

APPEAL NO. 34888

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Jerry Goldizen And Bill Goldizen, Co-Administrators

Of the Estate of Elva Lee Goldizen,

Plaintiffs/Appellants,

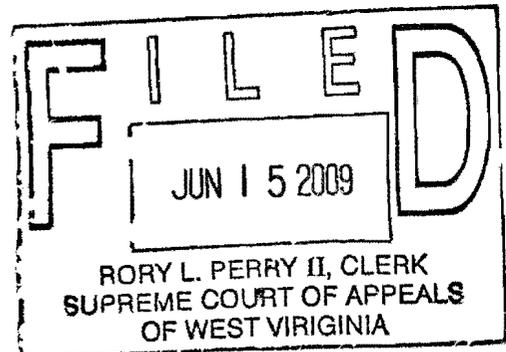
v.

Appeal from Grant County Circuit

Court, Civil Action No. 07-C-36

Grant County Nursing Home,

Defendant/Appellee.



APPELLANTS' BRIEF

J. David Cecil (WV State Bar #683)

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I.

KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER COURT

This is an appeal from an order of the Circuit Court of Grant County, West Virginia (“lower court”) that erroneously denied Appellants’ Motion to Vacate the Scheduling Order and Request to Continue the Trial, granted Appellee’s Motion to Exclude the trial deposition of an emergency room treating physician for failure to comply with a Rule 16 Scheduling Order. The lower court’s sanction for this failure, in effect, was to dismiss the case by granting Appellee’s Motion for Summary Judgment for failure to timely name an expert witness pursuant to the requirements of West Virginia Code Section 55-7B-7 (2008). Appellants’ Motion to Alter or Amend Judgment was wrongfully denied on October 30, 2008.

II.

STATEMENT OF FACTS

The Appellants as sons and co-administrators of the Estate of Elva Lee Goldizen filed a medical malpractice action against Appellee, Grant County Nursing Home, for negligently and wrongfully causing the death of Elva Lee Goldizen. The allegations in Appellants’ Complaint reiterated the specific finding from Elva Lee Goldizen’s death certificate that she died as a result of “acute aspiration.” Additionally, the nursing home’s medical records indicated that just prior to Ms. Goldizen’s death, specific instructions had been issued by

the nursing home's director and physician, Dr. Dewey Bensenhaver, that Goldizen was to be given a soft diet.

On October 11, 2007, a Rule 16 Scheduling order was entered by the lower court setting forth specific dates for completion of various pre-trial activities with a trial date of October 14, 2008.

The parties were in compliance with the lower court's scheduling order when on February 7, 2008, Appellants' counsel took the telephonic deposition of the physician Dr. Dewey Bensenhaver who had previously been identified as Appellants' expert and who had executed Ms. Goldizen's death certificate on October 31, 2003. Bensenhaver cited as cause of death "acute aspiration". Additionally, Appellants' had named Michele L Winter, a licensed registered nurse with a degree and substantial experience in Health Care Management systems, as an expert.

During the course of Dr. Bensenhaver's February 7, 2008 Deposition, it was revealed that Bensenhaver was the medical director of the nursing home, and he did an abrupt 180 degree turn. While first confirming that he had signed Ms. Goldizen's death certificate and, thereby, certified that the specific and immediate cause of her death was "acute aspiration," he now believed that this was in error. Five years after signing the death certificate, Dr. Bensenhaver opined that Goldizen had died from a heart attack or stroke or perhaps a seizure. Dr. Bensenhaver after reviewing certain records relating to Goldizen but without conferring with the emergency room treating physician, Dr. Robert Gaudet, or any of the nursing home personnel, had concluded that his initial cause of death was wrong. Dr.

Besenhaver said he had talked to another hospital ER physician he but never directly to Dr. Gaudet concerning Mrs. Goldizen's death.

Among the medical records obtained by Appellant was the emergency room medical report dated October 31, 2003, that specifically indicated that the treating physician on the day of Ms. Goldizen's death was Dr. Gaudet. During Dr. Besenhaver's deposition, inquiry was made by Appellants' counsel as to the current location of Dr. Gaudet. Dr. Besenhaver indicated that he was unaware of Dr. Gaudet's current location. Appellants' counsel then proceeded to develop what information, if any, caused Dr. Besenhaver to disregard his opinion that he certified, on the death certificate, as Ms. Goldizen's cause of death some five years prior to the deposition. As noted above Dr. Besenhaver's opinion was not exactly succinct or conclusive.¹

On June 4, 2008, Appellants' counsel telephonically took the depositions of Heather Wright Barger and Patricia Lynn Williams, both registered nurses working in the emergency room at Grant Memorial Hospital at the time of Ms. Goldizen's death. During Barger's deposition, the following discussion occurred regarding the matters listed in ER medical charts and her recollection of the events of October 31, 2003:

"EMS reports possible aspiration of fish. Unable to clear airway with Heimlich maneuver."

Q You have down for respiratory, you have, "Partially obstructed." You made

¹ Besenhaver's depo at page 23, "I would -this—this is - after reviewing the record, I think Mrs. Goldizen had some event while eating, either cardiac, stroke, maybe a seizure, that she immediately stopped eating. Later, Mr. Armada, "And my question is, today, as we're speaking right now, you think the immediate cause of death is either cardiac in nature or a stroke? Answer: "or possibly a seizure."

that assessment?

A Me.

"Agonal respiration noted, suction attempted per RT to obtain food particles."

Q What does that mean?

A That they were trying to clear her airway to see if that would help breathing, and when they did so, they sucked up some food.

A "Suction continues per R.T. with fish particles obtained."

Q And with fish particles obtained, did you observe the fish particles?

A Yes.

Q Did you make any observation of how much material was extracted from her throat?

A We didn't measure it, if that's what you're asking. It seemed like a lot because it was pretty much a continuous process.

Q Do you recall what reason was -- the reasoning for inserting the E.T. tube?

A Normally because their airway just isn't stable enough. As I recall, that's the case with Ms. Goldizen.

Q Again, ronchi, what does that mean to you? What does it sound like?

A It's just a coarse, congestion of the lung field.

Q If one had stuff in their lungs, whether it be mucus or otherwise, or particles, would it give off a sound that would be identified as ronchi?

MS. BISER: Object to the form of the question.

THE WITNESS: Yes.

Q You have, "B.V.M.," the mask, "squeezing," and is that with resistance?

A Right.

Q What does that mean?

A That there's something blocking.

Q There's an obstruction in the airway?

A The airway.

Q You've already read the 13:05 entry. The 13:09 says, "Family present."

A Uh-huh.

Q That's the family was actually in the room, if you recall?

A I can recall two family members being brought to the trauma room by the physician.

A "Dr. Bensenhaver speaking to Dr. Gaudet regarding code status. Dr. Gaudet

and P. Williams, R.N. speaking with family regarding patient's status. Family advised to stop all efforts."

Q Have you ever had any discussions with any of the family members, Ms. Goldizen's family members, in regard to the events surrounding her death there in the emergency room?

A I was questioned one time as to if I knew where Dr. Gaudet's location was.

Barger Depo. at pgs 7,11,12, 17-24, 26,30 &32.

Patricia Lynn Williams' deposition provided the following discussion:

"I recall that she was brought to our emergency department by ambulance and that she was in respiratory distress and that we initiated treatment. Actually, we continued treatment that had been initiated during the five minute ride from the nursing home to the hospital in the ambulance."

"So we began treating her, attempting to relieve the airway obstruction, attempting to determine the cause of the airway obstruction and, therefore, to relieve it, but we were not terribly successful in any of that, and she expired eventually after some intervention with medication and bag valve mask and assessing vital signs and that sort of thing."

"It was initially made by the EMS personnel in that they reported a possible aspiration of fish and they were unable to clear the airway. It's also noted that she had signs of respiratory compromise, which would be evident as a result of the fact she had cyanosis and agonal respirations, I believe, it was stated on the chart in one place. And, you know, I don't know which person stood up and waved their arms and said, "This patient has respiratory problems." I don't know that anyone did, really."

"Okay. "Thirteen hundred, respiratory arrest/unresponsive. Patient was eating fish in nursing home. Appeared to choke."

Q Now, that information was written by whom?

A It is signed at the bottom of the page by Dr. Gaudet.

A The only discussion I had with a family member was I received a phone call probably maybe about a month or so ago from a family member asking me if I knew how to get in touch with Dr. Gaudet, and my answer to that was no, I do not.

A I don't recall. I remember reading from the chart that Dr. Gaudet placed the E.T. tube. That means that he's the one who intubated her.

Williams Depo. at pgs 7-9, 15,20, & 31.

Having determined that another expert was necessary, Appellants' counsel began a search for Dr. Gaudet, the actual treating emergency room physician on February 11, 2008, and his efforts and those of Appellants continued thereafter until September 9, 2008 when the office of Appellants' counsel finally obtained a current phone number for Dr. Gaudet . Recognizing that there might be delays in successfully locating and arranging a deposition with Dr. Gaudet, Appellants had on August 7, 2008, filed a motion with the lower court seeking to vacate the scheduling order of October 11, 2007, requesting leave to supplement Appellants' expert list by adding a "causation expert" and requesting a continuance of the trial date. The trial was over two months away at the time of the motion.

On August 15, 2008, Appellee filed a response in opposition to Appellants' motion arguing that Appellants' counsel had more than adequate time to find another expert witness after the February 11, 2008 Deposition. Further, Appellee argued that the lower court, pursuant to Rule 16 of the West Virginia Rules of Civil Procedure and *Bartles v Hinkle*, 472 S.E.2d. 827 (W.Va. 1996), had the authority to sanction Appellants by excluding the addition of an expert witness at what Appellee asserted was a late date, if Appellants "intentionally or with gross negligence failed to obey a court order."

By Order dated August 21, 2008, the lower court denied Appellants' motions to vacate the scheduling order and request to continue the October 14, 2008, trial date. The order stated that Dr. Bensenhaver had opined that "acute aspiration could not be the cause

of Mrs. Goldizen's death because it was reported Ms. Goldizen was having "agonal respirations" when she got to the hospital" and that if someone had an obstructed airway they could not breathe at all.² The lower court further found that Appellants were aware on February 7, 2008, that Dr. Bensenhaver would not provide "Plaintiff-friendly" expert testimony and another expert should have been obtained by the time of Appellants' motion. Further, the lower court asserted that it was not "persuaded that Dr. Gaudet could not be located."

On the date Dr. Gaudet was located, Appellants' counsel informed Appellee's counsel and requested available dates for Dr. Gaudet's trial deposition. Appellee's counsel replied that she was not available any time in September as she had trial commitments and numerous attempts by Appellants' counsel to discuss, via the telephone, possible dates for Dr. Gaudet's deposition were ignored. Appellee's counsel simply refused to accept Appellants' counsel's telephone calls. Having exhausted all avenues for obtaining a mutually agreeable date to depose Dr. Gaudet, Appellants' counsel was compelled to unilaterally obtain a trial deposition date for September 30, 2008, and sent notice to Appellee's counsel. A copy of both Appellants' letter to Appellee's counsel and her response are attached.

On September 18, 2008, Appellee filed a Motion for Protective Order and Motion to Exclude along with a response in opposition to Appellants' notification of Notice of Trial

² Actually, agonal respirations is defined as of, relating to, or associated with agony and especially the death agony <chemical changes in the blood during the *agonal* state -- *Journal of the American Medical Association*>; also see deposition testimony of Ms. Barger quoted above.

Conflict.³ Arguing the same matters argued in Appellee's initial response to Appellants' motions, Appellee added the additional argument that, "Plaintiffs did not...provide a report from Dr. Gaudet and/or a summary of the opinions he was expected to offer in this case" and that "Plaintiffs had not supplemented their discovery responses."

Appellants' September 24, 2008, Response to Appellee's Motion for Protective Order and Motion to Exclude provided a copy of the March 28, 2008, "Appellants' Disclosure of Expert Witnesses" which had indicated that Dr. Robert Gaudet might be called as an expert witness and that he was the emergency room treating physician at Grant Memorial Hospital. Of course, it was abundantly clear from medical records and nurses' testimony that Dr. Gaudet had made the initial determination of the "immediate cause of death" for Goldizen.⁴ Appellants' response further argued that Appellee had a medical release dated August 10, 2007, permitting counsel to obtain the entire medical chart from Grant Memorial Hospital with notations of Dr. Robert Gaudet and other health care providers who had treated Mrs. Goldizen immediately prior to her death.

Interestingly on September 23, 2008, the lower court without hearing entered its order granting the Protective Order and Motion to Exclude the testimony of Dr. Robert Gaudet, the lower court directed Appellants not to take the deposition of Dr. Gaudet noticed for September 30, 2008, in part, because Appellee's counsel had a trial scheduled in

³ Appellants' counsel pursuant to Rule 5.04 of the West Virginia Trial Court Rules had noticed the lower court that a case pending in Kanawha County, with civil action number 03-C-1222 had been continued to October 14, 2008. Clearly, as the Kanawha County case was filed in 2003, it was approximately five years older than the above-styled action. As far as Appellants' counsel knows no action as required by Rule 5.05 of the West Virginia Trial Court Rules to resolve this conflict was undertaken by either circuit court.

⁴ Appellee, in fact, listed Dr. Besenhaver as a witness on its Listing of Witnesses of March 14, 2008.

Kanawha County on September 29, 2008 and the previously scheduled trial before the Circuit Court of Kanawha County should prevail over the deposition scheduled by Appellants under Rule 5.02(d) of the Trial Court Rules.⁵

On October 1, 2008, the date originally scheduled for a pre-trial conference the lower court heard the arguments of counsel upon Appellants' Motion to Continue the trial and Appellee's Motion for Summary Judgment for failure of Appellants to name an expert witness pursuant to West Virginia Code Section 55-7B-1, *et. seq.* Since the first motion determined the second, the lower court first addressed the motion for continuance. The lower court was primarily critical of the alleged delay in locating Dr. Gaudet believing it could have been accomplished more expediently. Further, the Court asserted that the Court's law clerk had located Dr. Gaudet in less time than Appellants' counsel. To address the lower court's concerns and make certain that the lower court had all the information necessary to make a proper ruling pursuant this Court's precedent and Rule 16 of the West Virginia Rules of Civil Procedure, Appellants' counsel clarified that if the lower court found that there was any inappropriate delay with regard to expert discovery, then the delay was solely occasioned by counsel and not Appellants. As such, Appellants' counsel argued that if a sanction was necessary, then it should be visited on counsel and not Appellants. The lower court disregarded Appellants' argument and stated:

“...I recognize that if I grant this Motion, to exclude his testimony, as you've admitted in your Response, then you don't have a causation and about five minutes from now I grant Summary Judgment and the whole case is over and

⁵ The lower court entered its order before receipt of Appellants' timely response, which was filed five (5) days after Appellee filed its motions or the day after the lower court entered its order.

your clients don't get their day in Court. And I don't, I don't like that at all. But I think, you know, I think frankly, you've put me in that situation. And maybe the Supreme Court will say give them their day in Court regardless of the rules, regardless of the delays, but I'm sure not going to say that.

So, I'm going to rule that because you've not made good efforts to find him and that we're way past the discovery deadlines, that I'm not going to allow Dr. Gaudet to testify in this matter or his deposition to be taken.

October 1, 2008, Order. Thereafter, the lower court granted Appellee's Motion for Summary Judgment.

On October 6, 2008, Appellants filed a Motion to Alter or Amend the Judgment and on October 30, 2008, that motion was denied. The Appellants' Petition for Appeal was timely filed in this Court.

III.

ASSIGNMENT OF ERRORS

- A. THE LOWER COURT ERRED DENYING IN DENYING APPELLANTS' MOTION TO VACATE THE SCHEDULING ORDER AND REQUEST TO CONTINUE THE TRIAL**
- B. NO SANCTIONS WERE APPROPRIATE UNDER THE CIRCUMSTANCES .**
- C. THE LOWER COURT ERRED BY EMPLOYING THE WRONG SANCTION IF A SANCTION WAS APPROPRIATE AT ALL**
- D. AS A RESULT OF THE FIRST TWO ERRORS THE COURT ERRED IN GRANTING THE APPELLEE'S SUMMARY JUDGMENT.**

VI.
POINTS & AUTHORITIES

West Virginia Cases

<i>Alpine Property Owners Ass'n, Inc. v. Mountaintop Development Co.</i> , 365 S.E.2d 57, 62 (W.Va. 1987).	14,27
<i>Anderson v Kunduru</i> , 215 W. Va. 484, 600 S.E.2d. 196 (2004),	
<i>Bartles v Hinkle</i> , 472 S.E.2d. 827, 836 (1996).	14,23
<i>Bell v Inland Mut. Ins. Co.</i> , 332 S.E.2d. 127 (1985)	14
<i>Caruso v Pearce</i> , __ W.Va., __ S.E.2d. __ (No. 34144, May 4, 2009)	25
<i>Davis v. Sheppe</i> , 197 S.E.2d 113, 116 (W.Va. 1992)	14
<i>Dimon v Mansy</i> , 198 W. Va. 40, 45, 479 S.E.2d. 339 (1996)	25
<i>Hadox v Martin</i> , 544 S.E.2d. 395 (W.Va. 2001)	21,22,25
<i>Kincaid v Southern West Virginia Clinic, Inc.</i> 475 S.E.2d. 827 (1996).	14
<i>Mills v Davis</i> , 211 W. Va. 569, 567 S.E.2d. 285 (2002)	17,18
<i>Painter v. Peavey</i> , 451 S.E.2d 755 (W.Va. 1994).	14
<i>Sheely v. Pinion</i> , 490 S.E.2d. 291 (W.Va. 1997).	14

Other Jurisdictions

<i>Bann v Ingram Micro, Inc.</i> , 108 F3d. 625 (5 th Cir. 1997)	23
<i>Byrd v. Guess</i> , 137 F.3d 1126, 1132 (9 th Cir. 1998)	22
<i>Dockum v. Wal-Mart Stores Texas, LP</i> , 220 Fed.Appx. 335 (C.A.5 (Tex.) 2007)	23
<i>Galdamez v. Potter</i> , 415 F.3d 1015, 1020 (9 th Cir. 2005)	22
<i>Hoffman v. Tonnemacher</i> , 2007 WL 2318099 (E.D.Cal. 2007)	23
<i>New York v. Micron Technology, Inc.</i> , 2009 WL 29883 (N.D.Cal., 2009)	22

Statutes

West Virginia Rules of Civil Procedure, Rule 16

West Virginia Rules of Civil Procedure, Rule 56

V.
STANDARD OF REVIEW

The standard for review from a sanction order under Rule 16 of the West Virginia Rules of Civil Procedure is for abuse of discretion. *Sheely v. Pinion*, 490 S.E.2d. 291 (W.Va. 1997). The imposition of sanctions by a circuit court under West Virginia Rules 16 or 37 for failure to obey the lower court's order is within the sound discretion of the lower court and will not be disturbed on appeal unless there has been an abuse of that discretion. *Bell v Inland Mut. Ins. Co.*, 332 S.E.2d. 127 (1985); *Kincaid v Southern West Virginia Clinic, Inc.* 475 S.E.2d. 827 (1996). Both rules (16 & 37) permit only those sanctions as are "just", *Bartles v Hinkle*, 472 S.E.2d. 827, 836 (1996).

This case is before this Court on appeal from an order of the Circuit Court of Grant County granting Appellee's Motion For Summary Judgment. "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavey*, 451 S.E.2d 755 (W.Va. 1994).

This Court has continually stated, "[I]t is the policy of the law to favor the trial of all cases on their merits." *Davis v. Sheppe*, 197 S.E.2d 113, 116 (W.Va. 1992). As such, this Court has found, "Because summary judgment forecloses trial on the merits, this Court does not favor the use of summary judgment." *Alpine Property Owners Ass'n, Inc. v. Mountaintop Development Co.*, 365 S.E.2d 57, 62 (W.Va. 1987). Consequently, this Court has held:

“[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.’ Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. Of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).” Syllabus Point 1, *Andrick v. Town of Buchannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992).

Id. at Syl. Pt. Continuing, this Court found that the “circuit court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.” Id.

VI.

ARGUMENT

A. THE LOWER COURT ERRED IN DENYING APPELLANTS' MOTION TO VACATE THE SCHEDULING ORDER AND REQUEST TO CONTINUE THE TRIAL

The lower court denied Appellants' motion for a continuance, which was filed almost two (2) months before the scheduled trial date, even though the lower court was well aware of the unique circumstances occasioned by Dr. Besenhaver's "about face" regarding the cause of Ms. Goldizen's death. The lower court opined that it did so because it believed that Appellants' counsel had not been diligent in locating a critical witness. Further, the lower court denied Appellants the opportunity to take the trial deposition of a critical witness adding even greater damage to the sanction already imposed. The effect of this sanction was to deprive Appellants of an opportunity to present their case to a jury and was a prelude to the granting of Appellee's Motion for Summary Judgment based on Appellants' failure to name a "causation expert." For the reasons clearly set forth in **Sections B and C and D** delineated below, the lower court committed error in failing to grant Appellants' Motion to Vacate the Scheduling Order and Request to Continue the Trial.

B. NO SANCTIONS WERE APPROPRIATE UNDER THE CIRCUMSTANCES .

As this Court stated in *Anderson v Kunduru*, 215 W. Va. 484, 600 S.E.2d. 196 (2004), when discussing the application of Rule 16 of the West Virginia Rules of Civil Procedure,

... our Rules of Civil Procedure are, first and foremost , to be construed in a manner that “secure[s] the just, speedy and inexpensive determination of every action.” W. Va. Rules of Civil Procedure, Rule 1 (1998).

In *Miller v Davis*, 211 W. Va. 569, 567 S.E.2d. 285 (2002), the trial court dismissed a suit because the plaintiff had failed to attend a scheduled defense medical examination. The Court in reviewing the record found that there was no pattern of wrongdoing and thus questioned the extreme use of Rule 37 of the Rules of Civil Procedure. The Court opined that ,

Because the law favors the resolution of legal claims on the merits, In Re Dierschke (citation omitted) and because dismissal is a sever sanction that implicates due process ... we have previously deemed dismissal with prejudice to be a ‘draconian remedy’ and a remedy of last resort. (citations omitted) Because dismissal is such a severe sanction, ending the litigation and leaving a party with an appeal as the only option, we feel it is inappropriate to make use of it unless other steps have first been tried.

Miller at pages W. Va. 292, S.E.2d 575.

In the instant case Appellants’ counsel advised the Court that he had tried to locate the expert who was key to the Appellants’ case, but had been unsuccessful. Specific dates were provided the Court on which attempts to locate Dr. Gaudet were attempted, yet the Court in its independent investigation (had his Clerk

presumptively seek Dr. Gaudet's location by internet) had found an address in a short time. It's not clear what the "Clerk" found and no specific mention of the results of this Court's investigation were provided. Appellants' counsel, however, stated on the record at the October 1, 2008 Hearing that,

Mr. Armada: We attempted, as the Court knows, and we provided the Court with documents, we attempted to locate him [Dr. Gaudet]. He is licensed in five states and evidently is a, what they call in the trade, I guess, a 'gypsy emergency room physician. He handles several hospitals. We finally located him. Notified counsel. Attempted to secure his evidentiary deposition.

. . . .I mean his testimony by way of deposition or otherwise will be nothing more than what he, in fact, wrote in the Emergency Room record, which they have had for months, if not a year. . .

Appellants' counsel provided the lower court with detailed information concerning the manner of and attempts to locate Dr. Gaudet, but based on the Court's "independent investigation"⁶ the trial court was not convinced that reasonable efforts had been made to find Dr. Gaudet. However, as is clear Dr Gaudet would offer as his opinion from the records he made at the time of Mrs. Goldizen's death; records which certainly the Appellee had had for some time.

In *Mills v Davis*, supra, this Court held in syllabus point 2, citing *Bartles v Hinkle*, 196 W. Va. 381, 472 S.E.2d. (1996),

Although Rules 11, 16, and 37 of the West Virginia Rules of Civil Procedure do not formally require any particular procedure, before issuing a sanction, a court must ensure it has an adequate foundation

⁶ It was never clear exactly what that "independent investigation" consisted of or what specific contact had been made, if at all, by the lower court's clerk with Dr. Gaudet.

either pursuant to the rules or by virtue of its inherent powers to exercise its authority. The Due Process Clause of Section 10 of Article III of the West Virginia Constitution requires that there exist a relationship between sanctioned party's misconduct and the matters in controversy such that the transgression threatens to interfere with the rightful decision of the case....

As counsel for the Appellants had provided an accurate listing of his attempts to locate Dr. Gaudet and those details show that reasonable and appropriate efforts were made and that Appellants' counsel's other procedural efforts were consistent with the requirements of the lower court's Rule 16 Scheduling Order, this purported delay was neither flagrant nor unreasonable. The more reasonable approach which would ensure that the matter was tried on the merits was to grant the continuance in the first instance. Any inconvenience to Appellee or its counsel, could be address by the Court as the matter proceeded.

C. THE LOWER COURT ERRED BY EMPLOYING THE WRONG SANCTION IF A SANCTION WAS APPROPRIATE AT ALL

The trial court has various sanction options available including striking a pleading, entering a default judgment, or dismissal of the action. But the trial court should rarely impose these extreme sanctions unless the court finds that a lesser sanction would not better serve the ends of justice. Where, as in the instant case, Appellants had timely complied with all of the

other requirements of the October 11, 2007, Scheduling Order, the trial court's options should be limited to lesser sanctions designed to achieve compliance with the court orders and expedite proceedings. This Court's precedent is replete with cases demonstrating the appropriate, reasonable and just action to be taken whenever a court finds that a party's counsel, through no fault of party, has inadvertently failed to comply with a court's scheduling order.

For example, in *Anderson v Kunduru*, supra, a case substantially similar to the above-styled action, an attorney failed to produce the report of an expert designated as a witness in a medical malpractice case. The trial court found that the omission was the fault of the attorney not the client. In *Anderson*, as in this case, the trial court imposed its sanctions against the client by refusing to grant the plaintiff's motion for continuance, excluding the proposed testimony of the treating ER physician, refusing to allow the trial deposition of the same expert and then granting summary judgment to the defendant because the plaintiffs had no "causation expert." In explaining the consequence of the trial court's ruling, this Court stated:

[T]he circuit court essentially imposed a sanction upon a party-appellant ...for the admittedly sole misconduct of the party's attorney. By excluding Dr. Cox's testimony, the circuit court excluded what little evidence the party's attorney had compiled on a critical issue in the case, and thereby eviscerated the party's entire cause of action.

Id. at 200.

In determining whether the trial court's actions, actions that are striking

similar to the lower court's action in the instant action, were proper, this Court held:

In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.

Id. at Syl. Pt. 3 (internal citations omitted). Considering this precedent, this Court found that the plaintiff's repeated failure to comply with the trial court's scheduling order was the sole fault of her attorney and not the plaintiff. "Justice compels that the offending attorney should suffer for his actions, **not the litigants.**" *Id.* at 201 (emphasis added). As such, this Court found that the trial court abused its discretion in striking the testimony of the plaintiff's expert and reversed the trial court's order. *Id.*

In *Hadox v Martin*, 544 S.E.2d. 395 (W.Va. 2001) the plaintiff failed to provide certain medical bills in accordance with the trial court's scheduling order; as such, the trial court excluded the medical records. While considering the trial court's holding, this Court stated:

On the appeal of sanctions, 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. It does not mean, however, that we will rubber stamp the sanction decisions of a trial court. Both Rule 16(f) and 37(b) of the Rules of Civil Procedure allow the imposition of only those sanctions that are "just."

As the United States Supreme Court recognized in *Chambers v. NASCO, Inc.* 501 U.S. 32, 111 S.Ct. 2123, 115 L.E.2d 27 (1991), '[b]ecause of their potency, ... [sanction] power must be exercised with restraint and discretion A primary aspect of ... [a trial court's] discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process.' *Id.* at 44-45, 111 S.Ct. 2123. This Court summarized the difficulties encountered in fashioning appropriate sanctions and the need to refrain from overly harsh sanctions as follows in *Bartles*:

'It is hard to find an area of the law in which the governing rules are, and probably have to be, so vague. Admittedly, 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). The difficulty is that the range of circumstances is so vast, and the problems so much matters of degree, as to defy mechanical rules. Taken together, the cases set forth a list of pertinent considerations. Among those commonly mentioned are the public's interest in the expeditious resolution of litigation, the court's need to manage its docket, the severity of the violation, the legitimacy of the party's excuse, the repetition of violations, the deliberateness *vel non* of the misconduct, mitigating excuses, prejudice to the other side and to the operations of the court, and the adequacy of other sanctions.'

Hadox, 544 S.E.2d at 400.

In *Hadox*, this Court found that the violation was minimal, isolated and unlikely to prejudice the defendant. Further, this Court found no evidence that the plaintiff's failure was malicious or intentional. This Court then found that the trial court abused its discretion in excluding the medical information and, therefore, reversed the lower court's order. *Id.* The facts in the instant case suggest a similar circumstance and the lower court's action here was clearly inappropriate and deprives the Appellants of their day in court.

The United States Court of Appeals for the Ninth Circuit held that in

evaluating whether a party has shown "manifest injustice" that warrants amendments to scheduling orders, courts consider four factors: (1) the degree of prejudice or surprise to the [non-moving party] if the order is modified; (2) the ability of the [non-moving party] to cure the prejudice; (3) any impact of modification on the orderly and efficient conduct of the trial; and (4) any willfulness or bad faith by the party seeking modification. *Galdamez v. Potter*, 415 F.3d 1015, 1020 (9th Cir. 2005); *Byrd v. Guess*, 137 F.3d 1126, 1132 (9th Cir. 1998); See also, *New York v. Micron_Technology, Inc.*, 2009 WL 29883 (N.D.Cal.,2009); *Hoffman v. Tonnemacher*, 2007 WL 2318099 (E.D.Cal. 2007).

Appellee knew early on that the Dr. Gaudet was the ER physician who treated Ms. Goldizen and it had access to the medical records he prepared relating to Ms. Goldizen and the deposition testimony of the ER nurses. Clearly, had the lower court agreed to continue the trial and afforded the Appellants the opportunity to depose Dr. Gaudet, the court could have also extended the time for Appellee to obtain any necessary rebuttal witness. Assuming, *arguendo*, that there was delay on the part of Appellants' counsel in reaching Dr. Gaudet, it clearly was not a continuation of a long any pattern of intentional delay or contumacious conduct by Appellants' counsel. Appellants' counsel's futile attempts to find and depose Dr. Gaudet, lead him to believe that an amendment of the scheduling order and a continuance of the trial was necessary and in the interests of Appellants. The motion to continue was denied. Appellants then attempted to take the trial deposition of Dr. Gaudet without any cooperation from Appellee's counsel. While

there may have been some inconvenience to the lower court and Appellee, had the lower court granted Appellee's motion for continuance, it could have provided adequate amenities to Appellee to help alleviate any inconvenience. Further, Appellee cannot demonstrate that any alleged delay in Appellants' counsel contacting Dr. Gaudet was the result of willful conduct or bad faith. Instead, to the extent that there was any delay contacting Dr. Gaudet, such delay was inadvertent and excusable. Moreover, to the extent that fault exists regarding delay in providing expert information to Appellee and failure to comply with the lower court's scheduling order, the fault rests solely with Appellants' counsel and not Appellants. It undisputed that Appellants had no part in causing any delay or noncompliance. In fact, that record demonstrates that Appellants attempted to assist Appellants' counsel in locating the evasive Dr. Gaudet.

In *Bann v Ingram Micro, Inc.*, 108 F.3d 625 (5th Cir. 1997), the United States Court of Appeals for the Fifth Circuit, upon review of a district court order, elaborated on the proper standard for determining an appropriate sanction under Rule 16(f). Specifically, the Fifth Circuit found:

A district court cannot impose the extreme sanction of dismissal under Rule 16(f) unless the court first finds that a lesser sanction would not have served the interests of justice. *Securities & Exchange Commission*, 979 F.2d at 382. Dismissal with prejudice is a drastic remedy to which a court may resort only in extreme situations where there is a clear record of delay or contumacious conduct by the plaintiff. *Silas v. Sears, Roebuck & Co., Inc.*, 586 F.2d 382, 385 (5th Cir.1978). Absent such a showing, the trial court's discretion is limited to the application of lesser sanctions designed to achieve compliance with court orders and expedite proceedings.

Id. at 627. See also *Dockum v. Wal-Mart Stores Texas*, LP, 220 Fed.Appx. 335 (C.A.5 (Tex.) 2007).

In *Bartles v Hinkle*, *supra*, this Court held that there must be a relationship between the sanctioned parties' misconduct and the matters in controversy. Specifically, the trial court must identify the alleged wrongful conduct and determine if it warrants a sanction. Assuming that the conduct warrants a sanction, then the court must determine who engaged in the wrongful conduct. Was it the client, the attorney or both? One of the four (4) situations in which the court may impose sanctions under Rule 16(f) is "If a party or a party's attorney fails to obey a scheduling order."

For the same reasons this Court identified in *Anderson, supra*, the lower court here abused its discretion and committed error when sanctioning Appellants, pursuant to Rule 16(f) for their alleged failure to comply with lower court's scheduling order, by precluding them from taking the deposition of Dr. Gaudet and use him as Appellants' causation expert at trial. As the lower court failed to identify a single action taken by Appellants that caused any alleged delay, *Anderson* clearly dictates the lesser sanction against the responsible party, Appellants' counsel. Id. 600 S.E.2d at 201. As the lower court's order sanctioned an innocent party, it is unjust and constitutes an abuse of discretion. Id.; Hadox, 544 S.E.2d. at 400. This Court recently reiterated this view in the recent case of *Caruso v Pearce*, ___W.Va. ___, ___S.E.2d. __ (No. 34144, May 4, 2009), in its discussion of a dismissal under Rule

41(b) of the West Virginia Rules of Civil Procedure. This Court held, citing, *Dimon v Mansy*, 198 W. Va. 40, 45, 479 S.E.2d. 339 (1996),

This Court has held that '[b]ecause of the harshness of the sanction, a dismissal with prejudice should be considered appropriate only in *flagrant cases*.' *Id.* (emphasis by this Court). . . [W]e recognize that dismissal based on procedural grounds is a severe sanction which runs counter to the general objective of disposing of cases on the merit.'⁷

D. AS A RESULT OF THE FIRST TWO ERRORS THE COURT ERRED IN GRANTING THE APPELLEE'S SUMMARY JUDGMENT

The lower court having already excluded the essential evidence for Appellants' case by its previous actions and Appellants had already argued that Dr. Gaudet was a necessary witness in their case and had given the lower court the basis for their belief that the testimony of Dr. Gaudet would provide the decedent's cause of death. Appellants had made all arguments including those under 56(f) of the West Virginia Rules of Civil Procedure against the motion, the lower court nevertheless granted Appellee's motion for summary judgment. Appellants' counsel stated:

Your Honor, the only thing I would do, for the purposes of the record, then I would ask the Court, as an officer of the Court, that the Court open up discovery and I be permitted to take the deposition of Dr. Gaudet. Without that, as the Court has already announced, we cannot overcome the Motion for Summary Judgment.

⁷ Justice Cleckley's opinion in *Mansy* also stated "fundamental to the judiciary is the public's confidence in the impartiality of judges and proceedings over which they preside). Too often, that dignity is eroded, not enhanced, by too free of a recourse to rules foreclosing consideration of claims on the merit." *Mansy*, at page 45.

Appellants believe that, in applying the appropriate Rule 16 standards for sanctions this Court must find that the ruling of the Circuit Court of Grant County was in error and that said error was further magnified when the lower court granted Appellee's Motion for Summary Judgment and dismissing Appellants' Complaint. Addressing a similar situation in *Anderson*, this Court found:

As for the circuit court's February 14, 2003 order granting summary judgment, the record reveals that-at the time-Dr. Cox was the only expert who the appellant had retained who could testify as to the appellees' standard of care, and the breach of that standard of care. Because the circuit court's dismissal of Dr. Cox's opinion eviscerated the appellee's case and set the stage for the summary judgment order, that order too must be reversed.

Id. 600 S.E.2d at 201.

The parallel between *Anderson, supra*, and the present matter is undeniable. The action by the lower court served to punish the Appellants when, if any sanction was appropriate it should have visited upon Appellants' counsel. Furthermore, the sole basis for the lower court granting summary judgment to Appellee was Appellants' alleged failure to comport with lower court's scheduling order. There had been no argument or assertion that there were no genuine issues of material fact to be resolved in this matter. The lower court's order improperly resolved this matter solely upon procedural issues and, therefore, contradicted this Court's longstanding legal precept that matters should be tried on their merits. *Alpine Property Owners, supra* 365 S.E.2d at 62. Summary judgment was wholly inappropriate in this case and should be reversed.

VI

RELIEF PRAYED FOR

WHEREFORE, Appellants pray that the ruling of the Grant County Circuit Court be reversed and remanded for further proceedings that will allow Appellants to proceed in this matter, set a new trial date, allow Appellants to take the deposition of Dr. Gaudet, and let this matter run its course consistent with Appellants right to trial, and for such other and appropriate relief as this Court deems just.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Jerry Goldizen And Bill Goldizen, Co-Administrators

Of the Estate of Elva Lee Goldizen

Plaintiffs/Appellants

v.

**Appeal from Grant County Circuit
Court, Civil Action No. 07-C-36**

Grant County Nursing Home,

Defendant/Appellee

CERTIFICATE OF SERVICE

I, J. David Cecil, appeal counsel for JERRY GOLDIZEN AND BILL GOLDIZEN, Co-Administrators of the Estate of Elva Lee Goldizen, the Appellants herein, certify that service of the Appellants' Petition for Appeal was made upon the parties listed below by mailing a true and exact copy thereof to

Rita Massie Biser, Esquire

MOORE & BISER, PLLC

317 Fifth Avenue

South Charleston, W.Va. 25303

David A. Sims, Esquire

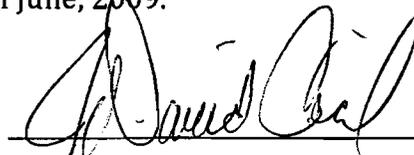
Law Offices of David A. Sims

1200 Harrison Avenue,

Suite 2000

Elkins, WV 26241

in a properly stamped and addressed envelope, postage prepaid, and deposited in the United States mail this the 15th day of June, 2009.



J. David Cecil
Appeal Counsel for Appellants

Frank M. Armada
Attorney at Law

3972 TEAYS VALLEY ROAD
HURRICANE, WV 25526

304-757-2691
304-757-2694
facsimile
farmada@mac.com

September 9, 2008

Rita Massie Biser, Esquire
MOORE & BISER
Suite 603
405 Capitol Street
Charleston, WV 25301

RE: Estate of Elva L. Goldizen v. Grant County Nursing Home

Dear Rita:

We have located Dr. Gaudet. I would like to schedule his evidentiary trial deposition in the next few weeks. Kindly advise what dates in September you would be available for the same.

Should you have any questions, please do not hesitate contacting me.

Very truly yours,

Frank M. Armada
Frank M. Armada

FMA/pp

EXHIBIT B

September 9, 2008

Frank M. Armada, Esq.
3972 Teays Valley Road
Hurricane, WV 25526

FILE COPY

Re: Jerry Goldizen and Bill Goldizen, Co-Administrators of the
Estate of Elva Lee Goldizen v. Grant County Nursing Home
Civil Action No. 07-C-36, Circuit Court of Grant County

Dear Frank:

I am in receipt of your letter dated September 9, 2008, wherein you request dates to take the evidentiary deposition of Dr. Gaudet. As you are aware, the discovery deadline in this matter was July 25, 2008, and has long since passed. Accordingly, I object to your belated attempt to schedule the deposition of this fact witness on the eve of trial. As Judge Jordan previously ruled, and as has now been demonstrated by your recent ability to locate Dr. Gaudet, the location of Dr. Gaudet could have been accomplished during the 15 months this matter has been pending and well within the discovery period. Consequently, I cannot agree to this deposition and it will be necessary for you to obtain permission from the Court to depose Dr. Gaudet at this late date.

I would further note that I do not have sufficient dates available in September, or really before trial for that matter, to travel to Virginia to attend the deposition of Dr. Gaudet. I have another matter set for trial in Kanawha County, beginning on September 29, 2008, and will be preparing for the same. Thereafter, I will be preparing for the trial of this matter.

If you would like to discuss this matter further, please do not hesitate to contact me.

Very truly yours,



Rita Massie Biser

cc: David A. Sims, Esq.

EXHIBIT C

MOORE & BISER
LAW GROUP PLLC

405 Capitol Street, Suite 603
Charleston, WV 25301

304.414.2300
304.414.4506

Rita Massie Biser, Esq.
rbiser@moorebiserlaw.com
Ext. 102

September 9, 2008

Frank M. Armada, Esq.
3972 Teays Valley Road
Hurricane, WV 25526

FILE COPY

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Estate of Elva Lee Goldizen v. Grant County Nursing Home
Civil Action No. 07-C-36, Circuit Court of Grant County

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If you would like to discuss this matter further, please do not hesitate to contact me.

Very truly yours,



Rita Massie Biser

cc: David A. Sims, Esq.

**PLAINTIFF'S
EXHIBIT**

D