

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 34747

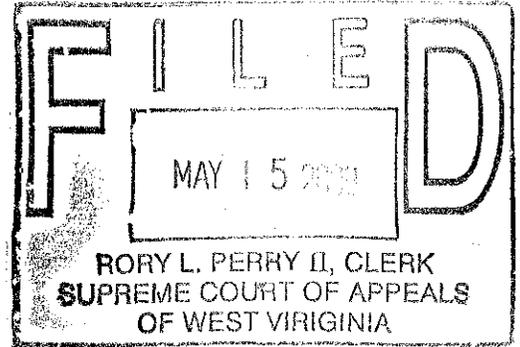
ANDREA KARPACS-BROWN,
Individually and as Administratrix of the
Estate of her Mother, Elizabeth Karpacs, and
of the Estate of her Father, Andrew Karpacs,

Plaintiff Below, Appellee,

v.

ANANDHI MURTHY, M.D.,

Defendant Below, Appellant.



Appeal from the Circuit Court of Wetzel County

BRIEF FOR APPELLANT

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v.

ANANDHI MURTHY, M.D.,

Defendant Below, Appellant.

Appeal from the Circuit Court of Wetzel County

BRIEF FOR APPELLANT

Anandhi Murthy, M.D., respectfully prays that this Court reverse the "Judgment Order" entered in this proceeding on July 29, 2008, in the Circuit Court of Wetzel County (Hon. Mark A. Karl, presiding).

**KIND OF PROCEEDING AND
NATURE OF RULINGS BELOW**

Appellee Andrea Karpacs-Brown charged below that, in June 2001, her mother Elizabeth Karpacs died as a result of medical malpractice. As originally filed, the suit joined as Defendants Appellant Murthy, who is a general surgeon, and the Wetzel County Hospital. (The Hospital was dismissed before trial and is not a party to this Appeal). Dr. Murthy answered that her treatment of Mrs. Karpacs met the standard of care in every respect, and that she was otherwise not responsible for Mrs. Karpacs' death.

After completion of pretrial proceedings, the case proceeded to trial by jury (Karl, J., presiding). At trial, Appellee confined her claims to those seeking damages for Mrs. Karpacs' alleged conscious pain and suffering prior to her death, and damages on behalf of Mrs. Karpacs' three adult children (Ms. Karpacs-Brown, Kevin J. Karpacs, and Carol E. Smittle) for the loss of their mother. She also sought punitive damages.

Following fewer than three days of evidentiary proceedings, the trial Court dismissed the claim for punitive damages, but submitted all

other claims to the jury (Trial Transcript (“Tr.”), Jan. 25, at 571 (all trial dates are in 2008)). The jury returned a verdict, in Ms. Karpacs-Brown’s favor, in the total amount of \$4 Million, comprising \$1 Million for the pain-and-suffering claim of Mrs. Karpacs and \$1 Million each for her three adult children (Tr., Jan. 25, at 585-588; Journal Order entered Jan. 31, 2008).

Thereafter the Court denied Dr. Murthy’s timely Motions for post-trial relief and entered its “Judgment Order” (Findings of Fact, Conclusions of Law and Memorandum Order Denying: Defendant’s Renewed Motion for Judgment as a Matter of Law, Defendant’s Motion for Judgment Notwithstanding the Verdict and Defendant’s Alternative Motion for New Trial, entered July 29, 2008 (hereinafter referred to as “Order on Motion for Judgment or New Trial”); Memorandum Order Denying Defendant’s Motion to Alter the Jury Verdict with Findings of Fact and Conclusions of Law, Judgment of the Court, and Judgment Order, entered July 29, 2008 (hereinafter referred to as the “Judgment Order”)). The Judgment Order awarded Ms. Karpacs-Brown \$4 Million pursuant to the jury’s verdict, plus \$1,992,238.77 in prejudgment interest, \$1,600.67 in post-judgment interest per day, and taxable costs

(Judgment Order, pp. 15-16).

In a separate post-trial Order, the Court ruled that Ms. Karpacs-Brown is entitled to recover all of her “attorney’s fees, expenses, and costs that would normally be borne by the Plaintiff” for the prosecution of this entire civil case (Order and Findings of Fact and Conclusions of Law Regarding Plaintiff’s Motion for Attorney’s Fees and Costs, entered July 29, 2008, at 19 (hereinafter referred to as the “Order on Attorneys’ Fees”)).

Upon entry of its Judgment Order, the Court also permitted Ms. Karpacs-Brown to amend her Complaint to add Dr. Murthy’s professional liability insurance carrier as a Defendant, and to assert a claim against it for what Ms. Karpacs-Brown alleged was “bad faith vexatious, wanton and oppressive conduct” in this case, including the carrier’s refusal to settle Appellee’s claims against Dr. Murthy (Findings of Fact, Conclusions of Law and Memorandum Order Granting Plaintiff’s Motion for Leave to File An Amended Complaint, entered July 29, 2008; Plaintiff’s Amended Complaint, entered as of Feb. 5, 2008). (Although this separate claim against the insurance carrier remains pending below, and no party requested certification pursuant to

Rule 54(b) of the West Virginia Rules of Civil Procedure, the “Judgment Order” adjudicating Appellee’s claims against Dr. Murthy is appealable now, and this Court granted Dr. Murthy’s timely Petition for Appeal. E.g., Hubbard v. State Farm Indemnity Co., 213 W.Va. 542, 549-551, 584 S.E.2d 176, 183-185 (2003); Syl. Pt. 2, Durm v. Heck’s Inc., 184 W.Va. 562, 401 S.E.2d 908 (1991)).

In capsule, this Appeal contests these rulings of the Court below:

(i) Its decision at trial precluding Dr. Murthy from introducing certain evidence to rebut a claim and impeach highly inflammatory testimony;

(ii) Its decision at trial declining to enter judgment as a matter of law on the claim for Mrs. Karpacs’ alleged pain and suffering;

(iii) Its decision after trial declining to reduce the judgment to \$1 Million, the maximum allowable amount pursuant to Section 55-7B-8 of the West Virginia Code (as applicable to this action);

(iv) Its decision after trial awarding Ms. Karpacs-Brown \$1,992,238.77 in “prejudgment interest”; and

(v) Its decision after trial awarding Ms. Karpacs-Brown attorneys’ fees and costs “that would normally be borne by the Plaintiff.”

We discuss below the content and context of each ruling.

STATEMENT OF FACTS

A. Mrs. Karpacs' Illness On June 1

In 2001, Mrs. Karpacs was 76 years old (Joint Trial Exhibit (“J. Ex.”) 1, at 1-15). A cigarette smoker for 35 years, she had serious lung disease -- asthma, chronic obstructive pulmonary disease (“COPD”), and emphysema (Tr., Jan. 24, at 239-240 (Karpacs-Brown); J. Ex. 1, at 1-8). She had a history, among other things, of high blood pressure, and had undergone abdominal surgery (for her colon) in the past (Tr., Jan. 24, at 240-242 (Karpacs-Brown); J. Ex. 1, at 1-8, 1-10, 1-15).

In May 2001, Mrs. Karpacs was admitted into the Wetzel County Hospital, where she received treatment for her COPD and for pneumonia (Tr., Jan. 24, at 242-243 (Karpacs-Brown); Tr., Jan. 24, at 336 (Smittle)). Her therapy included oxygen and antibiotics (J. Ex. 4, Tab 10, at A10009). She remained in the Hospital for almost three weeks, and was discharged on May 22, 2001 (Tr., Jan. 24, at 243 (Karpacs-Brown); Tr., Jan. 25, at 479 (Murthy)).

The antibiotics that Mrs. Karpacs received can cause a bacterial imbalance resulting in infection and inflammation of the colon (a

condition known as “clostridium difficile colitis”) (Tr., Jan. 25, at 468-469, 495 (Murthy)). In late May, after her discharge from the Hospital, Mrs. Karpacs developed diarrhea and vomiting; and on the morning of June 1 she was taken to the Wetzel County Hospital Emergency Room (J. Ex. 1, at 1-2). She reported symptoms of abdominal pain, inability to move her bowels, nausea and vomiting, and prior episodes of diarrhea (J. Ex. 1, at 1-8, 1-10). In the Hospital, Mrs. Karpacs received treatment from her primary care physician, Terry T. Tallman, M.D., and from Dr. Murthy, a general surgeon, whom Dr. Tallman brought in as a consultant (J. Ex. 1, at 1-10 to 1-13).

Throughout the day of June 1, Dr. Tallman and Dr. Murthy ordered various diagnostic and laboratory tests (J. Ex. 1, at 1-10 to 1-13). From these tests, it became apparent that Mrs. Karpacs was suffering from an infection of some sort (Tr., Jan. 25, at 498-500 (Murthy)). Accordingly, her physicians prescribed antibiotics, and they also ordered fluids to combat Mrs. Karpacs’ dehydration and to prepare her for possible exploratory surgery to find the source of infection (Tr., Jan. 25, at 496-497, 510-512, 522-524 (Murthy)). Based upon her symptoms and test results, and her medical history, during the course of June 1 the

physicians considered, as the possible cause of Mrs. Karpacs' maladies, that she had a diseased gallbladder, or an infected, inflamed colon (a side effect of the antibiotics she had received earlier), or that she had an "ischemic" colon (meaning that tissue in her colon was being deprived of blood bearing oxygen) (J. Ex. 1, at 1-12).

Dr. Murthy physically examined Mrs. Karpacs three times on June 1 (at approximately 9:40 a.m., 1:00 p.m., and 8:20 p.m.) (J. Ex. 1, at 1-40 to 1-41). At 6:00 p.m., and then twice after her third visit (at approximately 10:15 p.m. and 11:20 p.m.), Dr. Murthy spoke with Hospital personnel and determined Mrs. Karpacs' condition and assessed her treatment regimen (Tr., Jan. 24, at 252 (Karpacs-Brown); J. Ex. 1, at 1-41). According to Dr. Murthy's testimony, throughout June 1 she considered that Mrs. Karpacs' physical condition made it unlikely that she would survive the risks of exploratory surgery, and that therefore the prudent course was to continue administering antibiotics and fluids, and by so doing try to improve her condition and increase her ability to withstand the exploratory surgery, if that diagnostic tool were necessary (Tr., Jan. 24, at 289, 295-297 (Murthy); Tr., Jan. 25, at 522-524 (Murthy)).

B. The “Do Not Resuscitate” Order

Late on June 1 -- after Dr. Murthy’s 11:20 p.m. telephone call -- Mrs. Karpacs’ family conferred with Dr. Tallman, Mrs. Karpacs’ primary care physician, and received the current assessment of Mrs. Karpacs’ condition (Tr., Jan. 24, at 225 (Karpacs-Brown); Tr., Jan. 24, at 344 (Smittle)). Based upon that assessment, the family determined to end further efforts to prolong her life through extraordinary means (J. Ex. 1, at 1-19 and 1-42 (unredacted)). Accordingly, shortly after midnight on June 2, Dr. Tallman directed a “Do No Resuscitate” order to Mrs. Karpacs’ health care providers (J. Ex. 1, at 1-19 and 1-42 (unredacted)).

Thereafter, the Hospital’s staff administered medication to maintain Mrs. Karpacs under sedation (Tr., Jan. 24, at 345 (Smittle)). She died approximately six hours after the “Do No Resuscitate” order, at 5:55 a.m. on June 2 (J. Ex. 1, at 1-42).

C. The Alleged Malpractice

Ms. Karpacs-Brown based her claim upon the testimony of one expert, William Battle, M.D., a general surgeon, whom Appellee presented to identify the pertinent standard of care and Dr. Murthy’s

supposed deviation from it. Dr. Battle's testimony appears in the Trial Transcript, Jan. 23, at pages 80-198.

In sum, Dr. Battle's criticism was that Dr. Murthy should have been more aggressive in administering antibiotics and fluid and should have conducted exploratory abdominal surgery to try to reach a firm diagnosis (Tr., Jan. 23, at 115-119 (Battle)). Dr. Battle acknowledged that the surgery carried a severe risk that Mrs. Karpacs would not survive it, and that it was exploratory surgery only, but without that surgery, he opined, she had no chance of survival (Tr., Jan. 23, at 136 (Battle)). According to Dr. Battle, the standard of care required the surgery, in these circumstances.

D. Proof Of Damages

At trial, Ms. Karpacs-Brown presented no proof of economic loss. (Indeed, during Jury Selection, Appellee's Trial Counsel advised the Court that Ms. Karpacs-Brown sought no economic damages (Tr., Jan. 22, at 172-173)). The evidence on damages is cited below.

1. Mrs. Karpacs' Alleged Pain And Suffering

At trial there was in fact no evidence that Mrs. Karpacs suffered conscious pain and suffering as a result of alleged negligence. Mrs.

Karpacs came to the Hospital with a complaint, among other things, of abdominal pain, not attributable to any alleged negligence. While under treatment at the Hospital, however, she remained comfortable, and sedated in her final hours (see, e.g., Tr., Jan. 24, at 221-222, 223, 224-226, 227-229, 250-251 (Karpacs-Brown); Tr., Jan. 24, at 311-313, 315-317 (K. Karpacs); Tr., Jan. 24, at 338-339, 340-342, 344-345 (Smittle)).

In this connection, Appellee, Ms. Karpacs-Brown, testified that, when she visited her mother at approximately midnight -- after the family had decided upon the "Do Not Resuscitate" order -- Mrs. Karpacs was alert, sitting up and watching television, and engaged in conversation (Tr., Jan. 24, at 224-226, 250-251 (Karpacs-Brown)). She gave no indication that she believed her condition was terminal, that she had any sense of impending death, or that she was otherwise in pain (Tr., Jan. 24, at 226, 250-251 (Karpacs-Brown)). Indeed, the medical records reflect that, during the evening of June 1, while she was awake, Mrs. Karpacs was resting "quietly," with no "anxiety" and no complaints of "pain," and even when pressure was placed on her abdomen (where, upon admission, she had complained of pain), her response was that "it hurts a little bit," with no "facial grimace or severe pain noted" (J. Ex. 1,

at 1-41). After the “Do Not Resuscitate” order, the Hospital staff ensured that Mrs. Karpacs received appropriate sedation, and she died in her sleep (Tr., Jan. 24, at 227-229 (Karpacs-Brown); Tr., Jan. 24, at 316-317 (K. Karpacs); Tr., Jan. 24, at 344-345 (Smittle); J. Ex. 1, at 1-42).

In a colloquy after all the evidence had been received, the trial Court correctly noted:

“I recall the testimony that the family members, when they were there, that she did not appear to be in discomfort; that she was watching television, she was watching QVC. I believe the plaintiff said that specifically. I believe Mr. [Kevin] Karpacs, the son, also said that.” (Tr., Jan. 25, at 569).

2. Damages For Mrs. Karpacs’ Children

Appellee presented her own testimony, and that of her brother and sister, to establish their sorrow upon their mother’s passing, and the loving relationship that Mrs. Karpacs had with her husband, children, and grandchildren (Tr., Jan. 24, at 214-220, 229-236, 238-239 (Karpacs-Brown); Tr., Jan. 24, at 306-310, 318-322 (K. Karpacs); Tr., Jan. 24, at 329-333, 345-349 (Smittle)). All of the testimony related to noneconomic loss; and Dr. Murthy did not contest that the evidence was sufficient for the jury’s consideration (Tr., Jan. 25, at 568).

E. Pertinent Rulings Below

**1. Precluding Any Mention
Of The “Do No Resuscitate” Order**

a. The Motion In Limine

Before trial, Appellee requested a ruling that Dr. Murthy be precluded “from offering any testimony or otherwise arguing that Elizabeth Karpacs’ death was hastened or that her injuries were magnified or enhanced because of the fact that her family agreed on a ‘Do Not Resuscitate’ Order” (Plaintiff’s Motion In Limine No. 5, entered July 16, 2004). In response, Dr, Murthy offered that she did not intend to argue or present evidence that the “Do Not Resuscitate” order “hastened” Mrs. Karpacs’ death, “magnified or enhanced” her injuries, or otherwise contributed to her death, but that the “Do Not Resuscitate” order might be admissible for other purposes (Defendant Anandhi Murthy, M.D.’s Response to Plaintiff’s Motion In Limine No. 5, entered Aug. 6, 2004).

The Court entered Appellee’s proposed Order granting the Motion and providing pertinently:

“Plaintiff’s Motion in Limine No. 5 is
GRANTED. The defendant is prevented from

arguing, suggesting or attempting to introduce evidence that Elizabeth Karpacs' death was hastened by her DNR ['Do Not Resuscitate'] Order and the defendant is also precluded from arguing, suggesting, or attempting to introduce evidence that the DNR Order magnified or enhanced Elizabeth Karpacs' injuries."

Order Granting Plaintiff's Motions in Limine Nos. 2, 3, and 5, entered February 22, 2006). The propriety of this Order is not challenged in this Appeal.

b. The Court's Initial Ruling At Trial

Early in the trial, Ms. Karpacs-Brown's Counsel objected to any mention or display of the "Do Not Resuscitate" order before the jury, and argued that the Court's in limine ruling was broad enough to proscribe all references (Tr., Jan. 24, at 199-204). After colloquy, the Court ruled, over objection, that all references to the "Do Not Resuscitate" order would be "redacted," and not displayed to the jury (Tr., Jan 24, at 203-207). "[W]herever it appears, it's redacted," the Court announced (Tr., Jan. 24, at 206).

**c. The Court's Rulings
And Appellee's Evidence**

Thereafter, Mrs. Karpacs' three adult children emphasized before

the jury that at all times they expected their mother would receive whatever care was necessary to preserve her life, even if it carried risks of death; that they would have approved risky exploratory surgery; and that, at times after the “Do Not Resuscitate” order was entered, Dr. Murthy had abandoned her patient (Tr., Jan. 24, at 223-224, 227, 228-230, 236-238 (Karpacs Brown); Tr., Jan. 24, at 315-318, 322 (K. Karpacs); Tr., Jan. 24, at 342-347, 349-350 (Smittle)). The Court rejected Dr. Murthy’s argument that reference to the “Do Not Resuscitate” order was necessary to contradict this testimony and rebut the claim of abandonment (Tr., Jan. 24, at 237-238 (“[w]e’re not going to get into the DNR[;] [m]y ruling stands”); see also Tr., Jan. 24, at 346, where Appellant’s Counsel argued, “If we’re not allowed to talk about the DNR, he can’t be criticizing what went on after it was enacted”).

Thus, the jury was permitted to hear, without contradiction, Appellee Karpacs-Brown’s testimony that she expected “whatever condition” her mother had “would be diagnosed and treated” (Tr., Jan. 24, at 224); that she “[d]efinitely” would have taken her mother to another hospital if that treatment was thought necessary (*id.* at 227); that Dr. Murthy never returned to the Hospital or contacted the family after

midnight (after the “Do Not Resuscitate” order) (*id.* at 228-229); and that she was “shocked” at her mother’s death because it “[d]idn’t seem like we’d get any help” (*id.* at 230). Similarly, Appellee’s brother Kevin testified that, when he arrived at the Hospital after midnight, Dr. Murthy was not there, and there did not appear to be any doctor around (*id.* at 316); that, after he had arrived, he was “surprised” and “was hoping ... that there was something that might be able to be done” (*id.* at 317); that even then he would have been willing to take his mother to another hospital if he had been told there was equipment at that location that might prolong her life (*id.* at 317-318); and that even after midnight he would have authorized exploratory surgery even though the surgery carried risks of death (*id.* at 322). Finally, Appellee’s sister Ms. Smittle added that, when she returned to her mother late on June 1, there was no “sign” of Dr. Murthy (*id.* at 344-345); that she was “surprised” at her mother’s failing condition because “nobody told us nothing was wrong” (*id.* at 345); that her mother’s death was “completely unexpected” (*id.* at 346-347); and that, if she had known that emergency but risky exploratory surgery was available to try and save her mother’s life, “it would have been worth it to take that chance” (*id.* at 349-350).

**d. The Court's Rulings
 And Appellee's Closing Argument**

In his Closing Argument, Appellee's Counsel repeatedly stressed his theme that Mrs. Karpacs' family did not know the gravity of her condition, that they would have done anything to try to save her, and that Dr. Murthy had abandoned her patient. The Court permitted this argument, notwithstanding its preclusion of any reference to the "Do Not Resuscitate" order (Tr., Jan. 25 (Closing Arguments), at 69-70 ("I'll note your objection[;] [t]he DNR ruling will stand"))).

Illustrative of Appellee's argument are these passages:

“ ... [F]or the last 18 hours of Elizabeth Karpacs's life nothing was done to treat her condition except a little bit of water, some antibiotics that came about six hours late, and observation....

* * *

“ ... They observed Mrs. Karpacs as she just, quite simply, over 18 hours, died of this condition.

“Observation isn't treatment.....

* * *

“... [E]ach of the Karpacs children ... were never told how sick their mother was

* * *

“After that 8:00 visit when Dr. Murthy tinkered with the fluids some more ... and went home....

* * *

“[To Dr. Murthy] ‘What did you do?’
‘Nothing.’

* * *

“You should not excuse it that Dr. Murthy not only didn’t help Mrs. Karpacs, but didn’t ... let her go find somebody else who would. Instead, she ordered x-rays for the next day. ‘See you in the morning.’ Mrs. Karpacs is not there anymore.

* * *

“ ... It’s fiddling while Rome burned.

* * *

“...[W]e’re asking you to say that this family had a right to know, they had a right to decide, and they had a right even to say, ‘Make every effort to save Mrs. Karpacs’s life or send me to somebody who will try it.’...

“It’s wrong. It’s inexcusable....

* * *

“I want you to remember what Carol and Kevin said, that their mother had a life worth

fighting for. Their mother would have fought for her life had she just been given the chance. They would have fought alongside her for that chance ... to take the surgery and take the risk. They never got that chance.

“That was taken away when Dr. Murthy took that information ... and went home without ever telling them....

* * *

“... It was unconscionable.

* * *

“ ... [T]he most unreasonable thing that was done was to deprive the family of the right to know and the right to decide.

“Everybody in this family told you that Mrs. Karpacs didn't know what was going on and was not told what was happening. That information went home with Dr. Murthy. That's wrong. That's not excusable.

* * *

“... [F]rom 8:00 at night to 5:00 the next morning -- Mrs. Karpacs didn't see any doctor at all. Can you believe that?

“ ... [F]or those last nine and a half, almost ten hours of her life, she's not seen by Dr. Murthy.

* * *

“ ... Dr. Murthy went home and didn’t come back.

* * *

“ ... [D]oes anything ... you heard change the fact that Mrs. Karpacs only got a little bit of water and a little bit of medicine, no doctor, no surgery, no treatment to save her from the condition that they knew was going to kill her?

* * *

“... [The family] never got to decide. No opportunity whatsoever because they weren’t given the information. They weren’t told. That’s illegitimate. That’s not something that is acceptable.

* * *

“Please use some of your time in deliberations to ask yourself ‘where was [Dr. Murthy] that night?’...

* * *

“Dr. Murthy didn’t do anything all that afternoon, and at 8:00 Dr. Murthy went home and left her with the people who loved her most. She ... didn’t get anymore [sic] treatment, and that was wrong, and I will ask that your verdict reflect that that was wrong.”

Tr., Jan. 25 (Closing Arguments), at 7, 10-11, 16-18, 21, 23-25, 68-73, 75-76.

e. **The Court's Post-Trial Ruling**

After trial, Dr. Murthy renewed her position and urged that the preclusion of any reference to the "Do Not Resuscitate" order, while allowing Appellee's evidence and argument, compelled a new trial. The Court denied the Motion (Order on Motion for Judgment or New Trial, entered July 29, 2008).

2. **Denying The Motion For Judgment On Mrs. Karpacs' Pain And Suffering Claim**

Arguing that there was legally insufficient evidence of Mrs. Karpacs' compensable conscious pain and suffering (including mental anguish), Dr. Murthy at trial moved for judgment, as a matter of law, on this claim (Tr., Jan. 25, at 555). Viewing this only as "a point of argument" to be made for the jury, the Court denied the Motion and also overruled Appellant's objection to the pertinent jury instruction (Tr., Jan. 25, at 568-569, 572-573). Dr. Murthy renewed her motion for judgment, after trial, and the Court denied the requested relief (Order on Motion for Judgment or New Trial, entered July 29, 2008).

3. **Declining To Reduce The Verdict To The Statutory Maximum**

After trial, Dr. Murthy asked the Court, in the event a new trial

were not ordered, to reduce the \$4 Million verdict to \$1 Million, the maximum permitted under Section 55-7B-8 of the West Virginia Code (1986).

The Court declined. Its rationale was that, because the verdict form did not call for the segregation of economic and noneconomic losses, the entire \$4 Million could be compensation for economic loss, which would not be subject to the statutory ceiling. “[T]his Court will not inquire into what proportion of the wrongful death award constituted non-economic loss.” Judgment Order entered July 29, 2008, at 1. The Court ignored Dr. Murthy’s argument that, because there had been no evidence of economic loss, it was unnecessary to list separately “economic” and “noneconomic” damages on the verdict form.

4. Awarding Appellee Prejudgment Interest

After trial the Court, adopting Appellee’s proposed Order verbatim, awarded “\$1,992,238.77 in prejudgment interest to the Plaintiff as personal representative for the statutory beneficiaries as identified in the verdict form” (Judgment Order, entered July 29, 2008).

5. Awarding Appellee Her Attorneys’ Fees

When it entered its post-trial rulings, the Court also granted

Appellee's motion asking that she be awarded her attorneys' fees and costs. Recognizing that it was deviating from the "American Rule," and once again adopting Appellee's proposed Order verbatim, the Court concluded that Dr. Murthy should be responsible for Appellee's fees and costs, and cited these reasons.

1. The Court adopted Appellee's position that Dr. Murthy's professional liability insurance carrier -- in this case and others -- had pursued a "vexatious settlement strategy";

2. The Court adopted Appellee's allegation that -- in another case -- Dr. Murthy's professional liability carrier had engaged in misconduct;

3. The Court adopted Appellee's argument that Dr. Murthy's trial testimony -- in this case and in another malpractice suit against Dr. Murthy -- had, in one respect in each, deviated from what Appellee's Counsel (who was also the plaintiff's counsel in the other suit) had expected; and

4. The Court adopted Appellee's argument that positions Dr. Murthy had taken in this case (i) on settlement and mediation and (ii) on whether one expert should be permitted to testify at trial, had caused

“needless” litigation on these points.

Order on Attorneys’ Fees, entered July 29, 2008.

**ASSIGNMENTS OF ERROR
AND DISPOSITION BELOW**

1. Because Appellee presented unfairly prejudicial evidence and argument inconsistent with the “Do Not Resuscitate” order, the Court abused its discretion by denying Dr. Murthy the opportunity to use the “Do Not Resuscitate” order to answer, contradict, or rebut that evidence and argument.

2. Because Appellee presented no evidence of the decedent’s alleged pain and suffering, the Court erred, as a matter of law, in denying Dr. Murthy’s motion for judgment on that claim.

3. Even if the Court properly denied a new trial:

a. Because Appellee presented no evidence of economic loss, the Court erred, as a matter of law, in declining to reduce the verdict to the statutory maximum of \$1 Million.

b. Because Appellee presented no evidence of any out-of-pocket loss, the Court erred, as a matter of law, in awarding Appellee prejudgment interest.

c. The Court erred, as a matter of law, in awarding Appellee her attorneys' fees and costs.

ARGUMENT

I. **DENYING DR. MURTHY THE OPPORTUNITY TO ANSWER APPELLEE WITH REFERENCE TO THE "DO NOT RESUSCITATE" ORDER WAS PREJUDICIAL ERROR**

A.

The Court's ruling precluding any mention of the "Do Not Resuscitate" order -- in the face of Appellee's contentions at trial -- created unfair prejudice. The Court's pretrial ruling, which we do not contest, proscribed Dr. Murthy's use of the order on issues of causation. It did not serve as a predicate for the Court's broader trial ruling, at Appellee's urging, forbidding any reference to the order, either to establish Dr. Murthy's compliance with the standard of care or to contradict witnesses who testified inconsistently with the order.

The error below was the Court's failure to recognize that Ms. Karpacs-Brown's evidence, and her Counsel's argument, unfairly created before the jury the illusion of (i) a family that, if aware of Mrs. Karpacs' condition, would have taken "any" measure at "any" time to

save her -- in other words, a family that never would have authorized a “Do Not Resuscitate” order; and (ii) a health care provider who, abandoning her patient, “fiddled while Rome burned.” The ruling circumscribed Dr. Murthy’s ability to prove facts impeaching testimony that the family was unaware of Mrs. Karpacs condition, and that there was no bound to the care they would authorize. And it blocked effective rebuttal to the inflammatory charge of abandonment, the charge Appellee’s Counsel so effectively underscored in Closing Argument.

At trial, if the Court believed the circumstances of the “Do Not Resuscitate” order were irrelevant, then Ms. Karpacs-Brown should not have been permitted to introduce evidence, and offer arguments, inconsistent with its existence. That unanswered testimony created an image allowing the jury, on less than all the facts, to find that Dr. Murthy concealed information, denied the family resort to extraordinary life-saving measures, and then “went home.” That uneven presentation, particularly in view of the verdict’s extraordinary size, was presumptively prejudicial.

B.

This Court’s jurisprudence requires the balanced receipt of

evidence absent here. Answering evidence otherwise inadmissible will become admissible, to prevent prejudice, if one party “opens the door” to it. E.g., Rohrbaugh v. Wal-Mart Stores, Inc., 212 W.Va. 358, 365-366, 572 S.E.2d 881, 888-889 (2002) (permitting the defendant to introduce evidence of its treatment of other injured employees after the plaintiff had claimed he was fired to save the costs of a workers compensation claim); Bailey v. McDonald, 204 W.Va. 352, 355-356, 512 S.E.2d 865, 868-869 (1998) (error to preclude testimony of a former patient after the defendant had called a former patient to testify for the defense); State v. Mann, 205 W.Va. 303, 312-313, 518 S.E.2d 60, 69-70 (1999) (cross-examination of defendant on cocaine addiction permissible because defense had opened the door); see also State v. Guthrie, 194 W.Va. 657, 682, 461 S.E.2d 163, 188 (1995) (“[t]he most significant feature of the curative admissibility rule ... is that it 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”). And there must be particular regard for impeachment evidence. See, e.g., Doe v. Wal-Mart Stores, Inc., 210 W.Va. 664, 678, 558 S.E.2d 663, 677 (2001); State v. Blake, 197 W.Va.

700, 708-710, 478 S.E.2d 550, 558-560 (1996).

C.

In State v. Blake, *supra*, 197 W.Va. at 709, 478 S.E.2d at 559, this

Court held:

“Although erroneous evidentiary rulings alone do not lead to automatic reversal, we are obligated to reverse where the improper exclusion of evidence places the underlying fairness of the entire trial in doubt or where the exclusion affects the substantial rights of the defendant. We find the error in this case rose to this dimension. Making this determination involves the assessment of the likelihood that had the jury heard the excluded evidence, its outcome would have been affected. ‘If one cannot say, with fair assurance, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.’ Kotteakos v. United States, 328 U.S. 750, 765 (1946).” (Emphasis added).

Indeed, the refusal to allow admissible evidence is “presumed to be prejudicial where it does not appear that a verdict against a party objecting was unaffected thereby.” Blankenship v. Mingo County Economic Opportunity Comm'n, Inc., 187 W.Va. 157, 164 n.10, 416 S.E.2d 471, 478 n.10 (1992). This Court has applied this principle on numerous occasions. E.g., Mays v. Chang, 213 W.Va. 220, 225, 579

S.E.2d 561, 566 (2003) (excluding blood test evidence in a medical malpractice case was reversible error because the jury could have concluded that the physician had a duty to perform the test and that he had breached the duty; trial's outcome could have been different if the evidence was admitted); Hadox v. Martin, 209 W.Va. 180, 187, 544 S.E.2d 395, 402 (2001) (excluding accident report was reversible error; "there is no reasonable assurance that the jury would have reached the same conclusion had the evidence been admitted"); Lacy v. CSX Transp. Inc., 205 W.Va. 630, 650, 520 S.E.2d 418, 438 (1999) (excluding accident diagram was reversible error because it could have supported the plaintiff's testimony and rebutted that of the defendant); Crawford v. Roeder, 169 W.Va. 158, 161, 286 S.E.2d 273, 275-276 (1982) (excluding eyewitness testimony was reversible error because it "might well have had a substantial effect upon the outcome of the case"); Tedesco v. Weirton General Hosp., 160 W.Va. 466, 472, 235 S.E.2d 463, 466 (1977) (excluding statements in medical records was reversible error; "[r]efusal of the trial court to admit admissible evidence at the trial of an action is presumed to be prejudicial and, where it does not clearly

appear that a verdict against a party objecting was unaffected thereby, a judgment rendered thereon shall be reversed”).

D.

The Court gave no reason for extending its pretrial ruling, and refusing to accept Dr. Murthy’s contention that Appellee was exploiting that ruling unfairly and had thus “opened the door” to answering evidence, and argument, necessary to prevent unfair prejudice. The Court’s ruling on the “Do Not Resuscitate” order resulted in a trial that was not evenly balanced. This Court should order a new trial.

**II. THERE WAS NO EVIDENCE OF
COMPENSABLE PAIN AND
SUFFERING FOR MRS. KARPACS**

Under the wrongful death act, Mrs. Karpacs’ Estate was eligible to recover damages for conscious pain and suffering and mental anguish that she had suffered prior to her death. But, as in any case in which this damage is alleged, there must be proof -- both of the fact of damage and its causation -- sufficient to raise a question for the jury.

“To award damages for pain and suffering, there must be evidence of conscious pain and suffering of the decedent prior to death. Where ... there is no evidence that the decedent

consciously perceived pain and suffering, no damages for pain and suffering are allowed.”

Syl. Pt. 6, McDavid v. United States, 213 W.Va. 592, 584 S.E.2d 226 (2003).

Here no witness with first-hand knowledge of Mrs. Karpacs' condition -- in neither her family's testimony nor the recorded observations of her health-care providers -- offered any evidence of conscious pain and suffering proximately caused by any action of Dr. Murthy. The gravamen of Appellee's case was that more aggressive action should have been taken to find, through exploratory surgery, the cause of Mrs. Karpacs' symptoms. Those symptoms, upon arrival at the Hospital, included abdominal discomfort. But that pain was not attributable to the alleged negligence, and indeed, according to the evidence, while at the Hospital Mrs. Karpacs was made comfortable through treatment. And Appellee's case offered no assurance that Mrs. Karpacs would have been pain- and anxiety-free had she endured exploratory open abdominal surgery, a procedure that offered no guarantee of diagnosis and cure.

Upon hearing all the evidence, the trial Court did not disagree

about the absence of evidence, but opined that the point was a matter of argument for the jury. That observation was an error of law; the claim should have been dismissed. See, e.g., Adams v. Sparacio, 156 W.Va. 678, 684, 196 S.E.2d 647, 652 (1973) (even a “mere scintilla” of evidence “is insufficient to carry the case to the jury”); Syl. Pt. 1, Oates v. Continental Ins. Co., 137 W.Va. 501, 72 S.E.2d 886 (1952) (“[a] jury will not be permitted to base its findings of fact upon conjecture or speculation”).

**III. IN ANY EVENT, THE MAXIMUM
RECOVERABLE AMOUNT ON
ALL CLAIMS COULD BE \$1 MILLION**

Upon a proper finding of liability, the maximum recoverable amount for all noneconomic loss in this matter was \$1 Million. West Virginia Code, § 55-7B-8 (1986) (setting the maximum); Syl. Pt. 6, Robinson v. Charleston Area Medical Center, Inc., 186 W.Va. 720, 414 S.E.2d 877 (1991) (the single maximum applies to all claims). The jury awarded Mrs. Karpacs’ Estate \$1 Million for her loss, which Appellee acknowledges was solely noneconomic in nature, and awarded \$3 Million to her children for their loss. The Court below refused to reduce the total award to \$1 Million because, in its view, the jury could have

treated as economic loss its entire \$3 Million award to Mrs. Karpacs' children, and the verdict form did not distinguish economic from noneconomic loss in the children's awards. That decision was wrong as a matter of law.

A.

There was no proof of economic loss; indeed, there was no claim of economic loss. Mrs. Karpacs' claim was for pain and suffering; the jury awarded her \$1 Million for it, and the Court below did not find that as exempt from the statutory limit. Mrs. Karpacs' children's claims were for the sorrow and noneconomic loss of the loving relationship they had with their mother. The jury received no instruction on economic loss. See Proposed Charge to the Jury, filed Jan. 25, 2008, at 11-13 (signed by Judge Karl). And the jury is presumed to have followed its instructions. See, e.g., State v. Miller, 197 W.Va. 588, 606, 476 S.E.2d 535, 553 (1996).

On the children's damages, the Court instructed pertinently:

“If you find for the Plaintiff, you will determine what sum of money will compensate the beneficiaries for the injury and loss to them resulting by reason of the wrongful death of Elizabeth Karpacs....

“In determining damages by reason of the wrongful death, your verdict shall include, but not be limited to, damages for the following:

“Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent.

“You are instructed that it was not necessary for the Plaintiff to introduce evidence as to the monetary value of Elizabeth Karpacs’ family’s mental anguish and emotional distress. It is only necessary that she prove the nature and extent of these damages, and it is for you, the jury, to use your own judgment, sense and experience, to determine the monetary value of said damages.” (Proposed Charge to the Jury, filed Jan. 25, 2008, at 11-12).

This instruction tracked the evidence. There was no effort to cast Mrs. Karpacs’ relationship in economic terms: She was not described as someone who baby-sat for her children while their parents were away, or who otherwise cooked or cared for her adult, independent children, or who otherwise performed specific, quantifiable services. The testimonial account of each of the three children was ample, but it portrayed evidence only of “[s]orrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices

and advice.” Dr. Murthy did not object to the instruction, or to the verdict form based upon it, because there was evidence to support the instruction. There was no evidence to support an instruction on economic loss, and no such instruction was given.

In sum, the jury’s wrongful death award was for noneconomic loss, in toto, because there is no evidential or legal basis to presume otherwise.

B.

Adopting Appellee’s arguments and proposed order, the Court below relied upon Gerver v. Benavides, 207 W.Va. 228, 530 S.E.2d 701 (1999), cert. denied, 529 U.S. 1131 (2000), and certain language in the verdict form. Judgment Order, entered July 29, 2008, at 1, 9-15. That reliance was misplaced.

In contrast to this case, in Gerver there was evidence of noneconomic and economic loss, and the Gerver jury received instructions on both. The jury instructions included specific, identified elements of economic and noneconomic damages within the definitions of both “general” damages and “special” damages. The verdict form tracked these definitions, and indeed specifically listed identified

elements of economic loss (medical expenses, for example) -- precisely as they had been identified within the instructions -- within the “general damages” section of the form. Gerver v. Benavides, supra, 207 W.Va. at 234-235, 530 S.E. 2d at 707-708.

On these facts, this Court held that, because of the identified intermingling of economic and noneconomic loss within the instructions and verdict form, the failure to request separate findings on the economic and noneconomic elements precluded the Court from considering whether the jury had, in fact, awarded more than the statutory limit in noneconomic damages. In such circumstances, where review is “entirely a matter of grace,” “there is no means to determine whether the non-economic damages assessed by the jury exceeded the \$1,000,000 statutory limit, this Court will not presume that error occurred.” Gerver v. Benavides, supra, 207 W.Va. at 235, 530 S.E. 2d at 708.

In this case, there were no instructions on economic loss. There was no intermingling of economic and noneconomic loss within the instructions. Nevertheless, adopting Appellee’s argument, the Court below noted that the following underscored language in the verdict form

could serve as the predicate for characterizing as “economic loss” the entire \$3 Million the jury awarded to Mrs. Karpacs’ three children:

“Past and future sorrow, mental anguish and solace, loss of companionship, comfort and guidance, and loss of services, protection, care and assistance” (Journal Order, entered Jan. 31, 2008, at 4, 5; emphasis added).

The underscored words must be applied, however, consistently with the jury instructions, and the evidence. The jury was told it could award “[s]orrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice” (emphasis added). The “loss of services, protection, care and assistance” -- on the evidence adduced at trial -- can only be additional iterations of “solace,” all compensable as noneconomic loss. If it were otherwise, the award would be unsupported by any evidence, and inconsistent with the jury instructions.

C.

This Court has admonished that its jurisprudence on verdict forms and special interrogatories is

“not intend[ed] ... to create a trap for the unwary defendant and a jackpot for the silent plaintiff. Our job is not to bail careless defense counsel

out of problems of their own making, but neither is it to provide a windfall for plaintiffs who sit by and allow the matter of damages ... to become hopelessly confused.”

Miller v. Monongahela Power Co., 184 W.Va. 663, 673, 403 S.E.2d 406, 416 (1991), overruled on other grounds, Mallet v. Pickens, 206 W.Va. 145, 522 S.E.2d 436 (1999).

Dr. Murthy did not invite the error below. The Court’s strained interpretation of the verdict form not only ignored Ms. Karpacs-Brown’s express disavowal of economic damages, the lack of proof of such loss, and the absence of instructions on such damages, but it also meant that the jury awarded nothing for the sorrow and other noneconomic loss depicted in the children’s testimony. So contorting the verdict form, to achieve a result so far removed from the evidence and the jury instructions upon which the verdict form must rest, should not be condoned.

IV. THERE WAS NO BASIS FOR THE AWARD OF PREJUDGMENT INTEREST

Prejudgment interest may be awarded only “if there is an ascertainable pecuniary loss.” Syl. Pt. 3, Capper v. Gates, 193 W.Va. 9, 454 S.E.2d 54 (1994). It is available only if there has been a “loss of use

of funds.” Syl. Pt. 7, Wilt v. Buracker, 191 W.Va. 39, 443 S.E.2d 196 (1993), cert. denied, 511 U.S. 1129 (1994). It may be applied on “special damages ... or ... liquidated damages.” W.Va. Code § 56-6-31(a). “Special damages includes lost wages and income, medical expenses, damages to tangible personal property and similar out-of-pocket expenditures, as determined by the court.” Id. (emphasis added).

Here there was no evidence of any “out of pocket expenditures.” This was not a case in which damages were liquidated, or a plaintiff was denied the use of funds. There was no “ascertainable pecuniary loss.” The Court’s award of almost \$2 Million in prejudgment interest was error.

V. THERE WAS NO BASIS FOR THE AWARD OF ATTORNEYS’ FEES

The trial Court based its extraordinary order awarding attorneys’ fees and costs on its negative perceptions of Dr. Murthy’s professional liability insurance carrier and on discrete events involving Dr. Murthy in this and another case. The Court erred, as a matter of law, in several respects.

A.

To justify an exception to the “American Rule” on attorneys’ fees and costs, there must be clear and convincing evidence, demonstrable on the Record, that the litigant against whom the award runs -- not her insurer -- “has acted in bad faith, vexatiously, wantonly or for oppressive reasons.” E.g., Syl. Pt. 6, Miller v. Lambert, 196 W.Va. 24, 467 S.E.2d 165 (1995); id., 196 W.Va. at 32-33, 467 S.E.2d at 173-174 (noting the “clear and convincing” standard)). The standard is even more exacting than that for an award of punitive damages, which the Court below held were inappropriate in this case. See Midkiff v. Huntington Nat. Bank West Virginia, 204 W.Va. 18, 20 n.5, 511 S.E.2d 129, 131 n.5 (1998). Aggressively defending oneself -- even declining to settle -- is not a basis for making the award. E.g., Sally-Mike Properties v. Yokum, 179 W.Va. 48, 51, 365 S.E.2d 246, 249 (1986).

B.

The trial Court made its dissatisfaction with Dr. Murthy’s insurer quite clear. At a pretrial hearing, when considering a motion for a continuance, the Court voiced its concern, based upon newspaper accounts of another case involving Dr. Murthy, and upon the Court’s

apparent experience in other cases, about Dr. Murthy's insurer's apparent unwillingness to settle cases (Tr., Mar. 28, 2007, at 8). The Court gratuitously expressed this sentiment:

“After I make my decision about the trial [on the continuance motion], I want to talk to some people from [the insurance carrier]. I want this policy that they have. I've had dealings with them for years.

“I've had this policy where they come in and don't do anything in trying to get a case settled when the hospitals pony up money, radiologists pony up money, but the doctor and [the insurance carrier] do nothing. You can put the word out that I want to talk to the people from your company.” (Tr., Mar. 28, 2007, at 9).

Thereafter, when it made its post-trial ruling awarding fees and costs -- against Dr. Murthy, not her insurer -- the Court emphasized its displeasure with the insurance company, and accepted the accounts of newspapers and Appellee's Counsel about occurrences in other cases. See, e.g., Order on Attorneys' Fees, at 6-7 (¶¶ 20-21) (the insurance carrier “has a history of offering nothing and rejecting offers to mediate in even the most meritorious cases,” citing “news accounts”); 7-8 (¶¶ 22-25 (citing a document filed in a Florida case alleging improper conduct by an affiliated insurance company; see Plaintiff's Motion for Attorney's

Fees and Costs and Incorporated Memorandum in Support, entered Feb. 5, 2008, at Exhibit H (discussing the Florida case)); 8 (¶¶ 26-27) (citing the insurance carrier's alleged "refus[al] to offer a single penny" in the other malpractice case involving Dr. Murthy in West Virginia).

The Court lost perspective; and its desire to strike at the insurance company was erroneous, in several respects.

1. Even if Dr. Murthy's insurer had engaged in offending conduct, in this and other cases, Dr. Murthy cannot be punished for it. Appellee, in another context below, realized this elementary principle of fundamental fairness, for in moving to amend her Complaint, to add the "bad faith" claim against Dr. Murthy's insurer, Ms. Karpacs-Brown asserted, as justification for the amendment, "[The insurance carrier] is solely and exclusively the entity against whom the plaintiff's legal fees, costs and expenses should be assessed pursuant to the exception to the 'American' rule which exists when an entity acts in bad faith, vexatiously, wantonly or for oppressive reasons in the defense of a lawsuit." (Plaintiff's Motion for Leave to File An Amended Complaint, entered Feb. 5, 2008, at 2; emphasis added).

2. To the extent this award against Dr. Murthy is based upon her insurer's actions in other cases, and the Court's Order makes clear that it is, the award finds no support in the law.

3. Even if Dr. Murthy's insurer had failed in this case to negotiate in good faith, which we do not concede, that action could not serve as the basis for a fee award, in favor of Ms. Karpacs-Brown, against the insurer. E.g., Cook v. McDowell County Emergency Ambulance Svc. Authority, Inc., 191 W.Va. 256, 260-261, 445 S.E.2d 197, 201-202 (1994); Grove By and Through Grove v. Myers, 181 W.Va. 342, 353, 382 S.E.2d 536, 547 (1989). If the hammer of an exception to the "American Rule" cannot be used directly against the insurer responsible for an offending settlement position, then a fortiori it should not be available against the insured, who was not responsible.

4. The Record below makes plain that Dr. Murthy and her insurer did participate in settlement discussions. There were successive monetary offers, culminating in an offer of \$150,000 against a settlement demand of \$650,000, and the parties did participate in mediation (see, e.g., Order on Attorneys' fees, at pp. 5-6 (¶¶ 14-18)). That the eventual verdict exceeded the plaintiff's demand, the defendant's offer, and the

statutory limit is not basis for applying an exception to the American Rule, or crafting a new one. See, e.g., Verba v. Ghaphery, 210 W.Va. 30, 36-37, 552 S.E.2d 406, 412-413 (2001).

C.

Once again adopting Appellee's arguments, the Court below based its award, in part, upon three discrete events involving Dr. Murthy. Singly or together, they are not proper support for the ruling.

1. Mediation. Before trial, a disagreement arose as to whether mediation should occur before the trial Judge (Ms. Karpacs-Brown's preference) or before a neutral third party (Dr. Murthy's preference). Dr. Murthy did not refuse to participate in mediation altogether. After Ms. Karpacs-Brown filed a motion to compel mediation, the dispute resolved with mediation occurring before a neutral third party. After a series of demands, offers, counter-demands, and counter-offers, settlement discussions ended. See, e.g., Order on Attorneys' fees, at pp. 5-6 (¶¶ 14-18); Defendant's Response to Plaintiff's Motion to Compel Mediation Before the Court, entered May 9, 2007; Affidavit of Geoffrey C. Bown, Esq. [Appellee's Counsel] in Support of Plaintiff's Motion for Attorney's Fees and Costs, entered Feb. 7, 2008).

2. Preclusion of an Expert. More than three years before trial, Ms. Karpacs-Brown moved to preclude Dr. Murthy's use of Roger Abrahams, M.D., as an expert witness at trial, based upon the content of Dr. Abrahams' deposition testimony. Dr. Murthy did not oppose the Motion, and the Court entered an Order precluding the witness. Then, a month before trial, Dr. Murthy asked the Court to reconsider its ruling, citing among other things intervening precedent of this Court, but the Court declined. At trial, Dr. Murthy filed a proffer of what Dr. Abrahams would have testified, and also requested that the Court allow testimony, outside the presence of the jury, simply to preserve the point for appeal. See Dr. Murthy's "Motion to Complete Trial Record," entered Feb. 5, 2008; Order on Attorneys' Fees, at pp. 8-12 (¶¶ 28-48). The Court denied Dr. Murthy's request for a testimonial proffer. (Dr. Murthy has elected not to include the Court's ruling precluding Dr. Abrahams as an assignment of error).

3. Impeachment of Dr. Murthy at Trial. At trial, Dr. Murthy testified about the content of a conversation she said she had with her patient, Mrs. Karpacs. Appellee's Counsel suggested in questioning that this testimony was inconsistent with Dr. Murthy's responses to pretrial

discovery, which Appellee emphasized did not relate the conversation (Tr., Jan. 24, at 259-264). In seeking attorneys' fees, Appellee argued, and the Court accepted, that a similar incident had occurred in Appellee's Counsel's prior lawsuit against Dr. Murthy. See Order on Attorneys' Fees, at pp. 13-14 (¶¶ 49-54).

These three incidents did not create "needless" litigation; they reflect routine litigation events and do not bespeak the kind of conduct warranting the gross sanction the Court imposed. See, e.g., Helmick v. Potomac Edison Co., 185 W.Va. 269, 278, 406 S.E.2d 700, 709, cert. denied, 502 U.S. 908 (1991) (fee award denied notwithstanding defendant's erroneous statement in suit); Smith v. First Community Bancshares, Inc., 212 W.Va. 809, 824, 575 S.E.2d 419, 434 (2002) (fee award denied notwithstanding dismissal of plaintiff's complaint for failure to produce sufficient evidence to support fraud claim). Moreover, even if, for example, the Court properly could find that Dr. Murthy's position on mediation (which ultimately was accepted) had prompted a needless motion, or that Dr. Murthy's request for reconsideration on the witness was unreasonable -- neither of which we concede -- the acceptable course would have been to award reasonable

fees incurred in connection with each of those events, not to award Appellee her fees for the entire litigation. See, e.g., Flanagan v. Stalnaker, 216 W.Va. 436, 443 n.8, 607 S.E.2d 765, 772 n.8 (2004).

And it was not proper to look to alleged misconduct in another case (in which neither this trial Judge nor Dr. Murthy's Counsel below were participants), or to a single episode of impeached trial testimony in this case, as a basis for the global award of fees.

D.

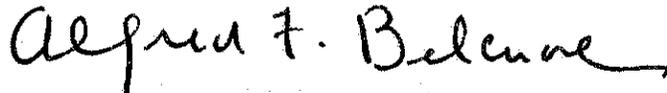
With its Order on Attorneys' Fees, and with each of the post-trial rulings challenged in this Appeal, the trial Court followed the disfavored practice of adopting verbatim "findings" and "conclusions" drafted by Ms. Karpacs-Brown, the party in whose favor the Court intended to rule. See, e.g., State ex rel. Cooper v. Caperton, 196 W.Va. 208, 214, 470 S.E.2d 162, 168 (1996). This practice produced reversible error, which this Court now may correct. See, e.g., West Virginia Educ. Ass'n v. Consolidated Public Retirement Bd., 194 W.Va. 501, 513-515, 460 S.E.2d 747, 759-761 (1995).

CONCLUSION

For the foregoing reasons, the Judgment should be reversed and the cause remanded (i) for entry of judgment, in Dr. Murthy's favor, on the claim of Mrs. Karpacs' Estate, and (ii) for a new trial on the claims of Mrs. Karpacs' children. In the alternative, the Judgment should be reversed and the cause remanded with instructions to enter judgment for no more than \$1 Million, plus post-judgment interest and ordinary taxable costs.

Respectfully submitted,

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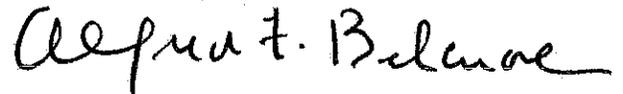
May 2009

CERTIFICATE OF SERVICE

I hereby certify that, on May 14, 2009, I caused the foregoing
Brief for Appellant to be served upon each of the other parties herein by
mailing one copy thereof, first-class postage prepaid, each to:

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