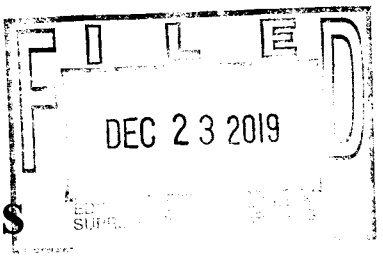

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 REPLY BRIEF

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December 23, 2019

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I. ARGUMENT

A. Eastern Made an Arbitrary Offer to Purchase Mr. Harlow's Interest.

The West Virginia Uniform Liability Act (the "Act") requires limited liability companies to purchase the interest of departing members for "fair value" and authorizes circuit courts to award fees and expenses when a company behaves "arbitrarily" in negotiating the purchase.

In his brief, Petitioner Michael D. Harlow demonstrated that Respondent Eastern Electric, LLC ("Eastern") made an arbitrary offer to purchase Mr. Harlow's one-third interest in Eastern. To recap, Eastern offered Mr. Harlow either $45,500 or a one-third share of any recovery in the Grim matter. This offer was *not* based on Eastern's balance sheet or income statements. Instead, Eastern arrived at the $45,500 figure by simply doubling a $20,000 offer which its lawyer recommended, but which Eastern's members decided was too low. Petitioner's Br. at 9-12.

This offer could not have been more arbitrary. The amount was not only unsupported by Eastern's balance sheet, but was actually *inconsistent* with Eastern's balance sheet. Eastern's own expert opined that Mr. Harlow's interest was worth roughly $80,000 plus a one-third interest in the Grim matter and Eastern subsequently stipulated that Mr. Harlow's interest was worth $100,000 plus a one-third interest in the Grim matter.

Tellingly, Eastern makes *absolutely no effort* in its brief to explain its arbitrary offer. While it loudly protests that the offer was not arbitrary, it provides no basis for this Court to reach that determination. At no point does Eastern tie its offer of $45,500 to a balance sheet or income statement or financial document of any kind. Indeed, Eastern carefully avoids *even mentioning* the amount of the offer in its brief, knowing that it cannot explain the basis for its $45,500 offer.

Eastern does offer excuses for its arbitrary offer. It claims, for example, that it was confused about how to quantify its accounts receivable and that it had concerns about paying the judgment in a prevailing wage lawsuit. But neither of these issues prohibited Eastern from making a fair and reasoned offer to Mr. Harlow. Indeed, *even when* Eastern factored in the payment of the prevailing wage judgment and *even when* Eastern applied an understated value to its accounts receivable, Eastern's balance sheet *still showed* that the value of Mr. Harlow's interest was worth at least $60,000. *See* Petitioner's Br. at 10. Eastern could have offered this amount and even sought a payment plan from Mr. Harlow if it was concerned about its ability to stay in business.[1] But instead, Eastern offered only $45,500 in cash to Mr. Harlow for reasons that were never explained.

Eastern also suggests that Mr. Harlow "bore significant responsibility" for the prevailing wage verdict and that Eastern's remaining members deserve credit for choosing the "honorable path forward" by remaining at Eastern to pay the verdict. Eastern's Br. at 7. This self-serving narrative is both unsupported by the record and simply incorrect. Mr. Harlow's accountant opined that Mr. Harlow's interest should be reduced by the prevailing wage verdict and Mr. Harlow never argued otherwise. Mr. Harlow therefore willingly paid for his share of the prevailing wage verdict and there is nothing "honorable" about Eastern's efforts to use that verdict as an excuse to pay Mr. Harlow less than fair value for his interest.

Finally, Eastern cites case law for the proposition that having "widely divergent opinions" on fair value is not a basis for awarding attorney fees. *See* Eastern's Response at 30,

[1] Notably, the Act contemplates that it may be difficult for companies to make payments and permits circuit courts to order "installment payments.' W.Va. Code §31B-7-702(a)(1). However, the Act ultimately mandates that companies "shall" pay "fair value." W.Va. Code §31B-7-701(a)(1).

citing *Lincoln Provision, Inc.* 2013 WL 6263475 at *9.[2] But Eastern misses the point. Mr. Harlow is not seeking fees simply because Eastern had a *different* opinion on the value of the company. Mr. Harlow is seeking fees because Eastern made an arbitrary offer that had no basis whatsoever. No one held an opinion that Mr. Harlow's interest was worth only $45,500. If Eastern had made an initial offer consistent with the opinion of its expert accountant, the parties would likely not be before this Court.[3]

Plainly, Eastern's offer was arbitrary and caused Mr. Harlow to generate exorbitant fees and expenses to recover the fair value of his interest in Eastern. Eastern does not even put up a fight on this issue.

B. Eastern Cannot Avoid Fees and Expenses Simply by Submitting an Arbitrary Offer in a Timely Fashion.

Because it cannot explain or justify the purchase offer it made to Mr. Harlow, Eastern tortures the language of the Act to suggest that "any" purchase offer – no matter how arbitrary – is acceptable as long as it is made on time and in compliance with other procedural requirements of the Act. This argument is without merit.

Under the Act, a company is required to purchase a departing member's interest for "fair value." W.Va. Code §31B-7-701(a). To accomplish this requirement, the Act requires the company to make a purchase offer to the member within thirty days, together with information about the company's assets, liabilities and balance sheet as well as an "explanation" of how the offer was calculated. W.Va. Code §31B-7-701(b).

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[2] Eastern elsewhere argues that *Lincoln Provision* stands for the proposition that attorney fees are not appropriate "even when the company made no initial purchase offer at all." Eastern's Br. at 25. The court in *Lincoln Provision* made no such finding. In that case, neither party sought fees and the court never examined whether fees should be awarded when no initial purchase offer was made.

[3] Eastern's accountant valued Mr. Harlow's interest at roughly $80,000 plus one-third of the Grim matter, compared to the value of $100,000 plus one-third of the Grim matter reached by Mr. Harlow's expert accountant.

Eastern argues that it cannot be held liable for fees and expenses as long as it submitted a timely purchase offer accompanied by the financial information required under the statute. Eastern's argument appears to be based on two contentions. First, Eastern suggests that a fee award under W.Va. Code §31B-7-702(d) "may" only be based on the failure to make a timely offer in compliance with W.Va. Code §31B-7-701(b). And, second, Eastern suggests that *any* purchase offer – no matter how arbitrary – complies with W.Va. Code §31B-7-701(b) as long as the offer is made on time and includes the required financial information.

Both of Eastern's contentions are faulty. First, the language of W.Va. Code §31B-7-702(d) does *not* limit fee awards to situations in which the requirements of W.Va. Code §31B-7-701(b) have been violated. The statute provides as follows:

> 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 [§ 31B-7-701] (b).

W.Va. Code §31B-7-702(d) (*emphasis added*). This permissive language merely says that fees "may" be "based on the company's failure to make an offer or to comply with" W.Va. Code §31B-7-701(b), but it does *not* rule out fee awards for other reasons. Indeed, if Eastern were correct, fees could only be sought *from* the company and not *by* the company. But the statute plainly provides that *any* party (including the company) can seek fees and expenses. In fact, Eastern sought fees and expenses in the action below.[4]

Second, there is no merit to the argument that *any* offer – no matter how arbitrary or unreasonable – satisfies the requirements of the Act. Under W.Va. Code §31B-7-701(a), a company is *required* to purchase a member's interest for "fair value." To achieve this requirement,

[4] Eastern's request for fees was denied by the circuit court. JA 00012-14. Eastern did not appeal that denial.

W.Va. Code §31B-7-701(b) requires the company to make a purchase offer within thirty days, complete with financial records and an explanation of how the offer was calculated. These statutory provisions must be read in concert. *Boley v. Miller*, 187 W. Va. 242, 247 (1992) ("A cardinal rule of statutory construction compels us to consider any section in the context of the entire statutory scheme to which it relates"). Plainly, the Legislature intended the "offer" required by Section 701(b) to motivate the purchase for "fair value" required by Section 701(a).

To this end, the Legislature requires companies to provide financial information as well as an "explanation" of how the offer is calculated, so that the departing member can evaluate the fairness of the offer. W.Va. Code §31B-7-701(b). It would make no sense for the Legislature to require a company to document and explain an unreasonable or arbitrary offer. *See State v. Kerns*, 183 W. Va. 130, 135 (1990) (courts have a duty "to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results"). Plainly the Legislature contemplated a *reasoned* offer, not an arbitrary one.

Indeed, the *entire purpose* of the fee shifting provision in W.Va. Code §31B-7-702(d) is to motivate parties to act in good faith. The drafters of the Uniform Limited Liability Act of 1996 (upon which West Virginia's statute is based) commented that the "power of the court to award costs and attorney's fees incurred in the suit under subsection (d) is an incentive for both parties to act in good faith." *See* Comment to Section 702, Uniform Limited Liability Company Act (1996). Consistent with this, courts interpreting similar statutes have found that an arbitrary purchase offer is just the type of "arbitrary action that an award of attorney fees was meant to deter." *Security State Bank, Hartley, Iowa v. Ziegeldorf*, 554 N.W.2d 884, 895 (Iowa 1996) (applying similar statute).

Eastern cannot reasonably argue that a company can avoid fees by making an arbitrary offer as long as the offer is made on time and includes required financial information.[5]

C. The Circuit Court Failed to Award Fees for Arbitrary Conduct Because It Applied the Wrong Standard.

As Petitioner explained in his initial brief, at least one court applying a statute similar to W.Va. Code §31B-7-702(d) has concluded that fees and expenses should be awarded when a company makes an "arbitrary" offer. *See Security State Bank, Hartley, Iowa v. Ziegeldorf*, 554 N.W.2d 884 (Iowa 1996).

Here, however, the circuit court never considered whether to award fees for Eastern's "arbitrary" behavior pursuant to W.Va. Code §31B-7-702(d). Instead, the circuit court applied the standard for awarding fees in equity, which requires "clear and convincing" evidence that "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). Specifically, in denying fees and expenses to Mr. Harlow, the circuit court ruled 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. The circuit court never analyzed whether Eastern's offer was "arbitrary," as the Court did in *Ziegeldorf*.

To mask this failure, Eastern argues that an award of fees and expenses is "discretionary." But Eastern misses the mark. Mr. Harlow does not dispute that fee awards are discretionary. However, that does not mean that the circuit court had the discretion to apply the wrong legal standard. Questions of law are decided by this Court *de novo*. If this Court determines

[5] Mr. Harlow does not concede that Eastern complied with W.Va. Code §31B-7-701(b). For example, that statute requires the company to explain how it calculated the offer. As explained above, Eastern never explained the basis of its $45,500 cash offer. It likewise never explained why Mr. Harlow should forego his share of any recovery in the *Grim* matter.

that the circuit court failed to apply the proper standard for awarding fees under the Act and that Eastern behaved arbitrarily, it can and should remand this matter to the circuit court to determine the size of the fee award. *See Ziegeldorf* at 895 (concluding that company acted arbitrarily and remanding to lower court to calculate fee award).

Eastern also defends the circuit court's use of a "clear and convincing" standard to determine whether fees and expenses should be awarded. To be clear, Mr. Harlow believes there *is* clear and convincing evidence that Eastern behaved arbitrarily and Mr. Harlow stated so in briefs below.[6] However, Mr. Harlow does not need to meet the "clear and convincing" standard to prevail under W.Va. Code §31B-7-702(d). West Virginia expressly requires "clear and convincing" proof in special circumstances, such as in claims for punitive damages in civil trials. *See* W.Va. Code §55-7-29. However, given that W.Va. Code §31B-7-702(d) imposes no specific evidentiary burden, this matter should be governed by the preponderance of the evidence standard applicable to most civil claims. *See Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 557* (2014) (rejecting application of "clear and convincing" standard to attorney fee-shifting provision in Patent Act, noting that the statute "imposes no specific evidentiary burden, much less such a high one").

In summary, if the Legislature wished for fees to be awarded only when the clear and convincing standard for awarding fees in equity is met, the Legislature would not have enacted W.Va. Code §31B-7-702(d). The statute would have been unnecessary, as circuit courts *already* have the inherent equitable power to award fees when there is clear and convincing evidence of vexatious or oppressive conduct. It must be presumed that the Legislature sought to enact a

[6] Below, Mr. Harlow argued that there was clear and convincing evidence that Eastern's conduct justified an award of fees under both the statutory standard and the evidentiary standard. However, Mr. Harlow never argued that clear and convincing proof was required under W.Va. Code §31B-7-702(d).

separate standard in which fees are awarded when there is a preponderance of evidence that a party has behaved "arbitrarily." *See Octane Fitness* at 557-558 (refusing to construe fee-shifting provisions narrowly on the basis that doing so would render them superfluous to a court's inherent power to award fees).

This matter must be reversed and remanded because the circuit court failed to apply the standard that the Legislature intended.

D. Eastern Acted "Vexatiously or Not in Good Faith."

In his initial brief, Mr. Harlow argued that Eastern not only acted "arbitrarily," but also "vexatiously or not in good faith" by failing to negotiate in good faith, by not providing accounts receivable information to Mr. Harlow and by seeking to disqualify Mr. Harlow's wife (who is an attorney) from assisting him.

To be clear, Mr. Harlow does *not* need to prevail on these additional arguments to be entitled to fees. The statute provides that fees can be awarded when a company acts "arbitrarily, vexatiously *or* not in good faith." W.Va. Code §31B-7-702(d)(*emphasis added*). In *Ziegledorf*, the court applied a similar statute and found that an arbitrary offer alone justified a fee award. *See Security State Bank, Hartley, Iowa v. Ziegeldorf*, 554 N.W.2d 884 (Iowa 1996).

However, Mr. Harlow maintains that Eastern also behaved "vexatiously or not in good faith" and briefly replies to Eastern's arguments to the contrary as follows:

1. Eastern Did Not Negotiate in Good Faith.

Eastern recites the history of offers and counteroffers between the parties in an effort to show that Eastern negotiated in good faith. But its summary lacks context.

While Eastern did progressively increase its offers to Mr. Harlow, it was not until January 2019 that Eastern made an offer that was even supported by Eastern's own financial

records. At that time, Eastern offered $95,000 plus one-third of any recovery in the Grim matter. This was the *first time* that Eastern made an offer that matched or exceeded the opinion of Eastern's own expert, who opined that Mr. Harlow's interest was worth roughly $80,000 plus a one-third interest in the Grim matter. This January 2019 offer occurred *nearly two years after* Mr. Harlow left the company in April 2017. During that nearly two-year period, Mr. Harlow incurred substantial attorney fees and expenses that were not addressed by the January 2019 offer.[7]

Eastern suggests that it actually made a "six-figure" offer much earlier than this, but the evidence on this point does not support Eastern's position. In its brief, Eastern states that it made a $75,000 offer to Mr. Harlow in May 2018 and that its lawyer Tom Ewing "advised that Eastern would be willing to pay up to six figures ($100,000) to resolve this case." Eastern's Br. at 17. Here is Mr. Ewing's actual testimony:

> A. At the time of the $75,000 offer was made, we had discussions about – understand that this is like based on where his clients were at the time, and we understood that this likely was not going to settle it, and I foreshadowed to him that I believed I could get to a six-figure number, but probably no more than that. I mean, I didn't officially extend that, but I let him know trying to figure out once he got a response from his client, are we going to be able to get this resolved, because my whole thing for the longest time was we just need a value and figure out how we get this resolved.

JA at 00383-384. Contrary to Eastern's claims, Mr. Ewing's testimony makes it clear that Eastern "didn't officially extend" an offer of $100,000 in May 2018 and that its official offer was actually one that Eastern "understood . . . was not going to settle" the case. Indeed, the $75,000 "official" offer still did not include any amount for Mr. Harlow's potential recovery in the Grim matter. The testimony cited by Eastern hardly proves that it negotiated reasonably.

[7] The January 2019 offer also required additional concessions on Mr. Harlow's part that were not required by the Act.

2. Eastern Resisted Providing Accounts Receivable Information.

In its initial brief, Mr. Harlow argued that Eastern showed a lack of good faith by resisting Mr. Harlow's efforts to obtain information about Eastern's accounts receivable.

In its response, Eastern provides its very lengthy account of how numerous discovery and procedural disputes were addressed below and alleges that it complied with all the circuit court's discovery orders. But Eastern cannot deny that it failed to provide full information about its accounts receivable. Even Eastern's own expert accountant had to revise his expert report in April 2019 to include missing accounts receivable that were not revealed until Mr. Harlow received subpoenaed records from Eastern's customers in February 2019. JA 001188.[8] The fact that Eastern was never sanctioned by the circuit court does not prove that Eastern acted in good faith.

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

In its initial brief, Mr. Harlow argued that Eastern acted "vexatiously or not in good faith" by seeking to disqualify Mr. Harlow's wife (an attorney) for purely tactical reasons.

Notably, Eastern never really denies in its response that its motives were purely tactical.[9] At no point does Eastern argue that it had a concern that Ms. Harlow was sharing company secrets with Mr. Harlow or that Ms. Harlow's assistance to Mr. Harlow was disadvantaging Eastern in any way.

But, Eastern continues to maintain that Ms. Harlow should have been disqualified because her prior representation of Eastern was "substantially related" to her representation of Mr. Harlow. In doing so, Eastern argues that Mr. Harlow is seeking to have this Court "overrule"

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[8] Ultimately, Eastern's expert found that Eastern's books understated Eastern's accounts receivable by $124,111. JA 001188.

[9] In an effort to lend weight to its argument that it has not acted "vexatiously or not in good faith," Eastern notes (in passive voice) that the Office of Disciplinary Counsel "has opened an investigation" into Ms. Harlow's representation of Mr. Harlow. Eastern's Br. at n. 4. To be clear, ODC opened the investigation at Eastern's urging.

State ex rel. Keenan v. Hatcher, 210 W.Va. 307, 557 S.E.2d 361 (2001) and instead apply this Court's definition of "substantially related" in Comment [3] to Rule 1.9(a). *See* Eastern's Br. at 36-37.

But this is not true. While Petitioner believes that Comment [3] provides greater clarity on whether matters are "substantially related," Petitioner is *not* arguing that the Court must overrule *State ex rel. Keenan.* Petitioner maintains that disqualification is also not warranted under the ruling set forth in that case. In *State ex rel. Keenan*, this Court ruled that "the primary focus of the substantial relationship test is on the potential danger that an adverse relationship with a former client may jeopardize the confidentiality of information communicated during the prior representation." *State ex rel. Keenan v. Hatcher*, 210 W.Va. at 313. And, the Court clarified that the substantial relationship test "involves a realistic appraisal of the possibility that confidences had been disclosed in the one matter which will be harmful to the client in the other." *Id.* at 314 (*citing Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 2224 (7th Cir. 1978)). Here, as Petitioner demonstrated in his initial brief, there was no danger that Ms. Harlow would share material information from Eastern that Mr. Harlow did not already have as a member of Eastern during the prior matter and the main witness at trial. Indeed, Eastern points to no such information in its response brief.[10]

Eastern appears to believe that matters are "substantially related" whenever there are some overlapping facts between the two representations. However, that is not the test. In Comment [3] to Rule 1.9(a), this Court provided the following example:

[10] Eastern argues that Ms. Harlow's "joint representation" of Mr. Harlow and Eastern did not permit her to forward file materials to Mr. Harlow after the parties became adverse. Eastern's Br. at 38. But Eastern cites no law for this proposition. Mr. Harlow maintains that a client or former client is always entitled to all documents from his lawyer's file and may further direct that those documents be forwarded to new counsel.

> a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, *the lawyer would not be precluded,* on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction from nonpayment of rent.

Rule 1.9(a), Comment [3]. Here, Ms. Harlow assisted Eastern in its defense of a prevailing wage claim, but has not subsequently taken a position on prevailing wage issues in opposition to Eastern.[11]

Finally, Eastern raises a new argument that was not considered by the circuit court below. Specifically, Eastern argues that Ms. Harlow should have also been disqualified under Rule 1.7 for having a concurrent conflict of interest. Petitioner strongly disagrees that there was concurrent representation of Eastern and it is inappropriate for Eastern to raise the issue now when it did not seek a ruling or create a record on the issue below.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner maintains his position that oral argument in this matter is appropriate for the reasons stated in Petitioner's initial brief.

III. 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*

[11] *See State ex rel. Keenan* at n8 (substantial relationship test "prohibits a lawyer from undertaking a representation that involves an attack on the work that was performed for a former client").

Martha Harlow, which the circuit court, in part, relied upon in denying Mr. Harlow's request for fees and costs.

Respectfully submitted,

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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 Reply 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 23rd day of December 2019:

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