IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 19-0643

MICHAEL D. HARLOW

Plaintiff below, Petitioner,

v.

EASTERN ELECTRIC, LLC.

Defendant below, Respondent.

EASTERN ELECTRIC, LLC'S RESPONSE BRIEF

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I: STATEMENT OF THE CASE

Petitioner appeals the Circuit Court's refusal to award him attorney fees and costs in litigation over the value of Petitioner's distributive share in Eastern Electric, LLC ("Eastern")[1], which arose following his dissociation in April 2017. On May 7, 2019, Business Court Division Judge James H. Young, Jr., sitting in the Circuit Court of Nicholas County, West Virginia, heard over eight hours of testimony on the fee issue from four witnesses and admitted 52 exhibits into evidence. In an Order entered June 19, 2019, the Circuit Court affirmatively concluded Eastern did not act arbitrarily, vexatiously, or in bad faith and refused to award Petitioner fees and expenses. Petitioner, who did not testify at the May 7th hearing, now seeks to use this appeal to re-litigate factual matters that were resolved adversely to him below. This Court should affirm the Circuit Court's well-reasoned, discretionary decision not to award fees and costs.

Petitioner, Michael Harlow, was a 1/3rd member of Eastern, until, by notice given March 20, 2017, he voluntarily dissociated effective April 14, 2017. JA000825-000933. His dissociation followed immediately on the heels of a nearly $400,000 verdict against Eastern in a prevailing wage case, *Grim, et al. v. Eastern Electric, LLC*, Civil Action No. 13-C-111 in the Circuit Court of Kanawha County.[2] Mr. Harlow was largely responsible for bidding and completion of the public contract which led to the *Grim* verdict. The magnitude of the verdict cast a shadow over the continued financial viability of Eastern; so much so that that Mr. Harlow demanded Eastern file bankruptcy to avoid payment of the verdict. When the two other members of Eastern, Michael Charles Pritt and Christopher Skaggs, did not acquiesce in Petitioner's demand to bankrupt the company in the aftermath of the *Grim* verdict, Mr. Harlow elected to dissociate. After initial attempts to negotiate a dissociation agreement were unsuccessful, Eastern, pursuant

[1] Eastern is now known as Eastern Group, LLC.
[2] This case is referred to in Eastern's Response Brief as *Grim* or the *Grim* case.

to W.Va. Code §31B-7-701(b), made a timely purchase offer accompanied by all required information. Eastern was assisted by an experienced business attorney, Michael Stuart of Steptoe & Johnson, in preparing its response.

After continued negotiations reached an impasse, Petitioner filed suit on December 8, 2017, pursuant to W.Va. Code §31B-7-701 to determine the fair value of the distributional interest and establish the terms of the purchase pursuant to W.Va. Code §31B-7-702(a)(1)-(3). Eastern's new counsel, Thomas Ewing, who was retained after Mr. Stuart was appointed and confirmed as the United States Attorney for the Southern District of West Virginia, accepted service and answered. The matter was then moved to the Business Court Division on Petitioner's uncontested motion. A scheduling order was entered May 22, 2018, and discovery commenced. Eastern timely objected to the scope of several of Petitioner's discovery requests and third-party subpoenas. These objections were largely sustained. During discovery, Eastern's counsel worked cooperatively with Petitioner's first counsel, Joshua Rogers of Dinsmore & Shohl, to identify the information needed to arrive at a valuation and had, after discovery rulings by the Court in September 2018, reached agreement on remaining discovery issues. However, in November 2018, Petitioner substituted new counsel, Robert Dunlap, who engaged in a flurry of motion practice to attempt to reopen discovery and expand the scope of the litigation by adding new claims and new parties. Eastern's opposition to these efforts was successful, but this late-stage motion practice resulted in a delay of both a scheduled Business Court mediation and trial. The Court concluded that throughout the case Eastern complied with both the Rules of Civil Procedure as well as the its orders regarding discovery.

It became apparent as the case progressed that Petitioner's spouse, attorney Martha Hopkins Harlow, directed and participated in all aspects of the litigation. When Eastern

requested that she cease and desist from engaging in a professional representation adverse to Eastern, she refused to do so and filed a formal notice of appearance to appear as counsel of record. Eastern objected on the basis that she had a clear conflict of interest since she provided legal advice to Eastern and its members in the *Grim* case. The Court granted Eastern's motion and disqualified Ms. Harlow Hopkins from formally participating in the case. Petitioner attempts to re-litigate her disqualification.

Eastern attempted to negotiate a resolution of the valuation dispute throughout the litigation. However, each time an offer was made, Petitioner responded with an increased demand. Ultimately, the parties stipulated to the value of Mr. Harlow's interest. The only matters left for the Court to decide were the terms of payment and either party's entitlement to reasonable fees and expenses under W.Va. Code §31B-7-702(d), which grants a circuit court discretion to award fees and costs it if determines a party acted "arbitrarily, vexatiously, or not in good faith." W.Va. Code §31B-7-702(d).[3]

II: SUMMARY OF ARGUMENT

The Circuit Court affirmatively found that: (1) Eastern's initial offer fully complied with W.Va. Code §31B7-701(b); (2) that its initial purchase offer was reasonable (i.e. not arbitrary) and made in good faith in light of the financial position of the company; (3) that Eastern's subsequent offers were also reasonable (i.e. not arbitrary) and that it did not negotiate in bad faith; (3) that Eastern complied with the West Virginia Rules of Civil Procedure regarding discovery and complied with the its rulings regarding discovery (i.e. it did not litigate vexatiously); and (4) that it did not act in bad faith.

[3] Petitioner did not appeal the Circuit Court's ruling establishing the terms of the payment for his distributional interest.

The Circuit Court did not abuse its discretion under W.Va. Code §31B-7-702(d) in declining to award Petitioner his reasonable fees and costs or in disqualifying Ms. Hopkins Harlow from representing Petitioner.

First, the Court applied the correct evidentiary standard when it determined that Petitioner first must show arbitrary, vexatious, or not in good faith conduct by clear and convincing evidence before the Court can consider exercising its discretion to award fees and costs under §7-702(d). Petitioner's arguments that this standard is incorrect disregard long established and accepted principles of statutory construction. Petitioner also ignoring the fact he specifically urged the application of a clear and convincing evidence standard to an award of fees and costs under §7-702(d) in his briefings on the matter. Petitioner cannot now claim it was error for the Court to apply the standard he urged be applied. *Second*, regardless of the burden of proof that Petitioner must meet to show arbitrary, vexatious, or bad faith conduct; based on the factual findings made by the Court, Petitioner did not meet it. *Third*, the Court did address the issues of arbitrary or vexatious conduct. Its findings that there was substantial and reasonably uncertainty about the viability of the company because of the *Grim* verdict and that Eastern's initial and subsequent offers were reasonable was a determination that Eastern did not act arbitrarily. Similarly, the fact that the Court ruled in Eastern's favor on the vast majority of discovery issues presented to it and the fact it found that both its discovery orders and the Rules of Civil Procedure had been complied with is a determination that Eastern did not act vexatiously. *Finally,* the Circuit Court's decision to disqualify Martha Hopkins Harlow was limited in scope to prohibiting Ms. Hopkins Harlow's formal participation as counsel of record for Petitioner. JA0001582-001587.

In disqualifying Ms. Hopkins Harlow, the Court chose not to proceed further and make a formal finding Ms. Hopkins Harlow's legal assistance to Petitioner was a violation of her professional and ethical obligations. That issue was left for another day and another forum. JA001588-001589.[4]

III: STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary under Rule 18(a) of the West Virginia Rules of Appellate Procedure. The issues at stake here have been decided and the facts and legal arguments are adequately presented in the briefs and record. The decision to award attorney fees and expenses under either W.Va. Code §31B-7-702(d) or under the Court's inherent equitable authority is discretionary, and the Court did not abuse its discretion in declining to award either party fees and expenses. "Following a bench trial, the circuit court's findings, based on oral or documentary evidence, shall not be overturned unless clearly erroneous, and due regard shall be given to the opportunity of the circuit judge to evaluate the credibility of the witnesses." *Wallace v. Pack,* 231 W. Va. 706, 709, 749 S.E.2d 599, 602 (2013) (per curiam); W.Va. R. Civ. P. 52(a). "Under this standard, if the circuit court's account of the evidence is plausible considering the record viewed in its entirety, we may not reverse it, even though convinced that had we been sitting as the trier of fact, we would have weighed the evidence differently. We will disturb only those factual findings that strike us wrong with the "force of a five-week-old, unrefrigerated dead fish." *Id.* (quoting *United States v. Markling*, 7 F.3d 1309, 1319 (7th Cir.1993), *cert. denied*, [514] U.S. [1010], 115 S.Ct. 1327, 131 L.Ed.2d 206 (1995)).

[4] The Office of Disciplinary Counsel has opened an investigation into the issue of whether Ms. Hopkins Harlow's representation of Mr. Harlow in the dissociation litigation constituted a conflict of interest and violation of the Rules of Professional Conduct. JA001652.

IV: ARGUMENT

A. Factual history of the litigation.

i. The Grim litigation.

Mr. Harlow's April 14, 2017 dissociation and the negotiations over the value of his interest in Eastern in the late spring and summer of 2017 cannot be isolated from the context in which they took place, which was on the heels of a nearly $400,000 judgment rendered against Eastern in March 2017.

Eastern is an electrical contracting business based in Nicholas County, West Virginia. Prior to Petitioner's dissociation, it had three members: Michael Harlow, Christopher Skaggs, and Michael Charles Pritt who each held a one-third interest. Eastern had three primary business units: electrical contracting, engineering, and safety management. Mr. Harlow was responsible for the electrical contracting side of the business. while Mr. Skaggs and Mr. Pritt were more focused on the engineering and safety monitoring aspects of the business. JA000486-000487.

The *Grim* case was a prevailing wage case arising out of work Eastern was performing for the State of West Virginia. Eastern bid the state contract in reliance on representations from the Department of Administration that prevailing wages were not required. Eastern initially prevailed on summary judgment, but that ruling was reversed upon appeal. *See Grim v. E. Elec., LLC*, 234 W. Va. 557, 767 S.E.2d 267 (2014). Petitioner was the individual who bid the contract at issue in *Grim. Id.* at 234 W.Va. at 562, 767 S.E.2d at 272. He was also Eastern's main witness at trial. JA001667.

Ultimately, a jury found that the work was prevailing wage work and that there was no honest mistake that alleviated Eastern's liability. JA001424. With the addition of interest, as well as having to include items such as payroll taxes, and attorney fees, the total amount of the *Grim*

liability was recorded on Eastern's books at $389,474. JA000487. Eastern has elected to pursue a Legislative Claims Commission action to recoup its loss in the *Grim* case since it had acted in reliance upon representation of state officers. The claim is still pending and was part of the valuation negotiation.[5]

The obligation to pay the *Grim* verdict created substantial uncertainty as to whether Eastern would continue as a viable business. Michael Harlow wanted to bankrupt Eastern after the verdict, but the other two members did not. JA000489. The verdict also created uncertainty from a cash flow perspective as Eastern was negotiating a payment plan with the *Grim* Petitioners at the time Petitioner dissociated and Eastern's remaining owners did not know the outcome of the negotiation or how the payment plan would impact Eastern's ongoing operations and obligations such as loan payments, payments to vendors, insurance, and other ongoing expenses. JA000488. After the verdict, the two remaining members of Eastern choose the honorable path forward: they chose to work harder to try to generate enough revenue to keep the business afloat while paying their employees the wages the *Grim* jury determined they were entitled to receive. In contrast, Mr. Harlow, who bore significant responsibility for the *Grim* verdict, quit and left to the remaining members the responsibility of generating sufficient income to pay the large judgment. Additionally, because Mr. Harlow oversaw the electrical contracting portion of the business, his departure created uncertainty as to whether that side of the business would continue. JA000489-490.

In these circumstances, the Circuit Court appropriately found that the *Grim* judgment created "*substantial and reasonable uncertainty* as to whether Eastern would be able to continue business operations." JA00008 (June 19, 2019 *Order Regarding Attorney Fees* at Findings of

[5] The Claims Commission matter is styled *Eastern Electric, LLC v. Department of Administration*, Case No. CC-17-0214.

Fact ¶6) (emphasis added).

ii. Petitioner's dissociation and initial negotiations.

Following receipt of Mr. Harlow's March 20, 2017 notice of intent to dissociate effective April 14, 2017, Eastern responded and timely delivered a purchase offer to Petitioner as required under W.Va. Code §31B-7-701(b) on May 12, 2017. Petitioner does not dispute that the offer included all financial information required by §31B-7-701(b). JA000595-000603; JA000320-000322(J. Rogers)[6].

Prior to providing the statutory purchase offer, the parties attempted, but were unable, to negotiate a settlement agreement. Petitioner's initial draft of the agreement sent with his March 20, 2017 notice included a personal guaranty from Eastern's remaining members. JA000316-000317. In Eastern's revisions, the guaranty provision was removed. In its proposed revisions, Eastern included a non-compete clause to which Mr. Harlow objected. While not uncommon in business agreements, neither the personal guaranty nor the non-compete are required under W.Va. Code §31B-7-701. JA000316-000318; 000584-000592 (Pltf.'s Ex. 1); JA000825-000833 (Def's Ex. 1).

Eastern's initial offer was made in light of the "'substantial and reasonable uncertainty' that existed as to whether Eastern would be able to continue business operations." JA00008. The Court also concluded that Eastern also "continued to negotiate with Petitioner by making *reasonable offers* in light of [its] financial standing...." JA000014 (June 12, 2019 *Or. Regarding Attorney Fees* at Conclusions of Law ¶10 (emphasis added)[7]

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[6] The information included a statement of the Company's assets and liabilities as of Petitioner's dissociation date, the most recent balance sheet and income statement, and an explanation of the estimated amount of the offer. W.Va. Code §31B-7-701(b).

[7] This offer was also very close to 1/3rd of the net equity of the company over the years 2012-2017 as stated by Petitioner's expert. *See* JA000706(Pltf.'s Ex. 22). The increase in the assets and liabilities shown for 2017 on the graph on JA000706 is because Petitioner's expert utilized the accrual method for that year's information even

Though not required by the statute, it is true that Eastern did not have the assistance of its accountant in preparing its initial offer. Eastern's accountant also prepared the personal tax returns of its members, including Petitioner, and he did not want to be involved in assisting with the valuation of Petitioner's distributional interest. Nevertheless, he did advise Eastern that the asset approach was a common approach for valuing a business of Eastern's size and type. JA000490-000491. Moreover, Eastern's counsel in making its initial offer, Michael Stuart, had accounting experience. [8]

Eastern operates on a cash basis. *See* JA000477; JA000001042.[9] This means that income is recorded when the payment is received and expenses are not recognized until they are paid. Information about unbilled work-in-progress ("WIP"), i.e. time that employees may have worked, but not yet billed, is not reflected on Eastern's books until an invoice is issued. JA00493-00495. Since Eastern operated on a cash basis, in preparing Eastern's initial offer, Kristin Moores, Eastern's bookkeeper, prepared what she described as a recast balance sheet in an effort to include receivables for which invoices had been issued and payables for which bills had been received. However, the un-invoiced WIP's that were not yet on Eastern's books were not included. JA000493-000496. Additionally, Eastern utilized Kelly Blue Book and actual vehicle mileage to arrive at the values assigned to its vehicles listed on the asset/liability statement, JA000491-000494. It assigned a long-time employee, John Kuhn, a master electrician who had previously owned his own electrical contracting business and who was responsible for

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though past years' information was based on a cash method, which is the accounting method Eastern utilized in its normal operations.

[8] Mr. Stuart, currently the United States Attorney for the Southern District of West Virginia, is an experienced commercial and transactional lawyer whose private practice focused heavily on mergers and acquisitions, business transactions, corporate finance, and business development. And, he is also an accountant. In fact, before practicing law, Mr. Stuart worked as an accountant for PricewaterhouseCoopers, one of the world's largest accounting and auditing firms. *See* Mr. Stuart's official Department of Justice biography, https://www.justice.gov/usao-sdwv/meet-us-attorney (last accessed Nov. 14, 2019).

[9] Def's Ex. 16, 2016 S Corporation Tax Return at Sch. B, p. 2 (showing cash basis accounting method).

purchasing many of Eastern's tools and materials, to inventory and place a value on its tools and materials based on his knowledge and experience as to the actual condition and worth of the used tools and materials. JA000492-000493.

The Court found that the reason that receivables for WIP's were not reflected in its initial financial statements "was largely due to Eastern's standard accounting practices that omitted work-in-progress that was not yet billed." And, while the Circuit Court found this was "perhaps not the best accounting practice," it specifically found that "it does not rise to the level of vexatious conduct...." JA000014 (June 12, 2019 *Or. Regarding Attorney Fees* at Conclusions of Law ¶11.

On May 19, 2017, Petitioner rejected the initial offer and proposed three alternative counteroffers. The first was for $120,000, plus one-third of any net recovery from the *Grim* Claims Commission action; the second was a lump-sum total of $225,000, and release of any right to claim any portion of the recovery from the Claims Commission action; and the third was for the parties to hire an outside expert to value the interest, provided the valuation would not be w binding. JA000257-000258; JA000604-610. Eastern rejected this demand on May 22, 2017. JA000611. However, contrary to Petitioner's assertion, negotiations did not end. *See* Petr's Bf. at 3. Instead, the parties continued to talk directly. JA000261-000262. During these negotiations, Eastern expressed a willingness to retain an independent third-party to value Mr. Harlow's interest and communicated this to Petitioner's counsel on August 23, 2017. JA000326-326; JA000612. Petitioner did not accept this overture, and through the fall of 2017 Petitioner's counsel, Joshua Rogers, advised Eastern's counsel, Michael Stuart, he was still considering Eastern's offer to retain an expert. JA000326-000328; JA000834-000832.[10]

[10] Petitioner's expert, Lane Ellis, testified he was retained in August of 2017, though he did not enter a formal agreement with Petitioner until October. JA000405-406. Petitioner's retention of Ellis was not communicated to

iii. Eastern's pre-suit voluntary production of information.

In the fall of 2017, the parties undertook a pre-suit voluntary production of information. On October 25, 2017, Mr. Rogers advised Petitioner had hired Arnett Carbis Toothman, LLP ("ACT") to assist in the valuation of his interest and forwarded preliminary information requests from ACT. JA000327-000328; 000838-000842. On November 20, 2017, Petitioner sent a supplemental information request from ACT. JA000265; 000616-000619. The parties entered into a tolling agreement on November 22, 2017. As part of this agreement, Eastern was to deliver the information requested by Petitioner's expert within five business days after the request. JA000269-000270.

Eastern voluntarily responded to both requests for information. JA000271. However, it is the case that the responses were not forwarded to Petitioner within time set forth in the tolling agreement. JA000270. With respect to the preliminary information request, Ms. Moores received the request on October 26, 2017, prepared the response, and sent it to Eastern's counsel on November 14, 2017. JA000503-000504. Ms. Moores first received the supplemental request on December 18, 2017. She gathered the information and provided Eastern's responses to Mr. Stuart on December 26, 2017. JA000510-000511. Eastern's counsel provided the responses to the preliminary informational requests to counsel for Petitioner on December 7, 2017 JA000328-000329.

In December, 2017, upon Mr. Stuart's confirmation as United States Attorney, Eastern was required to find a new attorney. JA000279-000281(J. Rogers); 000511 (K. Moores). Suit had been filed by Petitioner's counsel on December 8, 2017, but the complaint was not served until Eastern's new counsel, Thomas Ewing, accepted service March 2, 2018. Eastern received

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Eastern until late October. Instead, Petitioner represented that he was still considering Eastern's offer to hire an expert. JA000834 (Sept. 8, 2017 email at Def.'s Ex. 2)

the supplemental requests on December 18 and provided its responses to Steptoe & Johnson on December 26, 2017. However, Eastern and Mr. Ewing, were not aware prior to February 20, 2018, that these responses had not been forwarded to Petitioner. JA000511. Mr. Ewing, provided the responses to the supplemental information requests on February 20, 2018. JA000338-000339; 000379; 000846-000864.[11]

Based on this testimony, the Court properly found that, while Eastern provided the responses to its counsel, because of the inevitable delay brought about the transition to new counsel, the documents were not forwarded to Petitioner. However, they were promptly sent once the matter was brought to Eastern's attention. JA000009; 000015-000016, (June 12, 2019 *Or. Regarding Attorney Fees* at Findings of Fact ¶¶12-14, Conclusions of Law ¶13.

iv. Petitioner's delays in discovery and overbroad requests.

This litigation was protracted in large measure by Petitioner's delays in serving discovery and providing material to his expert, his overbroad discovery requests, and his last-minute attempts to add parties and claims relating to issues that had nothing to do with the valuation of his interest in Eastern as of his April 14, 2017 dissociation. *See* W. Va. Code §31B-7-701(a)(1). Though suit was filed on December 8, 2017, Petitioner did not file any formal discovery requests for another six months. JA000336-000337; 000001 (Docket Sheet). Eastern timely served its responses and objections to Petitioner's discovery on July 18, 2018 and then continued to seasonably supplement as new information was obtained. JA000001-000002.[12]

Central to the dispute below and to Petitioner's appeal here is the issue regarding Eastern's unbilled WIP's and accrued liabilities. The record reveals that this issue did not arise

[11] Eastern was required to involved new counsel within Kay Casto & Chaney, PLLC in the fall of 2018 when Mr. Ewing was appointed as Circuit Judge in the Twelfth Judicial Circuit in Fayette County, West Virginia upon the retirement of Judge John Hatcher.

[12] Eastern then provided two further voluntary supplementations on March 20, 2018 and April 27, 2017, prior to the service of any formal discovery. JA000380-000384 (T. Ewing); 000854-000864.

until late June of 2018. Mr. Rogers believes the issue was first discussed in a phone call on June 25, 2018. JA000339; 000346. Mr. Ewing believes that the first written communication on the issue was a June 28, 2018 email discussing settlement. JA000386. Both Mr. Ewing and Mr. Rogers confirmed they continued to discuss the issue through the summer of 2018 and were working cooperatively to complete the valuation of Petitioner's interest. JA000349-000340 (J. Rogers); 000386-000389 (T. Ewing).

However, Petitioner's discovery was, in many instances, overbroad and not focused on obtaining information relevant to the value of his interest as of April 14, 2017. Petitioner argues in his Brief he was forced to subpoena accounts receivable information from customers. But these subpoenas sought information for time periods well beyond his dissociation. *See* Petr's Brief at 17. On July 25, 2018, Petitioner served subpoenas on three of Eastern's customers: Sustainable Modular Management, Inc., Collins Hardwood Company, LLC, and Brookfield Power New York. JA000673-000687. For Sustainable Modular, Petitioner sought all documents relating to work performed by Eastern for the years 2016-2018 and all documents relating to interactions with Eastern intended to continue, explore, or generate business for the years 2017 and 2018. JA000682.[13]

Eastern timely filed a Motion to Quash these subpoenas, and the Court, after a hearing on September 18, 2018, granted the motion, ruling that such "forward-looking" information had "no bearing whatsoever on determining the fair value of [Petitioner's] distributional interest as of April 14, 2017 *regardless of the valuation used, and certainly is not relevant under the asset valuation method used by the [Petitioner's] expert.*" JA002145 (*Order* Nov. 8, 2018 at ¶21)

[13] Plaintiff sought the same information from Collins Hardwood Company, LLC. JA000687. For Brookfield, Plaintiff sought the same information plus information relating to safety incidents involving the members of Eastern and any documents Brookfield may have relating to Plaintiff's dissociation from Eastern. JA000677

(emphasis added). Petitioner now cites this Motion to Quash, which Eastern won, as "evidence" of Eastern's bad-faith, arbitrary, or vexatious conduct.

Petitioner's June 18, 2018 discovery requests likewise sought information for periods well beyond his dissociation date.[14] Both parties agreed that the Court's ruling regarding the "forward-looking" information sought in the subpoenas also mooted Petitioner's discovery requests to the extent they sought such information. JA000358.

On October 15, 2018, Mr. Rogers and Mr. Ewing had a phone call wherein they discussed what issues remained with the discovery requests considering the outcome of September 18, 2018 hearing on the Motion to Quash and what information Petitioner's expert needed to finish his valuation with a focus on the unbilled, accrued receivable and liability information. An agreement was reached where Petitioner would receive information from Brookfield and Collins Hardwood after re-serving his subpoenas in conformance with the Court's September 18, 2018 ruling and Eastern would supplement with documents in its possession related to the unbilled, accrued receivable and liability information. JA000360. Mr. Harlow's counsel's testimony is consistent with Mr. Ewing's, who testified he believed Petitioner would get information from Brookfield and Collins Hardwood via their subpoenas such that Eastern did not need to produce that information and that Eastern would produce remaining unbilled accrued receivable and liability information. JA000401-000403 (T. Ewing).

Four days after counsels' conversation, Eastern served its second supplemental responses and produced accrued employee expenses billed to Brookfield, accrued billing to Brookfield through April 14, 2017, bank statements for vehicle loans, mortgage statements, payroll summaries for the weeks ending April 9, 2017 and April 28, 2017, accrued employee vacation through April 14, 2017, a payroll summary for Mr. Harlow's vacation payout, a paystub dated

[14] Petitioner's counsel acknowledged these requests sought information well-beyond April 14, 2017. JA000357

May 5, 2017, for Mr. Harlow's vacation, accrued employee reimbursements through April 14, 2017, employee timesheets from April 1 through April 14, 2017, and April timesheet hours and accrued billing as of April 14, 2017. JA000362-000364; 000918-000928.[15]

Both Mr. Rogers and Mr. Ewing worked together throughout discovery in good faith to resolve the discovery disputes. JA000355-000356; 000360 (J. Rogers); 000394-000395 (T. Ewing). Their testimony confirms that Eastern believed this supplementation, along with the pending reissuance of the subpoenas and the Court's ruling regarding "forward-looking" information resolved the remaining discovery disputes. JA000362-000365 (J. Rogers); 000401-000402 (T. Ewing).

Shortly after agreement on discovery was reached by Mr. Rogers and Mr. Ewing, Petitioner substituted Robert Dunlap as his counsel, who entered his appearance on November 9, 2018. After the close of discovery and without leave of court, Mr. Dunlap served additional subpoenas to several of Eastern's sureties. JA00001-00002; 002068-002109. On December 14, 2018, despite Mr. Rogers' agreement with Mr. Ewing,, without additional meet and confers, and without advising Eastern he believed its discovery responses remained deficient, Petitioner filed a motion to compel. JA00001-00002; 002110-002134. And, on December 21, 2018, Petitioner filed a Motion for Leave of Court to File an Amended Complaint to add claims against both Mr. Pritt and Mr. Skaggs individually, and another entity Trinity Solutions, LLC, for alleged acts or omissions that took place months after Petitioner's dissociation and that flowed from alleged

[15] Petitioner repeatedly failed to timely provide discovery materials to his expert, which also delayed his expert's ability to complete his valuation. For example, Petitioner did not provide the WIP information produced on October 19, 2018 until March 21, 2019 – some five months later. And, while Petitioner received documents from Sustainable Modular on August 1, 2018 in response to its subpoena, he waited more than seven and a half months before finally forwarding those documents to his expert on March 21, 2019. *See* JA000780-000781 (Pltf.'s Ex. 23, ACT Apr. 22, 2019 valuation at Appendix B "Sources of Data.")

breaches of duties owed to Trinity, not Eastern.[16] JA00001-00002; 001804.

These untimely filings led to a postponement of the Business Court mediation and a continuance of trial. After hearing argument on Eastern's objections, on February 19, 2019, the Court (1) denied Petitioner's motion to amend; (2) granted Eastern's motion to quash Petitioner's untimely subpoenas; and (3) denied Petitioner's motion to compel apart from allowing a limited inspection of Eastern's documents related to its accounts with Brookfield Renewable and Sustainable Modular. JA001809-001879; 001802-001809. This document inspection occurred as ordered. JA000011 at ¶27.

Eastern prevailed or substantially prevailed with respect to its objections to Petitioner's overbroad discovery requests and the last-minute attempt to expand the scope of the litigation by adding new parties and unrelated claims. Recognizing this, the Court properly determined that Eastern "substantially complied with the West Virginia Rules of Civil Procedure in regards to discovery" and that, while there were issues that could not be resolved without court involvement, the Circuit Court's discovery rulings were complied with. JA000011-000012 (June 19, 2019 *Order Regarding Attorney Fees* at Findings of Fact ¶¶28-29).

v. The stipulation as to the value of Mr. Harlow's interest.

Petitioner's assertion throughout his Brief that Eastern forced him to go through protracted and expensive litigation before ultimately stipulating to a value of $100,000 misstates the history of settlement negotiations. The Court, in its Order Regarding Attorney Fees provided a succinct summary of settlement negotiations in its Findings of Fact that shows while Eastern was making good-faith efforts to bridge the gap, Petitioner was not reciprocating. JA000008, 000010-000011 (June 19, 2019 *Or. Regarding Attorney Fees* at Findings of Fact ¶¶6-8, 18-25).

[16] Mr. Harlow subsequently filed an amended motion seeking leave to file a second amended complaint. JA000001-000003.

In May of 2018, a year before the stipulation was reached, Eastern made a settlement offer $75,000.00. JA000010 (June 19, 2019 *Or. Regarding Attorney Fees* at Findings of Fact ¶18). When conveying this offer, counsel for Eastern advised that Eastern would be willing to pay up to six figures ($100,000) to resolve this case. JA0000383-000384. Mr. Harlow rejected this offer and increased his demand to $130,000 and 1/3rd of any potential Claims Commission recovery or $200,000 with no Claims Commission recovery. JA000010 (June 12, 2019 *Or. Regarding Attorney Fees* at ¶19). In January of 2019, Eastern made an offer of $95,000 plus 1/3rd of any potential Claims Commission recovery, which was essentially a "split the difference" number between the two parties' experts' valuations. JA000010-11 (June 12, 2019 *Or. Regarding Attorney Fees* at Findings of Fact ¶22). On January 24, 2019, Mr. Harlow rejected this offer and increased his demand again to $122,000.00 *plus* interest, *plus* 1/3rd of the net of any potential Claims Commission recovery, *plus* attorney fees. Id. Attorney fees at that time were estimated at $56,400, so this demand had a total value of approximately $178,400. JA001257. Only after his expert reduced his valuation opinion was Petitioner willing to stipulate to a value of $100,000, an amount that the case could have resolved for a year earlier before discovery commenced.

While Eastern's expert was prepared to testify the value of Petitioner's interest was less, Eastern stipulated to this amount to avoid significant additional litigation costs and expenses, including expert expenses, associated with litigating value. Because of the stipulation on value, the Court did not take evidence to determine the value of Petitioner's interest. If it had, the evidence developed during discovery could have easily supported a finding that the value of Petitioner's interest was much less than the amount ultimately stipulated to.

vi. Martha Hopkins Harlow's disqualification.

a. Representation of Eastern's in Grim.

An examination of Martha Hopkins Harlow's own affidavit demonstrates why her limited disqualification was proper. JA001703-001750. Martha Hopkins Harlow is a lawyer licensed to practice in West Virginia and admitted to the patent bar. JA001703 (Hopkins Harlow Aff. ¶1). From 2013 through 2015 she accompanied Mr. Harlow to hearings in the *Grim* matter and attended meetings with Eastern, its members, and their counsel prior to those hearings. JA001705-001705 (Hopkins Harlow Aff. ¶¶5,7). After this Court's remand of *Grim* in 2014, she participated extensively in the case.

In October of 2015, counsel for Eastern in the *Grim* case sought clarification about Ms. Hopkins Harlow's role as he was concerned about maintaining the attorney-client privilege. JA001705-001706 (Hopkins-Harlow Aff. ¶9). In response, she affirmed she was acting as counsel for Eastern and its members. JA001669 at fn. 4. In preparation for trial in February of 2016, she attended witness preparation sessions and helped draft Eastern's pretrial memorandum. JA001706 (Hopkins-Harlow Aff. ¶10-11). The *Grim* trial was continued to February of 2017 and in preparation for the 2017 trial, Ms. Hopkins Harlow prepared draft examination scripts for Eastern's members and its business manager, assisted in strategy and tactical decisions, prepared questions for Eastern's members to its trial counsel, attended witness preparation sessions, generated documents, such as a timeline, to "facilitate witness preparation", communicated regularly with trial counsel, and prepared exhibits and pretrial filings. JA001707-001708 (Hopkins Harlow Aff. ¶¶12-13). In short, she was involved in nearly every aspect of trial preparation in the *Grim* matter.[17] On March 23, 2017, she sent Eastern and its members a "file

[17] She also assisted Eastern and its members in dealing with its trial counsel's outstanding invoices. JA0001708 (Hopkins Harlow Aff. ¶14).

closing letter" stating that she has been "assisting [Eastern] informally" in the *Grim* litigation and that her "representation of Eastern is now concluded." JA000915.

b. Involvement adverse to Eastern in the dissociation action.

Ms. Hopkins Harlow was actively directing and participating in Mr. Harlow's dissociation directly adverse to Eastern even before the conclusion of the *Grim* matter. The Harlow's retained Mr. Rogers in 2016 to discuss the preparation of an operating agreement, which then shifted to the preparation of a dissociation agreement. JA000246. Ms. Hopkins Harlow's affidavit avers she assisted in "most, if not all activities in this dissociation matter to date," including the "drafting and revising of the early settlement agreement;..." that was attached to Petitioner's March 20, 2017 notice letter. JA001710 (Hopkins Harlow Aff. ¶18); JA000825-000833. Ms. Hopkins Harlow's involvement in the dissociation adverse to Eastern at the outset is further demonstrated by the fact that when Mr. Rogers communicated with Mr. Stuart on April 28, 2017, about Mr. Stuart's redlines to the proposed dissociation agreement Ms. Harlow Hopkins helped draft, he forwarded the email not to Michael Harlow, but to Martha Hopkins Harlow. JA000593-00595.

Her actions adverse to Eastern continued unabated after April 14, 2017. She admits to being intimately involved in evaluating Eastern's initial offer and in preparing Petitioner's counteroffer; to meeting directly with the members of Eastern in the summer of 2017 without Eastern's counsel being present to continue efforts to negotiate the matter; to being the one that selected, retained, and interacted with Petitioner's expert; and to drafting the tolling agreement and the complaint. And, after filing suit, she drafted discovery requests, the third-party subpoenas, and worked on preparing "most if not all filings, exchanges between counsel, and

preparation for and attendance at hearings." JA001710-001711 (Hopkins Harlow Aff. ¶18)[18] JA000916-000917.

The value of Ms. Hopkins Harlow's legal services in the *Grim* case was put at issue in the distributive share negotiation when Petitioner's counsel asserted in his May 19, 2017, letter to Mr. Stuart that Petitioner should get credit in determining his share of any *Grim* Claims Commission action recovery for Ms. Hopkins Harlow's contributions to Eastern during the *Grim* case. JA001787-000790. Her work in *Grim* was again put at issue by Petitioner in his written discovery, which sought information regarding Mrs. Hopkins Harlow's legal services to Eastern. JA0001610; 001621-001646 (*See* Interrogatory No. 4 and Request for Admission No. 72.) And, she admitted to the Court the Petitioner had put the value of her legal services in *Grim* at issue during her argument in opposition to Eastern's Motion to Disqualify. JA0001582-001587.[19]

Ms. Hopkins Harlow also admits to providing ten communications between her and Eastern's members, including communications Petitioner was not included on, to counsel for Mr. Harlow in this case for use in a September 6, 2018 meet and confer letter. JA0001713 (Hopkins Harlow Aff. ¶21);[20] JA000897-000903. Petitioner later filed these communications as exhibits to his December 2018 Motion to Compel.

A hearing was held on Eastern's motion on April 4, 2018. The Court held that an appearance of impropriety existed and that she was pursuing a claim against her former client:

> Ms. Harlow: How could it hurt the LLC?
>
> The Court: Well, I don't want to argue with you about it. I have found that you have told me that you're going to make a claim that could affect the value of this, this company.
>
> Ms. Harlow: Based upon my legal fees, which I'm entitled to prove. I would have to

[18] Ghostwriting is a form of representation. *See* W.Va. Rules Prof. Cond. R. 1.2, Cmt. 8.

[19] At the same hearing, Ms. Hopkins Harlow admitted her own personal stake in this litigation saying; "...I'm involved in paying for this case. I'm affected by the expense in this case. I'm affected personally by the success of this case." JA001587r

[20] The September 2, 2018 letter with attachments is found at JA000880-000915

prove that.

The Court. I get that, you are, but not against your own client. So I'm going to find there is a conflict of interest, and I will deny you're being admitted to practice this suit. So you may draw your order based upon that.

Ms. Harlow: Can I have a – some – we never get enough clarification from you, Your Honor. You've seen that a number of times. Let me ask some questions. What does that mean, I can't be counsel? Does that mean I can't talk to my --

The Court: That means I've found a conflict of interest by the appearance of impropriety under the rules; also that you have a claim for fees that could affect the market value of this LLC. And that's basically what we're fighting over, what the value is.

JA001587 (Tr. Apr. 4, 2019 Hrg.)

In so ruling, the Court then prohibited Ms. Hopkins Harlow from formally appearing as counsel for Petitioner. However, the Court specifically avoided the issue of whether her actions in providing extensive behind the scenes assistance in the litigation constituted violations of her ethical obligations. JA001589; 001415; 001417; 001871.

B. The Circuit Court applied the appropriate evidentiary standard.

In reviewing the decision of the lower court to award, deny, or grant in part a request for attorney fees this Court employs an abuse of discretion standard. *See Sanson v. Brandywine Homes, Inc.*, 215 W. Va. 307, 310–11, 599 S.E.2d 730, 733–34 (2004); *see also* Syl. Pt. 1, *W. Virginia Dep't of Transportation, Div. of Highways v. Newton*, 238 W. Va. 615, 797 S.E.2d 592 (2017). The Court did not abuse its discretion and acted properly in refusing to award attorney fees. As detailed below, the Court applied the standard that Petitioner advocated for and that which is required by West Virginia's common-law. Additionally, granting attorney fees under West Virginia Code §31B-7-702(d) is within the court's discretionary powers, and given the punitive nature of granting attorney fees, the Court rightfully declined Petitioner's request.

Petitioner never articulated in his fee motion that a lesser standard of proof should be applied. To the contrary, Petitioner argued that a clear and convincing evidence standard applies

to §7-702(d). For example, Mr. Harlow's Amended Motion for Summary Judgment Finding of Bad Faith, in a section arguing Eastern acted "arbitrarily, vexatiously, or not in good faith" under §31B-7-702(d), provides:

> Defendant's failure to provide accounts receivable information to address deficiencies in its one-page Attachment B document and later concession of the same only when faced with third party evidence and expert testimony *is clear and convincing evidence* that Defendant ... acted "arbitrarily, vexatiously, or not in good faith" for purposes of Section 702(d) *or* in "bad faith, vexatiously, wantonly, or for oppressive reasons" under *Sally-Mike Prop.*

JA 002390-002391 (Emphasis added).[21]

Eastern does not concede that the Court erred in applying a clear and convincing standard. However, Petitioner now argues it was error to apply this standard. Assuming, *arguendo*, this was error, it was invited error. By specifically urging or silently acquiescing to the application of a clear and convincing evidence standard to §7-702(d), Mr. Harlow cannot now raise that alleged error on appeal. *See* Syl. Pts. 2 & 3, *Hopkins v. DC Chapman Ventures, Inc.*, 228 W. Va. 213, 215, 719 S.E.2d 381, 383 (2011) (per curiam); Syl. Pt. 1, *Maples v. W. Virginia Dep't of Commerce, Div. of Parks & Recreation*, 197 W. Va. 318, 319, 475 S.E.2d 410, 411 (1996). This is "a cardinal rule of appellate review applied to a wide range of conduct." *State v. Crabtree*, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996).

[21] Petitioner argued repeatedly in his Amended Motion that the clear and convincing evidence standard applied to §7-702(d) as well. *See* JA002394 ("In sum, Defendant's actions support by clear and convincing evidence a finding that Defendant has acted 'arbitrarily, vexatiously, or not in good faith' for purposes of Section 31B-7-702(d) *and/or* the *Sally-Mike Prop* bad faith exception to attorney fees.") (Emphasis added); JA002381-002382 (Defendant's conduct explained herein establishes by clear and convincing evidence that Defendant has acted in bad faith for purposes of West Virginia Code §31B-7-702(d) *and* under *Sally-Mike Prop. v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986)). *See also*, Plaintiff's original Motion for Summary Judgment Finding of Bad Faith, JA001433; 001443; 001446.

i. The rules of statutory construction dictate application of a clear and convincing evidence standard.

Petitioner is correct in stating that West Virginia Code §31B-7-702 is silent as to the burden of proof that is required before a court may exercise its discretion to award attorney fees. Petitioner then argues that the common-law clear and convincing burden of proof is not proper in the context of the statute at issue here. In so doing, he argues this Court should apply an undefined, lesser standard. Well-established, and long-adhered to principles of statutory construction that have been adopted by this Court support the Circuit Court's use of a clear and convincing evidence standard to assess a fee claim under §7-702(d).

"A statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law applicable to the subject-matter, whether constitutional, statutory, or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith." Syl, Pt. 4, *Davis Mem'l Hosp. v. W. Virginia State Tax Com'r*, 222 W. Va. 677, 678–79, 671 S.E.2d 682, 683–84 (2008) (internal quotations omitted). "Faced with a statute that is silent about the burden of proof, we start by recognizing that Congress legislates 'against a background of common-law adjudicatory principles.'" *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991). "With this in mind, we presume—unless a contrary statutory purpose is apparent—that Congress has crafted a statute with the expectation that settled common-law principles will apply." *Irobe v. United States Dep't of Agric.*, 890 F.3d 371, 378 (1st Cir. 2018).[22]

[22] The present case is distinguishable from the situation recently addressed by this Court in *The John A. Shepherd Mem. Ecological Reservation, Inc. v. Michael Fanning and Michael Sanger*, No. 19-0450 (Nov. 19, 2019). In

For example, 28 U.S.C. § 1927 is a federal statute vesting federal courts with the discretion to award fees and costs against an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously..." 28 U.S.C.A. § 1927. Like W.Va. Code §31B-7-702(d), it is silent on the burden of proof that must be met by a party seeking to recover fees and costs. However, consistent with what the Court below did in this case, numerous federal courts applying §1927 have held that unreasonable or vexatious conduct must be shown by clear and convincing evidence. *See Bryant v. Military Dep't of Mississippi*, 597 F.3d 678, 694 (5th Cir. 2010) ("Sanctions under 28 U.S.C. § 1927 are punitive in nature and require 'clear and convincing evidence, that every facet of the litigation was patently meritless' and 'evidence of bad faith, improper motive, or reckless disregard of the duty owed to the court'"); *Huthnance v. D.C.*, 793 F. Supp. 2d 177, 181 (D.D.C. 2011) (holding a finding of vexatiousness under §1927, "*like a finding of litigation misconduct under a court's inherent power*," must be supported by clear and convincing evidence)(emphasis added); *United States v. Purdue Pharma L.P.*, No. 5:10-CV-01423, 2015 WL 2401410, at *4 (S.D.W.Va. May 20, 2015) (unpublished) (denying fee award under §1927 because amended complaint "was not clearly frivolous," which implied heightened burden of proof).

Here, Petitioner asks this Court to disregard these principles of statutory construction and create a new rule, not in harmony with applicable existing constitutional, statutory, or common law standards. When a statute is silent and does not specify the burden of proof, the court cannot simply ignore the existing common-law and statutory framework in which the statute was enacted to create a lower burden of proof.

Fanning, the statutory silence was the result of the express, deliberate decision by the Legislature not to adopt a provision of the Revised Model Nonprofit Corporation Act. *Id.* at *9.

ii. The award of attorney fees and costs is discretionary

West Virginia Code §31B-7-702(d) states:

> If the court finds that a party to the proceeding acted arbitrarily, vexatiously or not in good faith, it may, award one or more other parties their reasonable expenses, including attorney's fees and the expenses of appraisers or other experts, incurred in the proceeding. The finding may be based on the company's failure to make an offer to pay or to comply with section 7-701(b).

The statute very clearly leaves the award of attorney fees within a court's discretion if it first finds a party acted arbitrarily, vexatiously, or not in good faith. Even if a court finds that a party acted arbitrarily, vexatiously, or not in good faith, the statute does not require it to award attorney fees. The West Virginia legislature could make an award of attorney fees mandatory if it desires. It has done so in other statutes, but declined to do so in adopting the Uniform Limited Liability Act.

This Court has made it clear that "the decision to award or not to award attorney's fees rests in the sound discretion of the circuit court." *Sanson* at 215 W. Va. 307, 310–11, 599 S.E.2d 730, 733–34 (2004). *See also, Humphrey Indus., Ltd. v. Clay St. Assocs.*, LLC, 170 Wash. 2d 495, 507, 242 P.3d 846, 853 (2010)(finding that "even if [a party] did fail to substantially comply with the 30 day statutory deadline, or if [a party] did act arbitrarily, vexatiously, or not in good faith, the opposing party is not automatically entitled to an award of attorney fees. Rather, the decision to award attorney fees rests in the discretion of the trial court.") At least one federal district court, applying a statute very similar to West Virginia's, exercised its discretion and refused to award attorney fees even when the company made no initial purchase offer at all. *Lincoln Provision, Inc. v. Puretz*, No. 8:10CV344, 2013 WL 6263475, at *3 (D. Neb. Oct. 10, 2013), reversed and remanded on other grounds, 775 F.3d 1011 (8th Cir. 2015).

iii. The award of attorney fees is punitive and requires a heightened evidentiary burden.

Both state and federal courts have held that "the underlying rationale of fee-shifting upon a showing of bad faith is punishment of the wrongdoer rather than compensation of the victim. For that reason, the standard for a finding of bad faith is stringent ... [and] attorneys' fees will be awarded only when extraordinary circumstances or dominating reasons of fairness so demand." *Nepera Chem., Inc. v. Sea-Land Serv., Inc.*, 794 F.2d 688, 702 (D.C. Cir. 1986). *See also*, *Hall v. Cole*, 412 U.S. 1, 5 (1973) ("the underlying rationale of 'fee shifting' is, of course, punitive."). The West Virginia Supreme Court of Appeals has held that "[a]n obvious purpose of awarding attorney fees and costs in a case involving fraud is that intentional conduct such as fraud should be punished and discouraged." *Boyd v. Goffoli*, 216 W. Va. 552, 569, 608 S.E.2d 169, 186 (2004). Similarly, the Legislature has explicitly required that conduct sufficient to support an award of punitive damages be demonstrated by clear and convincing evidence. *See* W.Va. Code §55-7-29(a).

One of the reasons for a stringent standard for awarding attorney fees is the chilling affect it can have on an attorney's duty to zealously represent their client. As California State Courts have held, "[t]he use of courts' inherent power to punish misconduct by awarding attorney's fees may imperil the independence of the bar and thereby undermine the adversary system." *Lieppman v. Lieber*, 180 Cal. App. 3d 914, 921 (Ct. App. 1986). West Virginia Courts have also cautioned "that the losing litigant should not be discouraged from fairly prosecuting or defending a claim" by assessing attorney fees. *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 52, 365 S.E.2d 246, 250 (1986).

A recent West Virginia Law Review article, authored in part by Judge Reeder, explains the need for a stringent evidentiary standard:

> "In awarding attorney fees for bad faith, **courts apply a stringent standard, and attorney fees will only be awarded 'when extraordinary circumstances or dominating reasons of fairness so demand.'** The reason for such a stringent standard is that the underlying rationale of fee shifting is punishment of the wrongdoer rather than compensation of the victim. Because of the 'potency' of the inherent power of the court to impose sanctions for bad faith, a court must use restraint. Therefore, an award of attorney fees should only be granted when the party has acted in a manner so reprehensible that punishment is required. Stated another way, '**only truly egregious conduct – the kind in which 'the very temple of justice has been defiled,' – will justify a departure from the American Rule.**"

Matthew G. Chapman, The Honorable Joseph K. Reeder, and Jonathan G. Brill, *Practitioner's Guide to Attorney Fees in West Virginia*, 122 W. Va. L. Rev. Online 1 (Sept. 16, 2019) (emphasis added).[23]

Parties have the right to aggressively prosecute *and defend* their cases and that ability must not be hampered by fear of having to pay the opposing party's attorney fees in situations where matters have been aggressively, but as the Court found here fairly, litigated within the bounds of the rules and laws of the court. As detailed below, the Court consistently found that Eastern's conduct came adhered to the rules of discovery, that Eastern abided by the Court's discovery orders, that Eastern met the requirements of W. Va. Code 31B-7-701, *et. seq.*, and that Eastern's actions were reasonable.

C. Eastern's conduct was reasonable and not arbitrary.

The Court specifically found that Eastern acted reasonably in making its initial and subsequent purchase offers, that it complied with the Rules of Civil Procedure in conducting discovery, and that it complied with the its order regarding discovery. JA000011-12; 000015-16 (June 12, 2019 *Order Regarding Attorney* Fees, Findings of Fact at ¶¶28-29, Conclusions of Law at ¶13). Judge Young's factual findings and conclusions do not support Petitioner's claim Eastern acted arbitrarily and cannot plausibly be viewed by this Court as clearly erroneous. *See*

[23] September 16, 2019, https://wvlawreview.wvu.edu/west-virginia-law-review-online/2019/09/16/practitioner-s-guide-to-attorney-fees-in-west-virginia.

Wallace v. Pack, 231 W. Va. 706, 709 (2013)(per curiam); *see also* Syl. Pt. 3, *State v. Vance,* 207 W.Va. 640, 535 S.E.2d 484 (2000).

Given the deferential standard of review applicable to the Court's factual findings, the *Ziegeldorf* case cited by Petitioner actually supports the Circuit Court's decision not to award fees. *Ziegeldorf* defines arbitrary as "*an unreasoned* decision made without regard to law for facts." *Sec. State Bank, Hartley, Iowa v. Ziegeldorf*, 554 N.W.2d 884, 894 (Iowa 1996) (emphasis added). To support his claim that Eastern acted arbitrary, Petitioner makes arguments that the Court, sitting as the trier of fact, found unpersuasive. First, Petitioner argues that he did not like the initial offer made by Eastern based upon the fact that he felt it undervalued his interest in the company and that it was made without the assistance of an accountant. Petitioner also argues that Eastern made the offer based on a recast balance sheet prepared by Eastern's office manager and based upon doubling the recommended offer suggested by Eastern's then attorney.

i. Eastern's initial offer complied with W.Va. Code §31B-7-701(b).

W.Va. Code §31B-7-701(b) states:

> (b) A limited liability company must deliver a purchase offer to the dissociated member whose distributional interest is entitled to be purchased no later than thirty days after the date determined under subsection (a) of this section. The purchase offer must be accompanied by:
>
> > (1) A statement of the company's assets and liabilities as of the date determined under section (a) of this section;
> > (2) The latest available balance sheet and income statement, if any, and;
> > (3) An explanation of how the estimated amount of the payment was calculated.

W.Va. Code §31B-7-701(b).

The requirement that the ultimate purchase be "fair value" is set forth in W.Va. Code §31B-7-701(a). This phrase is used to distinguish from the concept of "fair market value" due to the fact there is often not a market for the sale of interests in closely held LLC's. *See* Comments

to Section 702 of the Uniform Limited Liability Company Act (1996), upon which West Virginia's Uniform Limited Liability Company Act is based.[24] This language regarding the ultimate purchase is omitted from W.Va. Code §31B-7-701(b), which sets forth the requirements of the initial offer. The statutory scheme contemplates that an offer to purchase be made within 30 days of dissociation and that the offer be accompanied by the specific items set forth in W.Va. Code §31B-7-701(b)(1) through (3). It does not further specify what the offer must contain or what methodology must be used in arriving at the offer.

The statute establishes a framework for arriving at a value in the absence of a provision in an operating agreement spelling out a methodology for determining value. The statute explicitly contemplates that the offer may not, and perhaps often will not, be accepted because there is not agreement on value. After an initial offer is made, the statute sets forth a period of 120 days for the parties to continue to negotiate a final purchase price. If the parties thereafter do not reach an agreement, the statute then provides an additional 120-day period within which a party must file suit to seek a final judicial determination of the fair value of the interest. *See e.g.* W.Va. Code §§31B-7-701(d). This framework is set up specifically in recognition of the fact that there may be widely divergent opinions as to the value of an interest. Such disagreements are not arbitrary, vexatious, or in bad faith. *See Lincoln Provision, Inc.*, 2013 WL 6263475, at *9.

Section 7-702(d) specifically omits any mention of §7-701(a), which states the ultimate purchase is to be for fair value. Instead, §7-702(d) provides that a Court may, but is not required to, base a finding of arbitrary, vexatious, or not in good faith conduct on a party's failure to make *an offer* to pay *or* to comply with section 7-702(b). It is undisputed in this case that Eastern made an offer and that the offer included all the information required by §7-702(b). A statutory

[24] Neither party's expert discounted their valuation for lack of marketability. *See* JA000691-000742 at 000694, JA001053-001088 at 001074.

provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 6, *State ex rel. Biafore v. Tomblin*, 236 W.Va. 528, 782 S.E.2d 223 (2016). And, "[i]n the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies." Syl. Pt. 6, *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 486, 647 S.E.2d 920, 922 (2007).

The Court correctly concluded that Eastern complied with §31B-7-701(b). JA000011 (June 19, 2019 *Order Regarding Attorney Fees*, Conclusions of Law at ¶26). W.Va. Code 31B-7-702(d) is clear and unambiguous. It is the failure to make an offer or to comply with §7-701(b) that a court *may* consider in deciding whether a party acted arbitrarily, vexatiously, or not in good faith. This Court should not disturb the Circuit Court's findings by engrafting additional requirements into §§7-701(b) or 7-702(d).

ii. Eastern complied with the Rules of Civil Procedure and the Circuit Court's Orders.

The facts proffered by Mr. Harlow to support his claim that Eastern acted arbitrarily are simply inaccurate. Having differing opinions as to the value of a party's interest is not enough to give rise to a finding that Eastern acted arbitrarily. In *Lincoln Provision*, the United States District Court for the District of Nevada, applying the Illinois Limited Liability Company Act, held that "widely divergent opinions as to the fair value of Plaintiff's distributional interest" in an LLC is not a basis for an award of fees under an Illinois statute very similar to West Virginia's. *See Lincoln Provision, Inc.*, 2013 WL 6263475, at *9.

Judge Young thoroughly addressed Petitioner's unfounded assertions of arbitrary and vexatious conduct. *First*, the Court found that "at the time of [Harlow's] dissociation and subsequent negotiations Eastern was uncertain as to whether it could even continue business

operations because of the nearly $400,000 liability resulting from the *Grim* verdict. Defendant continued to negotiate with [Harlow] by making reasonable offers in light of the financial standing of the Eastern." JA00004 (June 19, 2019 *Order Regarding Attorney Fees*, Findings of Fact at ¶ 10). *Second* the Court found that due to Eastern's standard accounting practices prior to Mr. Harlow's dissociation the initial financial statements did not accurately reflect accounts receivables, however, this did warrant finding Eastern acted vexatiously. JA000014-000015 (June 19, 2019 *Order Regarding Attorney Fees*, Conclusions of Law at ¶11). *Third*, Eastern complied with the Rules of Civil Procedure regarding discovery and complied with the Court's discovery orders, including relating to inspection of documents. JA000015-000016 (June 19, 2019 *Order Regarding Attorney Fees*, Conclusions of Law at ¶¶12-13). These factual findings demonstrate that Eastern's actions were reasonable based on the law and facts. These are specific findings and conclusions that Eastern did not act arbitrarily.

D. Eastern acted neither vexatiously nor in bad faith.

The Court's factual findings that Eastern acted reasonably and that it complied with the Rules of Civil Procedure and the Court's discovery orders also forecloses Petitioner's arguments that the Court failed to determine Eastern acted vexatiously. Vexatious is defined as "without reasonable or probable cause or excuse; harassing; annoying." *Black's Law* Dictionary, 1264 (Bryan A. Gardner, ed., 7th abridged ed., West 2000); *see also Newcome v. Turner*, 179 W.Va. 309, 312, 367 S.E.2d 778, 781, n. 5 (1988) (utilizing Random House Dictionary of the English Language definition of vexatious.)

Petitioner argues two points in support his claim that Eastern acted vexatiously and not in good faith. The first argument hinges on Petitioner's belief that the Court erred in applying the

heightened clear and convincing standard. Eastern has demonstrated that that the Court correctly applied the clear and convincing standard and as such, will not belabor the point.

Petitioner next points out that his counsel drafted a settlement agreement for consideration by Eastern, which was "largely rewritten" by Eastern and contained terms such as a non-compete clause that Petitioner rejected. Ptr.'s Br. at 13. However, Petitioner fails to mention that he inserted a personal guaranty clause that was likewise not required by the statute. JA000825-000833. After negotiations surrounding the settlement agreement reached an impasse, Eastern made an offer to purchase Mr. Harlow's distributional interest that everyone agrees contained all information required by W.Va. Code §31B-7-701(b). Mr. Harlow then contends that the offer made by Eastern was below the value his interest and that the below value offer was based upon Eastern's undervaluation of the company's assets including its real property, vehicles, and equipment and tools. Finally, Mr. Harlow argues that Eastern did not conduct discovery in good faith. Ptr.'s Br. at 14-15.

i. Eastern reasonably valued its assets.

Mr. Harlow maintains that Eastern intentionally undervalued its assets to justify what he contends was a low initial offer. As previously discussed, Eastern's initial offer was impacted by numerous things including its long-established accounting practices, advice of counsel, and the impact of the *Grim* decision; all of which the Circuit Court found to be a reasonable basis for Eastern's offer.

Mr. Harlow's first contention is that Eastern undervalued its building when compared to a prior appraisal. However, the appraisal was performed in 2007 before the building was built and was for purposes of obtaining a construction loan. JA000545-000455. The value of the real property listed on documents included with the purchase offer was higher than the value at which the real property was assessed for tax purposes. JA000974 It is the law in West Virginia that

owners of property are permitted to state opinions as to the value of their property. *See e.g. West Virginia Dep't Transportation v. Western Pocahontas Properties, L.P.*, 236 W.Va. 50, 79, 777 S.E.2d 619, 648 jj(2015); *Smithson v. USF&G*, 186 W.Va. 195, 204 (1991); *Travelers Indemnity Co. Plymouth Box & Panel Co.*, 99 F.2d 218, 223 (4th Cir. 1938) (representative of business allowed to express opinion as to value of business's property).

Petitioner criticizes the valuation of Eastern's vehicles on the basis they were listed lower than the assessor's appraised values. However, Petitioner's own expert admits the assessor's appraisal does not consider the actual condition or mileage of the vehicles. There is necessarily subjectivity in the valuation of real and personal property; a fact which Petitioner's expert and counsel admit. JA000321; 000443-000446. The Circuit Court heard extensive testimony and evidence regarding these factual disputes and concluded Eastern's initial and subsequent offers were reasonable. Petitioner has pointed to nothing in the record demonstrating this factual finding was clearly erroneous.

Petitioner contends that Eastern's valuation of its tools was inconsistent with the value listed on Eastern's balance sheet. This criticism is superficial and misses the mark. *First*, to determine the value of its tools, Eastern used a long-time employee who previously owned his own electrical contracting firm and whose job duties at Eastern included buying and selling new and used tools and equipment. Eastern asked him to value the tools based on his knowledge, training, and experience. JA000492-000493. *Second*, in referring to the balance sheet included with the initial offer, Petitioner disregards the line item under fixed assets for accumulated depreciation, which is treated as a lump sum. JA000060. Some portion of this accumulated depreciation must be applied to reduce the valuation of tools, office equipment, and furniture listed on the balance sheet. Again, Petitioner has pointed to nothing in the record indicating that

the Circuit Court's factual conclusions regarding the initial and subsequent offers were clearly erroneous.

ii. Eastern conducted discovery in good faith.

Prior to and throughout this litigation Eastern made multiple productions responding to Petitioner's initial informal requests for information and subsequent formal discovery. The record demonstrates that, despite Petitioner's overbroad discovery requests, Eastern attempted, through counsel, to work with Petitioner to respond to discovery, resolve discovery disputes, and provide the information necessary to allow for the completion of the valuation. Indeed, the record, as described in Section IV.A.iv, *supra,* indicates that both counsel believed discovery disputes were resolved via agreement in October of 2018 after the Circuit Court granted Eastern's motion to quash Petitioner's subpoenas and ruled "forward-looking" information irrelevant. Despite this agreement, and after the close of discovery, Mr. Harlow filed a Motion to Compel in December, 2018. This motion was, by and large, denied, though the Court did allow a limited inspection of documents at Eastern's office. The inspection occurred without incident as directed by the Court.

Further, Eastern prevailed with respect to other discovery disputes and motions. The Circuit Court quashed Petitioner's subpoenas to Eastern's sureties as being untimely. And, it denied Petitioner's last-minute attempts to amend his claims to drastically expand the scope of the litigation by adding new parties on new claims unrelated to his dissociation and the valuation of his interest in Eastern. JA001802-001803 (Mar. 20, 2019 *Order on Discovery Motions*); JA001804-001808 (Mar. 20, 2019 *Order Denying Plaintiff's Amended Motion for Leave of Court to File Second Amended Complaint*); JA002139-002149 (Nov. 9, 2018 *Order Resolving Defendant's Motion to Quash*). Even though Petitioner lost most of his discovery motions, the Court still nevertheless concluded his failed attempts to engage in overbroad and irrelevant

discovery were not vexatious or in bad faith. JA000018 (June 19, 2019 *Order Regarding Attorney Fees*, Conclusions of Law at ¶19). Petitioner cannot, with a straight face, claim that Eastern's discovery positions were vexatious or not in good faith when Eastern prevailed.

At their core, the disputes involved the late-arising issue of the WIP's. On this point, the record establishes that Eastern operated on a cash basis and the original accounts receivable information was produced in the context of Eastern's historical operations. Once this issue was raised in June of 2018 and discovery disputes regarding the scope of information were resolved favorably to Eastern, counsel worked together to identify what information needed to be produced and Eastern timely supplemented its discovery in accordance with counsels'. The Circuit Court concluded Eastern abided by both the Rules of Civil Procedure and its rulings on discovery. *See* Sections IV.A.ii and iv, *supra.*_Mr. Harlow has pointed to nothing in the record showing the Circuit Court's conclusions that that Eastern did not act arbitrarily, vexatiously or not in good faith in discovery was clearly erroneous.

E. Ms. Hopkins Harlow's disqualification was justified.

Martha Hopkins Harlow began working against Eastern and its remaining members while she still had an ongoing attorney/client relationship with them in the *Grim* matter. She continued to work adversely to Eastern after sending her March 23, 2017 file closing letter. At no point did she obtain informed consent to do so in writing from Eastern, Mr. Pritt, or Mr. Skaggs. This is not just a matter of whether she had a conflict of interest regarding a former client under Rule 1.9 of the West Virginia Rules of Professional Conduct, but also involves a concurrent conflict under Rule 1.7.

This Court has recognized for many years that the "ultimate decision of whether to disqualify a lawyer is left to the discretion of the trial judge." *State ex rel. Michael A.P. v. Miller*,

207 W. Va. 114, 119, 529 S.E.2d 354, 359 (2000);[25] Syl. Pt. 2 *Musick v. Musick*, 192 W. Va. 527, 528, 453 S.E.2d 361, 362 (1994). When the disqualification is based on counsel's conflict of interest, "the trial court is not to weigh the circumstances 'with hair-splitting nicety' but, in the proper exercise of its supervisory power over the members of the bar and with a view of preventing 'the appearance of impropriety,' it is to resolve all doubts in favor of disqualification." *State ex rel. Jefferson County Bd. of Zoning Appeals v. Wilkes*, 221 W.Va. 432, 440, 655 S.E.2d 178, 186 (2007) (quoting *United States v. Clarkson*, 567 F.2d 270, 273 n. 3 (4th Cir. 1977) (additional citations omitted). The Circuit Court appropriately resolved all doubts in favor of her disqualification.

i. The *Grim* case and the current case are substantially related.

Petitioner contends that the Circuit Court erred by determining that the *Grim* matter and the current matter were substantially related based on Syllabus Pt. 1 of *State ex rel. Keenan v. Hatcher*, 210 W. Va. 307, 309, 557 S.E.2d 361, 363 (2001), which provides:

> Under West Virginia Rule of Professional Responsibility 1.9(a), a current matter is deemed to be substantially related to an earlier matter in which a lawyer acted as counsel if (1) the current matter involves the work the lawyer performed for the former client; or (2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.

Syl. Pt. 1, *State ex rel. Keenan*, 210 W. Va. at 309, 557 S.E.2d at 363; JA001429.

The basis for this contention is that the Comments to the Rules of Professional Conduct adopted by Administrative Order in 2015 specifically define "substantially related" and the assertion that the Comments overrule prior binding precedent, as enunciated in a published

[25] In *State ex rel. Michael*, counsel asserted that the interested parties had waived any conflict. However, even the presence of a waiver did not divest the circuit court of its discretion to decide issues of disqualification. *State ex rel. Michael A.P.* 207 W. Va. at 120, 529 S.E.2d at 360. There has been no waiver here.

Syllabus Point, on when matters are substantially related.[26] Ptr.'s Br. at 18-21. In urging such a position, Petitioner ignores the Scope of the West Virginia Rules of Professional Conduct.

In fact, the Comments are not so limiting. Paragraph 15 of the Scope provides: "The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law." W.Va. R. Prof. Cond., Scope at [15]. And, the Scope specifically states the comments are intended as illustrative guides, not limiting definitions. Paragraph 21 provides: "The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. *The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.*" W.Va. R. Prof. Cond., Scope at [21] (emphasis added).

Petitioner cites to no controlling West Virginia authority for his position that the Court's limited disqualification of his wife from formally appearing and participating as counsel of record was erroneous. Instead, he cites in passing to cases out of Colorado, New Jersey, and Nebraska. *See* Petr's Br. at 20. And, he cites to Comment 3 to the West Virginia Rules of Professional Conduct (2015). *Id.* The fact of the matter is that Syllabus Pt. 1 of *State ex rel. Keenan* remains valid and was properly applied by the Circuit Court in the sound exercise of its discretion. If the Court were to overrule *State ex rel. Keenan*, it should do so via a published opinion with a new Syllabus Point, not via illustrative, non-authoritative comments to Rules of Professional Conduct adopted via an Administrative Order. *See* W. Va. Const. art. VIII, § 4.

[26] The 2015 revisions to Rule 1.9(a) were minor. The revised rule separated subsections (a) and (b) into two separate subparagraphs and, in subparagraph (a) replaced "consents after consultation" with "gives informed consent, confirmed in writing. *See* Strikethrough version of West Virginia Rules of Professional Conduct effective January 1, 2015. http://www.courtswv.gov/legal-community/court-rules/professional-conduct/pdf/RulesOfProfessionalConductStrikethroughFinal.pdf (last accessed Nov. 19, 2019).

Regardless, the matters are substantially related. The *Grim* case is front and center in this case in that the verdict was a liability that needed to accounted for in the valuation of Petitioner's interest and in that the uncertainty it created as to the viability of the Company is relevant when assessing Petitioner's argument Eastern's initial offer was arbitrary or made in bad faith.[27] Moreover, the potential recovery in the *Grim* Claims Commission action is a contingent asset of the company with a continuing expense component. And, Petitioner placed his spouse's work in *Grim* at issue in this case.

Petitioner's contention that any information Ms. Hopkins Harlow may have learned in *Grim* is not disqualifying because it was already in the possession of an adverse party is likewise without merit. *See* Petr's Br. at 20-21. The flaw in her reasoning is that the only reason she had access to that information in the first instance was because of her prior joint representation of the members in the *Grim* case. At the time she came into its possession the parties were not adverse. And, many of the communications she admits to providing to Petitioner's counsel were communications Petitioner was not included on and did not have until she disclosed them. JA0001713 (Hopkins Harlow Aff. ¶21); JA000897-000903.

The = Court did not abuse its discretion in finding the matters were substantially related and that, based on an appearance of impropriety, Ms. Hopkins Harlow could not formally participate in this case. JA0001430 (Apr. 29, 2019 *Order on Defendant's Motion to Disqualify,* Conclusion of Law at ¶9).¶

ii. Ms. Hopkins Harlow also had a concurrent conflict of interest in violation of Rule 1.7.

The true extent of Ms. Harlow's activities adverse to Eastern were hidden until she filed her Affidavit in support of her response to Eastern's Motion to Disqualify. It was only in this

[27] *See Eddy Creek Marina Resort, LLC v. Tabor*, 2011 WL 5599533 (Ky. Ct. App. Nov. 18, 2011) (not considering debt of company in valuing dissociating member's interest was clearly erroneous).

Affidavit that, for the first time, she admitted to essentially ghostwriting everything that has been filed in this case. *See* JA001710-001711(Hopkins-Harlow Aff. ¶18). And, it was in her Affidavit that she revealed she was acting directly adverse to Eastern while simultaneously representing it. This is a concurrent conflict of interest under Rule 1.7 of the West Virginia Rules of Professional Conduct.[28] The exceptions set forth in Rule 1.7(b) do not apply for a myriad of reasons; not the least of which is that Ms. Hopkins Harlow never obtained informed in writing consent from Eastern and all its members.

IV. Conclusion.

For the foregoing reasons, the Circuit Court applied the correct burden of proof to Petitioner's motion, correctly declined to award Petitioner attorney fees, and correctly ruled to disqualify Petitioner's wife from appearing as counsel of record for him. Petitioner, though he disguises his arguments as focusing on questions of law, is, in reality, asking this Court to retry the matter below and to substitute its judgment for that of the Circuit Court sitting as the finder of fact. The Circuit Court property exercised its discretion in declining to award Petitioner his fees and costs and this decision should be affirmed.

Respectfully submitted this 4th day of December, 2019.

[28] Rule 1.7(a) provides that: "Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

> **(1) the representation of one client will be directly adverse to another client**; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

WV R RPC Rule 1.7(a)(Emphasis added)

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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 19-0643

MICHAEL D. HARLOW

Plaintiff below, Petitioner,

v.

EASTERN ELECTRIC, LLC.

Defendant Below, Respondent.

CERTIFICATE OF SERVICE

I certify that I have this **6th day** of **December, 2019**, served the foregoing **EASTERN ELECTRIC, LLC'S RESPONSE BRIEF** via United States Mail, postage prepaid, upon counsel of record for the parties as the addresses below:

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