

**APPEAL NO. 34888**

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

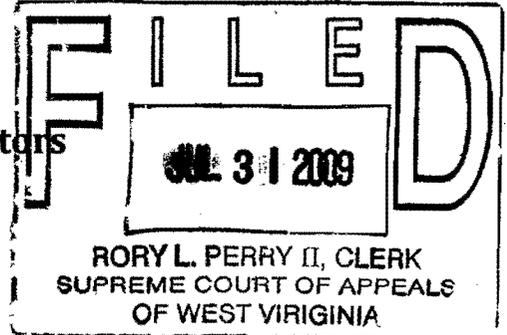
**Jerry Goldizen And Bill Goldizen, Co-Administrators  
Of the Estate of Elva Lee Goldizen,  
Plaintiff/Appellant,**

**v.**

**Appeal from Grant County Circuit**

**Court, Civil Action No. 07-C-36**

**Grant County Nursing Home,  
Defendant/Appellee.**



**APPELLANTS' REPLY BRIEF**

**J. David Cecil (WV State Bar #683)  
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I.

POINTS AND AUTHORITIES

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<i>Bartles v. Hinkle</i> , 196 W.Va. 381, 472 S.E.2d 827 (1996). . . . .	6
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<i>Coleman Kiser v. Caudill</i> , 210 W.Va. 191, 557 S.E.2d 245 (2001) . . . . .	6
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## ARGUMENT

Responding briefly to the Appellee's brief filed in this matter, Appellants address what appear to be its primary arguments. There are few issues that have not been fully addressed by this Court and which seem appropriate in response.

### I. THE LOWER COURT ERRED IN DENYING THE MOTION TO VACATE THE SCHEDULING ORDER AND REQUEST TO CONTINUE THE TRIAL

First Appellant responds to what appears to be Appellee's (and the lower court's) view that Appellants failed to act in compliance with the lower court's scheduling order or with reasonable dispatch in attempts to locate a known expert upon learning of the Dr. Besenhaver's new testimony as to Mrs. Goldizen's cause of death. The Appellee relies primarily, if not solely, on Justice McHugh's opinion in *Bell v. Inland Mut. Ins Co.*, 175 W.Va. 165, 332 S.E.2d 127 (1985). Appellee's reliance is misplaced. *Bell* held that where parties refused to provide **any** discovery, even after an order compelling the same, the strongest sanction was allowed. Actually, what the *Bell* decision holds is more precisely set forth in syllabus points 2 and 3:

2. The striking of pleadings and the rendering of judgment by default against a party as sanctions under *W.Va.R.Civ.P.* 37(b) for that party's failure to obey an order of a circuit court to provide or permit discovery may be imposed by the court where it has been established through an evidentiary hearing and in light of the full record before the court that the failure to comply has been due to willfulness, bad faith or fault of the disobedient party and not the inability to comply and, further, that such sanctions are otherwise just.

3. Although the party seeking sanctions under *W.Va.R.Civ.P.* 37(b) has the burden of establishing

noncompliance with the circuit court's order to provide or permit discovery, once established, the burden is upon the disobedient party to avoid the sanctions sought under *W.Va.R.Civ.P.* 37(b) by showing that the inability to comply or special circumstances render the particular sanctions unjust.

The instant case is a far cry from the intentional refusal of the defendants in *Bell* to provide any discovery or attempt to justify failure to do so. The *Bell* Court also added compelling conditions before imposition of such severe action by requiring some evidence of willfulness, contumacy or bad faith on the part of the disobedient party in order to support the imposition of this most serious sanction. In *Bell*, this Court discussed the limitations placed on the ultimate sanction of default judgment which may be equally applied to summary judgments as in the instant case,

As a general rule, the rendering of judgment by default as a sanction under Rule 37(b) should be used sparingly and only in extreme situations. See *Affanato v. Merrill Brothers, supra* at 140; *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 488 (S.D.Fla.1984). As the court stated in *Affanato*:

'The essential reason for the traditional reluctance of the courts to default a party is the 'policy of the law favoring the disposition of cases on their merits.' *Richman v. General Motors Corp.*, 437 F.2d 196, 199 (1st Cir.1971) (citing cases).' *Bell*, at pages W. Va. 172 and S.E.2d. 134.

The record before the Court shows that as early as four (4) days after the Besenhaver's deposition in which he changed the opinion of the cause of death, Appellant began a search to find Dr. Gaudet and that search continued until its successful conclusion on September 5, 2008.

Appellee in its brief and the lower court in its orders suggested that

Appellant could easily have found Dr. Gaudet by internet, yet that is exactly where the Appellant began the search to find Dr. Gaudet and it only exasperated finding his actual location. See: Exhibit B2 to Appellants' Motion to Vacate Scheduling Order and Request for Continuation of Trial Date.

**II.**  
**APPELLEE HAD NOTICE OF DR. GAUDET'S EXPERT TESTIMONY**

Second, while confirming that Appellants listed Dr. Robert Gaudet as an expert witness on March 28, 2008, Appellee argues, "no reports or opinions were produced with regard to Dr. Gaudet's testimony. A review of the March 28, 2008 disclosure shows, however, it specifically states in identifying Gaudet, "as expert witnesses in regard to the care and treatment rendered by them to Mrs. Goldizen as well as any diagnosis and/or prognosis made by them."

In fact that very information was all that Appellant would expect of Dr. Gaudet once he testified. As treating physician, as reflected in Mrs. Goldizen's medical records, it was Gaudet who examined, treated and diagnosed Mrs. Goldizen's cause of death. All the medical records were available to the Appellee, and yet Appellee made no attempt to depose Dr. Gaudet. (Perhaps he could not be found). Appellee's attempts to hide behind its failure to conduct discovery now became a shield against Appellants' reasonable request for a continuance of the trial date. See: *State ex rel. State Farm Fire v. Madden*, 192 W.Va. 155, 451 S.E.2d 721 (1994) in which this court held that if a party believes another has provided insufficient answers to interrogatories,

... the proper procedure is to file a motion to compel more complete answers. . .

*Nutter v. Maynard*, 183 W.Va. 247, 395 S.E.2d 491 (1990).

At the time of Appellants' Motion to Vacate The Scheduling Order And Request for Continuation of Trial Date, Appellee had filed no motions to compel more complete answers to Appellants' supplemental disclosures of March 28, 2008.

### III.

#### **NO SANCTION WAS APPROPRIATE AND EVEN IF IT WAS SUMMARY JUDGMENT WAS CLEARLY INAPPROPRIATE.**

Appellee cites *Sheely v. Pinson*, 200 W.Va. 472, 490 S.E.2d 291 (1997) in support of the lower court's ruling. This Court did affirm an order by the lower court to exclude an expert witness in *Sheely*, but the egregious factors upon which the Court affirmed were,

The record in this case reveals the following conduct. The plaintiffs failed to comply with the scheduling order deadline. The plaintiffs failed to respond to discovery requests made by both defendants. Defendant Pinion filed a motion to compel the plaintiffs to respond to his discovery requests. Plaintiffs failed to respond to the motion. The circuit court issued an order compelling the plaintiffs to respond to defendant Pinion's discovery requests. The record indicates that plaintiffs failed to timely comply with the Court's order. Defendant Butts filed a motion to strike plaintiffs' experts as a sanction for failure to disclose within the period set out in the scheduling order. The plaintiffs failed to respond to the motion. The circuit court reinstated the case to its docket because there was no evidence proving that the

plaintiffs were actually notified dismissal of the case was contemplated. In sum, plaintiffs showed no interest in this litigation until the circuit court dismissed the case from its docket. The circuit court did not abuse its discretion in precluding the plaintiffs' use of experts. *Shelly* at pgs 297 and 478.

Again the pattern and disregard of the lower court's order in *Sheely* far exceeded anything that occurred in the instant case while the sanction imposed here is clearly inappropriate thus unwarrantedly denying Appellants right to trial. It runs counter to this Court's concept that cases should be tried on their merits. Moreover, Appellants' counsel requested a continuance a full two months before trial was scheduled.

As this Court held in *State ex rel. Crafton v. Burnside*, 207 W.Va. 74, 528 S.E.2d 768 (2000),

*" . . . Rule 16(e) specifically provides that a scheduling order controls litigation "unless modified by a subsequent order." The standard for such a modification is by implication lower than that contemplated in amending a final pre-trial order, which should only be done "to prevent manifest injustice." [emphasis added]*

This Court has stated, assuming *arguendo* that any sanction is appropriate, the lower court should have followed the guidance set forth in syllabus points 2 and 3 of *Anderson v. Kunduru*, 215 W. Va. 484, 600 S.E.2d 196 (2004),

2. "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 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 the sanctioned party's misconduct and the matters in

controversy such that the transgression threatens to interfere with the rightful decision of the case. Thus, a court must ensure any sanction imposed is fashioned to address the identified harm caused by the party's misconduct." Syllabus Point 1, *Bartles v. Hinkle*, 196 W.Va. 381, 472 S.E.2d 827 (1996).

3. "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." Syllabus Point 2, *Bartles v. Hinkle*, 196 W.Va. 381, 472 S.E.2d 827 (1996).

Earlier in *Coleman Kiser v. Caudill*, 210 W.Va. 191, 557 S.E.2d 245 (2001), this Court had already provided clear guidelines for the imposition of sanctions,

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.*, pages W. Va. 197 and S.E.2d 251.

It is respectfully submitted that the lower court failed to follow this Court's guidelines. It is clear that if any sanction was appropriate here, which Appellants

ferverently dispute, such sanction should not result in the denial of the Appellants right to trial, but should be placed on the shoulders of the Appellants' counsel and then only to the extent, if any, that a delay has actually caused expense to the Appellee. As even the lower court confirmed since Dr. Gaudet's expert testimony was excluded, there was no basis upon which the Appellant could effectively respond the Appellee's motion for summary judgment. Having closed to the door to expert testimony, the lower court precluded any response by Appellants.

### **CONCLUSION**

For all the reasons set forth herein, for the reasons set forth in Appellants' initial brief with this Court and for such other reasons as appear to the Court, Appellants respectfully pray that the judgment of the Circuit Court of Grant County be reversed, that this Court direct the lower court to permit Dr. Gaudet as an expert witness, and that this matter to set for trial.

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**Jerry Goldizen And Bill Goldizen, Co-Administrators  
Of the Estate of Elva Lee Goldizen  
Plaintiffs/Appellants**

**v.**

**Appeal from Grant County Circuit  
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**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' Reply Brief was made upon the parties listed below by mailing a true and exact copy thereof to

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in a properly stamped and addressed envelope, postage prepaid, and deposited in the United States mail this the 31st day of July, 2009.



J. David Cecil  
Appeal Counsel for Appellants