

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

No. 34747

COPY

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/Appellee

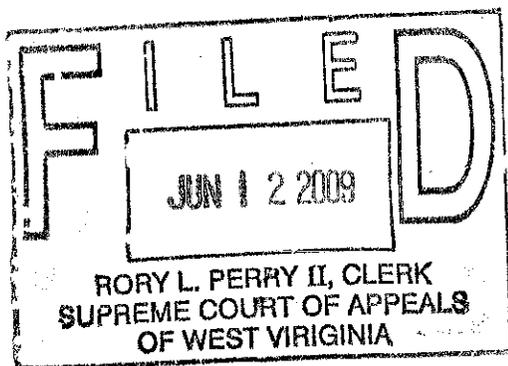
v.

ANANDHI MURTHY, M.D.

Defendant/Appellant

APPELLEE'S BRIEF AND CROSS ASSIGNMENT OF ERROR

FROM THE CIRCUIT COURT OF WETZEL COUNTY
CIVIL ACTION NO. 03-C-36-K



CHRISTOPHER J. REGAN #8593
GEOFFREY C. BROWN #9045
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
304-242-8410
Counsel for Appellee/Plaintiff

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

KIND OF PROCEEDING AND NATURE OF THE RULINGS IN THE LOWER COURT 1

A. Kind of Proceeding 1

B. Nature of the Rulings in the Lower Court..... 2

CROSS-ASSIGNMENT OF ERROR 4

A. The Trial Court Erred in Directing a Verdict in Favor of the Appellant on the Issue of Punitive Damages 4

B. A New Trial, on the Issue of Punitive Damages Only, Should be Ordered..... 5

FACTS OF THE CASE 5

A. Facts Surrounding Mrs. Karpacs' Death 5

 1. **The Negligence of Anandhi Murthy** 6

 2. **Mrs. Karpacs' Suffering Before Her Death** 11

 3. **The Karpacs' Family's Loss of Elizabeth Karpacs' Services, Kindly Offices, and Advice** 12

B. The Entry of Mrs. Karpacs' Do Not Resuscitate Order 13

C. Dr. Murthy's Abusive Litigation Conduct 15

 1. **Dr. Murthy's Failure to Engage in Good-Faith Settlement Discussions** 16

 2. **The Defendant's Abusive Trial Conduct**..... 19

 3. **Dr. Murthy's Intentional Under-Preparation of an Expert Witness and Attempted Trial by Ambush** 21

SUMMARY OF THE ARGUMENT 24

ARGUMENT.....27

A. The DNR Was Properly Excluded Because it Did Not Bear on Any Issue at Trial, Because No Proffer Was Made of DNR Evidence, and Because Appellant Defaulted When Appellee Moved to Exclude it Before Trial.....27

1. Standard of Review – Evidentiary Rulings Reviewed for Abuse of Discretion28

2. Appellant’s Effort to Convince the Jury That “Do Not Resuscitate” Orders Authorize the Abandonment of a Living Patient to a Belly Infection Was Justly Turned Aside by the Trial Judge28

3. Appellant Defaulted This Issue and Cannot Resurrect it Now.....31

B. Evidence of Pain and Suffering Was Presented by the Plaintiff Through Testimony and Documentary Evidence and Appellant’s Contention to the Contrary is Unavailing32

1. Standard of Review – Sufficiency of Evidence Reviewed for Abuse of Discretion32

2. The Medical Record Makes it Obvious That Mrs. Karpacs’ Fatal Intra-Abdominal Infection was a Painful Condition That Was Allowed Worsen and Progress by Dr. Murthy’s Negligence34

3. The Testimony of Mrs. Karpacs’ Children Likewise Established Pain and Suffering.....34

C. A Litigant Seeking to Rely on a Non-Economic Damage Cap Must Seek a Verdict Form That Separates Economic From Non-Economic Loss. Appellant’s Failure to Do So is Fatal to Her Attempt to Rely on § 55-7B-8 (1986)35

1. Standard of Review – Co-Mingled Damages are Not Reviewed35

2. The Trial Court, Who Heard the Evidence, Properly Found Evidence of Both Economic and Non-Economic Loss to Be Present in the Record and the Defendant Failed to Seek Separation of These Elements on the Verdict Form.....37

D.	The Prejudgment Interest Was Properly Awarded.....	41
1.	Standard of Review – Co-mingled Damages are Not Reviewed	41
E.	The Trial Court Properly Exercised Its Authority to Address the Copious Litigation Misconduct of the Appellant Through an Award of Attorney’s Fees.....	41
1.	Standard of Review – Judgment Which is not Final is Not Appealable.....	41
2.	Standard of Review – An Award of Sanctions is Reviewed for Abuse of Discretion.....	42
3.	Facts Underlying Sanctions Decision are Reviewed Under the “Clearly Erroneous” Standard.....	43
4.	The Failure to Obey Court Orders and All Appellant’s Associated Misconduct Warrants an Award of Fees.....	43
	CROSS-ASSIGNMENT OF ERROR	47
A.	The Trial Court Erred in Directing a Verdict in Favor of the Appellant on the Issue of Punitive Damages	47
B.	A New Trial, on the Issue of Punitive Damages <u>Only</u>, Should Be Ordered.....	50
	CONCLUSION.....	50

TABLE OF AUTHORITIES

Supreme Court of the United State Cases

Chambers v. NASCO, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991).....44

Supreme Court of Appeals of West Virginia Cases

Couch v. Chesapeake & O. Ry. Co., 45 W.Va. 51, 30 S.E. 147 (1898).....33

Delmar Oil Co. v. Bartlett, 62 W. Va. 700, 59 S.E. 634 (1907).....31

Gentry v. Mangum, 195 W.Va. 512 (1995).....27

Gerver v. Benavides, 207 W.Va. 228, 530 S.E. 2d 701 (1999), cert. denied, 529 U.S. 1131 (2000).....3, 35, 40

Graham v. Wallace, 214 W. Va. 178 (2003)46

Grove by and through Grove v. Myers, 181 W.Va. 342 (1989).....41

Hicks v. Gaphery, 212 W.Va. 327 (2002)28

Horkulic v. Galloway, 222 W.Va. 450, 665 S.E.2d 284, 295 (2008).....2

James M.B. v. Carolyn M., 193 W.Va. 289, 456 S.E.2d 16 (1995)42

Kesner v. Trenton, 158 W.Va. 997 (1975)40

Kocher v. Oxford Life Ins. Co., 216 W.Va. 56 (2004).....49

Laslo v. Griffith, 143 W.Va. 469, 102 S.E.2d 894 (1958).....35

Lord & McCracken v. Henderson, 65 W. Va. 322, 64 S.E. 134 (1909).....31

McDavid v. United States, 213 W.Va. 592 (2003).....2, 33, 34, 35, 40

McDougal v. McCammon, 193 W.Va. 229 (1995)28

Parkersburg & Marietta Sand Co. v. Smith, 76 W.Va. 246 (1915)27, 31

Pritt v. Suzuki Motor Co., Ltd., 204 W.Va. 388, 513 S.E.2d 161 (1998).....42

Rose ex rel. Rose v. St. Paul Fire and Marine Ins. Co., 215, W.Va. 250 (2004).....16

<u>Shafer v. Kings Tire Service, Inc.</u> , 215 W.Va. 169, 597 S.E.2d 302 (2004).....	43
<u>Shields v. Romine</u> , 122 W.Va. 639, 13 S.E.2d 16 (1940)	44
<u>Stanley v. Chevathanarat</u> , 222 W.Va. 261, 664 S.E.2d 146 (2008).....	41, 48
<u>State ex rel. Allstate Ins. Co. v. Gaughan</u> , 203 W.Va. 358, 508 S.E.2d 75 (1998)	16
<u>State ex rel. Rees v. Hatcher</u> , 214 W.Va. 746, 591 S.E.2d 304 (2003)	44
<u>Totten v. Adongay</u> , 175 W.Va. 634 (1985)	32
<u>Waddy v. Riggleman</u> , 216 W.Va. 250 (2004)	50
<u>Walker v. Monongahela Power Co.</u> , 147 W.Va. 825, 131 S.E.2d 736 (1963).....	35

West Virginia Code

W.Va. Code § 58-5-1	42
---------------------------	----

Other Cases

<u>Ginsberg v. St. Michael’s Hosp.</u> , 678 A.2d 271 (1996).....	29
<u>Loehner v. Simons</u> , 239 A.D.2d 468, 657 N.Y.S.2d 447 (2d Dep’t 1997)	38
<u>McKee v. Colt Electronics Co.</u> , 849 F.2d 46 (2d Cir.1988)	38
<u>Medvecz v. Choi</u> 569 F. 2d 1221 (3d Cir. 1977).....	49
<u>Plotkin v. New York City Health and Hospitals Corp.</u> , 221 A.D.2d 425, 633 N.Y.S.2d 585 (2d Dep’t 1995)	38
<u>Roberts v. Murthy</u> , Civil Action No. 02-C-14-M (Marshall County, 2007)	17, 20, 21
<u>Smartt v. NHC Healthcare/McMinnville, LLC</u> , Slip Copy, 2009 WL 482475 (Tenn.Ct.App., 2009)	48
<u>Wimer v. Macielak</u> , 47 Pa. D. & C.4th 364 (Crawford Cty. 2000).....	49

I. KIND OF PROCEEDING AND NATURE OF THE RULINGS IN THE LOWER COURT

A. Kind of Proceeding

Elizabeth Karpacs died a painful and unnecessary death because her surgeon, Dr. Anandhi Murthy, completely failed to treat Mrs. Karpacs' known emergency surgical condition. Dr. Murthy examined Mrs. Karpacs and knew she had an "acute abdomen" – a belly infection – and would probably die from it without surgery, but she took no strong action and then inexplicably went home without operating to save Mrs. Karpacs' life or transferring Mrs. Karpacs to another facility where she could get help from another surgeon. Instead, Dr. Murthy told Mrs. Karpacs' family test results would be "in tomorrow" before she went home. She did not return until after Mrs. Karpacs died.

The Appellee's father, widower Andrew Karpacs, originally filed suit and litigation ensued for five years before trial in January of 2008. After the Appellant pulled a nuisance-value settlement offer eleven days before trial, the case was tried before a jury in the Circuit Court of Wetzel County (Karl, Chief Judge, presiding). The jury found in favor of the plaintiff. Specifically, the jury awarded \$1,000,000.00 in wrongful death damages to each surviving child and \$1,000,000.00 to the estate for survivorship damages. Though the jury was not informed of Dr. Murthy's history of egregious malpractice, Appellee notes that a verdict of over five and half million dollars was returned against Dr. Murthy in Wetzel County in 2007, as a result of equally shocking failures to care for one of her patients.¹

¹ As the trial judge stated: "This is the second multi-million dollar award against Dr. Murthy in Wetzel County in less than a year. In both cases, experts testified that Dr. Murthy's treatment of her patients not only constituted negligence but actually went beyond the pale to the level of a gross deviation from the standard of care – amounting in Roberts v. Murthy to performing experimental surgery and in this case, to simply abandoning her patient." 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 at ¶ 25; Record at 1375 (emphasis supplied)

Appellant challenges three fact-based, discretionary rulings by the trial judge, one excluding evidence, one submitting an issue of fact to the jury, and another awarding sanctions for litigation misconduct. She also challenges the trial judge's application of syllabus point law in the areas of verdict forms and prejudgment interest. These assignments of error are in the main unpreserved (or unripe) and all lack merit as set forth herein.

The Appellant does not dwell on the high burden borne in her effort to upset the judgment through challenge of discretionary rulings. The standards of review include the following from Rule 61 of the West Virginia Rules of Civil Procedure:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Horkulic v. Galloway, 222 W.Va. 450, fn.9, 665 S.E.2d 284, 295 (2008). Moreover, the bulk of the appeal challenges wrongful death damages, notwithstanding this Court's holding that:

By crafting the damages portion of the wrongful death act so broadly, the Legislature established the principle that juries have almost unfettered discretion in awarding damages for a death caused by the wrongful act, neglect or default of another. "It is well settled in this jurisdiction that where the jury finds the defendant liable in a wrongful death action, it has absolute discretion, without regard to proof of actual damages, pecuniary loss and the like, to make any award it deems 'fair and just[.]'" Kesner v. Trenton, 158 W.Va. 997, 1002, 216 S.E.2d 880, 884 (1975).

McDavid v. United States, 213 W.Va. 592, 601 (2003).

B. Nature of the Rulings in the Lower Court

Dr. Murthy claims that the trial judge abused his discretion by enforcing an evidentiary order in limine to which Dr. Murthy failed to object. Specifically, Judge Karl's

evidentiary order addressed the “Do Not Resuscitate” order recommended by Mrs. Karpacs’ family doctor well after Dr. Murthy abandoned Mrs. Karpacs to her death. Uncontroverted evidence demonstrated that by the time Mrs. Karpacs’ family agreed to the DNR, her fate was sealed. If Mrs. Karpacs was going to have life-saving surgery, that surgery needed to come well before the time of the DNR. As such, and as Judge Karl correctly held, the DNR had nothing to do with any issue in the case. Disturbingly, Dr. Murthy now claims that she was prejudiced because, in her view, a doctor is relieved from any duty to her patient by such an order.²

Dr. Murthy also claims that the trial court abused its discretion by finding that the evidence, viewed as a whole and in the light most favorable to the plaintiff, reflected pain and suffering on the part of the decedent, notwithstanding evidence supporting this conclusion both in the medical records and in expert testimony.

Dr. Murthy claims Judge Karl abused his discretion again by finding that both non-economic and economic loss were occasioned by Mrs. Karpacs’ death and proven by the Appellee. Furthermore, despite Appellant’s clear failure to separate economic damages and non-economic damages on the verdict form, and the submission of evidence and a verdict form allowing the jury to find both, Appellant wants this Court to violate the bright-line rule from Gerver v. Benavides and decide what the jury was thinking when it made its awards.

Finally, Dr. Murthy claims that the trial judge abused his discretion by awarding attorney’s fees and expenses for the Appellant’s serial litigation misconduct before the trial court. Illustrative of the view she took of her duties toward Mrs. Karpacs is Dr. Murthy’s

² See *infra* at pp. 28-31. Cf. Appellees Brief at 14-16. In this section of her brief, Dr. Murthy actually complains that the Plaintiffs below were prepared to offer testimony that Mrs. Karpacs “would be diagnosed and treated.” *Id.* Dr. Murthy believes that a “Do Not Resuscitate” order is the equivalent of agreeing to die of infection. It should go without saying that at no time did the family complain that Dr. Murthy had failed to perform CPR – after all, Dr. Murthy was long gone by the time Mrs. Karpacs’ heart stopped anyway.

view of her duties to the trial court. When Dr. Murthy violates a court order, there has been a “disagreement,”³ when she misrepresents highly material matters or perjures herself, it is a “routine litigation event[.]”⁴ Dr. Murthy’s serial litigation misconduct warranted sanctions and attorney’s fees and her brief fails to show that Judge Karl abused his discretion.

Because the trial judge did not commit error in making the rulings complained of, the application for a new trial and adjustment of the judgment should be rejected.

II. CROSS-ASSIGNMENT OF ERROR

Appellee submits a single cross-assignment of error: The trial judge should have allowed the issue of punitive damages to be submitted to the jury, and erred in directing a verdict in favor of the Dr. Murthy on that issue.

A. The Trial Court Erred in Directing a Verdict in Favor of the Appellant on the Issue of Punitive Damages

The Appellee requested punitive damages in this case. The Appellant neither moved to dismiss that claim, nor for summary judgment on it and the plaintiff submitted evidence

³ Cf. Appellant’s Brief at 44, with Order Granting Motion for Sanctions and Attorney’s Fees at ¶ 61; Record at 1346:

Mediation is required by law in medical cases as described above. Nevertheless, Dr. Murthy refused to engage in mediation as required by law, and as ordered by the Court. The failure to obey Court orders subjects a litigant to sanctions. According to pleadings filed by counsel hired by Woodbrook, Dr. Murthy personally refused to authorize her carrier to negotiate at court-ordered mediation. See Dr. Murthy’s Response to Plaintiffs Motion to Compel Mediation. Whatever excuses are given, the Court’s Order was to mediate and the violation of the Court’s Order subjects the Defendant to sanction. Furthermore, the failure to participate meaningfully in mediation when it did occur is a further violation of the spirit of the Court’s Order.

⁴ Cf. Appellant’s Brief at 46 with Order Granting Motion for Sanctions and Attorney’s Fees at ¶ 62; Record at 1346:

As described above, Dr. Murthy altered highly material, even potentially dispositive testimony in both Roberts and Karpacs. In Roberts, Dr. Murthy claimed she had been intimidated into admitting facts conclusively establishing her liability. In Karpacs, Murthy took a different tack, claiming to have had her memory jogged as to a critical exculpatory conversation with the deceased by appearing at trial. Arguments over interpretation or modest changes in testimony are part of ordinary trial practice. But a defendant who repeatedly attempts to change dispositive testimony after the plaintiff rests, citing un-examinable reasons like conversations to which only the deceased was a witness or a surgeon’s purported fear of questioning makes a mockery of the oath and the discovery process.

that Dr. Murthy had grossly deviated from the standard of care, had acted with reckless disregard for her patient, and had concealed incredibly important information from the family.

As Appellee's expert surgeon testified:

Q. Dr. Battle, was Dr. Murthy's failure to rehydrate Mrs. Karpacs, give her antibiotics and operate on an emergency basis, was all of that a deviation from the standard of care?

A. Yes.

Q. Is it even close?

A. No. And I don't mean to be demeaning or disrespectful or meanspirited to anyone, but it was egregiously bad.

Q. And why is that your opinion, Dr. Battle?

A. Because of the seemingly obvious things that should have been done that were not done.

TS of Trial at 133-34. As set forth in the statement of facts herein, the evidence in this case was more than sufficient for the jury to find that Dr. Murthy deviated "egregiously" from the standard of care, such a deviation rising to reckless indifference to her patient's safety. The trial court, in denying Murthy's Motion for a New Trial put it as follows:

Dr. Battle testified that Dr. Murthy's conduct failed to meet the standard of care by a wide margin, and that the failure to meet the standard of care directly caused Mrs. Karpacs' suffering and death. Dr. Battle described Dr. Murthy's failure to operate to save the life of her patient as an egregious one and agreed that Dr. Murthy had, in effect, abandoned Elizabeth Karpacs to a painful death.⁵

The issue should have been submitted to the jury.

B. A New Trial, on the Issue of Punitive Damages Only, Should be Ordered

Where, as here, the trial court fails to submit an issue to the jury that should have been submitted, the remedy is a new trial, limited to the issue requiring resubmission.

III. FACTS OF THE CASE

A. Facts Surrounding Mrs. Karpacs' Death

⁵ Order, Including Findings Of Fact And Conclusions Of Law Denying Defendant's Renewed Motion For Judgment As A Matter Of Law, Denying Defendant's Motion For A Directed Verdict And Defendant's Alternative Motion For A New Trial at ¶ 23; Record at 1355.

1. The Negligence of Anandhi Murthy

At just after 7:00 am on June 1, 2001, Elizabeth Karpacs arrived in the Wetzel County Hospital Emergency Room. On admission, Mrs. Karpacs complained of abdominal discomfort, episodes of nausea and vomiting, decreased appetite and diarrhea.⁶ Lab tests run immediately following Mrs. Karpacs' arrival in the emergency room revealed, among other significant findings, that Mrs. Karpacs' white blood cell count was 43,900, an amount four times above the normal range and a "panic" value,⁷ indicative of a "rip-roaring"⁸ infection. Then, at 9:08 am, Mrs. Karpacs received an abdominal x-ray that raised the possibility that Mrs. Karpacs was suffering from an inflammatory or ischemic condition in her colon.⁹

After receiving this information, Mrs. Karpacs' family doctor obtained a surgical consult from the defendant, Dr. Murthy. When Dr. Murthy saw Mrs. Karpacs in the Wetzel County Hospital Emergency Room at approximately 9:40 am, Dr. Murthy also realized that Mrs. Karpacs was suffering from a distended and tender abdomen.¹⁰

As the plaintiff's expert, William S. Battle, M.D., testified, these signs and symptoms indicated that Mrs. Karpacs was suffering from a painful and life-threatening intra-abdominal condition known as ischemic colitis. For patients like Mrs. Karpacs, the standard of care required Dr. Murthy to administer antibiotics immediately and to rehydrate Mrs. Karpacs emergently to stabilize her condition and prepare her for surgery. After giving the emergency fluids and antibiotics an opportunity to work, the standard of care required a procedure known as an exploratory laparotomy designed to identify and excise the infected portion of the colon.

⁶ See Emergency Room Record (Joint Exhibit 1 at pgs 1-8 through 1-11).

⁷ See Testimony of Dr. Battle, Tr. Vol. I at 102 ("a panic value, meaning look at this; this is extraordinarily out of range").

⁸ Id. at 102-103 (Dr. Battle: "It tells us that she, first of all, has a pretty good immune system that she can respond with one that high . . . [and] it means that person . . . has a rip-roaring infection somewhere.")

⁹ See XR ABD Series (Joint Exhibit 1 at pg 1-24).

¹⁰ See Dr. Murthy's Report of Consultation (Joint Exhibit 1 at pg 1-15).

As Dr. Battle made clear, Mrs. Karpacs had no chance of survival without these interventions.¹¹

When confronted with these medical facts, Dr. Murthy admitted that at the time of her very first interaction with Mrs. Karpacs at approximately 9:40 am on June 1, 2001, she knew that Elizabeth Karpacs needed emergency care.¹² Specifically, Dr. Murthy admitted that Mrs. Karpacs had an acute abdomen and was likely septic.¹³ Indeed, and at no later than 10:15 am on June 1, 2001, Dr. Murthy knew that Mrs. Karpacs would likely die without surgery and flatly admitted this.¹⁴

In the face of this knowledge, Dr. Murthy's conduct was simply inexcusable. Despite the fact that Dr. Murthy knew that Mrs. Karpacs was in severe trouble and needed emergency care, she left Mrs. Karpacs in the Emergency Room that morning without issuing any orders.

At the time she left Mrs. Karpacs in the Emergency Room, Dr. Murthy knew that the standard of care required the administration of antibiotics on a STAT basis. Nonetheless, Dr. Murthy failed to make that order thereby delaying the administration of antibiotics to Elizabeth Karpacs for nearly six hours.¹⁵ However, as bad as Dr. Murthy's conduct was with respect to the administration of antibiotics, her conduct in that respect pales in comparison to her failure to prepare Mrs. Karpacs for life-saving surgery through adequate hydration.

As stated above, Dr. Murthy knew at 9:40 am that Mrs. Karpacs was probably going to die without surgery. In fact, Dr. Murthy agreed with the plaintiff's expert, Dr. Battle, that Mrs. Karpacs needed an exploratory laparotomy – a procedure that would have allowed Dr.

¹¹ See Trial Tr. Vol. I at 80-149; e.g., 121-22 (Dr. Battle: "The cost is they're going to die without the surgery . . . she had a reasonably good chance of surviving this operation more likely than not, actually, had it been done in a timely fashion").

¹² See Deposition of Anandhi Murthy (taken 12/11/03) at 41-42; Trial Tr. Vol. I at 277.

¹³ See Deposition of Anandhi Murthy (taken 12/11/03) at 41-42; Trial Tr. Vol. I at 255-57.

¹⁴ See Deposition of Anandhi Murthy (taken 12/11/03) at 41-43; Trial Tr. Vol. I at 257, 265.

¹⁵ See Deposition of Anandhi Murthy (taken 12/11/03) at 51-55; Trial Tr. Vol. I at 285-287.

Murthy to identify the source of Mrs. Karpacs' abdominal problems and given her a chance to correct whatever was wrong.¹⁶ When asked why she did not perform this operation, Dr. Murthy admitted that if Mrs. Karpacs had been properly hydrated, she would have performed the exploratory laparotomy. In fact, Dr. Murthy identified Mrs. Karpacs' hydration status as the only reason that she did not perform an exploratory laparotomy.¹⁷

As a result of that admission on Dr. Murthy's part, a large portion of the trial was directed at Dr. Murthy's woefully inadequate effort to re-hydrate Elizabeth Karpacs. As the medical records make clear, and despite the fact that Dr. Murthy cited Mrs. Karpacs' hydration status as the only thing preventing life-saving surgery, Mrs. Karpacs received only 100 milliliters (ml/cc) of fluid for the first four-and-a-half hours after Dr. Murthy saw her in the Emergency Room. When Dr. Murthy finally returned to see her critically ill patient several hours later (between 1:00 pm and 2:00 pm that afternoon), Dr. Murthy only increased the fluids to 200 milliliters per hour.¹⁸ Amazingly, and despite the fact that Dr. Murthy knew that Mrs. Karpacs would likely die without fluids and surgery, Dr. Murthy then left Mrs. Karpacs to lie in the hospital as she saw other patients in her office for the next six hours.¹⁹

Importantly, and according to Dr. Murthy's own admissions, there was a way to re-hydrate Mrs. Karpacs much more quickly through the use of a relatively simple piece of equipment known as a Swan-Ganz catheter.²⁰ Dr. Murthy's excuse for failing to provide Mrs. Karpacs with a Swan-Ganz catheter was frankly insulting. As Dr. Murthy admitted, the only

¹⁶ See Deposition of Anandhi Murthy (taken 12/11/03) at 85; Trial Tr. Vol. I at 290.

¹⁷ See Deposition of Anandhi Murthy (taken 12/11/03) at 80. At trial, Dr. Murthy attempted to partially distance herself from her unambiguous deposition testimony. During her trial testimony, Dr. Murthy admitted that Mrs. Karpacs' hydration status did prevent her from operating on Mrs. Karpacs, but that the hydration status was only "one of the main reasons" rather than the sole reason as testified to in her deposition. See Trial Tr. Vol. II at 536-37.

¹⁸ See Trial Tr. Vol. I at 300.

¹⁹ See Trial Tr. Vol. I at 265-66.

²⁰ See Deposition of Anandhi Murthy (taken 12/11/03) at 82-84; Trial Tr. Vol. I at 300-02.

reason that she failed to provide Mrs. Karpacs with a Swan-Ganz catheter was because Wetzel County Hospital didn't have one. However, as Dr. Murthy confessed, she was well aware that other hospitals in the region, such as OVMC, Wheeling Hospital and West Virginia University Hospital, had Swan-Ganz catheters at the time. Despite this knowledge, Dr. Murthy's plan for Mrs. Karpacs' care never included a transfer to a facility where she could get help.²¹ As a result of this shocking neglect, Elizabeth Karpacs sat in Wetzel County Hospital desperately needing an operation that would never come.

Dr. Murthy's egregious conduct was seriously compounded by her failure to level with Mrs. Karpacs and her family about the situation. As Dr. Murthy admitted, she did not tell Mrs. Karpacs that she was probably going to die without surgery.²² Additionally, Mrs. Karpacs' adult children were in the hospital for much of that day. As they all testified, Dr. Murthy never told them that their mother was going to die. Dr. Murthy never told them that the only thing preventing surgery was Mrs. Karpacs' hydration status, nor did she tell them that a transfer to another facility was possible in order to facilitate life-saving surgery. Instead, Dr. Murthy told the family that she would have to run some additional tests the next day in order to know how to proceed. Accordingly, the Karpacs family went home at around dinner time on June 1, 2001 with the intention of returning in the morning.²³

In the meantime, Dr. Murthy returned to the hospital to see Mrs. Karpacs at approximately 8:20 pm. By then, Elizabeth Karpacs was slipping into shock. She became cold, clammy and diaphoretic.²⁴ As the plaintiff's expert, William S. Battle, M.D., explained

²¹ See Trial Tr. Vol. I at 301-02.

²² See Trial Tr. Vol. I at 259.

²³ See, e.g., Testimony of Andrea Karpacs-Brown (Trial Tr. Vol. I at 224-27); Testimony of Carol Smittle (Trial Tr. Vol. II at 340-43).

²⁴ See Nurses' Notes (Joint Exhibit 1 at pgs 1-41).

to the jury, at this point, Mrs. Karpacs was “crashing.”²⁵ Even Dr. Murthy recognized that Elizabeth Karpacs was exhibiting shock.²⁶ In response to this rapidly deteriorating situation that had already gone on too long, Dr. Murthy slightly adjusted Mrs. Karpacs’ fluids and then went home having never explained to this family what was going on!²⁷ Knowing Mrs. Karpacs was going to die, Dr. Murthy did nothing and led the family to think things were fine.

By 10:15 pm, Mrs. Karpacs’ body had stopped making urine and the situation was truly hopeless. From her home, Dr. Murthy ordered the administration of Dopamine, even though she admitted she had no expectation that it would work.²⁸ Then, having sealed Elizabeth Karpacs’ fate for all practical purposes, Dr. Murthy stopped issuing orders and dropped out of the picture completely.

In the middle of the night, Andrew Karpacs, Elizabeth’s husband of over 45-years, received a call to come back into the hospital. He and his children had gone to their homes to rest, planning to come back and see Elizabeth the next day. As the jury heard, that phone call did not come from Dr. Murthy, but rather from Dr. Terry Tallman, Mrs. Karpacs’ family doctor. Dr. Tallman told the family what was happening and said they should come back to the hospital.²⁹ When the family arrived and heard that their mother would likely die that night they were shocked. After midnight, two hours after Dr. Murthy had completely quit on the situation, Dr. Tallman advised the family that nothing more could be done and he entered an order in the chart that there would be no CPR if Mrs. Karpacs’ heart stopped or if she stopped breathing.³⁰ No evidence was proffered at trial that Dr. Murthy even knew about the DNR or

²⁵ See Trial Tr. Vol. I at 136-37.

²⁶ See Trial Tr. Vol. I at 268.

²⁷ See Trial Tr. Vol. I at 265-66.

²⁸ See Trial Tr. Vol. II at 542-45.

²⁹ See Trial Tr. Vol. I at 224-27.

³⁰ See W.Va. Code § 16-30C-3(d) (“‘Do-not-resuscitate order’ means an order issued by a licensed physician that cardiopulmonary resuscitation should not be administered to a particular person.”)

that she acted on it or because of it in any particular way. At 5:55am, Elizabeth Karpacs stopped breathing, her heart stopped and she died.

2. Mrs. Karpacs' Suffering Before Her Death

As set forth above, Mrs. Karpacs was suffering from a painful intra-abdominal condition from the very onset. Indeed, it was her abdominal pain that prompted her to go to the hospital in the first place. As Dr. Murthy herself admitted, Mrs. Karpacs' ischemic colitis was an emergency condition, one outward sign of which was pain.³¹ She also had nausea and extensive diarrhea.³² Dr. Murthy's failure to act prolonged Mrs. Karpacs' painful condition.

As the trial judge stated:

On this issue of Mrs. Karpacs' pain, Dr. Battle's un-contradicted testimony was that Mrs. Karpacs was suffering from a serious painful condition. He further testified that such condition was in need of emergency surgical correction and that Mrs. Karpacs should have been promptly placed under anesthesia to facilitate the operation.³³

Additionally, Mrs. Karpacs began exhibiting the signs and symptoms of shock by approximately 8:20 p.m. By then, she was cold, clammy, sweaty and "crashing." As the night went on, Mrs. Karpacs' shock progressed. After being called back into the hospital by Dr. Tallman, Mrs. Karpacs' daughter noticed that she was cold and clammy and was having a difficult time responding.³⁴ She had a full oxygen mask on, which made communicating with her family extremely difficult in her last hours.³⁵ Not only did Mrs. Karpacs not survive because of Dr. Murthy, she spent her last hours hooked up to a mask, unable to talk to her children, grandchildren and husband, as the infection slowly killed her.

³¹ See Trial Tr. Vols. I and II at 164, 165, 276, 480, 494.

³² In fact, she had so much diarrhea, her labs read as malnourished.

³³ 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 [at p. 6-7, ¶ 24]; Record at 1355-1356.

³⁴ See Trial Tr. Vol. I at 228.

³⁵ See Trial Tr. Vol. II at 344.

By 2:00 am, Mrs. Karpacs was still alert, but had become lethargic.³⁶ By 3:00 am, Mrs. Karpacs had become restless and she commenced “Cheyne-Stokes” breathing, characterized as “abnormal and desperate periods of shallow and deep breathing.” By 3:20 am the nurse noted that Mrs. Karpacs had become “very restless.”³⁷ As morning dawned, the family appreciated that the end was near and said their good-byes. Mrs. Karpacs’ daughter, Andrea, told a particularly heartbreaking story about how she brought her own daughter in to say good-bye to her “MeeMaw” one last time.³⁸ The psychological agony suffered by Mrs. Karpacs in being forced, unnecessarily, into an undignified and abbreviated goodbye to her family apparently means nothing to Dr. Murthy, who characterized these events as “no evidence” of pain and suffering repeatedly before the trial judge and now does the same before this Court.

3. The Karpacs’ Family’s Loss of Elizabeth Karpacs’ Services, Kindly Offices, and Advice

At 5:55 a.m. on June 2, 2001, Elizabeth Karpacs died. Of course, Elizabeth Karpacs’ family was emotionally devastated by her loss. In addition, this entire family suffered the loss of Elizabeth Karpacs’ services, which came in the form of assistance with their own families, and also in the form of care rendered to Mrs. Karpacs’ elderly husband, Andrew. As all of Mrs. Karpacs’ children testified, Mrs. Karpacs was very involved in each of their lives and the lives of her grandchildren. For example, she was there to help her daughter when Andrea Karpacs-Brown’s first child was born, but was not there to help when later children arrived.³⁹

The family also missed the support that Mrs. Karpacs provided to her husband, Andrew. Andrew and Elizabeth Karpacs had been married for forty-five years. Until her

³⁶ See Nurses’ Notes (Joint Exhibit 1 at pgs 1-42).

³⁷ See Nurses’ Notes (Joint Exhibit 1 at pgs 1-42).

³⁸ See Trial Tr. Vol. I at 228.

³⁹ See Trial Tr. Vol. I at 218-219, 236.

death, they lived only with each other and were able to help one another live independently. When Mrs. Karpacs died, the burden of caring for Mr. Karpacs fell to his children and the whole family had to take up their role in caring for him. Indeed, Andrea and her husband had to build an entire addition onto their house so that Andrew could move in and receive care from his daughter and her family, a significant economic burden occasioned by the loss of Mrs. Karpacs.⁴⁰

Thus, and in addition to their overwhelming grief, this family lost a considerable and tangible amount of services that Elizabeth Karpacs would have rendered if not for the negligence of Dr. Murthy, as the jury recognized when it incorporated loss of services into the awards on the verdict form for each of Mrs. Karpacs' statutory beneficiaries.⁴¹ The loss of services, advice and kindly offices was not valued by a liquidated number, nor is it required to be under West Virginia law. Although Dr. Murthy now complains that this Court should sort the economic loss from the non-economic loss, so she can plead a damages cap, she never requested a verdict form that separated the damages, as required by this Court's precedents.⁴²

B. The Entry of Mrs. Karpacs' Do Not Resuscitate Order

On January 21, 2005, the plaintiff appeared before the trial court for hearing on her motion in limine regarding the DNR. Dr. Murthy failed to appear at the hearing.⁴³ The trial judge asked the plaintiff to submit a proposed order granting her motion in limine and the

⁴⁰ See Trial Tr. Vols. I and II at 218-220, 230-33, 236, 239, 309, 332.

⁴¹ See Verdict Form; See also, e.g., Order Denying Murthy's Motion to Alter the Verdict at ¶¶ 15-22; Record at 1374-1375.

⁴² Dr. Murthy also claims that the family disclaimed non-economic damages, but offers no supporting quotation of the record. Murthy's citation to the transcript involves the family's withdrawal of questions about funeral bills and medical expenses from its proposed voir dire, but no "waiver" of damages for lost services or economic damages is reflected anywhere in the transcript.

⁴³ This is reflected in the order excluding the DNR itself and in the transcript at 202-03 ("[JUDGE KARL: "as I looked at the first part of the order and it indicates that despite proper notice, the defendant did not appear in person or by counsel at the hearing on January 21st, 2005." (emphasis supplied).

Appellant did not respond to that draft order in any fashion.⁴⁴ In January of 2006, the plaintiff filed a supplemental Motion requesting the entry of an order regarding her DNR motion and, again, the Appellant did not respond.⁴⁵ After these multiple defaults, in February of 2006, the trial court entered an Order granting the plaintiff's motion.⁴⁶

It remains unclear what purpose Dr. Murthy intended to introduce evidence of the DNR for, as no proffer of any such evidence was ever made. It is clear, however, that Dr. Murthy was never criticized at trial for failing to perform CPR on Mrs. Karpacs – she was criticized for failing to give her antibiotics emergently, failing to hydrate her during the afternoon to get her ready for surgery, failing to operate on her, failing to send her somewhere where they would operate, and for simply going home knowing she would die without telling

⁴⁴ As the trial court explained in detail:

Well prior to trial, this Court set a scheduling order including deadlines for pretrial motions, including motions in limine.

On or about June 16, 2004, the plaintiff filed her Motion in Limine No. 5, seeking exclusion of the do not resuscitate order from evidence in the case, contending that it was irrelevant to the issues in the case and that its admission into evidence would be unfairly prejudicial.

On or about January 21st, 2005, the plaintiff brought her Motion in Limine No. 5 before this Court for a duly noticed hearing. Dr. Murthy failed to appear.

At that hearing, the Court GRANTED the Plaintiff's Motion and Ordered the plaintiff to submit a proposed order reflecting that decision. The plaintiff complied and on February 10, 2005, she served Dr. Murthy with her proposed Order.

Dr. Murthy did not respond. She did not object to the plaintiff's proposal or file a competing Order.

On September 27, 2005, the parties appeared before the Court for a status conference. At that conference, Dr. Murthy asked the Court to establish new deadlines for pre-trial motion practice. The Court granted Dr. Murthy's request. See Amended Scheduling Order (entered 10/5/05).

Dr. Murthy then submitted nothing under the deadlines she asked the Court to establish. On January 24, 2006, and having received no response from Dr. Murthy to her proposed order granting Motion in Limine No. 5, the plaintiff filed a Motion to enter her proposed findings of fact and conclusions of law. See "Plaintiff's Motion for the Entry of Certain Pretrial Orders."

Dr. Murthy again failed to respond in any fashion.

Thus, on February 18, 2006, the Court entered its "Findings of Facts and Conclusions of Law Regarding Plaintiff's Motion in Limine No. 5."

Through that Order, the Court ruled that the DNR could not be used at trial either to show that Mrs. Karpacs' death was hastened by the DNR or that the DNR in any way aggravated or affected her damages.

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 [at p. 5, ¶¶10-20]; Record at 1354-1355.

⁴⁵ Id.

⁴⁶ See "Order Granting Plaintiff's Motions in Limine Nos. 2, 3, and 5"; Record at 651.

anyone that. All of these failures of Dr. Murthy not only happened long before the DNR was entered – they were the reasons a DNR became necessary in the first place. Dr. Murthy has never explained how the DNR constituted any type of defense to any claim against her.⁴⁷

On behalf of the plaintiff, Dr. Battle testified that the first few hours of Mrs. Karpacs' care were absolutely critical and she needed to be in surgery by no later than 2:00 pm on June 1, 2001.⁴⁸ Of course, by 8:20 p.m., Mrs. Karpacs was going into shock and Dr. Murthy was on her way home. By 10:15 p.m., Dr. Murthy was issuing orders that even she knew had no possibility of success. However, it was not until 12:30 a.m. on June 2, 2001, over four hours after Dr. Murthy left the hospital for good, that Mrs. Karpacs' family made her DNR.

As stated above, Dr. Murthy never proffered any evidence or testimony regarding any significance the DNR had to any issue in the case. Perhaps because no explanation for how she intended to use the DNR would have been credible, Dr. Murthy did not make any record through counsel, or through testimony from herself, or her expert, as to how the DNR affected any material issue or what they would have said, or what questions would have been asked that was improperly excluded, thus forfeiting this alleged error. No witness testified and there was no other evidence that Mrs. Karpacs' DNR status was anything but a natural response by this family to a hopeless situation created by Dr. Murthy earlier in the day.

C. Dr. Murthy's Abusive Litigation Conduct

Because Dr. Murthy has seen fit to address Judge Karl's decision to award attorney's fees and costs to the plaintiff,⁴⁹ notwithstanding the lack of finality with regard to that order, it

⁴⁷ In the simplest terms, a DNR says: "If I die, don't bring me back," not "go ahead and let me die!" Dr. Murthy wanted to attempt to portray the family as having given up on Mrs. Karpacs for agreeing to the DNR, when the only reason Mrs. Karpacs was in that situation was that Murthy had abandoned her to her infection hours earlier when she could have made a difference.

⁴⁸ See Trial Tr. Vol. I at 124-25.

⁴⁹ While the order shifting fees has been entered, an amount of fees to be paid by Appellant has not been set. There is therefore no final judgment on the fee issue from which Appellant can seek relief. The reason no figure

is necessary to address some of the conduct undertaken by Dr. Murthy and her insurance carrier that mandated the award of fees by the trial court.⁵⁰ The litigation misconduct by Dr. Murthy and her insurance carrier in this respect can be broken into three categories: (a) the total disregard of court orders requiring mediation; (b) a pattern of presenting either false discovery and deposition answers or false testimony on critical topics at trial; and (c) the intentional under-preparation of an expert witness and subsequent efforts to wrongfully ambush the plaintiff with that expert's testimony.

One initial observation is warranted: Dr. Murthy claims in her Brief that she cannot be held responsible for her litigation conduct because her defense is directed by her insurance carrier and not by her.⁵¹ In fact, the Appellant's first rejoinder to the fee award reads: "[e]ven if Dr. Murthy's insurer had engaged in offending conduct, in this and other cases, Dr. Murthy cannot be punished for it." According to Dr. Murthy, the power of courts to sanction litigants, enforce orders and prevent misbehavior simply does not apply to her because her defense is directed by her carrier. The mind reels at the scope of that claim of immunity. But see State ex rel. Allstate Ins. Co. v. Gaughan, 203 W.Va. 358, 372, 508 S.E.2d 75, 89 (1998) (litigation actions taken by counsel in liability matters act on behalf of insured, not the carrier); Rose ex rel. Rose v. St. Paul Fire and Marine Ins. Co., 215, W.Va. 250, 257 (2004) (same).

1. Dr. Murthy's Failure to Engage in Good-Faith Settlement Discussions

Through the Scheduling Order that originally controlled this case, the trial court ordered the parties to mandatory mediation. In preparation for that anticipated mediation, on

was set is that the trial judge ordered the parties to attempt to agree on a reasonable figure – not asking Dr. Murthy to concede fees were owed, but merely to establish an amount of fees incurred –and Appellant refused to participate in that process and is instead appealing on an essentially interlocutory basis.

⁵⁰ Following the verdict, the trial Court granted leave to the plaintiff to add Dr. Murthy's insurance carrier, Woodbrook, as a party-defendant. Those claims are pending before Judge Karl.

⁵¹ Brief at 42.

June 14, 2004, the plaintiff extended an offer to Dr. Murthy to release her in exchange for the payment of her policy limits.⁵² That demand was summarily rejected with no counter-offer.⁵³ At the time, the parties had already scheduled mediation in front of a private mediator.⁵⁴ The defendant indicated she would not negotiate and the mediation therefore did not occur as ordered, the litigation continued, and trial was eventually scheduled for April 2, 2007.

The month before that scheduled trial, Dr. Murthy was the defendant in a separate Wetzel County medical malpractice trial captioned Roberts v. Murthy, Civil Action No. 02-C-14-M. After that trial resulted in a verdict against Dr. Murthy in excess of \$5.7 million dollars, Dr. Murthy asked that the Karpacs trial be continued due to Dr. Murthy's emotional state and the Roberts verdict publicity. At the hearing on Dr. Murthy's Motion to Continue, the following exchange occurred between Judge Karl and counsel for Dr. Murthy:

[THE COURT] I've had dealings with [Medical Assurance] 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 Medical Assurance do nothing. You can put the word out that I want to talk to the people from your company.

[COUNSEL FOR DR. MURTHY]: I will. I appreciate that, and I will pass it on.⁵⁵

After Dr. Murthy's Motion to Continue was granted, the plaintiff moved the trial court for an Order compelling mediation.⁵⁶ The Court ordered mediation and a mediation was eventually held, if one could call it that.

During the mediation, participation in which was ordered by Judge Karl (twice) in this case, the Defendant's behavior was vexatious, oppressive and unreasonable. Of course, much

⁵² See June 14, 2004 letter from Mr. Brown to Ms. Vaglianti (attached as Ex. B to "Plaintiff's Motion for Attorneys Fees and Costs and Incorporated Memorandum in Support"); Record at 1093.

⁵³ Id. at Ex. C; Record at 1094.

⁵⁴ Id. at Ex. D; Record at 1095.

⁵⁵ Tr. of March 28th, 2007 hearing at 9.

⁵⁶ See Order and Findings of Fact and Conclusions of Law Regarding Plaintiff's Motion for Attorney's Fees and Costs at ¶ 14; Record at 1335.

of this conduct may well have been suggested Woodbrook Casualty Insurance, Inc. ("Woodbrook"), Dr. Murthy's liability carrier. Woodbrook has done business in this State for many years as a liability carrier along with its related companies known as Medical Assurance and ProAssurance. But the actions are the legal acts of the Appellant, and any recovery for punishment she suffered because of Woodbrook is between her and her carrier.

In this case, and after grudgingly and slowly offering \$150,000.00 in this serious wrongful death case, the Woodbrook representative slammed her briefcase shut and walked out of the court-ordered mediation, ending the proceeding. This occurred despite the willingness of everyone else, including the mediator, to proceed with negotiations.⁵⁷

Thereafter, two truly extraordinary developments took place. As the re-scheduled trial in this case approached, Dr. Murthy apparently personally asked her attorneys to try to settle the case, regardless of her insurance carrier's continued unwillingness to negotiate. As memorialized by a contemporaneous letter:

When we [attorneys Brown and James] talked on Friday, you told me that Dr. Murthy was personally interested in a renewed settlement demand from my client. When I asked about Woodbrook's posture, you told me that as far as you know, Woodbrook's position remains unchanged from the position communicated to me a few months ago by Steve Brooks. That is, Woodbrook had (and has) authorized an offer of \$150,000, but no more. After speaking with you Friday, I have the continuing understanding that from Woodbrook's perspective, no more will be authorized to settle this case. Instead, I now understand that Dr. Murthy is interested in hearing a renewed offer from my client out of her own desire to see if the case can be settled -- independent of the position taken by her carrier.⁵⁸

Remarkably, only three days later, Appellant refused to enter into further negotiation and "pulled" the nuisance offer it had made off the table.⁵⁹

⁵⁷ See Affidavit of Geoffrey Brown (filed on February 6, 2008); Record at 1142.

⁵⁸ See Letter from Plaintiff's counsel dated January 7th, 2008 (attached as Ex. F to "Plaintiff's Motion for Attorneys Fees and Costs and Incorporated Memorandum in Support"); Record at 1098.

⁵⁹ See Letter from Defense counsel dated January 10th, 2008 (attached as Ex. E to "Plaintiff's Motion for Attorneys Fees and Costs and Incorporated Memorandum In Support"); Record at 1097.

Whether in accordance with Woodbrook's design, or Murthy's, the actions of Murthy ensured that this case went to trial and the verdict ensued. Unfortunately, what happened here is not a unique set of circumstances.

It is a fact that Woodbrook works with its insureds to adopt and even celebrate its strategy of ignoring the law, refusing to negotiate honestly or in good faith and thumbing its nose at courts. It is likewise known that Woodbrook deliberately pursues this strategy as its business policy, no matter the costs to victims or the courts of our state in wasted time and effort. Indeed, Medical Assurance/Woodbrook has a history of rejecting orders to mediate in even the most meritorious cases. For example, according to contemporaneous news accounts, in 2001 Medical Assurance opted to scour the country and contact 66 different experts in order to find an opinion favorable to its insured, rather than mediate a West Virginia malpractice case.⁶⁰ When Medical Assurance (now known as Woodbrook) was contacted about its behavior in that case, it actually seemed proud of what it had done:

A Medical Assurance Spokesman linked its handling of the Miller case to a longstanding policy of aggressively fighting claims. Last year, the insurer's CEO told stockholders that it spent more on defense costs than any of its competitors.⁶¹

Since that time, Medical Assurance's vexatious, unreasonable behavior has continued and grown bolder as it enlists Defendants into what amounts to litigation misconduct.

2. The Defendant's Abusive Trial Conduct

At the trial of this case, and despite detailed examination in two depositions and in written interrogatories about conversations with a family, Dr. Murthy, described for the first time a completely undisclosed, purportedly exculpatory, conversation that she alleged

⁶⁰ See "Physician Insurer Told to Reveal Info," The Charleston Gazette, Page 10A, October 26, 2001 (attached as Ex. G to "Plaintiff's Motion for Attorneys Fees and Costs and Incorporated Memorandum In Support"); Record at 1100.

⁶¹ Id.

occurred while she was alone with the decedent, in an effort to evade the theretofore well-established claim of the plaintiff that Dr. Murthy had failed to inform the family of her diagnosis and options.⁶² These radical, material changes in the doctor's answers were never disclosed to the Plaintiff under Rule 26(e).⁶³ This conduct by Murthy was not isolated.

During the above-mentioned Roberts trial, Dr. Murthy also made dramatic, material changes to her testimony at trial, altering previously damning material testimony and claiming it had been coerced out of her during a deposition. Murthy/Woodbrook's vexatious negotiation scenario played itself out during the course of litigation in that case as well. In that case, Murthy rejected court-ordered mediation and refused to offer a single penny despite similarly overwhelming evidence of malpractice.

One case in which Woodbrook's practices along these lines were exposed is described in the sworn declaration of physician Michael Austin.⁶⁴ In that case, consistent with its avowed policies, Woodbrook denied the claim and decided to defend it without speaking to the doctor at all.⁶⁵ Following the efforts of a Woodbrook attorney to induce Dr. Austin to give false testimony and then to prevent the doctor from correcting it, a Woodbrook Vice-President, Tony DaPore, and Woodbrook's Director of Claims, Roberta Spack, met directly with the doctor. These Woodbrook executives directly instructed Dr. Austin to lie at trial.⁶⁶ When the doctor refused to conspire with his insurer to defend the indefensible, Woodbrook

⁶² Dr. Murthy, after the close of Plaintiff's case, fabricated a conversation in which Mrs. Karpacs supposedly expressed terror at the prospect of surgery. Since Murthy had sworn she failed to tell Mrs. Karpacs she would die without it, the jury ultimately failed to credit the fabricated conversation.

⁶³ See Trial Tr. Vol. I at 257-64. Moreover, at p. 259, the fabricated conversation comes in as volunteered, non-responsively – further heightening the obviousness of the intentional ambush by Murthy and making it all the more certain that she had disregarded her 26(e) obligations as to this putative conversation.

⁶⁴ Attached as Ex. H to "Plaintiff's Motion for Attorneys Fees and Costs and Incorporated Memorandum in Support"; Record at 1102.

⁶⁵ Woodbrook was operating at that time under the name ProAssurance.

⁶⁶ Id. at 3.

threatened the doctor with the loss of coverage.⁶⁷ Woodbrook's hand-picked attorney for Austin told him that Woodbrook was taking every case to trial regardless of the physician's potential final judgment exposure.⁶⁸ Through a series of three different attorneys, as well as through its own executives, Woodbrook attempted to pressure the doctor to perjure himself.⁶⁹ In Roberts v. Murthy and Karpacs v. Murthy, Dr. Murthy made the same types of shocking, undisclosed reversals in testimony. One does begin to see a pattern, as Judge Karl clearly did.

Since Woodbrook is responsible for the full amount of the judgment in this case,⁷⁰ it is worth knowing that these are the folks who anticipate benefiting financially from a re-trial of this case, at the expense of the Karpacs family that waited almost seven years for a trial, and the justice the jury trial provided.

3. Dr. Murthy's Intentional Under-Preparation of an Expert Witness and Attempted Trial by Ambush

The abusive litigation conduct of the Defense spilled over into the use of its expert witnesses. As Judge Karl set forth in detail in his "Order and Findings of Fact and Conclusions of Law Regarding Anandhi Murthy, M.D.'s 'Motion to Complete Trial Record'" the Defense intentionally under-prepared an expert witness for deposition in order to save litigation costs and then tried on multiple occasions to take advantage of that situation by springing new opinions on the plaintiffs as late as the fourth day of trial.

As Judge Karl set forth in his Order, Dr. Murthy disclosed Roger A. Abrahams, M.D. as an expert on Elizabeth Karpacs' life-expectancy.⁷¹ When asked about that opinion in his deposition, Dr. Abrahams admitted that the life-expectancy rates listed in his expert witness

⁶⁷ Id. at 4-5, 7.

⁶⁸ Id. at 6-7.

⁶⁹ Id. at 1-8.

⁷⁰ See Shamblin v. Nationwide.

⁷¹ See Order and Findings of Fact and Conclusions of Law Regarding Anandhi Murthy, M.D.'s "Motion to Complete Trial Record" at ¶ 6; Record at 1316.

disclosure came from the abstract of a single piece of medical literature.⁷² He admitted that there were “probably plenty of other articles out there that would have other statistics that, you know, would be in this ballpark.”⁷³ When asked directly what he planned to say on the witness stand about Mrs. Karpacs’ life expectancy, Dr. Abrahams testified that it was “a hard question to answer,” with “a lot of variability.” That he could “give [the jury] a ballpark,” that “as long as nothing comes along and rocks the boat, [Mrs. Karpacs] may [have done] okay for a while,” that “it’s sort of a matter of luck,” depending on “a flip of the coin.”⁷⁴ This type of testimony is, of course, a little thin for court.

Amazingly, Dr. Abrahams confessed that his failure to develop fully-formed opinions was intentional. As Dr. Abrahams testified: “And just -- and actually, when -- initially, when I did this, I didn't actually get the whole article. I just got the summary, because, at that time, when I got the articles, I didn't -- I didn't know how far this was going to go. And I was sort of not trying to put hours and hours of billing in for them.”⁷⁵

Due to the extraordinary level of speculation contained in Dr. Abrahams’ deposition, on December 8, 2004, the plaintiff filed her “Motion in Limine to Exclude the Testimony of Roger Abrahams, M.D.” along with a notice of hearing setting her Motion before the trial court. Consistent with her pattern of ignoring the court, Dr. Murthy failed to file a written response to that Motion and failed to appear at the hearing despite proper notice. At the hearing on January 21, 2005, the Court ordered the plaintiff to submit proposed findings of

⁷² See Order and Findings of Fact and Conclusions of Law Regarding Plaintiff’s Motion for Attorney’s Fees and Costs at ¶ 29; Record at 1339.

⁷³ Id. at ¶ 30; Record at 1339.

⁷⁴ Id. at ¶ 31; Record at 1339.

⁷⁵ Id. at ¶ 32; Record at 1339-1340.

fact and conclusions of law regarding her Motion. The plaintiff complied and on February 10, 2005, she served Dr. Murthy with her Order. Dr. Murthy did not file a competing Order.⁷⁶

On September 27, 2005, the parties appeared before the Court for a status conference. At that hearing, Dr. Murthy asked the Court to establish new deadlines for pre-trial motion practice. The Court granted Dr. Murthy's request.⁷⁷ Dr. Murthy submitted absolutely nothing under the deadlines she asked the Court to establish, again wasting the court's time.

Having received no response from Dr. Murthy, on January 24, 2006, the plaintiff filed a Motion to enter her proposed findings of fact and conclusions of law.⁷⁸ Dr. Murthy failed to respond. Thus, on March 24, 2007, the Court entered its "Findings of Facts and Conclusions of Law Regarding Plaintiff's Motion in Limine No. 4 and Plaintiff's Motion in Limine to Exclude the Testimony of Roger Abrahams, M.D." all without objection from Dr. Murthy. Nearly nine months then elapsed without any word on the subject from Dr. Murthy.

Then, on December 11, 2007, less than two months before trial, Dr. Murthy moved the Court to reconsider. On January 12, 2008, the Court rightfully denied this request in part because "the party asking for reconsideration submit[ted] no new evidence and cites no change in the law that would provide a basis for the Court to reverse its own prior decision."⁷⁹

Then, on January 25, 2008, the fourth day of trial, Dr. Murthy submitted her "Proffer of Anticipated but Excluded Testimony of Roger Abrahams, M.D." Amazingly, Dr. Murthy disclosed Dr. Abrahams to testify on a wide range of previously completely undisclosed subjects. This testimony had not technically been "excluded" by the trial court because it was

⁷⁶ Id. at ¶ 33-37; Record at 1340.

⁷⁷ Id. at ¶ 38; Record at 1341.

⁷⁸ Id. at ¶ 39-40; Record at 1341.

⁷⁹ Id. at ¶ 45; Record at 1342.

never disclosed at all.⁸⁰ It was apparently intended to be presented at trial in the form of a pure ambush. Dr. Murthy's efforts to use Dr. Abrahams as a surprise witness failed, but the considerable waste of time inflicted on the court and the plaintiff provided another example of conduct that justifies Judge Karl's Order awarding fees to the plaintiff.

III. SUMMARY OF THE ARGUMENT

This Petition challenges only discretionary rulings that are in most cases forfeited or waived and should therefore be refused.

In regard to the first assignment of error, Dr. Murthy did not even appear at the hearing to contest the motion in limine regarding the DNR. In any case, an evidentiary ruling like that one is committed to the discretion of the trial judge and it was also plainly right, since a DNR is a "Do Not Resuscitate" order not a "Go Home Without Treating My Illness and Conceal the Gravity of my Situation From Me and my Family" order.⁸¹ A DNR does not authorize a surgeon to abandon a patient to die of a hideous belly infection.⁸² It does not authorize Dr. Murthy to go home after telling the decedent and her family that she will be back in the morning when she knows the patient will die before then.⁸³ Judge Karl's ruling was correct and Appellant forfeited the right to challenge it in any case.

Dr. Murthy's second assignment attacks the sufficiency of the evidence of pain and suffering notwithstanding obvious record evidence supporting the decision to submit that issue to the jury, for example the multiple references to her painful condition, her labored breathing, her slipping into shock and the emotional trauma of an abruptly forced goodbye to her family. Dr. Murthy's second assignment of error is a straightforward attack on the trial

⁸⁰ Id. at ¶ 47; Record at 1342.

⁸¹ See W.Va. Code § 16-30C-3(d) ("'Do-not-resuscitate order' means an order issued by a licensed physician that cardiopulmonary resuscitation should not be administered to a particular person.")

⁸² Id.

⁸³ Id.

judge's ability to perceive the evidence adduced in his courtroom. Substantial evidence of Mrs. Karpacs' pain and suffering was presented. The existence of some arguably contrary evidence is meaningless where, as here, the jury has weighed the evidence. Dr. Murthy's suggestion that Mrs. Karpacs was "happily watching TV" all night is an example of the callousness that brought Dr. Murthy to this position in the first place.

Dr. Murthy's third assignment relates to the application of the non-economic damage cap from the old, 1986 MPLA, and was forfeited when she failed to submit a verdict form distinguishing economic and non-economic damages. Appellant also uses the same point to attack the judge's decision to award pre-judgment interest, which is required by syllabus point law where economic and non-economic damages are mixed by a verdict form line-item. The third assignment of error likewise claims that Judge Karl could not perceive accurately the testimony he heard in a trial conducted in his courtroom. Judge Karl correctly ruled that evidence of both economic and non-economic loss were presented through the testimony presented at trial. Dr. Murthy indisputably failed to separate the damages or ask that they be separated on the verdict form. According to syllabus point law, such a default by a party seeking the benefit of a non-economic damage cap is conclusive, as neither this Court, nor trial judges should have to sift a jury's verdict and decide which damages were which when the party seeking the cap could have done so by submitting special interrogatories.

Dr. Murthy consistently misapprehends the difference between "special" versus "general" damages and "economic" versus "non-economic" damages. Wrongful death

damages, including economic damages such as loss of services need not be “proven to the penny,” or claimed in particular amounts like “special” items of damage.⁸⁴

Dr. Murthy’s fourth assignment, her attack of the assessment of pre-judgment interest fails also. The failure of the Appellant to separate the economic damages from non-economic damages waives any right to challenge the awarding of interest. Again Dr. Murthy failed to invoke her rights at trial to special interrogatories separating economic from non-economic loss and now wants the Court to sift the evidence and the jury’s verdict and make an apportionment. Such an invasion of the jury’s province is wholly unwarranted where Dr. Murthy failed to invoke her rights before the jury came back.⁸⁵ Moreover, given the extensive misconduct of Dr. Murthy, alternative grounds for pre-judgment interest are also available.

Finally, Dr. Murthy attacks the trial judge’s discretionary decision to award sanctions for Appellant’s copious litigation misconduct, but that decision has not been reduced to judgment and therefore is not ripe for appeal. Dr. Murthy attacks Judge Karl’s detailed findings of fact and conclusions of law that litigation misconduct by Appellant warranted an award of attorney’s fees in this case. See Findings of Facts and Conclusions of Law Granting Plaintiff’s Motion for Attorney’s Fees and Costs. The Order shows that Dr. Murthy

- 1) violated trial court orders;
- 2) repeatedly failed to appear at scheduled hearings;
- 3) filed misleading papers with the Court;
- 4) attempted to present an expert under a false premise;
- 5) presented inherently incredible testimony at trial (or, if she prefers, patently false interrogatory answers); and

⁸⁴ Appellant’s claim that Plaintiff “agreed” there was no economic damage in the case is wholly specious and it is obvious why Appellant does not quote the transcript it relies on – Appellant tries to spin the withdrawal of a voir dire question about claims for funeral expenses and medical bills into a withdrawal of the loss of services claim, even though the loss of services claim was specifically retained and went to verdict!

⁸⁵ This may well have been a strategic decision on Appellant’s part. Defendants routinely seek to have fewer “lines” for a jury to fill in, hoping that fewer lines will yield lower damages. Appellant took what looks like a calculated risk, obviously believing the damages for Mrs. Karpacs’ life would be small in total and now wants this Court to step in a protect it from the consequences of her own choices.

- 6) behaved vexatiously and oppressively, wasting the time of the Court and the plaintiff in a litigation that lasted five years.

Nothing reveals the nature of the Appellant so well as her contention that all of her misconduct is “insufficient” to warrant an attorney fee award, except maybe its unbelievable contention that litigants are immune from court sanctions based on the assertion that their litigation conduct is directed by their insurance carrier.

Both Dr. Murthy’s failures to care for her patient, Elizabeth Karpacs, and her litigation misconduct were egregious in the extreme. The jury properly found in favor of plaintiff below and awarded reasonable damages in light of the enormity of the family’s loss. The trial judge properly condemned and penalized the litigation misconduct on the part of Dr. Murthy.

IV. ARGUMENT:

A. The DNR Was Properly Excluded Because it Did Not Bear on Any Issue at Trial, Because No Proffer Was Made of DNR evidence, and Because Appellant Defaulted When Appellee Moved to Exclude it Before Trial

As set forth below, evidentiary matters are committed to the sound discretion of the trial court. “A party challenging a circuit court’s evidentiary rulings has an onerous burden because a reviewing court gives special deference to the evidentiary rulings of a circuit court.” Gentry v. Mangum, 195 W.Va. 512, 518 (1995). Moreover, a party desiring to challenge an evidentiary ruling of a trial court must proffer the evidence that was excluded on the record. See Parkersburg & Marietta Sand Co. v. Smith, 76 W.Va. 246 (1915). Dr. Murthy did not do so. Additionally, by failing to respond to Appellee’s Motion in limine, Dr. Murthy waived the right to object to the enforcement of the order. Finally, Judge Karl’s order excluding the DNR was correct, as the DNR had no relevance. As Judge Karl put it:

However, the Defendant failed to proffer any testimony relevant to the DNR or to identify any relevant purpose for introducing the Do Not Resuscitate Order before trial or during trial.

....
At the hearing on the post-trial motions in this case, Defendant indicated that it desired to introduce the DNR to suggest that Dr. Murthy had “no obligation” to Mrs. Karpacs once she had agreed to a DNR.

Defendant proffered no evidence at trial that would support the argument that persons who have executed a DNR are no longer entitled to competent medical treatment.

Furthermore, no evidence was adduced or proffered at trial that Dr. Murthy even knew about the DNR Order or that the existence of the DNR Order affected her conduct in any way.⁸⁶

This well supported discretionary ruling should stand.

1. Standard of Review – Evidentiary Rulings Reviewed for Abuse of Discretion

An evidentiary ruling of the trial judge is reviewed for abuse of discretion only:

The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard.

Syllabus Point 1 of McDougal v. McCammon, 193 W.Va. 229 (1995). The contention of Appellant that Appellee “opened the door” is subject to the same standard of review. Hicks v. Gaphery, 212 W.Va. 327, 336 (2002).

2. Appellant’s Effort to Convince the Jury That “Do Not Resuscitate” Orders Authorizes the Abandonment of a Living Patient to a Belly Infection Was Justly Turned Aside by the Trial Judge

In her Appeal, Murthy suggests that the DNR somehow cut off her obligations to the decedent entirely – that is, that a physician cannot violate the standard of care toward a patient

⁸⁶ See 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 at 8, ¶ 33-35; Record at 1357.

who is DNR. Not only is this argument devoid of any record support – no physician actually testified to this “theory of the exculpatory DNR,” it is absurd on its face, since a DNR is an order to avoid CPR in the case of heart attack or respiratory failure, and not an agreement to simply die of a treatable infection. In fact, the only court Appellant can find to have addressed an effort by a medical malpractice defendant to use a later-entered DNR as a defense called the argument “offensive:”

To argue and imply that the family's decision not to use extraordinary efforts to resuscitate Ginsberg was a substantial factor in his death is not only offensive but contrary to established tort law. It is well settled that a tortfeasor is liable for the natural and probable consequences of the tortious act. Ciluffo v. Middlesex General Hosp., 146 N.J.Super. 476, 482, 370 A.2d 57 (App.Div.1977). When as here, a medical professional commits an act of negligence having the capacity to accelerate the death of a patient, the medical professional can reasonably foresee that the patient, if competent to do so, or his family with the assistance of health care professionals, may be confronted with decisions affecting the quality of the patient's life. Where there is a decision not to employ extraordinary means in a situation precipitated in whole or in part by the negligence of the medical professional, such a decision may not be used to relieve the negligent medical professional of responsibility based on any theory of causation.

Ginsberg v. St. Michael's Hosp., 678 A.2d 271 (1996) (emphasis supplied).

Appellant also throws out testimony on pages 14-16 of her Brief that she claims would have been cross-examined differently with evidence of the DNR, but it turns out that Dr. Murthy is again acting deceptively, as the testimony she claims would have been attacked had nothing whatsoever to do with the DNR. They are all statements that the family expected Mrs. Karpacs' illness to be treated. None of them concern CPR or the DNR. For example, Andrea Karpacs Brown testified that:

A. Well, it seemed to be like in between like 1 and 3 [pm] my sister and I had talked to Dr. Murthy and asked her-- she mentioned that her gallbladder might have some problems with it and she could have a condition called ischemic colon; if she had it, it was serious, but she didn't know. She had mentioned, I think at that time, about the rectal tube and things being cloudy and wanting to redo that.

Q. Did you have any impression at that time that your mom had a fatal condition?

A. No.

Q. Did you expect that whatever condition she had, it would be diagnosed and treated?

A. That's why we took her there.⁸⁷

This testimony has no earthly connection whatever to a DNR entered at 12:30am the next morning, after Murthy's inaction had doomed Elizabeth Karpacs. But Murthy claims it does,⁸⁸ in an attempt to hoodwink this Court into letting her hoodwink a new jury later on.

Another issue in the case (and Murthy knows this) was the lack of a Swan-Ganz catheter at Wetzel County Hospital and the family's contention that Mrs. Karpacs should have been sent somewhere one was available.⁸⁹ Kevin Karpacs testified about that as follows:

Q. Did -- if you had known that different equipment was available to help your mom at another hospital, would you have been willing to take her there?

A. Definitely.

Q. I mean, not just to have her taken there by life flight or whatever, but you would have done that yourself, wouldn't you?

A. Nobody ever asked me about transporting her for different equipment or anything like that.

Q. You were never told that there was a piece of equipment called a Swan-Ganz catheter that they didn't have at Wetzel County that they might have somewhere else?

A. No.

Q. Was it ever indicated that -- to you that there was surgery that could be performed for your mom and it might be possible to do it somewhere else?

A. No.

Q. Would you have wanted, if there was life-saving surgery for your mom that could be done only somewhere else, would you have wanted to take her there to get it done?

A. Definitely.⁹⁰

⁸⁷ Trial TS at 223-24, quoted (out of context) at p. 15 of Murthy's Brief.

⁸⁸ Murthy's Brief at 15.

⁸⁹ Trial TS at 48.

⁹⁰ Tr. At 317-18, paraphrased out of context at p. 16 of Murthy's Brief. Apparently, by paraphrasing this, Murthy hopes to convince this Court that Kevin Karpacs was saying CPR equipment or ventilators or something was what was under discussion, but as the extended quotation shows, that is false. The criticism was quite specific and had nothing to do with CPR.

Likewise, this testimony has nothing whatever to do with CPR or a DNR and everything to do with the family's desire that Mrs. Karpacs' illness – her infection, be treated by doctors with medicine, and surgery if necessary. Dr. Murthy's contrary insinuation is that because the family elected no CPR at 12:30am, when Dr. Murthy had let the situation get entirely out of hand, they wanted Mrs. Karpacs to die. This suggestion is as offensive as it false and was properly excluded.

3. Appellant Defaulted This Issue and Cannot Resurrect It Now

As set forth above, Appellant defaulted this issue on multiple occasions, first by failing to appear at the hearing on Appellee's Motion in limine, second by ignoring the trial court's order to submit a proposed order on the subject,⁹¹ and again, by failing to proffer any legitimate use for the DNR or any testimony regarding its impact on the relevant issues.

Essentially, Dr. Murthy wants this Court to guess at what significance she would have claimed the DNR might have had had to the medical facts and guess again as to what the jury might have made of that testimony had it come into evidence. This is not proper on appeal. See Parkersburg & Marietta Sand, supra ; Delmar Oil Co. v. Bartlett, 62 W. Va. 700, 59 S.E. 634 (1907); Lord & McCracken v. Henderson, 65 W. Va. 322, 325, 64 S.E. 134 (1909).

Ultimately, Appellant cannot even begin (and does not attempt) to show excusable neglect of her obligations to preserve this point for effective review and the assignment of error should be rejected for that, among other reasons. As the trial court found:

The Defendant likewise failed to proffer any excusable neglect as to why she did not appear at the hearing on the plaintiff's Motion in Limine, respond to

⁹¹ See Seely v. Pinion, 200 W.Va. 472 (affirming exclusion of expert testimony related to repeated disregard of court rules and orders).

the plaintiff's proposed order, or object to the plaintiff's subsequent motion to enter her proposed order.⁹²

This assignment is merely an invitation to speculation on her forfeited claims of error.

B. Evidence of Pain and Suffering Was Presented by the Plaintiff Through Testimony and Documentary Evidence and Appellant's Contention to the Contrary is Unavailing

1. Standard of Review – Sufficiency of Evidence Reviewed for Abuse of Discretion.

In this assignment of error, Appellant essentially claims she was entitled to a directed verdict on the survivorship claim of Mrs. Karpacs' estate, on the grounds that there was no evidence that Mrs. Karpacs experienced pain or suffered. This Court explained in Totten v. Adongay, 175 W.Va. 634, 635 (1985), that:

Upon a motion to direct a verdict for the defendant, every reasonable and legitimate inference fairly arising from the testimony, when considered in its entirety, must be indulged in favorably to plaintiff; and the court must assume as true those facts which the jury may properly find under the evidence. Syl., Nichols v. Raleigh-Wyoming Coal Co., 112 W.Va. 85, 163 S.E. 767 (1932).

Id. (and collecting dozens of cases standing for the same proposition). The proposition runs in favor of both Plaintiffs and Defendants, whoever is the non-moving party. Id. at 636. Appellant's whole argument is therefore mal-designed, as it cites only its own favored bits of the record and simply ignores the substantial evidence favoring Appellee on this issue.

Furthermore, in challenging the amount of damages awarded in a wrongful death case, Appellant sails into the headwind of clear West Virginia law assigning the jury almost unfettered discretion in determining wrongful death awards:

By crafting the damages portion of the wrongful death act so broadly, the Legislature established the principle that juries have almost unfettered discretion in awarding damages for a death caused by the wrongful act, neglect

⁹² See 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 at 8, ¶ 32; Record at 1357.

or default of another. “It is well settled in this jurisdiction that where the jury finds the defendant liable in a wrongful death action, it has absolute discretion, without regard to proof of actual damages, pecuniary loss and the like, to make any award it deems ‘fair and just [.]’” Kesner v. Trenton, 158 W.Va. 997, 1002, 216 S.E.2d 880, 884 (1975).

McDavid v. United States, 213 W.Va. 592, 601 (2003) (emphasis supplied). While the “jury’s verdict is not, of course, unreviewable,” “a court may set it aside if it appears that the jury was actuated by passion, prejudice or corruption.” Id. at fn. 8. No such claim is advanced by Appellant, nor could one be made on the facts at issue.

The breadth and scope of jury discretion in awarding wrongful death damages was stated with great eloquence by Justice Dent in Couch v. Chesapeake & O. Ry. Co., 45 W.Va. 51, in 1898, and was revisited and re-affirmed in 2003 by this Court again in McDavid:

The legislature, having great confidence in the integrity and purity of the jury system, and a full reliance on the intelligence, moral uprightness, clear sense of justice, and impartiality of their fellow citizens when called upon, in the capacity of jurors, to sit in solemn judgment upon the lives, liberty, and property of others, clothed the jury with full power to determine the amount and character of damages that should be imposed upon a wrongdoer who by his negligence caused the death of his neighbor. . . . In doing so, it was the plain and expressed intention to take away from the courts all power to control the jury either as to the amount or character of the damages to be inflicted. The court is thus inhibited from instructing the jury that they should give or withhold punitive, consolatory, pecuniary, or compensatory damages. This is their sacred province, in which they are the supreme judges.

McDavid at 601-602 (quoting Couch)(emphasis supplied).⁹³ McDavid also held that pre-mortem pain and suffering are recoverable under the Wrongful Death Act. Id.

⁹³ Thus, Judge Karl did err in granting Appellant’s Motion for Judgment as a Matter of Law on the Issue of Punitive Damages, but he did not err in allowing the jury’s verdict to stand.

2. The Medical Record Makes it Obvious that Mrs. Karpacs' Fatal Intra-Abdominal Infection Was a Painful Condition That Was Allowed Worsen and Progress by Dr. Murthy's Negligence

As set forth above, the record in this case unambiguously showed that Mrs. Karpacs had a serious and painful condition warranting emergency treatment. As the trial Court stated, "Dr. Murthy failed to [adhere to the standards of care] and Mrs. Karpacs died from a painful dead bowel as a result."⁹⁴ The evidence likewise showed that Dr. Murthy did little to treat this condition (when she was not doing nothing at all) and such negligence prolonged and exacerbated Mrs. Karpacs' agony. It would be difficult to imagine, in view of the uncontested evidence that ischemic colitis is painful, causes nausea and diarrhea and severe dehydration, conditions with which most people are familiar and do not like, that a jury would fail to find that Mrs. Karpacs experienced pain and suffering. In any event, there is no legal basis to disturb the jury's judgment on this issue. See McDavid, supra.

3. The Testimony of Mrs. Karpacs' Children Likewise Established Pain and Suffering

The testimony of Mrs. Karpacs' children likewise showed tremendous physical and psychological torment that Mrs. Karpacs suffered because of Dr. Murthy. After callously leaving Mrs. Karpacs to die, knowing she would die, Dr. Murthy ordered tests for the morning she knew Mrs. Karpacs probably wouldn't live to take and sent the family home too. Another physician had to call the family back and tell them to start saying their goodbyes to Mrs. Karpacs who now could not be saved. The jury was free to conclude and easily did conclude that Mrs. Karpacs' pain and suffering, both physical and emotional was substantial and justified an award of damages. As this Court has observed, evidence of the decedent's pain

⁹⁴ See 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 at 3, ¶ 5; Record at 1352.

and suffering is often also relevant to the beneficiaries' mental anguish. See McDavid, 213 W.Va. 592, 604, fn. 11 (2003) ("evidence of the decedent's pain and suffering prior to his or her death from the injuries received as a result of the allegedly wrongful act may also be admissible to show the mental anguish of the decedent's beneficiaries").

The Appellant's argument runs afoul of the commonly stated rule that "[w]hen a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the weight of the evidence or without sufficient evidence to support it." Syllabus Point 4, Laslo v. Griffith, 143 W.Va. 469, 102 S.E.2d 894 (1958). In accord Syllabus Point 2, Walker v. Monongahela Power Co., 147 W.Va. 825, 131 S.E.2d 736 (1963). The evidence and inferences clearly supported the jury's conclusion that Appellant's negligence caused Mrs. Karpacs pain and suffering.⁹⁵ There is no basis to disturb the jury's judgment on the damages to be awarded for pain and suffering in a wrongful death case. McDavid, *supra*.

C. A Litigant Seeking to Rely on a Non-Economic Cap Must Seek a Verdict Form That Separates Economic From Non-Economic Loss. Appellant's Failure to Do So is Fatal to Her Attempt to Rely on § 55-7B-8 (1986):

1. Standard of Review – Co-Mingled Damages Are Not Reviewed

In this case, Appellant sought below to rely on the Medical Professional Liability Act's damages cap without seeking a verdict form that clearly separated economic from non-economic damages. According to Gerver v. Benevides, 207 W.Va. 228, 530 S.E. 2d 701 (1999), *cert. denied*, 529 U.S. 1131 (2000):

This Court has held on several occasions that when a litigant seeks to make procedural distinctions between "special" damages and "general" damages, that litigant bears the burden of insuring that the circuit court distinguishes

⁹⁵ See e.g. Combs v. Hahn, 205 W.Va. 102, 140 (requiring a new trial to be ordered where liability is found and jury without basis, refuses damages).

between types of damages in the jury's verdict form. See, e.g., Grove By and Through Grove v. Myers, 181 W.Va. 342, 382 S.E.2d 536 (1989).

Id., 207 W.Va. at 235. An error relating to the trial judge declining to apply the statutory "cap" is forfeited when the appealing party has failed to seek a verdict form segregating economic and non-economic damages. Id. This Court explained "[a]s 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." Id.

Civil Procedure Rule 49(b), which governs the use of jury interrogatories used in conjunction with a general jury verdict form, states that "(t)he court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict." Murthy had every right to ask for an interrogatory separating economic loss from non-economic loss if she desired to plead the cap. She failed to do so, and therefore waive her rights under the cap (if any she had).

Where, as here, there is no dispute that the Defendant failed to submit interrogatories sorting the damages, there can be no error in not applying the cap. As the trial court ruled:

In this case, the jury's verdict to each of the three wrongful death beneficiaries was for both economic and non-economic categories of damage. See Verdict form. The merging of non-economic and economic damages precludes post-verdict review of damage awards for compliance with the 1986 cap, unless the Defendant has objected in a timely fashion to the merging. As the Supreme Court of Appeals explained in Gerver v. Benavides, 207 W.Va. 228, (1999):

[the Defendant] did not submit special interrogatories that would allow the jury to segregate "economic" from "non-economic" losses. As 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.

Id. at 235. Since the verdict form in this case did not distinguish between economic and non-economic elements of damages available in wrongful death, review of the verdict for compliance with the statutory cap is not available to the Defendant. Id.

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 at p. 9; Record p. 1377. Judge Karl straightforwardly and correctly applied the law.

2. The Trial Court, Who Heard the Evidence, Properly Found Evidence of Both Economic and Non-Economic Loss to be Present in the Record and the Defendant Failed to Seek Separation of These Elements on the Verdict Form

The trial court properly rejected Appellant's claim that no evidence of economic loss was presented at trial, explaining its reasoning in detail as follows:

Under West Virginia law running back more than 100 years, pecuniary damages in wrongful death include losses suffered by the survivors as a result of the decedent's death, to include the value to the survivor of services, training and assistance that would have been given by the decedent prospectively, had she lived. See Searle's Adm'r v. Kanawha & O. Ry. Co. 32 W.Va. 370 (1889) ("while they must assess the damages with reference to the pecuniary injuries sustained by the next of kin in consequence of the death of Mrs. Tilley, they were not limited to the losses actually sustained at the precise period of her death, but might include also prospective losses, provided they were such as the jury believe from the evidence would actually result to the next of kin as the proximate damages arising from the wrongful death") quoting Tilley v. Railroad Co., 24 N. Y. 473-477 (emphasis supplied).

Accordingly, Judge Karl found that:

The survivors of Mrs. Karpacs were therefore entitled to damage not only for their grief and anguish at the death of their mother, but to recover for losses of her assistance and support as mother and grandmother to their children and the jury may properly assign economic, or "pecuniary," value to such losses. The failure of the Defendant to object to the combining of the different varieties of damages is fatal to an objection under the 1986 cap that is made, as here, post-verdict.⁹⁶

Judge Karl surveyed authority around the country and found it was not to the contrary, stating:

⁹⁶ It should be said that there is good strategic reason for the Defendant to decline to request the separation of damages. It is commonly thought among lawyers representing both sides of the bar that the more "lines" on the verdict form, the greater the damages may be. Whether that is superstition on the part of lawyers or not, it certainly explains why the Defendant in this case would not want two separate lines for each statutory beneficiary going back to the jury.

The distinction has been adopted explicitly by courts considering the issue. As a New York federal court explained, pecuniary or economic loss is not limited to lost income but includes loss of services and the loss of the value of the advice and guidance of a parent. The fact that wrongful death claimants are adult children does not bar this type of economic recovery:

The term “pecuniary injuries” has been broadly construed to include recovery for the “economically recognized and calculable losses of the household management services of [the deceased]” and “the premature loss of the educational training, instruction and guidance [that the children] would have received from the now-deceased parent.” Gonzalez v. New York City Housing Auth., 161 A.D.2d 358, 555 N.Y.S.2d 107, 108-09 (1st Dep’t 1990) (quotations omitted);

A particularly instructive case relied on by the trial Judge was Plotkin v. New York City Health and Hospitals Corp., 221 A.D.2d 425, 633 N.Y.S.2d 585, 586 (2d Dep’t 1995). That case held that in a wrongful death action, pecuniary injury includes children’s loss of “paternal nurture and care, as well as physical, moral, and intellectual training” provided by deceased parent. Further authority in New York explains that there is no prohibition barring such recovery by an adult child. See McKee v. Colt Electronics Co., 849 F.2d 46, 50-51 (2d Cir.1988); Loehner v. Simons, 239 A.D.2d 468, 657 N.Y.S.2d 447, 448 (2d Dep’t 1997) (financially independent adults may recover in wrongful death action). West Virginia law parallels these long-established principles.

Federal authorities likewise supported the decision. As Judge Karl pointed out:

The United States Court of Appeals for the 10th Circuit explained that loss of services is traditionally considered an economic loss (except in the context of loss of sexual relations with a spouse). Wolfgang v. Mid-America Motorsports, Inc., 111 F.3d 1515, 1528 (10th Cir. 1997). That court refused to apply Kansas’ draconian \$250,000.00 non-economic cap to loss of services damages. Id. See also McKinney v. California Portland Cement Co., 96 Cal.App.4th 1214, 117 Cal.Rptr.2d 849 Cal.App. 1 Dist., 2002 (finding loss of services to be an economic damage and stating: “Decedent performed services that saved the expense of hiring someone else.”). In fact, courts routinely treat loss of services as economic damages and even organizations of the defense bar fail to dispute the characterization. See St. Mary’s Hospital, Inc. v. Phillipe, 769 So.2d 961 (Fla., 2000)(“The Florida Defense Lawyers Association argues that the only elements of economic damages available to the Moglers are the

survivors' loss of services and the medical and funeral expenses incurred by the estate . . .”) (emphasis supplied). The view commended to this Court by the statutory language is therefore hardly novel or unusual.

Having broadly surveyed the applicable law, Judge Karl applied the law to the facts of the case presented in his courtroom and determined that evidence of both pecuniary and non-pecuniary loss had been presented, stating:

Services of a parent at issue in this case included (grand)child care, the loss of which is generally regarded as an economic loss, as well as certain household tasks like the cooking of holiday meals that also fall into that category. Of course the concepts of “assistance and care” are also partly economic in nature and embrace all of the sometimes prosaic, but highly valuable tasks performed by a modern grandmother, including, for example, serving and assisting her daughters at the births of grandchildren and in the early infancy of grandchildren when a grandmother is leaned on more heavily than any employee could be.⁹⁷ Andrea Karpacs Brown testified about the importance of having the assistance of her mother at the birth of her eldest daughter, Alexandria, born before June 2001, and the loss of those services for her afterborn sons, Nicholas and Zachary and daughter, Adrianna. The jury would be justified in awarding amounts for the economic value of Mrs. Karpacs’ lost services, whether or not Mrs. Karpacs would have charged for them because the purpose of the Wrongful Death Act⁹⁸ is to compensate the decedent’s beneficiaries as fully as possible.

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 at p. 11-13, ¶¶ 40-43; Record p. 1379-1341. There was therefore substantial evidence of both economic and non-economic loss co-mingled on the verdict form and where the defendant fails to object to such co-mingling, it is forbidden to plead the cap on damages after the verdict.

⁹⁷ West Virginia, of course, requires no proof whatsoever of financial dependency for wrongful death beneficiaries to recover economic loss. The Wrongful Death Act was specifically liberalized on this point. See Rice v. Ryder, 184 W.Va. 255, 257 (1990) (“Thus, we conclude that in a wrongful death action, a showing of financial dependency upon the decedent is not a prerequisite to recovery of the damages specified in W.Va.Code § 55-7-6(c)(1) (1989). West Virginia Code § 55-7-6(b) (1989)”)

⁹⁸ See Bond. Bond also set forth that the very same kinds of tasks, including “cooking. . . nursing sick family members . . . [and] looking after children” were sufficient to justify an award for economic loss. Id. at 586-87. In fact, Bond has been overruled only to the extent it required more than may be required today in the way of proof of wrongful death damages.

Additional support for these conclusions is found in McDavid, supra, which expressly held that in wrongful death the jury's discretion in awarding damages is "unfettered" and that "where the jury finds the defendant liable in a wrongful death action, [the jury] has absolute discretion, without regard to proof of actual damages, pecuniary loss and the like, to make any award it deems 'fair and just [.]'" Id. at 601; see also Kesner v. Trenton, 158 W.Va. 997 (1975). There is thus no ground for invading the jury's discretion in a case of wrongful death.

Appellant apparently does not dispute that loss of services was mingled with damages for grief and solace and therefore forfeited the right to seek review or application of the cap under Gerver, supra. Appellant's position that the evidence did not support a jury finding of economic loss simply flies in the face of McDavid and the factual findings of the trial court and the record as a whole, and cannot save the issue from Appellant's forfeiture. The evidence supported both species of damages and Appellant failed to separate them at her own peril.

As the trial court clearly put it:

Defendant suggests that the proof in this case was more heavily in the area of non-economic loss than economic loss and that this should influence the Court's decision. But the purpose of Gerver is to avoid such speculation about the views of the jury by placing upon the party who's interests are most at stake in regard to the "cap," the burden to seek a verdict form that will allow it to be clearly and simply applied. This Court will not speculate about the proportions the jury might have had in mind.

In any event, the jury in this case, without any objection from the Defendant, was permitted to consider the range of wrongful death damages without division into non-economic and economic components. When that occurs, the Defendant may not plead the statutory cap on non-economic damages in an effort to reduce the co-mingled award. Gerver. The Defendant's Motion to Modify the Verdict should be and therefore is DENIED.⁹⁹

This assignment of error should be refused for the same reasons.

⁹⁹ 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 at p. 15, ¶¶ 46-47; Record at 1343.

D. The Prejudgment Interest was Properly Awarded

1. Standard of Review – Co-mingled Damages Are Not Reviewed

As the Supreme Court of Appeals explained in Grove by and through Grove v. Myers, 181 W.Va. 342 (1989) (emphasis supplied):

Because prejudgment interest under W.Va.Code, 56-6-31 [1981] is to be recovered only on special or liquidated damages, a special interrogatory should be submitted to the jury for it to designate the amount of special or liquidated damages. Kirk v. Pineville Mobile Homes, Inc., 172 W.Va. 693, 310 S.E.2d 210, 213 (1983); In re Certification of Question from United States District Court, 369 N.W.2d 658, 662 (S.D.1985). When this procedure is not followed and only a general verdict is returned, the plaintiff is entitled to prejudgment interest on the entire amount of the general verdict containing special or liquidated damages in unspecified amounts. See syl. pt. 3, Kirk v. Pineville Mobile Homes, Inc., 172 W.Va. 693, 310 S.E.2d 210 (1983).

Like the previous assignment of error, there is simply no room for appeal once the defendant has defaulted on its obligation to segregate the damages. If Dr. Murthy wanted to avoid additional lines on the verdict form to hold the award down, she runs the risk of co-mingled damages and the risk that pre-judgment interest would be awarded. Appellee is entitled to a presumption that she proved everything her evidence tended to prove and to the resolution of all evidentiary conflicts in her favor. Stanley v. Chevathanarat, 222 W.Va. 261, 664 S.E.2d 146 (2008). That included loss of services of economic value.

E. The Trial Court Properly Exercised Its Authority to Address the Copious Litigation Misconduct of the Appellant Through an Award of Attorney's Fees

1. Standard of Review – Judgment Which is Not Final is Not Appealable

The trial court ruled that litigation misconduct by Appellant was sufficient to trigger an exception to the American Rule and to require the defendant to bear the plaintiff's attorney's fees. However, no figure was set for the sanction by the Court and the Court

ordered the parties to determine if the amount could be fixed by stipulation (Appellant was not, of course, asked to agree that fees were owed, merely to see if the fees incurred could be a matter of stipulation). Plaintiff attempted to work on a stipulation but Appellant ignored the trial court's order and instead attempts to appeal the fee award now, even though no figure has been assessed, nor any judgment entered. The trial judge indicated the parties should come back to the Court for an adversarial proceeding on the amount of fees if agreement could not be reached. Appellant filed her Petition before this could occur.

The award of sanctions with an amount to be determined is plainly interlocutory. There is no judgment of fees for Appellee to attempt to enforce. Such a judgment is not final and therefore, is not appealable. See, e.g., James M.B. v. Carolyn M., 193 W.Va. 289, 456 S.E.2d 16 (1995) (An order is final when it "leaves nothing to be done but to enforce by execution what has been determined."). Appellant did not seek a finding by the trial court that there was no just cause for delay under W.Va. Code § 58-5-1, or for certification of any question under Rule 54(b). The attempt to appeal the sanctions order is premature.

2. Standard of Review – An Award of Sanctions is Reviewed for Abuse of Discretion

Awards of litigation sanctions are reviewed for abuse of discretion as explained in Pritt v. Suzuki Motor Co., Ltd., 204 W.Va. 388, 513 S.E.2d 161 (1998):

With regard to a review of the appropriateness of sanctions ordered by a trial court, the standard, as we recognized in Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996), is abuse of discretion: "The question is not whether we would have imposed a more lenient penalty had we been the trial court, but whether the trial court abused its discretion in imposing the sanction."

Id. at 389-90, 472 S.E.2d at 835-36. In this case, the trial court's award of sanctions was based on a pattern of misconduct by Appellant, including disobeying court orders regarding mediation, ignoring the court's scheduling orders, deliberately wasting the plaintiff's time by

presenting under-prepared experts, attempting to mislead the court by preferring previously undisclosed opinions on the fourth day of trial and by proffering false testimony or false and incomplete discovery responses during the litigation. This misconduct warrants sanctions.

3. Facts Underlying Sanctions Decision are Reviewed Under the “Clearly Erroneous” Standard

Of course, the facts as found by the trial court are reviewed under the “clearly erroneous” standard:

a trial court has broad authority to enforce its orders and to sanction any party who fails to comply with its discovery rulings. Doulamis v. Alpine Lake Property Owners Ass'n, 184 W.Va. 107, 399 S.E.2d 689 (1990); W.Va.R.Civ.P. 16(f) & 37(b)(2) Mindful that case management is a fact-specific matter within the ken of the trial court, reviewing courts have reversed only for a clear abuse of discretion. A trial court's factual findings may not be set aside unless they are clearly erroneous. In particular, a trial court's credibility determinations are entitled to special deference.

Bartles at 389. Or as this Court more recently put it in Shafer v. Kings Tire Service, Inc. 215 W.Va. 169, 597 S.E.2d 302 (2004):

[T]he trial [court] ... is vested with a wide discretion in determining the amount of ... court costs and counsel fees, [sic] and the trial [court's] ... determination of such matters will not be disturbed upon appeal to this Court unless it clearly appears that [it] has abused [its] discretion.’ Syllabus point 3, [in part,] Bond v. Bond, 144 W.Va. 478, 109 S.E.2d 16 (1959).” Syl. Pt. 2, [in part,] Cummings v. Cummings, 170 W.Va. 712, 296 S.E.2d 542 (1982) [(per curiam)]. Syllabus point 4, in part, Ball v. Wills, 190 W.Va. 517, 438 S.E.2d 860 (1993). Syl. pt. 3, Daily Gazette Co., Inc. v. West Virginia Dev. Office, 206 W.Va. 51, 521 S.E.2d 543 (1999).

4. The Failure to Obey Court Orders and All Appellant’s Associated Misconduct Warrants an Award of Fees

The Supreme Court of Appeals held in Bartles that, in awarding sanctions:

The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.

Id. Furthermore, “[a] court ‘has inherent power to do all things that are reasonably necessary for administration of justice within the scope of its jurisdiction.’ 14 Am. Jur., Courts, § 171.” Syllabus Point 3, Shields v. Romine, 122 W.Va. 639, 13 S.E.2d 16 (1940). “Included within the circuit court's inherent power is the power to sanction.” State ex rel. Rees v. Hatcher, 214 W.Va. 746, 749, 591 S.E.2d 304, 307 (2003). A court has, independent of specific statutory- and rule-based schemes, the inherent authority to sanction litigants for egregious, bad-faith conduct that undermines the judicial process. See Chambers v. NASCO, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991).¹⁰⁰

¹⁰⁰ See also Daily Gazette v. Canady noting with extensive supporting citations:

The concept of the “inherent power” of the judiciary is well-recognized in this jurisdiction. In Syllabus Point 3 of Shields v. Romine, 122 W.Va. 639, 13 S.E.2d 16 (1940), this Court noted the general rule that, “A court ‘has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction.’ 14 Am.Juris., Courts, section 171.” See also Virginia Electric & Power Co. v. Haden, 157 W.Va. 298, 306, 200 S.E.2d 848, 853 (1973); Syl. pt. 2, Frazer Lumber Co. v. Haden, 156 W.Va. 844, 197 S.E.2d 634 (1973). This Court has acknowledged inherent judicial powers in a variety of contexts at both the appellate and trial court levels. See, e.g., In re Pauley, 173 W.Va. 228, 314 S.E.2d 391, 396 (1984) (provision and supervision of court personnel); Syl. pt. 4, Prager v. Meckling, 172 W.Va. 785, 310 S.E.2d 852 (1983) (imposition of sanctions to maintain a fair and orderly trial); In re L.E.C., 171 W.Va. 670, 301 S.E.2d 627, 630 (1983) (supervision, regulation, definition, and control of the practice of law); Perlick & Co. v. Lakeview Creditor's Trustee Committee, 171 W.Va. 195, 298 S.E.2d 228, 235 (1982) (elimination of dormant cases from judicial dockets); E.H. v. Matin, 168 W.Va. 248, 284 S.E.2d 232 (1981) (transfer of actions to lower tribunals for further proceedings); State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545, 556 n. 3 (1981) (compulsion of attendance by witnesses); Sparks v. Sparks, 165 W.Va. 484, 269 S.E.2d 847, 848 (1980) (grant of custody of a child to a person outside jurisdiction of court or permission to one who has custody to take child to another state or foreign jurisdiction); Hendershot v. Hendershot, 164 W.Va. 190, 263 S.E.2d 90, 96-97 (1980) (imposition of civil contempt sanctions); State ex rel. Goodwin v. Cook, 162 W.Va. 161, 171-72, 248 S.E.2d 602, 607-08 (1978) (appointment of special prosecutor); Syl. pt. 3, State ex rel. Bagley v. Blankenship, 161 W.Va. 630, 246 S.E.2d 99 (1978) (determination of funding necessary for the effective operation of the judiciary); State ex rel. Moran v. Ziegler, 161 W.Va. 609, 614, 244 S.E.2d 550, 553 (1978) (disqualification of private prosecutor); Eastern Associated Coal Corp. v. Doe, 159 W.Va. 200, 208, 220 S.E.2d 672, 678 (1975) (enforcement of judicial orders); Corbin v. Corbin, 157 W.Va. 967, 980, 206 S.E.2d 898, 906 (1974) (modification of divorce decrees); Virginia Electric & Power Co. v. Haden, 157 W.Va. at 306, 200 S.E.2d at 853 (transfer of actions to administrative agencies for further proceedings); State v. Cowan, 156 W.Va. 827, 834, 197 S.E.2d 641, 645 (1973) (direction of pretrial discovery); Maxwell v. Stalnaker, 142 W.Va. 555, 563, 96 S.E.2d 907, 912 (1957) (adjudication of payment of costs); State ex rel. Chemical Tank Lines, Inc. v. Davis, 141 W.Va. 488, 493, 93 S.E.2d 28, 31 (1956) (prescription and enforcement of rules and regulations for the conduct of judicial business).

In this case, the Appellant repeatedly flouted court orders including scheduling orders related to briefing, expert disclosure orders and mediation orders as well as repeated failures to appear before the Court at hearings. Since Appellant claims her misconduct is not sufficient to justify fee shifting, it is worth itemizing in detail:

The defendant's vexations and oppressive conduct was pervasive in the case, and includes at least the following categories of misconduct: 1) the violation of court orders regarding mediation; 2) the failure to participate meaningfully and in good faith in the court-ordered mediation when it did occur; 3) the failure to timely supplement prior incorrect discovery answers and deposition testimony under Rule 26(e); and 4) the material changes in testimony at trial following the plaintiff resting her case.

Mediation is required by law in medical cases as described above. Nevertheless, Dr. Murthy refused to engage in mediation as required by law, and as ordered by the Court. The failure to obey Court orders subjects a litigant to sanctions. According to pleadings filed by counsel hired by Woodbrook, Dr. Murthy personally refused to authorize her carrier to negotiate at court-ordered mediation. See Dr. Murthy's Response to Plaintiff's Motion to Compel Mediation. Whatever excuses are given, the Court's Order was to mediate and the violation of the Court's Order subjects the Defendant to sanction. Furthermore, the failure to participate meaningfully in mediation when it did occur is a further violation of the spirit of the Court's Order.

As described above, Dr. Murthy altered highly material, even potentially dispositive testimony in both Roberts and Karpacs. In Roberts, Dr. Murthy claimed she had been intimidated into admitting facts conclusively establishing her liability. In Karpacs, Murthy took a different tack, claiming to have had her memory jogged as to a critical exculpatory conversation with the deceased by appearing at trial. Arguments over interpretation or modest changes in testimony are part of ordinary trial practice. But a defendant who repeatedly attempts to change dispositive testimony after the plaintiff rests, citing un-examinable reasons like conversations to which only the deceased was a witness or a surgeon's purported fear of questioning makes a mockery of the oath and the discovery process.

It is particularly relevant that Dr. Murthy never honored her legal duty to supplement her discovery responses or deposition testimony when her memory changed. Dr. Murthy's conduct directly violated Rule 26(e) and constituted an attempt to immensely prejudice both plaintiffs. Rule 26(e)(2) states:

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which:

(A) The party knows that the response was incorrect when made,
or,

(B) The party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

Id. See also Syl. pt. 3, Prager v. Meckling, 172 W.Va. 785, 310 S.E.2d 852 (1983) (“Rule 26(e)(2) of the Rules of Civil Procedure imposes a continuing obligation to supplement responses previously made when, in light of subsequent information, the original response is incorrect.”).

Nevertheless, in Roberts and Karpacs, the first Plaintiff heard of Dr. Murthy’s new exculpatory testimony and facts was when she took the stand. Trial by ambush is not contemplated by the Rules of Civil Procedure. McDougal v. McCammon, 193 W.Va. 229, 236-37, 455 S.E.2d 788, 795-96 (1995).
Furthermore:

[t]he discovery process is the manner in which each party in a dispute learns what evidence the opposing party is planning to present at trial. Each party has a duty to disclose its evidence upon proper inquiry. The discovery rules are based on the belief that each party is more likely to get a fair hearing when it knows beforehand what evidence the other party will present at trial. This allows for each party to respond to the other party’s evidence, and it provides the jury with the best opportunity to hear and evaluate all of the relevant evidence, thus increasing the chances of a fair verdict.

Graham v. Wallace, 214 W. Va. 178, 184-85 (2003) (emphasis supplied).

Order and Findings of Fact and Conclusions of Law Regarding Plaintiff’s Motion for Attorney’s Fees and Costs at ¶¶ 60-66, p. 15-18; Record at 1345-1348 (emphasis supplied).

This consistent disregard for the law, including disregard of court orders, failures even to appear before the Judge, presentation of false testimony and/or erroneous and materially incomplete discovery responses and the deliberate use of an under-prepared expert to waste the Appellee’s time and that of the court is inexcusable and justified the award of sanctions. The fact that Appellant had treated multiple trials as a game of “gotcha” with new, undisclosed, exculpatory testimony at both trials would by itself support the trial judge’s

decision to take strong action against this recalcitrant litigant. When the entire body of misconduct is weighed, it is clear that the order shifting attorney's fees is well-supported.

V. CROSS-ASSIGNMENT OF ERROR

Appellee submits a single cross-assignment of error: The trial judge should have allowed the issue of punitive damages to be submitted to the jury, and erred in directing a verdict in favor of the Defendant on that issue.

A. The Trial Court Erred in Directing a Verdict in Favor of the Appellant on the Issue of Punitive Damages

The Appellee sought punitive damages in this case. The Appellant neither moved to dismiss that claim, nor for summary judgment on it and the plaintiff submitted evidence that Dr. Murthy had grossly deviated from the standard of care, had acted with reckless disregard for her patient, and had concealed incredibly important information from the family. As Appellee's expert surgeon testified:

Q. Dr. Battle, was Dr. Murthy's failure to rehydrate Mrs. Karpacs, give her antibiotics and operate on an emergency basis, was all of that a deviation from the standard of care?

A. Yes.

Q. Is it even close?

A. No. And I don't mean to be demeaning or disrespectful or meanspirited to anyone, but it was egregiously bad.

Q. And why is that your opinion, Dr. Battle?

A. Because of the seemingly obvious things that should have been done that were not done.

TS of Trial at 133-34. As set forth in the statement of facts herein, the evidence in this case was more than sufficient for the jury to find that Dr. Murthy 1) knew of Mrs. Karpacs grave risk of death; 2) failed to act in the face of it; while 3) leading the family to believe no action was needed. The trial court, in denying Murthy's Motion for a New Trial put it as follows:

Dr. Battle testified that Dr. Murthy's conduct failed to meet the standard of care by a wide margin, and that the failure to meet the standard of care directly caused Mrs. Karpacs' suffering and death. Dr. Battle described Dr. Murthy's failure to

operate to save the life of her patient as an egregious one and agreed that Dr. Murthy had, in effect, abandoned Elizabeth Karpacs to a painful death.¹⁰¹

The standard required to affirm the grant of a directed verdict is demanding:

We have indicated that a motion for “judgment as a matter of law should be granted at the close of the evidence when, after considering the evidence in the light most favorable to the non-movant, only one reasonable verdict is possible.” Waddy v. Riggleman, 216 W.Va. 250, 255, 606 S.E.2d 222, 227 (2004) (citation omitted). In addition, “[u]pon a motion for [pre-verdict judgment as a matter of law], all reasonable doubts and inferences should be resolved in favor of the party against whom the verdict is asked to be directed.” Syl. pt. 5, Wager v. Sine, 157 W.Va. 391, 201 S.E.2d 260 (1973). Stated more pointedly,

in reviewing a motion for judgment as a matter of law, a court should (1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting the nonmovant which the evidence tended to prove, (3) give the nonmovant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn. Cleckley, et al., Litigation Handbook § 50(a)(1), at 73 (Cum.Supp.2007) (footnote omitted).

Stanley v. Chevathanarat, 222 W.Va. 261, 664 S.E.2d 146 (2008). In granting the motion, the trial judge indicated it was his view that the standard of egregiousness had not been met, an issue that was properly for the jury:

[JUDGE KARL]: I'm not inclined to grant punitive damages. I don't think it's been met; I don't think it's been proven. I looked at the argument. When I left here, I looked at the plaintiff's argument. I do not believe -- I'm not going to let it go to the jury on punitive damages. Objection's noted.¹⁰²

This method of resolving the issue – whether the Judge believes punitive damages are proper – is not the correct legal inquiry. As the Tennessee Court of Appeals explained in Smartt v. NHC Healthcare/McMinnville, LLC, Slip Copy, 2009 WL 482475 (Tenn.Ct.App., 2009), “[t]he trial court's language in granting the motion suggested that

¹⁰¹ Order, Including Findings of Fact and Conclusions of Law Denying Defendant's Renewed Motion For Judgment As A Matter Of Law, Denying Defendant's Motion For A Directed Verdict And Defendant's Alternative Motion For A New Trial at ¶ 23; Record at 1355.

¹⁰² Trial TS at 571.

the decision was based on personal conclusions, rather than whether reasonable minds could differ as to the conclusions to be drawn from the evidence. As such, the analysis applied by the trial court in granting the directed verdict motion was error.” Id. at *28. The Court went on to reverse the trial judge for granting a directed verdict on punitive damages and to require a new trial on that issue alone. Id. at *32. Likewise in West Virginia, the issue of whether punitive damages are proper is for the jury, not the judge. See Kocher v. Oxford Life Ins. Co., 216 W.Va. 56, (2004). Here, whether or not the trial judge felt the Appellee had proven her case, he was required to apply the proper standard of asking whether any reasonable jury could find she had. Failing to do so was error.

Punitive damages are permissible in medical negligence cases where the defendant acts with reckless indifference to the patient’s safety.¹⁰³ Moreover, courts have repeatedly held that abandoning a patient may be grounds for the award of punitive damages. In Medvecz v. Choi, the U.S. Court of Appeals for the Third Circuit reversed a trial court for directing a verdict on punitive damages in the face of evidence of abandonment and specifically cited the doctor’s credibility issues as a reason why the jury ought to have been allowed to decide the issue. 569 F.2d 1221 (3d Cir. 1977); see also Wimer v. Macielak, 47 Pa. D. & C.4th 364, 368-69 (Crawford Cty. 2000) (surgeon’s conduct in ignoring patient’s communications about postoperative complications which caused paraplegia could constitute reckless indifference”). In this case, the facts as found by the jury and affirmed by the Judge show that Dr. Murthy was aware of Mrs. Karpacs’

¹⁰³ An award of exemplary or punitive damages may be permissible in a medical malpractice action when the evidence shows gross negligence, or where the defendant’s breach of the applicable standard of care is extreme. Thus, the issue of punitive the damages liability of a nurse is properly submitted to the jury in an action arising from the death of a terminal respiratory-disease hospital patient who died while being moved from one room to another with the supplemental oxygen supply disconnected, where conflicting expert testimony would support a finding that the nurse was grossly negligent in failing to provide a portable oxygen supply during the move. AMJUR PHYSICIANS § 344 Exemplary or punitive damages.

substantial risk of death and nevertheless failed to act in the face of it. Not only did Dr. Murthy fail to intervene to save Mrs. Karpacs, she led the family to believe intervention was not needed. These egregious facts warranted the punitive instruction.

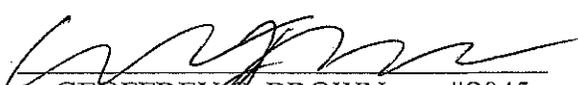
B. A New Trial, on the Issue of Punitive Damages Only, Should be Ordered

Where, as here, the trial court fails to submit an issue to the jury that should have been submitted, the remedy is a new trial, limited to the issue requiring resubmission. See e.g. Waddy v. Riggelman, 216 W.Va. 250 (2004). This Court should therefore order a new trial solely on the issue of punitive damages.

CONCLUSION

WHEREFORE, Appellee respectfully requests that the Appellant's Assignments of Error be REJECTED and that the trial court's decisions be affirmed, except for the granting of a directed verdict on the issue of punitive damages. With regard to the trial court's order directing a verdict on punitive damages, Appellee prays the Court will REVERSE that decision and REMAND the case for a trial LIMITED TO THE ISSUE OF PUNITIVE DAMAGES.

Very Respectfully submitted,
ANDREA KARPACS-BROWN,
Individually and as Administratrix of the
Estate of her Mother, Elizabeth Karpacs, and
Of the Estate of her Father, Andrew Karpacs,
Appellee/Plaintiff,

By: 

GEOFFREY C. BROWN #9045
CHRISTOPHER J. REGAN #8593
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
304-242-8410
Counsel for Appellee/Plaintiff

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

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/Appellee

v.

ANANDHI MURTHY, M.D.

Defendant/Appellant

CERTIFICATE OF SERVICE

Service of the foregoing APPELLEE'S BRIEF AND CROSS ASSIGNMENT OF
ERROR was had upon counsel of record by sending true and correct copies thereof in properly
addressed envelopes and depositing same in the United States Mail, postage prepaid, this 10th day of
June, 2009:

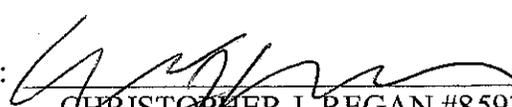
Stephen R. Brooks, Esq.
Flaherty, Sensabaugh, & Bonasso
965 Hartman Run Road, Suite 1105
Morgantown, WV 26505

Alfred F. Belcuore, Esq.
Montedonico, Belcuore & Tazzara, PC
1020 19th Street, N.W., St. 420
Washington, D.C. 20036

Robert C. James, Esq.
Flaherty, Sensabaugh, & Bonasso
1225 Market Street
P.O. Box 6545
Wheeling, WV 26003

Ancil G. Ramey, Esq.
Steptoe & Johnson, PLLC
P.O. Box 1588
Charleston, WV 25326

By:


CHRISTOPHER J. REGAN #8593
GEOFFREY C. BROWN #9045
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
Telephone: 304/242-8410
Counsel for Appellee/Plaintiff