
IN THE INTERMEDIATE COURT OF APPEALS
SUPREME COURT OF APPEALS OF WEST VIRGINIA

EARNEST DALE COLLINS, JR.,

Plaintiff-Below/Petitioner,

v.

J. KEVIN KOCH, M.D.,

Defendant-Below/Respondent.

From the Circuit Court of Wood County, West Virginia
The Honorable Jason Wharton, Judge
Civil Action No. CC-54-2022-C-222

RESPONDENT'S OPENING BRIEF

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INTRODUCTION

Trial courts are vested with broad and inherent authority to ensure that justice is administered fairly and efficiently. That authority necessarily includes “the ability to fashion an appropriate sanction for conduct which abuses the judicial process.” *Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d 827 (1996). The circuit court in this case exercised that discretion when it declared a mistrial and, after thorough briefing and oral argument, subsequently dismissed the case with prejudice. The dismissal was based on the Plaintiff’s counsel knowingly defying multiple rulings and introducing excluded testimony in front of the jury.

Petitioner’s brief miscasts the circuit court’s actions as precipitous. They were not. The record reflects that the circuit court was explicit in its rulings, cautious in its responses throughout trial, and shows its conclusions were well-supported. Only after counsel for the plaintiff repeatedly violated those rulings, culminating in an impermissible line of questioning in which plaintiff’s counsel read into the record evidence which the circuit court had excluded, did the circuit court intervene to preserve the administration of justice. The circuit court’s subsequent order documented a pattern of calculated disregard for its authority by Plaintiff’s counsel and imposed sanctions designed to preserve the integrity of the trial process.

Contrary to Petitioner’s claims, the sanction imposed was neither arbitrary nor excessive. The dismissal was grounded in West Virginia precedent holding that dismissal and default are appropriate where lesser sanctions would be futile or where counsel’s *willful conduct* has rendered a fair trial impossible. See Syl. Pt. 7, *State ex rel. Richmond American Homes of W. Va. v. Sanders*, 226 W. Va. 103, 697 S.E.2d 139 (2010); *Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d 827 (1996). Here, the circuit court expressly found that Plaintiff’s counsel’s actions were “repeated, calculated and represent[ed] a pattern of misconduct,” that he forced a mistrial, and that “it would be unfair

and inappropriate to allow Mr. Sims to benefit from his misconduct by forcing Dr. Koch to retry the case.”¹ In fact, the circuit court found that Plaintiff’s counsel deliberately invited a mistrial.² Those findings are well supported by the record and fully comport with *Bartles* and its progeny.

Equally misplaced is Petitioner’s suggestion that the circuit court failed to consider mitigating circumstances or to distinguish between counsel’s actions and the client’s interests. The circuit court’s order reflects precisely that consideration. It limited monetary sanctions to costs associated with the sanctions motion, declined to award all defense fees from the mistrial, and explained why a lesser sanction would not address the prejudice caused.³ The circuit court exercised restraint and tailored its response to the gravity and repetition of the misconduct before it.

This appeal is not about an inadvertent misstep or an isolated misunderstanding. It is about the repeated and knowing violation of the circuit court’s express directives, in front of a jury, on issues the circuit court had definitively ruled upon. The circuit court observed that behavior firsthand, assessed its cumulative effect, and concluded that dismissal was necessary to preserve the integrity of its process. In its written order, the circuit court expressly found that “Mr. Sims is an experienced trial attorney, who specializes in medical malpractice cases. The Court finds that this Court has had several cases go to trial with Mr. Sims, but this particular case was very different than the other cases the Court has experienced with Mr. Sims.”⁴ That finding confirms that the circuit court, fully aware of Mr. Sims’s experience in prior matters, determined that his conduct in this case represented an extraordinary and deliberate disregard for its evidentiary rulings. The circuit court’s firsthand assessment of counsel’s behavior, made in light of its own prior experience

¹ JA0007, JA0008

² *Id.*

³ *Id.*

⁴ JA0006

with the same attorney, warrants considerable deference. Under the deferential standard of review applicable to sanctions orders, the circuit court’s judgment must be affirmed.

ASSIGNMENTS OF ERROR

Petitioner identifies two assignments of error in his Opening Brief:

- 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.”

Neither constitutes error. The record demonstrates that the circuit court’s sanctions order was a proper and measured exercise of discretion under *Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d 827 (1996), and *State ex rel. Richmond American Homes of W. Va. v. Sanders*, 226 W. Va. 103, 697 S.E.2d 139 (2010). The circuit court identified on the record a pattern of deliberate and repeated violations of its evidentiary rulings, culminating in a direct attempt to elicit testimony the circuit court had expressly prohibited in front of the jury, and concluded that dismissal with prejudice was necessary to preserve the integrity of the trial process.

STATEMENT OF THE CASE

As noted in Petitioner’s Opening Brief, this matter arises from a medical malpractice action filed by Ernest Dale Collins, Jr. against Dr. J. Kevin Koch, alleging lack of informed consent in connection with a right hemicolectomy performed in September 2020.⁵ Dr. Koch denies all allegations of negligence and maintains that he fully satisfied the standard of care at all times.⁶ Any references to post-operative complications, pain, or ongoing symptoms are allegations only,

⁵ JA0010 – JA0014

⁶ JA0015 – JA0019

not findings of fact, and are expressly disputed by Dr. Koch. Indeed, as the trial progressed, it became apparent that Plaintiff could not present competent expert testimony establishing causation, and the case began to unravel. The record demonstrates that Plaintiff's counsel, realizing his case was collapsing, deliberately injected excluded testimony into the trial during his cross-examination of Dr. Koch's expert in an apparent attempt to provoke a mistrial.⁷

During discovery, Plaintiff designated several experts, including his treating gastroenterologist, Dr. Scott Naum.⁸ In deposition, Dr. Naum admitted that he could not state, to a reasonable degree of medical probability, that Dr. Koch's surgery caused any of Plaintiff's alleged symptoms.⁹ When asked directly, he conceded that no test or imaging confirmed such a link, that multiple possible etiologies existed, and that, while he "intuitively" thought the symptoms might relate to the prior surgery, he could not offer a definitive causal opinion.¹⁰ His testimony therefore did not meet West Virginia's legal threshold for admissible expert causation testimony.¹¹

Prior to trial, the circuit court heard multiple motions in limine. The circuit court ruled that if Plaintiff chose to call Dr. Naum at trial, Dr. Koch would be entitled to full cross-examination regarding the foundation and limits of any opinions.¹² Rather than calling Dr. Naum at trial, Plaintiff's counsel consciously chose not to call him and tried to get Dr. Naum's unsupportable opinion on causation in front of the jury and prevent Dr. Koch the opportunity to cross examine Dr. Naum. Plaintiff's counsel attempted, repeatedly, to read or reference portions of Dr. Naum's medical records and deposition testimony in front of the jury to suggest that Dr. Naum had

⁷ JA1244 – JA1247

⁸ JA0027 – JA0029

⁹ JA0736 – JA0737

¹⁰ JA0737

¹¹ W. Va. Code §55-7B-7

¹² JA0776

concluded Dr. Koch caused Plaintiff's alleged injuries.¹³ Each time, the circuit court sustained objections, struck the testimony, and admonished counsel that such conduct violated its rulings.¹⁴

These episodes were not isolated. Over the course of the three-day trial, Plaintiff's counsel repeatedly disregarded the circuit court's instructions, attempted to inject excluded expert opinions, and interrupted witnesses despite prior warnings.¹⁵ The circuit court found that Plaintiff's counsel "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 Dr. Koch 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 records while cross-examining Dr. Koch's expert witness, Dr. Julie Thacker."¹⁶

This final and most serious violation occurred during cross-examination of Dr. Koch's expert, Dr. Julie Thacker, when Plaintiff's counsel asked, in front of the jury, whether "Dr. Naum concluded that Dr. Koch's surgery was the cause" of Plaintiff's problems.¹⁷ That question directly contravened the circuit court's orders and sought to elicit an inadmissible medical causation opinion that even Dr. Naum himself had disclaimed.

The circuit court immediately sustained the objection, excused the jury, and, after considering the cumulative record of misconduct, declared a mistrial on its own motion.¹⁸ At a

¹³ JA0983-JA0984, JA0991-JA0994

¹⁴ *Id.*

¹⁵ JA0006, JA0007

¹⁶ *Id.*

¹⁷ JA1244

¹⁸ JA1244 – JA1248

subsequent sanctions hearing, following full briefing, full argument, and transcript review, the circuit court found that Plaintiff’s counsel’s conduct was “deliberate, repeated, and calculated”; that it “invited and caused the mistrial”; and that allowing a retrial would unfairly reward the offending party.¹⁹ Additionally, the circuit court found that “the overwhelming evidence demonstrates that Mr. Sims’ conduct was repeated, calculated and presented a pattern of misconduct, and went well beyond anything that might be expected of a “zealous” advocate.”²⁰ The circuit court therefore dismissed the action with prejudice and imposed limited monetary sanctions on Plaintiff’s counsel personally.²¹ The circuit court’s findings were detailed and supported by the trial record, which the circuit court referenced multiple times within its order, reflecting not an isolated error but a pervasive pattern of disregard for clear evidentiary rulings.

SUMMARY OF ARGUMENT

The circuit court’s dismissal with prejudice was a deliberate and disciplined exercise of judicial discretion taken only after repeated warnings, sustained objections, and curative instructions proved incapable of curbing Plaintiff’s counsel’s defiance. The circuit court applied the proper *Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d 827 (1996), framework, identified specific misconduct, and explained in detail why dismissal was the only sanction adequate to protect the fairness and integrity of the proceedings.

Plaintiff’s counsel repeatedly ignored explicit evidentiary rulings, disregarded multiple warnings by the Court, and attempted to introduce excluded expert opinions through improper questioning and mischaracterized records. Those violations were not isolated but formed a clear pattern of willful, bad-faith conduct, including “[c]lick[ing] his pen during witness testimony to

¹⁹ JA006 - JA0008

²⁰ JA0006

²¹ JA0008

signal questioning and testimony he disapproved of,” “[r]epeatedly interrupt[ing] witnesses, not letting them fully answer his questions,” “[a]ttempt[ing] to introduce an undisclosed alternative treatment opinion from his expert witness after the Court expressly prohibited it,” “[s]neak[ing] 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... this was in direct violation of the Court’s Order,” and “[p]urposefully, deliberately and knowingly violat[ing] the court’s order one last time by reading inadmissible statements into the records while cross-examining Dr. Koch’s expert witness, Dr. Julie Thacker.”²²

Having observed this behavior firsthand, the circuit court correctly found that counsel’s actions went “well beyond anything that might be expected of a zealous advocate,” in fact deliberately invited a mistrial, and rendered any lesser sanction futile.²³ Under *Smith v. Gebhardt*, such willfulness and bad faith fully justify dismissal. (“Imposition of sanctions of dismissal and default judgment for serious litigation misconduct pursuant to the inherent powers of the court to regulate its proceedings will be upheld upon review as a proper exercise of discretion when trial court findings adequately demonstrate and establish willfulness, bad faith or fault of the offending party.”) See *Smith v. Gebhardt*, 240 W. Va. 426 (2018), quoting *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 226 W.Va. 103, 697 S.E.2d 139 (2010).

The circuit court’s sanction also satisfied due-process requirements. Each *Bartles* factor was explicitly considered: the seriousness and pattern of the misconduct, its impact on the case, and the absence of any mitigating circumstances. The circuit court’s findings were supported by the record and its reasoning is transparent on the face of the order.²⁴ Dismissal under these

²² JA0005, JA0006

²³ *Id.*

²⁴ JA0001-JA0009

circumstances was not punitive; it was necessary to preserve the integrity of the judicial process and fairness to Dr. Koch.

As to the evidentiary issue, the circuit court's ruling regarding Dr. Naum's testimony was unambiguous and correct. Dr. Naum conceded in deposition that he could not link Plaintiff's alleged symptoms to Dr. Koch's surgery to a reasonable degree of medical probability.²⁵ Notwithstanding the circuit court's order allowing Plaintiff to call Dr. Naum at trial and allowing Dr. Koch to cross-examine Dr. Naum, Plaintiff's counsel chose not to call Dr. Naum. Rather, he chose to "sneak" in the opinions of Dr. Naum through other witnesses and deprive Dr. Koch the opportunity to cross-examine Dr. Naum.²⁶

Given Plaintiff's decision not to call Dr. Naum, the circuit court correctly concluded that it would be improper to allow Dr. Naum's legally insufficient opinion while depriving Dr. Koch the opportunity of full cross-examination of Dr. Naum. Plaintiff's counsel violated the circuit court's order in his examination of Dr. Koch, at which time the circuit court excused the jury, admonished Mr. Sims, and, when the jury returned, instructed the jury not to consider that evidence.²⁷ Notwithstanding this admonishment, Mr. Sims repeated the same misconduct during his examination of Dr. Thacker, Dr. Koch's expert, again attempting to elicit the excluded opinions in front of the jury.²⁸ The circuit court rightly rejected Plaintiff's "opened the door" argument, found willful misconduct, and concluded that the prejudice could not be cured.²⁹

Because both the dismissal and the underlying evidentiary findings were grounded both in fact and in law, supported by the record, and consistent with the circuit court's inherent authority

²⁵ JA0736 – JA0737

²⁶ JA0006

²⁷ JA0983-JA0984, JA0991-JA0994

²⁸ JA1244

²⁹ JA1244-JA1247

to maintain control over its proceedings, this Court should affirm the circuit court's order in its entirety.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner has requested oral argument in this matter. Respondent defers to the Court's discretion as to whether argument would assist in the resolution of this case. Respondent agrees that the issues presented may be appropriately decided on the written record and briefs but has no objection should the Court elect to set the matter for oral argument.

STANDARD OF REVIEW

The Court reviews an order granting sanctions under an abuse of discretion standard. The West Virginia Supreme Court of Appeals has consistently applied this standard in reviewing matters regarding the imposition of sanctions by a lower court. *Smith v. Gebhardt*, 240 W. Va. 426. The imposition of sanctions by a circuit court under West Virginia Rule of Civil Procedure 37(b) for the failure of a party to obey the circuit court's order to provide or permit discovery is within the sound discretion of the circuit court and will not be disturbed on appeal unless there has been an abuse of that discretion. *Shaheen Shafii v. Thomas*, 2025 W. Va. App. LEXIS 174, W. Va. R.C.P., Rule 37.

In reviewing challenges to the findings and conclusions of the circuit court, this Court applies a two-prong deferential standard of review. *In re Adoption of R.L.*, 249 W. Va. 89. The Court reviews the final order and the ultimate disposition under an abuse of discretion standard and reviews the circuit court's underlying factual findings under a clearly erroneous standard. *Lee Trace LLC v. Raynes*, 232 W. Va. 183, *Mt. Am., LLC v. Huffman*, 224 W. Va. 669.

Before issuing a sanction, a circuit court must have an adequate foundation either pursuant to the rules or by virtue of its inherent powers to exercise its authority. W. Va. Const. Art. III, §

10, *Rector v. Ross*, 245 W. Va. 352. The due process clause requires that there exists 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. *Id.* A circuit court must ensure that any sanction imposed is fashioned to address the identified harm caused by the party's misconduct. *Id.*

ARGUMENT

The circuit court's decision to dismiss this case with prejudice was a careful and deliberate exercise of discretion guided by established precedent and taken only after repeated warnings and lesser measures proved ineffective. The circuit court did not act precipitously or punitively. Rather, it acted to preserve the fairness and integrity of the judicial process after Plaintiff's counsel repeatedly violated explicit evidentiary rulings and introduced evidence the circuit court had excluded. The circuit court's findings were specific, detailed, and supported by ample record evidence; its sanction was proportional to the seriousness and persistence of the misconduct.

Petitioner's attempt to recast this as an abuse of discretion mischaracterizes both the facts and the governing law. Under *Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d 827 (1996), and its progeny, the imposition of sanctions lies within the sound discretion of the circuit court, which is in the best position to observe the conduct at issue, evaluate its effect on the proceedings, and fashion an appropriate remedy. Here, the trial judge personally observed Plaintiff's counsel's repeated defiance of clear evidentiary rulings and found that further proceedings would be "unfair and inappropriate" to Dr. Koch.³⁰ That finding, entitled to substantial deference, warrants affirmance.

³⁰ JA0008

I. The Circuit Court Acted Well Within Its Discretion in Dismissing the Case with Prejudice.

Petitioner’s first assignment of error challenges the circuit court’s dismissal order, claiming that it lacked adequate analysis and failed to consider less severe sanctions. This challenge lacks merit. Under West Virginia law, dismissal of a civil action as a sanction is justified “where an offending party has engaged in willfulness, bad faith, or fault.” *Smith v. Gebhardt*, 240 W. Va. 426. The “[i]mposition of sanctions of dismissal and default judgment for serious litigation misconduct pursuant to the inherent powers of the court to regulate its proceedings will be upheld upon review as a proper exercise of discretion when trial court findings adequately demonstrate and establish willfulness, bad faith or fault of the offending party.” *Smith v. Gebhardt*, 240 W. Va. 426, quoting *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 226 W.Va. 103, 697 S.E.2d 139 (2010).

The circuit court's findings here satisfy this exacting standard. The circuit court specifically found that Mr. Sims engaged in a pattern of misconduct and repeatedly violated its orders, that his conduct went well beyond that of a zealous advocate and that his conduct invited a mistrial.³¹ These findings demonstrate the willfulness and bad faith required to justify the sanction of dismissal. Indeed, as the circuit court found, Plaintiff’s counsel purposefully violated its orders and invited a mistrial.³² Plaintiff’s counsel wanted another “bite at the apple” because he believed he had lost the jury.

A. The Circuit Court Applied the Proper Bartles Framework.

Under West Virginia law, the imposition of sanctions for attorney or party misconduct is governed by the framework established in *Bartles v. Hinkle*, 196 W. Va. 381. “The Due Process Clause of Section 10 of Article III of the West Virginia Constitution requires that there exist a

³¹ JA0008

³² JA0006-JA0008

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.” *Rector v. Ross*, 245 W. Va. 352, quoting *Bartles v. Hinkle*, 196 W. Va. 381.

In formulating the appropriate sanction, a circuit court shall be guided by equitable principles and must consider four specific factors that were established in *Bartles v. Hinkle*, 196 W. Va. 381. These factors, which have been consistently applied by West Virginia courts, are: (1) the seriousness of the misconduct; (2) the impact the conduct had in the case and in the administration of justice; (3) whether there are mitigating circumstances; and (4) whether the conduct was an isolated occurrence or was a pattern of wrongdoing. *Warner v. Wingfield*, 224 W. Va. 277, citing to *Bartles v. Hinkle*, 196 W. Va. 381. The circuit court must identify the alleged wrongful conduct and determine if it warrants a sanction, and must explain its reasons clearly on the record if it decides a sanction is appropriate. *Bartles v. Hinkle*, 196 W. Va. 381. These factors provide a comprehensive framework for ensuring that sanctions are proportionate to the misconduct and serve the interests of justice while protecting the due process rights of the sanctioned party. *Id.*

Here, the circuit court applied each *Bartles* factor. First, regarding the seriousness of the misconduct, the circuit court found that Plaintiff’s counsel, Mr. Sims, deliberately and repeatedly violated explicit evidentiary rulings by attempting to elicit undisclosed expert opinions and read excluded material into the record.³³ The circuit court concluded that this conduct was “deliberate, repeated and calculated” and went “well beyond anything that might be expected of a zealous advocate.”³⁴ Second, in assessing the impact of the misconduct, the circuit court found that Mr.

³³ JA0005-JA0009

³⁴ *Id.*

Sims's actions directly caused a mistrial, undermined the integrity of the proceedings, and left the circuit court with "no choice but to declare a mistrial sua sponte" to preserve the administration of justice.³⁵ Third, as to mitigating circumstances, the circuit court expressly found none.³⁶ Despite multiple admonitions, Mr. Sims continued the same line of improper questioning and offered no justification or corrective action. Finally, addressing whether the conduct was isolated or part of a pattern, the circuit court determined that the misconduct was cumulative and pervasive, encompassing multiple witnesses and issues over the course of multiple trial days.³⁷ The circuit court found that this pattern reflected a willful disregard for the circuit court's orders and a consistent effort to introduce inadmissible evidence despite repeated warnings.³⁸

These findings demonstrate that the circuit court carefully, faithfully, and directly applied each *Bartles* factor, making specific, record-supported determinations as to the nature, impact, and repetition of the misconduct. The resulting sanction, dismissal with prejudice, was not imposed precipitously or punitively, but as a measured exercise of discretion designed to protect the integrity of the judicial process and prevent counsel from benefitting from conduct that invited a mistrial.

While dismissal and default judgment are considered severe sanctions that should be imposed only in extreme circumstances, *Smith v. Gebhardt*, 240 W. Va. 426, this case presents precisely such circumstances. Here, the attorney's repeated violations of evidentiary rulings, after repeated warnings, directly threatened the integrity of the trial process and ultimately forced a mistrial. When an attorney's misconduct is so egregious that it undermines the judicial process itself, dismissal becomes the appropriate remedy to preserve the court's authority and ensure

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

fairness to the opposing party. Here, Plaintiff's counsel invited a mistrial because he had lost the jury and wanted another "bite at the apple." Inviting a mistrial to get another opportunity to try a case is egregious and, indeed, undermines the judicial process itself.

B. No Additional Warning Was Required.

Petitioner's argument that additional warnings were required before dismissal lacks legal support. The record establishes that counsel received multiple warnings during trial about his conduct, yet continued to violate the circuit court's orders.³⁹ The circuit court's decision to declare a mistrial *sua sponte* demonstrates the severity of the misconduct and the circuit court's recognition that the proceedings had been irreparably compromised. Under these circumstances, no additional warning was necessary before imposing the sanction of dismissal.

This Court reviews sanctions orders under an abuse of discretion standard. On the appeal of sanctions, the question is not whether this Court would have imposed a more lenient penalty, but whether the trial court abused its discretion in imposing the sanction. *Bartles v. Hinkle*, 196 W. Va. 381. The circuit court's detailed findings, careful application of the *Bartles* framework, and measured response to egregious attorney misconduct demonstrate a proper exercise of discretion that should be affirmed. The dismissal order reflects exactly the type of disciplined analysis required under West Virginia law and represents an appropriate response to conduct that violated the integrity of the judicial process.

II. The Circuit Court Correctly Found That Plaintiff's Counsel Violated Its Evidentiary Rulings Concerning Dr. Naum's Testimony

The Supreme Court of Appeals of West Virginia reviews a trial court's evidentiary rulings under an abuse of discretion standard. "Rulings on the admissibility of evidence are largely within

³⁹ JA0896-JA0897; JA0929-JA0930; JA0951-JA0953; JA0983-JA0984; JA0991-JA0994

a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.” *State v. Louk*, 171 W. Va. 639, 301 S.E.2d 596, 599 (1983). A “trial court abuses its discretion if its ruling is based on an erroneous assessment of the evidence or the law.” *Bartles v. Hinkle*, 196 W.Va. 381, 389, 472 S.E.2d 827, 835 (1996).

The appellate court will review the circuit court's underlying factual findings under a clearly erroneous standard. *Tennant v. Marion Health Care Found.*, 194 W. Va. 97, 104. This deferential standard of review is particularly important when examining a trial court's firsthand assessment of attorney conduct during trial proceedings.

A. The Circuit Court's Evidentiary Ruling Was Clear and Proper

The record demonstrates that the circuit court’s limitation on Dr. Naum’s testimony was clear and well supported. Dr. Naum was identified as a treating physician, permitted to testify regarding his own treatment, observations, and any opinions that arose naturally from that treatment. However, in his deposition, Dr. Naum expressly stated that he could not offer any conclusions to a reasonable degree of medical probability regarding the cause of the plaintiff’s symptoms.⁴⁰ At the pretrial hearing addressing the parties’ motions in limine, the circuit court carefully delineated the permissible scope of testimony, explaining: “Well, so I think it’s probably a two-part ruling. The plaintiff is permitted to present their testimony, but you [Dr. Koch] are not prohibited from your cross-examination in the areas indicated on the record.”⁴¹ Thus, the circuit court allowed Plaintiff to present Dr. Naum’s testimony within the bounds of his treatment, but preserved Dr. Koch’s right to cross-examine him on any opinions offered.

Rather than calling Dr. Naum to testify within those limits, however, Plaintiff’s counsel sought to circumvent the circuit court’s ruling by reading Dr. Naum’s unsupportable opinions into

⁴⁰ JA0736 – JA0737

⁴¹ JA0776

the record, thereby attempting to introduce testimony without subjecting it to cross-examination. This tactic violated both the letter and spirit of the circuit court's evidentiary ruling and directly contributed to the mistrial.

Dr. Naum's own deposition testimony underscored the basis for the circuit court's restriction. When questioned about his testing and diagnostic workup, he admitted that his evaluations had not produced a clear clinical explanation for the plaintiff's abdominal complaints:

"Q. And from what I can glean from your progress notes, of all the testing and additional workup that you had ordered for Mr. Collins, the results of that testing never provided you with a clear clinical picture of why Mr. Collins was having the abdominal complaints that he was having; is that correct?

A. Yes."⁴²

These admissions confirmed that Dr. Naum lacked a medically supported causation opinion and could not express one to a reasonable degree of medical probability. Dr. Koch correctly argued that any statements purporting to link the plaintiff's symptoms to a particular cause were therefore speculative. The circuit court's order limiting the scope of Dr. Naum's opinions was thus not only unambiguous but necessary to ensure that the jury heard reliable, properly tested evidence rather than unexamined hearsay presented through counsel's questioning.

B. The "Opening the Door" Doctrine Does Not Apply

Petitioner's argument that Dr. Koch "opened the door" to Dr. Naum's excluded testimony is without any merit whatsoever. "The curative admissibility 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." *Miller v. Allman*, 240 W. Va. 438. However, for the curative admissibility rule to be invoked, the following must be shown: "(a) The original evidence must be inadmissible and prejudicial, (b) the rebuttal evidence must be

⁴² JA0736

similarly inadmissible, and (c) the rebuttal evidence must be limited to the same evidentiary fact as the original inadmissible evidence." *Miller v. Allman*, 240 W. Va. 438 (internal citations omitted).

None of those elements is met here. Dr. Koch did not introduce any inadmissible evidence concerning Dr. Naum's causation opinions. His testimony and that of his experts were confined to their own findings and opinions, none of which referenced or relied upon Dr. Naum's speculative conclusions. The fact that Dr. Koch's experts reviewed Dr. Naum's medical records as part of their case preparation does not "open the door" to reading into evidence the very causation opinions that the circuit court had expressly excluded. Review of underlying records by an expert is a standard component of case preparation and does not transform those records, or the treating physician's inadmissible opinions, into fair rebuttal evidence under the *Miller* standard.

Dr. Naum himself admitted in deposition that he could not offer a causation opinion to a reasonable degree of medical probability.⁴³ The circuit court correctly rejected this argument and properly found that Plaintiff's counsel's attempt to read those opinions to the jury violated its prior evidentiary ruling.

C. Plaintiff's Counsel Deliberately Violated the Circuit Court's Rulings

The record establishes a clear pattern of deliberate violations by plaintiff's counsel. Despite the circuit court's explicit rulings, counsel repeatedly attempted to introduce Dr. Naum's excluded causation opinions through indirect means, including reading from Dr. Naum's deposition and medical records and asking Dr. Koch's witnesses to interpret or adopt Dr. Naum's purported conclusions.⁴⁴

⁴³ JA0736 – JA0737

⁴⁴ JA0983-JA0984; JA0991-JA0994

The most egregious violation occurred during cross-examination of Dr. Koch's expert witness, Dr. Julie Thacker. The circuit court found that plaintiff's counsel "purposefully, deliberately and knowingly violated the Court's order one last time by reading inadmissible statements into the record while cross-examining Dr. Koch's expert witness, Dr. Julie Thacker."⁴⁵ This conduct occurred just after the circuit court had already admonished counsel and struck similar testimony from the record the previous day.

The circuit court's findings regarding counsel's conduct were based on direct observation of the trial proceedings. The circuit court concluded that counsel's violations were "repeated, calculated and represents a pattern of misconduct, and went well beyond anything that might be expected of a 'zealous' advocate."⁴⁶ The circuit court found that Plaintiff's counsel had deliberately invited a mistrial.⁴⁷

The circuit court's evidentiary rulings were clear and proper, its factual findings are well-supported by the record, and its determination that plaintiff's counsel violated those rulings is beyond reasonable dispute. The circuit court did not abuse its discretion in finding that counsel's conduct warranted dismissal. Petitioner's second assignment of error therefore fails as a matter of law, and the order below should be affirmed.

CONCLUSION

The circuit court's dismissal order represents a model of judicial restraint and careful reasoning, not an abuse of discretion. Faced with repeated and deliberate violations of clear evidentiary rulings, the circuit court acted only after multiple warnings, sustained objections, and curative instructions had failed to curb Plaintiff's counsel's misconduct. Its decision to dismiss

⁴⁵ JA0007

⁴⁶ *Id.*

⁴⁷ *Id.*

this action with prejudice was guided by established West Virginia precedent, supported by a fully developed record, and necessary to preserve both the fairness of the trial and the dignity of the judicial process.

As the record makes clear, the misconduct that led to dismissal was not a single misstatement or misunderstanding, it was a pattern of willful defiance. Plaintiff's counsel repeatedly ignored the circuit court's directives and attempted to introduce excluded expert testimony through indirect means, despite the circuit court's explicit and repeated rulings that such testimony was inadmissible. When those efforts culminated in an improper and prejudicial question before the jury, the circuit court was left with no alternative but to intervene. Having personally observed the conduct, the circuit court found it to be repeated and deliberate, a finding that is amply supported by the record and entitled to deference on appeal.

Dismissal was both proportional and necessary. The circuit court applied the *Bartles v. Hinkle* framework in full, identifying the specific misconduct, explaining its relationship to the fairness of the proceedings, and considering the absence of mitigating circumstances. It weighed the equities, concluded that lesser sanctions would be ineffective, and tailored its remedy accordingly, limiting monetary sanctions to those necessary to compensate for the harm caused. The circuit court exercised sound judgment in imposing a sanction commensurate with the gravity of the misconduct.

The circuit court's rulings regarding Dr. Naum's testimony were likewise proper. Dr. Naum's deposition testimony revealed that he could not offer a causation opinion to a reasonable degree of medical certainty. The circuit court's pretrial order made that limitation unmistakably clear. Plaintiff's decision to circumvent those rulings rather than call Dr. Naum as a witness deprived Dr. Koch of cross-examination and violated the most basic tenets of evidentiary fairness.

The circuit court's finding that these violations were deliberate, repeated, and incurably prejudicial was evidenced by the record.

In short, the circuit court was patient, thorough, and fair. Its findings demonstrate a conscientious exercise of discretion designed to uphold the integrity of the judicial process. This Court's task on appeal is not to reweigh those judgments, but to determine whether the circuit court abused its discretion.⁴⁸ On this record, it plainly did not. Every factor supports affirmance.

For the foregoing reasons, Respondent respectfully requests that this Court affirm the circuit court's order in its entirety, uphold both the dismissal and the sanctions imposed, and grant such other and further relief as this Court deems just and proper.

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⁴⁸ To the extent Plaintiff believes he has been aggrieved by the dismissal of his action, any potential remedy lies not against Dr. Koch, but against his own counsel, whose repeated violations of the circuit court's orders directly caused the mistrial and ultimate dismissal of the case.

CERTIFICATE OF SERVICE

I, the undersigned counsel for Defendant-Below/Respondent J. Kevin Koch, M.D., do hereby certify that service of the foregoing **RESPONDENT'S OPENING BRIEF** was served upon Plaintiff-Below/Petitioner on the 29th day of October, 2025, using the File and ServeXpress system:

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