sup>

Ultimately, the Court denied Defendant’s motion “so far as it relates to his request for the recovery of attorney’s fees, costs, and expenses through the trial of the matter.”<sup>120</sup> And the Court granted “Defendant’s motion in so far as it relates to his request for attorney’s fees, costs, and expenses relating to bringing forth this Motion for Sanctions and, further, grants Defendant’s motion with respect to his request that this matter be dismissed with prejudice.”<sup>121</sup> The order is clear that “David A. Sims personally pay all the attorneys’ fees, costs and expenses.”<sup>122</sup>

### SUMMARY OF ARGUMENT

The sanctions order below cannot stand on its own. As the circuit court saw it, the parties’ disagreement about expert testimony, is attributable only to Petitioner. No fault lies with Defendant’s counsel for the ambiguous and later retracted stipulation to the admissibility of Petitioner’s medical records. No fault lies with Defendant’s counsel for repeatedly misstating the applicable law to garner rulings

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<sup>117</sup> JA0007–0008.

<sup>118</sup> JA0008.

<sup>119</sup> JA0001–0009.

<sup>120</sup> JA0008.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

incompatible with the evidence. And certainly, no fault lies with the circuit court for not reducing its pretrial orders to writing, and for walking back, in its entirety, the Court's pre-trial order granting Plaintiff's motion to present causation evidence.

In Petitioner's view, however, blame is not hard to place here. Despite authenticity and admissibility stipulations that were stripped away by defense counsel during trial, and the circuit court granting his motion to present Dr. Naum's testimony to the jury, something changed. The court's evidentiary rulings changed. And because no basis in law or fact supports that change, this Court should reverse.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioner respectfully requests oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure, as this case challenges a circuit court's exercise of discretion in ruling on questions governed by settled law.

### **STANDARD OF REVIEW**

This Court reviews an order granting sanctions for an abuse of discretion. *Bartles*, 196 W. Va. at 389–399; 472 S.E.2d at 835–836. “Admittedly, a trial court has broad authority to enforce its orders and to sanction any party who fails to comply with its discovery rulings.” *Id.* (citing *Doulamis v. Alpine Lake Property Owners Ass'n*, 184 W. Va. 107, 399 S.E.2d 689 (1990)). But “[a] trial court abuses its discretion if its ruling is based on an erroneous assessment of the evidence or the law.” *Id.* (citing *Cox v. State*, 194 W. Va. 210, 218, n.3 460 S.E.2d 25, 33 n.3 (1995)). So, while appellate courts “will not lightly disturb that decision[,]” that “does not mean, however, that [appellate courts] will rubber stamp the sanctions decisions of a

trial court.” *Id.*

The review of a sanctions order “include[s] two separate components.” First, this Court “must examine whether the sanctioning court identified the wrongful conduct with clear explanation on the record.” *Smith v. Gebhardt*, 240 W. Va. 426, 430, 813 S.E.2d 79, 83 (2018) (quotation omitted). Second, this Court “must determine whether the sanction actually imposed fits the seriousness of the identified conduct in light of the impact the conduct had in the case and the administration of justice, any mitigating circumstances, and with due consideration given to whether the conduct was an isolated occurrence or a pattern of wrongdoing.” *Id.*

## ARGUMENT

Petitioner is constitutionally entitled to the opportunity to submit his case to a jury, and the order below strips him of that right notwithstanding that “circuit court[s] must ensure that there is an adequate predicate for exercising its substantial authority under either the rules or its inherent powers and must also ensure that the sanction is tailored to address the harm identified.” *Cox*, 194 W. Va. at 218, 460 S.E.2d at 33 (Cleckley, J., concurring) (emphasizing that “[t]his is particularly true when the sanction is in the form of a dismissal.”); *see also* Syl. Pt. 1, *Bartles*, 196 W. Va. 381, 472 S.E.2d 827 (“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.”).

The order below fails to support its sanctions decision in two that ways warrant

reversal. First, the remedy of dismissal is unrelated to the harm that is said to justify the sanction. Second, the court’s justification for ordering sanctions—at all—is wholly without merit. Independently, each reason provides a basis for this Court to reverse; together, they leave no room for doubt.

**I. The circuit court erred when it sua sponte granted a mistrial and dismissed Petitioner’s case with prejudice because it found Petitioner’s trial counsel violated the court’s evidentiary rulings.**

“[D]ismissal and default judgment are considered drastic sanctions that should be imposed only in extreme circumstances.” *State ex rel Richmond Am. Homes of W. Va. v. Sanders*, 226 W. Va. 103, 113, 697 S.E.2d 139, 149 (2010) (quoting *Cattrell Cos. v. Carlton, Inc.*, 217 W. Va. 1, 14, 614 S.E.2d 1, 14 (2005)). “Dismissal, the harshest sanction,” is only appropriate “after other sanctions have failed to bring about compliance.” *Doulamis v. Alpine Lake Prop. Owners Ass’n, Inc.*, 184 W. Va. 107, 112, 399 S.E.2d 689, 694 (1990). That is because the sparse and prudent use of dismissal as a sanction effectuates “the policy of law favoring the disposition of cases on their merits.” *Bell v. Inland Mut. Ins. Co.*, 175 W. Va. 165, 172, 332 S.E.2d 127, 134 (1985).

When the Supreme Court of Appeals of West Virginia has affirmed dismissal as a sanction, the litigation misconduct that justified such a sanction is in an entirely different league than what happened here. *See e.g., Woolwine v. Raleigh General Hospital*, 194 W. Va. 322, 328, 460 S.E.2d 457, 463 (1995) (“In almost any conceivable set of circumstances, a circuit court’s failure to (1) warn of an impending ultimate sanction, or (2) consider less onerous sanctions before dismissing the case would amount to reversible error . . . We would, however, characterize [an] egregious pattern

of neglect as an exception to the rule.”); *Ohio Power Co. v. Pullman Power, LLC*, 230 W. Va. 605, 611, 714 S.E.2d 830, 836 (2013) (“Late production of the first ‘hundreds of thousands of pages of documents’ just a week before trial ‘constituted unjustified noncompliance’ with the West Virginia Rules of Civil Procedure”); *but see Smith*, 240 W. Va. at 434, 813 S.E.2d at 87 (reasoning “discovery actions . . . [that] had already been dealt with and had been deemed an insufficient basis for dismissal . . . results unequivocally in a conclusion that dismissal . . . was not justified under these circumstances”).

That did not happen here. Not even close.

**A. The order below lacks substantive analysis on the identified conduct’s impact in the case, the mitigating circumstances, and the different factual contexts underlying the identified conduct.**

What the court identified as the wrongful conduct of Petitioner’s trial counsel just does not warrant the sanction of dismissing Petitioner’s case with prejudice. “Imposition of such a drastic sanction is justified only where an offending party has engaged in willfulness, bad faith, or fault.” Syl. Pt. 7, *State ex rel. Richmond Am. Homes of W. Va.*, 226 W. Va. at 103, 697 S.E.2d at 139 (referring to the sanction of dismissal). To protect against abuses of the dismissal sanction, a circuit court “must explain its reasons clearly on the record[,]” considering: “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*, 196 W. Va. at 381, 472 S.E.2d at 827. More to the point, however, the order does not consider

Petitioner's interests—at all.<sup>123</sup>

The order centers around Mr. Sims's conduct, and the Court dismissed the case with prejudice because "it would be unfair and inappropriate to allow Mr. Sims to benefit from this misconduct by forcing Dr. Koch to retry this case."<sup>124</sup> So, to sanction Mr. Sims, in addition to the monetary sanctions already imposed, the Court threw out Petitioner's case—as opposed to ordering Mr. Sims pay for the expenses and costs of the mistrial. That make no sense. In an order focused solely on sanctioning Mr. Sims, the Court dismissed his client's case, Peittioner's case, while refusing to order Mr. Sims to pay for the mistrial the Court determined he purposefully caused. *See Doulamis*, 184 W. Va. at 112, 399 S.E.2d at 694.

Relatedly, that the monetary sanction applies only to the sanctions motion and hearing and not the entire trial, as requested, undermines the reasonableness of the dismissal.<sup>125</sup> The Court did not explain why it would be more unfair to Dr. Koch to retry this case than it would be for Petitioner to never have his day in court. The discovery is complete, the parties have a good idea of the opposing side's presentations, and this case proved to need less than a week to try. The amount of time and money required to retry this case is minimal when put up against the public interest in resolving cases on their merits,<sup>126</sup> and Petitioner's right to have the jury

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<sup>123</sup> JA0001–0009.

<sup>124</sup> JA0008.

<sup>125</sup> *Id.* (denying Defendant's motion "so far as it relates to his request for the recovery of attorney's fees, costs, and expenses through the trial of the matter").

<sup>126</sup> *See Bell*, 175 W. Va. at 172, 332 S.E.2d at 134.

he demanded decide the merits of his case.<sup>127</sup>

**B. When the circuit court sua sponte declared a mistrial, it eliminated any merits-based justification for dismissal.**

The circuit court declared a “mistrial *sua sponte* as it was the only viable option to preserve the integrity of the administration of justice.”<sup>128</sup> Then, it granted dismissal with prejudice because “it would be unfair and inappropriate to allow Mr. Sims to benefit from his misconduct by forcing Defendant to retry this case.” But a circuit court “must ensure any sanction imposed is fashioned to address the identified harm caused by the party’s misconduct.” Syl. Pt. 1, *Bartles*. The opposite happened below.

To impose the sanction of dismissal “for serious litigation misconduct” the “trial court findings [must] adequately demonstrate and establish willfulness, bad faith or fault of the offending party.” Syl. Pt. 7, *State ex rel. Richmond Am. Homes of W. Va.* And “[t]o 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*, 196 W. Va. at 381, 472 S.E.2d at 827.

Here, the sanctionable conduct is much less serious than in *Bartles*, the only case the circuit court’s order cited, and the other leading cases supporting the

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<sup>127</sup> *Drumheller v. Fillinger*, 230 W. Va. 26, 34, 736 S.E.2d 26, 34 (2012) (“[T]he constitutional right to a jury trial has been in existence since the founding of the State.”) (citing Article III, Section 13 of the West Virginia Constitution).

<sup>128</sup> JA1246.

sanction of dismissal. Most notably, there was no written order that was defied over a period of time, outside of the heat of trial, from which the type of willful bad faith can be deduced. The Court describes Mr. Sims’s conduct as “repeated” violations of court orders, but its own findings cite multiple different scenarios, to which different orders applied or where circumstances triggered an exception to the prior order(s). Never was Mr. Sims combative with the Court or did he do anything more than note his disagreement with the court’s evidentiary rulings for the record.

Similarly, the conduct cannot be said to have had an incurable impact on the case because *defense counsel objected to the court ordering a mistrial sua sponte*.<sup>129</sup> That Defendant preferred to go to trial with an instruction for the jury to disregard excluded testimony, undermines the Court’s insistence that dismissal, which is only used as a last resort, was “fair.”<sup>130</sup> Likewise, the risk to the administration of justice no longer existed after the mistrial was granted. The case, procedurally, was in the same place it was pre-trial when the court found Petitioner presented “sufficient evidence” to survive summary judgment.

And mitigating circumstances are abundant. The Court’s pretrial rulings were not reduced to writing to which the counsel for either party, or the court, could later easily refer. Defense counsel elicited testimony indistinguishable from the testimony that Mr. Sims wanted to question witnesses about. Then there are the Court’s inconsistent applications of its evidentiary rulings. Most flagrant among them,

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<sup>129</sup> JA1245–1246.

<sup>130</sup> JA0008.

finding defense counsel did not open the door, or at the very least, reasonably could not be thought to have opened the door, to inquiry about Dr. Thacker's review of Dr. Naum's deposition.

All that aside, the Court's order contradicts itself in an important way that confirms dismissal was inappropriate. The order denied Defendant's motion for sanctions "so far as it relates to his request for the recovery of attorney's fees, costs, and expenses through the trial of the matter." That the Court distinguished between the merits phase and the sanctions phase of the proceedings when it came to monetary sanction—shows dismissal was more about preventing another trial than punishing wrongful conduct. This is buttressed by the Court ordering that "David A. Sims personally pay all the attorneys' fees, costs and expenses." And when the misconduct is attributable solely to a litigant's attorney, the sanction imposed should be "to the detriment of the offending attorney and not the attorney's client." *Anderson v. Kunduru*, 215 W. Va. 484, 485, 600 S.E.2d 196, 197 (2004). Because "[d]ismissal, the harshest sanction," is only appropriate "after other sanctions have failed to bring about compliance." *Doulamis*, 184 W. Va. at 112, 399 S.E.2d at 694.

**II. The circuit court erred when it found Petitioner's trial counsel violated the court's evidentiary ruling concerning Dr. Naum's expert testimony.**

The circuit court was wrong to prohibit Petitioner's questioning of defense experts about the facts on which they relied to render their opinions for two distinct, but related, reasons. First, even if inadmissible, after Defendant and Dr. Thacker testified to relying on Dr. Naum's records and deposition testimony Petitioner's trial

counsel was entitled to ask why Dr. Naum’s contrary conclusions did not alter their opinions. Second, Dr. Naum’s records were ripe for cross examination.

**A. Defendant’s and Dr. Thacker’s testimony opened the door for Petitioner to ask about each expert’s reliance on Dr. Naum’s records and deposition testimony.**

When the defense experts testified that they reviewed Dr. Naum’s deposition testimony, Petitioner was entitled to inquire about how those “pertinent”<sup>131</sup> facts did or did not impact their expert opinions. “Opening the door is also referred to as the doctrine of curative admissibility.” *Miller v. Allman*, 240 W. Va 438, 450, 813 S.E.2d 91, 103 (2018) (quoting *United States v. Rucker*, 188 Fed. Appx. 772, 778 (10th Cir. 2006)). This rule “allows a party to present otherwise inadmissible evidence on an evidentiary point where an opponent has ‘opened the door’ by introducing similarly inadmissible evidence on the same point.” *Id.* If the door is opened, “to present rebutting evidence on an evidentiary fact: (a) [t]he original evidence must be inadmissible and prejudicial, (b) the rebuttal evidence must be similarly inadmissible, and (c) the rebuttal evidence must be limited to the same evidentiary facts as the original inadmissible evidence.” *Id.* (citing Syl. Pt. 10, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995)).

Here, the original evidence was inadmissible because the circuit court ruled it so, and it was prejudicial because it was cited to support Defendant’s expert’s opinions that Plaintiff’s injuries are unrelated to the right colectomy done by Defendant. That is testimony that goes to the central issue of Petitioner’s case. Straightforwardly, the

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<sup>131</sup> JA1232–1233

rebuttal evidence is similarly inadmissible because it is the same evidence as the original evidence. And the rebuttal evidence discussed the same facts as the original evidence because, again, it is the same evidence. Thus, Dr. Naum's records and deposition testimony satisfy the curative admissibility requirements.

Likewise, the order also fails to address the arguments about opening the door that Mr. Merriman made at the sanctions hearing. The order states only that "Defendant and his lawyers in no way invited contributed to or 'opened the door' to any of the violations which forced the Court to declare the mistrial."<sup>132</sup> Instead, the Court offered a conclusory list of five justifications for issuing sanctions:

That Mr. Sims knowingly:

- i. Clicked his pen during witness testimony to signal questioning and testimony he disapproved of.
- ii. Repeatedly interrupted witnesses, not letting them fully answer his questions.
- iii. Attempted to introduce an undisclosed alternative treatment opinion from his expert witness after the Court expressly prohibited it.
- iv. Sneaked in an "opinion" from Plaintiff's treating physician, Dr. Naum. He did this knowing full well that Dr. Naum's "opinion" was not expressed to a reasonable degree of probability. He also did this knowing full well that Defendant did not have an opportunity to cross examine Dr. Naum. Moreover, this was in direct violation of the Court's order.
- v. Purposefully, deliberately and knowingly violated the Court's order one last time by reading inadmissible statements into the record while cross-examining Defendant's expert witness, Dr. Julie Thacker.<sup>133</sup>

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<sup>132</sup> JA0006.

<sup>133</sup> JA0006-0007.

The first two justifications can be easily disposed of because neither can reasonably be said to support dismissal of Petitioner’s case with prejudice. For the third justification, Petitioner understands that to refer to Dr. Silverman’s trial testimony about endoscopic submucosal dissection. The record reveals Petitioner’s trial counsel believed his expert disclosure covered all alternative treatment options, including ones that may “not [be] an acceptable treatment option[,]” meaning “Defendant did not have a duty to disclose it.”<sup>134</sup> Even if Petitioner’s trial counsel was wrong about that, the court struck the testimony from the record and instructed the jury “to disregard the last question and the witness’s last answer.”<sup>135</sup> That said, the dispute over Dr. Silverman’s expert testimony pales in comparison to the dispute over Dr. Naum’s expert testimony. For the circuit court’s fourth and fifth justifications, those related to Dr. Naum’s testimony, the order is wrong on the facts and the law.

On the facts, the order characterizes Mr. Sims’s conduct as in “direct violation of the Court’s order” without explaining why Mr. Sims could not have reasonably thought the door had been opened, as argued at the sanctions hearing.<sup>136</sup> It also imputes a “[p]urposefully, deliberately and knowing” intent onto Mr. Sims without citing specific facts other than that the “conduct was cumulative and represents a pattern and practice of disregarding the Court orders and interfering with the

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<sup>134</sup> JA0951–0952.

<sup>135</sup> JA0955.

<sup>136</sup> JA0007.

administration of justice.”<sup>137</sup> Likewise, the order fails to distinguish between the different factual circumstances from the different instances of conduct the Court identified warranted sanctions, which precludes the establishment of a pattern or practice of misconduct.

On the law, in basing the order on the exclusion of Dr. Naum’s testimony, it does not address how expert opinions may be rendered considering inadmissible evidence or how inquiry into those topics is not prohibited. *See* W. Va. R. Evid. 703; *see also* Fed. R. Evid. 703, Comm. Notes (“When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert’s opinion, a trial court applying this Rule must consider the information’s probative value in assisting the jury to weigh the expert’s opinion on the one hand, and the risk of prejudice resulting from the jury’s potential misuse of the information for substantive purposes on the other.”). Additionally, it implicitly adopts the defense counsel’s arguments that the Dr. Naum’s opinions were excluded because they were not offered with a reasonable degree of medical certainty. JA1265 (Defendant arguing at the sanctions hearing that “had the question been going on further Dr. Thacker would have clearly testified that Dr. Naum doesn’t have an opinion to a reasonable degree of medical certainty . . . Mr. Sims knew there was a valid basis for the exclusion of Dr. Naum’s comments in his records”).

That is legally wrong. *Cross v. Trapp*, 170 W. Va. 459, 467, 294 S.E.2d 446, 454 (1982) (“We hold, therefore, that the causality requirement in cases applying the

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<sup>137</sup> *Id.*

doctrine of informed consent is to be resolved by an objective test: Whether a reasonable person in the patients position would have withheld consent to the surgery or therapy had all material risks been disclosed.”). Not to mention, dismissal on that basis is contrary to the Court’s pretrial ruling, where the Court said “[t]he plaintiff is permitted to present their testimony [on causation using Dr. Naum’s records], but [defense counsel] are not prohibited from your cross examination in the areas as indicated on the record.”<sup>138</sup>

As an absolute minimum, Petitioner was entitled to cross examine Respondent’s trial experts about the facts on which they relied.

**B. Dr. Naum’s medical records and deposition testimony were fair game for cross examination.**

When the circuit court prohibited Petitioner from cross examining defense expert witness about the facts they considered that contradicted the opinion they offered to the jury, it committed reversible error. “The scope of cross-examination of a witness includes not only the subject matter of direct examination, but also the credibility of the witness.” *Gamblin v. Ford Motor Co.*, 204 W. Va. 419, 424, 513 S.E.2d 467, 472 (1998). “Impeachment evidence is not . . . offered to prove the truth of the matter asserted. Instead, impeachment evidence is to be considered by the trier of fact for the limited purpose of assessing a particular witnesses’ credibility.” *Id.* Petitioner was denied that opportunity below.

That is especially problematic is medical malpractice cases. *Iyer v. W. Va. Bd.*

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<sup>138</sup> JA0776.

*Of Med.*, 2018 W. Va. LEXIS 350, at \*12 (W. Va. May 11, 2018) (finding the argument that a doctor “improperly relied on inadmissible hearsay evidence in formulating his opinion” through the review of a patient’s medical records was “without merit”); see also Fed. R. Evid. 703 Comm. Notes (“[A] physician in his own practices bases his diagnosis on information from numerous sources and of considerable variety, including statements by . . . other doctors[.] . . . The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross examination, ought to suffice for judicial purposes.”).

Dr. Koch and Dr. Thacker testified that Dr. Koch’s surgery did not cause Petitioner’s pain, suffering, and other complications. Still, Petitioner was not entitled to probe the impact Dr. Naum’s records and testimony had on each expert’s opinion. See *Mayhorn v. Logan Medical Found.*, 193 W. Va. 42, 48, 454 S.E.2d 87, 93 (1994) (finding a “trial judge was clearly wrong when he found” contradictory expert evidence inadmissible because it “defies logic” that “a medical expert’s reliance on medical records” was unreasonable).

Petitioner should have been permitted to ask Defendant and Dr. Thacker why Dr. Naum’s findings did not alter their conclusions. That legal error constitutes an abuse of discretion. *Cox*, 194 W. Va. at 218 n.3, 460 S.E.2d at 33 n.3 (“A trial court abuses its discretion if its ruling is based on an erroneous assessment of the evidence or the law.”). This Court should reverse.

## CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Court vacate the order below and remand for a new trial.

**Respectfully Submitted,**  
**Ernest Dale Collins, Jr.,**  
**Petitioner**  
*By counsel*

*s/ Anthony J. Majestro*

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**CERTIFICATE OF SERVICE**

I certify that on September 29, 2025 I served a true copy of Petitioner's Opening Brief upon counsel of record through the Court's Electronic Filing System.

*s/ Anthony J. Majestro* \_\_\_\_\_  
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