IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Docket No. 19-0643

ON APPEAL FROM THE
CIRCUIT COURT OF NICHOLAS COUNTY

MICHAEL D. HARLOW
Plaintiff Below, Petitioner

v.

EASTERN ELECTRIC, LLC
Defendant Below, Respondent.

PETITIONER MICHAEL D. HARLOW'S BRIEF

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TABLE OF AUTHORITIES

Cases

Statutes

Rules

TABLE OF CONTENTS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS:

Michael D. Harlow, by counsel, respectfully submits his Petitioner's Brief, which challenges the Circuit Court of Nicholas County's June 19, 2019 *Order* denying an award of reasonable expenses to Michael D. Harlow and its underlying April 29, 2019 *Order On Defendant's Motion to Disqualify Martha Harlow.*

I. ASSIGMENTS OF ERROR

A. The circuit court erred by applying the wrong standard to determine whether attorney's fees and costs should be awarded in an action under the West Virginia Uniform Limited Liability Act (the "Act"). The circuit court applied the standard for granting fees in equity rather than the standard set forth at W.Va. Code §31B-7-702(d), which expressly allows fees and costs to be awarded when a party has behaved "arbitrarily, vexatiously or not in good faith."

B. Because the circuit court applied the wrong standard, it erred by failing to determine whether the Respondent acted "arbitrarily" under the Act, as set forth at W.Va. Code §31B-7-702(d).

C. Because the circuit court applied the wrong standard, it erred by requiring "clear and convincing" evidence of bad faith or similar conduct, which is an evidentiary burden required in equity, but not by the Act.

D. The circuit court erred when it failed to find that Respondent had behaved "vexatiously or not in good faith" under W.Va. Code §31B-7-702(d).

E. The circuit court erred by disqualifying Petitioner's wife, Martha J. H. Harlow, from formally representing Petitioner and erred by failing to award Mr. Harlow his reasonable expenses related to Respondents' Motion to Disqualify.

II. STATEMENT OF THE CASE

This appeal presents the first opportunity for this Court to address the appropriate standard for awarding attorney's fees and costs under the West Virginia Uniform Limited Liability Company Act (the "Act").

Under the Act, when a member elects to disassociate from a limited liability company, the company is required to pay "fair value" for the member's distributional interest and to make a purchase offer to the member within thirty days. *See* W.Va. Code §31B-7-701(a) and (b). If the parties cannot agree on a purchase price, the disassociated member may bring an action to determine the fair value. *See* W.Va. Code §31B-7-701(d) and (e). If the circuit court in such an action finds that the company acted "arbitrarily, vexatiously or not in good faith," the circuit court may award reasonable expenses (including expert and attorney fees) to the dissociated member. *See* W.Va. Code §31B-7-702(d).

Petitioner Michael Harlow ("Petitioner" or "Mr. Harlow") is an electrician who was one of three members of Respondent Eastern Electric Company, LLC ("Eastern"). He elected to disassociate from the company in April 2017. When Eastern would not offer fair value for Mr. Harlow's membership interest, he was forced to bring an action under the Act in the Circuit Court of Nicholas County. As explained more fully below, Mr. Harlow's action was very successful: the company made a very low initial offer and Mr. Harlow ultimately recovered far more than that offer. The litigation, however, was protracted and expensive, and Mr. Harlow submitted a request

for his reasonable expenses under the Act. That request, however, was denied by the circuit court in a June 19, 2019 order that is the subject of this appeal.

The facts demonstrate that Mr. Harlow should have been awarded his reasonable expenses under the Act. In response to Mr. Harlow's dissociation from the company, Eastern played hardball. On May 12, 2017, Eastern offered Mr. Harlow a mere $45,500 *or* a one-third share in any recovery obtained by the company in a claim it had filed before the West Virginia Claims Commission ("Grim matter"). (JA 000596). This offer was *completely arbitrary:* Eastern offered $45,500 simply because its lawyer advocated offering $20,000, which Eastern then "doubled" because it knew $20,000 was too low. (JA 000669). The amount was not tied to the values reflected on Eastern's balance sheet in any way.

In response to Eastern's low and arbitrary offer, Mr. Harlow sought a reasonable resolution. On May 19, 2017, Mr. Harlow offered to do one of three things: accept $120,000 *plus* one-third of any recovery from the Grim matter; accept $225,000 without any recovery for the Grim matter; or agree to the appointment of a neutral third-party expert to evaluate the value of the company and Petitioner's share. (JA 000604-605). However, rather than engage a neutral third-party or negotiate any further, Eastern pushed the parties into expensive and protracted litigation. In a letter dated May 22, 2017, Eastern rejected Mr. Harlow's proposals for resolution as "unreasonable" and stated that Eastern's original offer was its final and best offer. (JA 000611).

Mr. Harlow was eventually left with no choice but to file the instant action to value his membership interest. The ultimate outcome - delivered after numerous discovery disputes and seventeen months of bitter litigation - was very unfavorable for Eastern. Eastern's *own* expert conceded that Petitioner's interest was worth roughly $80,000 *plus* one-third of the Grim recovery – a figure much larger than the purchase offer made by Respondent ($45,000 *or* one-third of the

Grim recovery). (JA 000011; JA 001186; JA 001198-1199). Petitioner's expert similarly determined that Petitioner's interest was worth $100,000 *plus* one-third of the Grim recovery. (JA 000011; JA 000747; JA 000765; JA 000794-796). Ultimately, the parties *stipulated* that the value of the Petitioner's share was worth $100,000 *plus* a one-third interest in the Grim matter and Respondent was ordered to pay this amount. (JA 000006). This amount was very close to Mr. Harlow's initial offer made in May 2017, two years earlier.

By any measure, the Respondent's initial purchase offer of *either* $45,000 *or* one-third of the Grim recovery was woefully inadequate. Rather than make a good faith offer for fair value, Eastern made a completely arbitrary offer that even its own expert could not support. Nevertheless, despite the expensive and needless litigation that Plaintiff was forced to endure, the circuit court found in its June 19, 2019 order that Mr. Harlow would *not* be awarded his reasonable expenses.

However, this is *precisely* the type of situation in which reasonable expenses should be awarded under the Act. Eastern made an arbitrary, low-ball offer to Mr. Harlow and then forced him to litigate for nearly two years in order to obtain fair value for his membership interest. As set forth below, however, the circuit court, failed to award Mr. Harlow his reasonable expenses because it improperly focused on the standard for awarding attorney fees *in equity*, as opposed to the *statutory standard* set forth in the Act. In doing so, the circuit court required "clear and convincing" proof of bad faith or vexatious conduct, whereas the Act only requires a showing that a party has acted "arbitrarily, vexatiously or not in good faith." As a result, the circuit court failed to award fees incurred due to Eastern's "arbitrary" offer and failed to grant fees for Eastern's failure to negotiate and litigate in good faith.

III. SUMMARY OF ARGUMENT

Courts can grant attorney fees and costs to the prevailing party in two ways. First, in exceptional circumstances, a court can use its equitable powers to grant fees and costs when the opposing party has acted in bad faith. Second, a court can grant fees and costs pursuant to the express terms of a fee-shifting statute.

Here, Mr. Harlow sought fees and costs from Eastern under the Act, which expressly allows a circuit court to award fees when a limited liability company behaves "arbitrarily, vexatiously or not in good faith" in an action to value a departing member's interest. W.Va. Code §31B-7-702(d). Rather than apply this *statutory* language, however, the circuit court focused solely on whether Mr. Harlow was entitled to fees *in equity*, which requires a "clear and convincing" showing that a party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.

Because it applied the wrong standard, the circuit court failed to award Mr. Harlow fees and costs for Eastern's "arbitrary" purchase offer pursuant to W.Va. Code §31B-7-702(d). As explained below, there is judicial precedent for awarding fees when a party makes an "arbitrary" offer that has no legal or factual basis, as Eastern did here. The circuit court, however, never even analyzed whether Eastern behaved "arbitrarily," as required by the statute. This was reversible error.

Similarly, the circuit court erred when it failed to find that Eastern had behaved "vexatiously or not in good faith." As explained below, Eastern failed to negotiate in good faith, resisted giving Mr. Harlow the information necessary to value his interest, and launched a needless effort to disqualify Mr. Harlow's wife (who is an attorney) from assisting him. However, the circuit court excused Eastern's conduct – perhaps because it was mistakenly looking for "clear and convincing" proof of bad faith as required to award fees in equity. This also was reversible error.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes this matter is appropriate for oral argument and decision under Rule 20 of the West Virginia Rules of Appellate Procedure because the case involves an issue of first impression regarding the proper standard for awarding attorney fees and costs under the West Virginia Limited Liability Company Act.

V. ARGUMENT

A. The Circuit Court Applied the Wrong Standard and Thereby Failed to Award Expenses to Mr. Harlow for Eastern's "Arbitrary" Actions.

1. Fees Can Be Awarded In Equity or By Statute.

Under the "American Rule," each party in litigation bears its own attorney fees and costs. However, there are exceptions to this rule. For instance, "[t]here is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as 'costs,' without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. "Syl. Pt. 3, *Sally-Mike Properties v. Yoakum*, 179 W.Va. 45, 366 S.E.2d 246 (1986). However, fees are rarely granted in equity and the standard for granting such relief is high. This Court has found, for instance, that "bad faith" must be proven by "clear and convincing evidence" before attorney's fees will be granted in equity. *See Miller v. Lambert*, 196 W.Va. 24, 33, 467 S.E.2. 165, 174 (1995).

Importantly, an award of costs and fees can also be authorized expressly by statute. In this case in particular, the Act provides that a circuit court may award reasonable expert and attorney fees in an action to value a member's interest when the opposing party acts "arbitrarily, vexatiously or not in good faith." *See* W.Va. Code §31B-7-702(d). Critically, the Act's statutory provision

does not require "clear and convincing" proof for such an award, nor does it limit fees to instances of bad faith or vexatious conduct.

In this case, the circuit court erred by relying on the stringent standard for granting fees *in equity* instead of looking to the *express statutory standard* for awarding expenses under the Act. After noting that "there is authority in equity" to award fees against a party that has acted "in bad faith, vexatiously, wantonly or for oppressive reasons," the circuit court looked to prior West Virginia cases to define "bad faith" and "vexatious" behavior. (JA 000013). Then, after noting that bad faith "must be proven by clear and convincing evidence in order for a Court to assess costs," the circuit court concluded that "neither party has proven by clear and convincing evidence that either party acted in bad faith, vexatiously, wantonly, or for oppressive reasons." (JA 000013-14).

This was error. The Act *expressly* provides that reasonable expenses may be awarded when a party acts "arbitrarily" in a court action to determine the fair value of a member's interest in a limited liability company. W.Va. Code §31B-7-702(d). However, the circuit court did not apply this statutory language. It made no effort to define what constitutes "arbitrary" behavior under the Act, nor did it determine whether Eastern behaved "arbitrarily" in its dealings with Mr. Harlow. There is precedent, however, to aid this Court in answering these questions.

2. There is Precedent for Awarding Fees for "Arbitrary" Actions.

West Virginia's Uniform Limited Liability Act is based on a uniform act -- the Uniform Limited Liability Act of 1996 ("Uniform Act") -- proposed by the National Conference of Commissioners on Uniform State Laws. Unfortunately, there appear to be no court decisions determining when reasonable expenses should be awarded for "arbitrary" action under the

Uniform Limited Liability Act of 1996 or the various state statutes modeled after it, including West Virginia's statute.

Importantly, though, the attorney fee provision found in the Uniform Act and West Virginia's Act is identical or nearly identical to provisions found in similar statutes. For example, West Virginia also uses the "arbitrarily, vexatiously or not in good faith" standard to award fees under both its Business Corporation Act and Uniform Partnership Act. *See* W. Va. Code § 31D-13-1331(a)–(b)(2) (court costs and counsel fees under West Virginia's Business Corporation Act); W. Va. Code § 47B-7-1(i) (purchase of disassociated partner's interest under West Virginia's Uniform Partnership Act). Other states likewise use identical or similar language to award expenses in actions to determine the value of corporate shares or partnership interests. *See* Fla. Stat. § 620.2123(1) (court costs and counsel fees under Florida's Revised Uniform Limited Partnership Act); N.C. Gen. Stat. § 55-13-31(a) (court costs and expenses under North Carolina's Business Corporation Act); S.C. Code Ann. § 33-13-310(a) (court costs and counsel fees under South Carolina's Corporations, Partnership and Associations Act); Wash. Rev. Code § 23B.13.310(1) (court costs and counsel fees under the Washington Business Corporation Act).

While this Court has never considered what conduct constitutes "arbitrary" action meriting the award of fees under West Virginia's various business statutes, a court in Iowa has undertaken such an analysis. As with the statute here, Iowa's Business and Professional Corporations and Companies statute allows fees to be awarded when a party acts "arbitrarily, vexatiously, or not in good faith" in an action to determine the value of a dissenting shareholder's shares. *See* I.C.A. 490.1331. In *Security State Bank, Hartley, Iowa v. Ziegeldorf*, 554 N.W.2d 884 (Iowa 1996), the Supreme Court of Iowa considered whether an award of attorney's fees to a dissenting shareholder under this statute was warranted on the grounds that the company's offer was "arbitrary." Because

the Iowa statute did not define "arbitrary," the Supreme Court of Iowa elected to give the term its "ordinary meaning." *Id.* at 894. In doing so, the court looked to the dictionary for guidance and ultimately determined that "arbitrary" means "an unreasoned decision made without regard to law or facts." *Id.* Applying this standard, the court found that attorney's fees should have been awarded to a dissenting shareholder after the company offered the book value of the shares, rather than the fair value, without any "legal or factual basis." *Id.* at 895.

3. The Circuit Court Should Have Awarded Fees for Eastern's Arbitrary Conduct.

The circuit court below should have undertaken a similar analysis to that of the *Ziegeldorf* Court. The Act expressly allows an award of fees and expenses when a party behaves "arbitrarily" in an action to determine a member's interest. W.Va. Code §31B-7-702(d). While the Act does not define the terms "arbitrary" or "arbitrarily," the circuit should have applied the ordinary definition of these terms. Syl. Pt. 6, in part, *State ex rel. Cohen v. Manchin*, 175 W. Va. 525, 336 S.E.2d 171 (1984) ("Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning."). The circuit court should have then determined – as required by the Act – whether Eastern's actions were "arbitrary," as that term is ordinarily understood.

Had the circuit court undertaken this analysis, it would have had to conclude that Eastern acted "arbitrarily." Upon a member's disassociation, a company is required to purchase the member's interest for "fair value" and must make a purchase offer to do so in no more than thirty days. *See* W.Va. Code §31B-7-701(a) and (b). The offer must be accompanied by information about the company's assets, liabilities and balance sheet as well as an estimate of how the offer was calculated. W.Va. Code §31B-7-701(b). Companies that do not follow this process do so at their peril. The Act grants circuit courts authority to award reasonable expenses when a party acts

"arbitrarily, vexatiously or not in good faith" and emphasizes that such awards "may be based on the company's failure to make an offer to pay or to comply with" the Act's procedures for making an offer. W.Va. Code §31B-7-702(d).

Here, Eastern did not make an offer for "fair value" as required by the Act. Instead, its offer to Mr. Harlow was entirely arbitrary. Although Eastern routinely uses an accountant for its business affairs, it did not employ an accountant prior to making an offer to Mr. Harlow. (JA 000490). Instead, Eastern had its office manager cobble together some information about the book value of the company's assets and liabilities, and then prepared a "recast" balance sheet that arbitrarily adjusted some of these book values based on direction from the company's remaining members. (JA 000493-494). This "recast" balance sheet, however, had major deficiencies. It significantly undervalued or omitted many of the company's assets and wholly omitted significant accounts receivable due to the company.[1] (JA 000605-606). Indeed, Mr. Harlow's expert accountant would later discover that Eastern's had undervalued its assets by over $281,000.[2]

To make matters worse, Eastern then made an offer to Mr. Harlow that wasn't even tied to its flawed and "recast" balance sheet at all. Although Eastern's *own* "recast" balance sheet indicated that Mr. Harlow's interest was worth at least $60,000, Eastern offered Mr. Harlow *either* $45,500 *or* one-third of any recovery in the pending Grim matter.[3] Eastern's offer letter never

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[1] Eastern valued its assets at $756,472 using subjective values for its assets instead of obtaining or applying third party valuations. (JA 000599). For example, Eastern: assessed its real property at $120,000 despite a 2007 appraisal valuing the property at $175,000 (JA 000559-436); failed to include values for some assets altogether (e.g., a bucket truck and $125,844 in accounts receivables) (JA 000785); and deemed one debt owed by Trinity Solutions (owned in part by the two remaining Eastern members) as "uncollectible" – a decision Mr. Harlow's accountant called "self-serving."(JA 000597; 000472).

[2] Relying on appraisals and other third-party documentation, Mr. Harlow's accountant determined that Eastern's assets were actually worth $1,038,230 rather than the $756,472 claimed by Eastern – a difference of over $281,000. (JA 000788).

[3] Eastern's "recast" balance sheet showed that Eastern had net equity of $180,485.27. (JA 000599). As a one-third owner of Eastern, the value of Mr. Harlow's share would be in excess of $60,000.

revealed how Eastern calculated the $45,500 cash component of its offer.[4] But, the company's remaining members later conceded that they reached the amount by simply doubling a $20,000 offer that their lawyer had suggested, but which Eastern's remaining members felt was too low. (JA 000669).

As in *Ziegeldorf*, such an offer had no "legal or factual basis." 554 N.W.2d at 895. In *Ziegeldorf*, the defendant was found to have behaved "arbitrarily" when it based its offer on book value rather than fair value. Id. at 894. Here, Eastern behavior was even worse. It started with the book value of its assets, made some arbitrary adjustments to those book values, and then ultimately made an offer untied to either book value or fair value: $45,500 or one-third of any recovery in the Grim matter. No one can claim that this offer resembled fair value. Indeed, Eastern's *own* expert accountant ultimately opined that Mr. Harlow's interest was worth roughly $80,000 *plus* one-third of the Grim matter. (JA 000011; JA 001186; JA 001198-1199). Similarly, Mr. Harlow's expert accountant would later value Mr. Harlow's interest to be $100,000 *plus* 1/3 of the Grim matter. (JA 000011; JA 000747; JA 000765; JA 000794-796).

Eastern engaged in just the type of "arbitrary action that an award of attorney fees was meant to deter." *Ziegeldorf* at 895. The Act requires companies to offer disassociated members "fair value" for their shares. *See* W.Va. Code §31B-7-701(a) and (b).[5] Eastern, however, made

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[4] Nor did it explain why Mr. Harlow should give up his share of any recovery in the Grim matter if he accepted the $45,500.

[5] It's not clear that the circuit court understood that Eastern was under a statutory obligation to make an offer of "fair value" to Mr. Harlow. In its final order, the circuit court noted that there were numerous discovery disputes, but that Eastern had complied with the Act by "delivering a purchase offer and the mandated accompanying information to the disassociated member within thirty (30) days." (JA 000011). The circuit court's language suggests that it believed that *any* purchase offer (whether or not for fair value) met the requirements of the Act. But, when read together, W.Va. Code §31B-7-701(a) and (b) dictate that the offer must be for "fair value."

an arbitrary offer that was unsupported by any facts and then forced Mr. Harlow to litigate for nearly two years before ultimately agreeing to substantially the value sought by Mr. Harlow at the outset.[6] Mr. Harlow requests that the Court find that Eastern acted "arbitrarily" under the Act and remand this matter to the circuit court to award Mr. Harlow his reasonable expenses consistent with W.Va. Code §31B-7-702(d). In determining whether the circuit court applied the proper standard, this Court should review the issue *de novo*, as it involves a question of law.

B. The Circuit Court Erred by Failing to Find that Eastern Acted "Vexatiously or Not in Good Faith."

In addition to its failure to consider whether Eastern acted "arbitrarily," the circuit court also erred by failing to find that Eastern acted "vexatiously or not in good faith" under the Act. The circuit court so erred in two ways.

First, the circuit court again erred by applying the wrong standard. As noted above, the circuit court improperly focused on the standard for awarding fees in equity, which requires "clear and convincing" evidence of bad faith. The Act, however, imposes no heightened proof requirement. It merely requires a finding that "a party to a proceeding acted arbitrarily, vexatiously, or not in good faith." W.Va. Code §31B-7-702(d). There is no requirement under the Act that there be "clear and convincing" evidence of such conduct.[7] This Court should review the circuit court's application of the legal standard *de novo*, as it involves a question of law.

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[6] Mr. Harlow initially sought $120,000 plus one-third of any recovery in the Grim matter in May 2017 (JA 000604-604). He ultimately received $100,000 plus one-third of any recovery in the Grim matter.

[7] Petitioner does not concede that there was not "clear and convincing" evidence of bad faith or similar conduct by Eastern.

Second, the circuit court abused its discretion by finding that Eastern did not behave "vexatiously or not in good faith." As demonstrated below, there were multiple ways in which Eastern engaged in such conduct.

1. Eastern Failed to Negotiate in Good Faith.

In conjunction with his disassociation from Eastern, Michael Harlow's counsel drafted a "Disassociation Agreement" for consideration by Eastern. (JA 000584-592). The draft Disassociation Agreement provided that the parties would "meet in good faith to try to amicably arrive at a fair value" for Mr. Harlow's distributional interest and contained a provision allowing the parties to seek assistance from a "certified valuation analysist or other professional" if the parties chose to do so. Id.

Eastern's response was unproductive. It returned a largely rewritten agreement that included provisions entirely inconsistent with the Act. (JA 000584-592). In particular, Eastern demanded that Mr. Harlow agree to a non-competition clause that would prevent Mr. Harlow from working within 150 miles of his home for 36 months - an onerous condition certainly not required under the Act for Mr. Harlow to receive fair value. (JA 000593). Mr. Harlow's lawyer informed Eastern that if the non-competition clause and similar items were "serious requests," that Mr. Harlow would prefer to proceed with the valuation procedure set forth in the Act. (JA 000594). Eastern responded with the low and arbitrary offer that led to this case: it offered Mr. Harlow *either* $45,500 *or* a one-third share of any recovery in the Grim matter. (JA 000595-596). Eastern declared that the offer would remain open for only one week. Id.

Having been a member of Eastern for sixteen years, Mr. Harlow knew that Eastern's offer was not for fair value. In a letter from counsel dated May 19, 2017, Mr. Harlow pointed out that

Eastern had greatly undervalued many of the company's assets. In particular, Mr. Harlow alerted Eastern that it had:

- Undervalued the company's building and land, in a manner inconsistent with an existing appraisal in the company's possession;
- Undervalued the company's vehicles, in a manner inconsistent with the tax assessor's valuations; and
- Undervalued the company's office equipment and tools, in a manner inconsistent with the company's own balance sheet entries.

(JA 000605-607).

In an effort to resolve the matter, Mr. Harlow offered to do one of three things: accept $120,000 *plus* one-third of any recovery from the Grim matter; accept $225,000 without any recovery for the Grim matter; or agree to the appointment of a neutral third-party expert to evaluate the value of the company and Petitioner's share. (JA 000604-605).

Eastern summarily rejected this offer three days later as "unreasonable" and declared that its initial offer was its best and final offer. (JA 000611). In doing so, Eastern made no effort to respond to Mr. Harlow's concerns regarding the low values used by Eastern for its building, land, vehicles, tools and office equipment. It also again rejected Mr. Harlow's efforts to have a third-party expert value the company.

Eastern's response would prove harmful to all involved. After a great deal of costly discovery and litigation, Mr. Harlow's expert accountant, Arnett Carbis Toothman, would verify that Mr. Harlow's concerns were well grounded. In particular, Arnett Carbis Toothman found that Eastern's property and equipment were worth $409,634. (JA 000791). Eastern, however, had only valued these items at $279,413 in its "recast" balance sheet. (JA 000599). Additionally, Arnett Carbis Toothman found that Eastern had undervalued accounts receivable by an alarming $125,844. (JA 000789). In total, Arnett Carbis Toothman found that Eastern had undervalued its assets by over **$281,000**. (JA 000788; JA 000599). After adjusting for these differences, Arnett

Carbis Toothman valued Mr. Harlow's interest at $100,000 plus one-third of any recovery in the Grim matter – a number that Eastern stipulated to on the eve of trial. (JA 000011; JA 000747).

Despite all this, the circuit court found that Eastern had not negotiated in bad faith. Perhaps motivated by its mistaken belief that there must be "clear and convincing" proof of bad faith, the circuit court excused Eastern's actions. While the circuit court acknowledged that Eastern had used "perhaps not the best accounting practice" in calculating its assets, it noted that there was "no evidence that the books were 'cooked' in order to present a lower figure to Mr. Harlow." (JA 000014-15).

Petitioner respectfully submits that evidence of accounting fraud should not be necessary to show that a party has failed to negotiate in good faith under the Act. Under the Act, Eastern was required to offer Mr. Harlow "fair value" for his membership interest. But, as established above, Eastern made an initial offer that bore no relationship to the actual value of the company's assets. Even if this offer was simply a result of poor accounting practices (Mr. Harlow disputes this) Eastern had an opportunity to quickly correct the problem. As detailed above, Mr. Harlow pointed out serious concerns with Eastern's valuation methods at the outset. Additionally, Mr. Harlow suggested hiring a neutral third-party expert to help the parties value the company.

But Eastern summarily rejected all of this. It never responded to Mr. Harlow's concerns and rejected his early efforts to have a third-party expert value the company. Instead, Eastern doubled down on its initial, arbitrary offer and battled until the eve of trial, almost two years later. Only then did it finally concede that Mr. Harlow was entitled to $100,000 plus one-third of any recovery in the Grim matter.

All of this is ample evidence that Eastern failed to negotiate in good faith. But as described below, there is even more.

2. Eastern Resisted Providing Mr. Harlow With Accurate Information.

The Act insures that former members of a limited liability company have access to relevant company information. W.Va. Code §31B-4-408(a) expressly provides that the "company shall provide former members and their agents and attorneys access for proper purposes to records pertaining to the period during which they were members." Despite this, Eastern resisted providing Mr. Harlow with information necessary to value his membership interest.

After Eastern broke off negotiations in May 2017, Mr. Harlow engaged Arnett, Carbis Toothman to help him value his membership interest. To perform this task, Arnett, Carbis Toothman generated information requests in October and November 2017. (JA 000614-619). Several of these requests were aimed at determining whether there were accounts receivable owed to the company beyond those identified in the company's May 12, 2017 offer to Mr. Harlow. Id. In particular, Arnett, Carbis Toothman sought information about work in progress at the time of Mr. Harlow's disassociation from the company on April 14, 2017. Id.

Eastern, however, resisted providing information about its accounts receivable for April 2017. First, in response to Arnett, Carbis Toothman's 2017 requests, and then in response to Petitioner's formal discovery requests in June 2018, Eastern repeatedly provided cursory information claiming that there were only limited accounts receivable for April 2017. (JA 000411-414). But, Mr. Harlow knew better, having been one of Eastern's members. So, Mr. Harlow subpoenaed the records of clients Eastern was performing work for in April 2017. (JA 000288-291).

Tellingly, Eastern sought to quash these subpoenas. (JA 000296). But its efforts were to no avail. One customer (Sustainable Modular) responded to the subpoena prior to a September 18, 2018 hearing on the motion to quash. Id. Another customer (Brookfield) responded

subsequently on February 1, 2019. (JA 000430). Both responses revealed substantial missing accounts receivable for April 2017. (JA 000293-296; JA 000424; JA 000434). Additionally, the circuit court granted a motion to compel that resulted in Eastern providing an additional 2000 pages of information pertaining to the missing accounts receivables for Sustainable Modular and Brookfield on April 5, 2019. (JA 001785 – JA 000429).

After undergoing these extraordinary efforts, Mr. Harlow learned what he had suspected from the outset: Eastern had not disclosed all accounts receivable due to the company at the time of Mr. Harlow's disassociation. After finally receiving adequate records in April 2019, Mr. Harlow's expert accountant Arnett, Carbis Toothman opined that Eastern's accounts receivable were actually **$125,844** greater than Eastern had revealed when making its initial offer to Mr. Harlow. (JA 000789).

Eastern did not act in good faith. Mr. Harlow, as a former member of the company, was entitled to information about the company's accounts receivable during Mr. Harlow's tenure at the company. Eastern not only resisted providing this information, but actively sought to prevent its disclosure. It unsuccessfully sought to quash subpoenas issued to Eastern's customers and had to be compelled by the circuit court to allow Mr. Harlow and his accountant to review Eastern's records. If Eastern had simply shared information in good faith, litigation expense could have been avoided by both parties.

3. Eastern Needlessly Sought to Disqualify Mr. Harlow's Wife from Assisting Him.

Rather than negotiate in good faith or provide information allowing accountants to value the company, Eastern focused its efforts on pointless battles. In particular, Eastern launched an unnecessary effort to keep Mr. Harlow's wife (who is an attorney) from providing Mr. Harlow with legal assistance.

Prior to Mr. Harlow's disassociation from Eastern, it was sued in a prevailing wage case.[8] Because Mr. Harlow was one of three members of Eastern and the main witness for Eastern at trial, Ms. Harlow provided some assistance to Eastern in its defense. Ms. Harlow did not charge for her services.

Unfortunately, Eastern would later use Ms. Harlow's free assistance against her. Two months before the trial date below, Eastern filed a motion to disqualify Ms. Harlow from assisting her husband on the grounds that she had previously represented Eastern in the "substantially related" prevailing wage matter. The circuit court ultimately disqualified Ms. Harlow from formally representing her husband at trial, but did allow her to communicate with her husband's lawyer. (JA 001428 – 1431).

Eastern's efforts were purely tactical. Ms. Harlow had not acquired any confidential information that would be used against Eastern at trial. Mr. Harlow had long been a member of Eastern and was familiar with the company's assets and liabilities. As such, there was no danger that Ms. Harlow would share confidential information that Mr. Harlow did not already have, nor was there any danger that Eastern would be disadvantaged in any way.

Accordingly, the motion to disqualify Ms. Harlow should have never been pursued and should have been denied. Rule 1.9(a) of the West Virginia's Rules of Professional Conduct provides that "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person *in the same or substantially related* matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." Rule 1.9(a) (emphasis added).

[8] This case was the precursor to the Grim matter, in which the company now seeks recovery in the West Virginia Court of Claims.

In determining whether matters are "substantially related," courts have frequently focused on whether the lawyer could have acquired any confidential information during the earlier representation that could be used against the former client in the subsequent representation. *See, e.g., Kaselaan & D'Angelo Assocs., Inc. v. D'Angelo*, 144 F.R.D. 235, 241 (D.N.J. 1992); *People v. Frisco*, 119 P.3d 1093, 1096 (Colo. 2005) (en banc); *State ex rel. Wal-Mart Stores, Inc. v. Kortum*, 559 N.W.2d 496, 501 (Neb. 1997).

Consistent with this, West Virginia focuses on whether confidential information could be used against a former client when determining whether matters are "substantially related." In 2015, this Court amended Rule 1.9 and added Comment [3] specifically to define "substantially related" as follows:

> Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute *or if there otherwise is* a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

West Virginia Rules of Professional Conduct, Effective January 1, 2015, As Amended by Order: September 29, 2014 ("2015 Professional Rules")(*emphasis added*). Comment [3] further states that:

> Information *that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying.*

Id. (emphasis added).

Applying this test, Ms. Harlow should not have been disqualified. The prevailing wage case did not involve "the same transaction or legal dispute" as Mr. Harlow's action to value his membership interest. And the free assistance Ms. Harlow provided the company in the prevailing wage case did not provide her with confidential information she could use against the company on behalf of her husband. Indeed, any information Ms. Harlow learned about Eastern was already

known by her husband. This is important because information "that has been disclosed . . . to other parties adverse to the former client will ordinarily not be disqualifying." *Id.*

Of course, Eastern understood all this. Its efforts to disqualify Mr. Harlow's wife were purely tactical and are but another example of its failure to act in good faith. The circuit court erred as a matter of law when it found that Ms. Harlow should be disqualified and abused its discretion by failing to award Mr. Harlow his fees and costs for Eastern's pursuant of Ms. Harlow's disqualification.[9] The circuit court's disqualification ruling should be reviewed *de novo* and the court's failure to grant fees should be reviewed under the abuse of discretion standard.

VI. CONCLUSION

Petitioner Michael D. Harlow respectfully requests that this Honorable Court reverse the circuit court's June 19, 2019 order denying fees and costs to Mr. Harlow and remand this matter to the circuit court so that it may calculate the reasonable fees and costs to be awarded to Mr. Harlow. In conjunction with this request for relief, Petitioner also requests that this Honorable Court reverse the circuit court's April 29, 2019 *Order On Defendant's Motion to Disqualify Martha Harlow,* which the circuit court, in part, relied upon in denying Mr. Harlow's request for fees and costs.

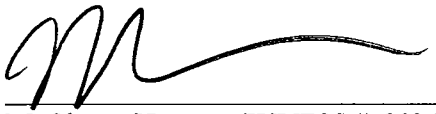
[9] The circuit court relied on its April 29, 2019 *Order On Defendant's Motion to Disqualify Martha Harlow* to determine that Eastern had not engaged in bad faith and to deny Mr. Harlow's request for fees and costs in its June 19, 2019 order. JA 000016. Accordingly, Petitioner has also appealed the April 29, 2019 order in his effort to obtain his reasonable fees and costs.

Respectfully submitted,

MICHAEL D. HARLOW

By Counsel

JACKSON KELLY PLLC



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0643

MICHAEL D. HARLOW

Plaintiff Below/Petitioner,

v. **(On Appeal from the Circuit Court of Nicholas County, No. 17-C-149)**

EASTERN ELECTRIC, LLC.

Below Defendant/Respondent.

CERTIFICATE OF SERVICE

I, M. Shane Harvey, counsel for Petitioner, Michael D. Harlow, do hereby certify that I have served ***Petitioner's Brief*** on all parties by depositing a true and exact copy thereof, in the United States Mail, postage paid, addressed to counsel of record at the addresses listed below on this the 28th day of October 2019:

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