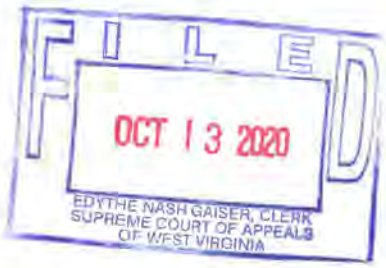

No. 20-0685

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHRISTOPHER CHAFIN, M.D., AND CHEAT LAKE URGENT CARE, PLLC,

PETITIONERS,

V.

DAVID ANDERSON, BRIAN BOAL, BOAL & ASSOCIATES, P.C., GILLEN ENTERPRISE, LLC, AFFORDABLE CONTRACTORS, LLC, AND BUILD IT, LLC,

RESPONDENTS.

In The Circuit Court of Monongalia County, West Virginia
The Honorable Susan B. Tucker
C.A. No.: 16-C-547

RESPONDENTS' BRIAN BOAL AND BOAL & ASSOCIATES, P.C. BRIEF

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I. QUESTIONS PRESENTED

A. Whether an extraordinary Writ of Prohibition should be issued where the circuit court committed no clear error in granting Respondent's Motion to Strike Plaintiffs' Expert Disclosure filed ten months beyond the deadline for the disclosure of expert opinions in violation of three scheduling orders?

B. Whether an extraordinary Writ of Prohibition should be issued based upon Petitioners' claim that circuit court Judge Susan B. Tucker's order granting Respondent's Motion to Strike Petitioners' Expert Disclosure was the result of personal animus harbored by Judge Tucker against Petitioners' counsel, where this Court previously denied Petitioners' Motion to Disqualify the circuit court judge in this matter based upon the same allegations of the judge's personal animus against Petitioner's counsel?

II. STATEMENT OF THE CASE

By way of brief background, on October 27, 2016, Petitioner Christopher Chafin ("Chafin"), part owner of Cheat Lake Urgent Care ("CLUC") (collectively "Petitioners"), commenced this action against David Anderson ("Anderson"), another part owner of CLUC, alleging that Anderson embezzled funds from CLUC. Chafin, subsequently filed an Amended Complaint naming Respondents Brian R. Boal and Boal and Associates, P.C. (collectively "Boal") as defendants and later filed a Second Amended Complaint naming CLUC as a plaintiff. The gravamen of the claims asserted against Boal in this action are that Boal failed to discover Anderson's defalcations in the nature of embezzling funds from CLUC and failed to ensure payment of Chafin's personal income taxes. The Second Amended Complaint, although devoid

of factual specificity as to the complained-of conduct of Boal, alleges that Boal was retained by CLUC to provide accounting and tax services to the practice, and to provide personal accounting and tax services to Chafin individually. Petitioners allege that Boal handled payroll for CLUC, and was responsible for the withholding of salary in order to pay federal and state taxes, as well as the filing and paying of taxes. Petitioners allege that past practices, as well as statements and representations, led Petitioners to believe that a portion of Chafin's salary had been withheld in order to pay at least a portion of his income taxes. Chafin alleges that because Boal did not pay his income taxes from money withheld from his paycheck, the Internal Revenue Service has attempted to collect, and is in the process of collecting money from him. Petitioners further allege that Boal failed to discover that Anderson had embezzled money from CLUC.

The Second Amended Complaint sets forth multiple counts against Boal, including breach of contract, negligence, accounting malpractice, negligence, negligent misrepresentation, and constructive fraud. Almost identical averments are alleged against Boal in each count, including, *inter alia*, failing to provide accounting and tax services to Petitioners in accordance with generally accepted accounting principles (GAAP), failing to perform a number of accounting duties, failing to pay Chafin's income taxes and failing to discover Anderson's embezzlement of funds from CLUC.

On Dec 6, 2018, the circuit court conducted a scheduling conference in accordance with W.Va.R.Civ.P. 16(a). Following the conference, the circuit court entered a Case Scheduling Order dated December 6, 2018, *inter alia*, setting forth a May 9, 2019 deadline for the Petitioners "to disclose trial experts". A.R. at 403. On May 1, 2019, Petitioners disclosed the identities of two experts, both certified public accountants, but did not provide any substantive facts or

opinions of the expert witnesses to which either expert was expected to testify. A.R. at 3. The circuit court's procedure requires that the disclosure of expert witnesses comply with W.Va.R.Civ.P. 26(b)(4)(A), which provides, in part, that a party must state the "subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion". Consequently, the Petitioners' disclosure was utterly deficient.

Following a scheduling conference held on June 18, 2019, the circuit court issued an Amended Case Scheduling Order on June 19, 2019, requiring Petitioners to "supplement trial experts' opinions" by August 9, 2019. A.R. at 407. In addition to the requirements of the Scheduling Orders, on May 25, 2017, Boal had served Interrogatories and Requests for Production of Documents on Petitioners. Interrogatory No. 10, in particular, requested information concerning Petitioners' experts' opinions, which reads, in part; "With respect to any expert witness that you expect to call at trial; (a) Give a complete statement of all opinions expressed by that expert and reasons and basis therefore." Petitioners failed to produce the information requested by Interrogatory No. 10 concerning their experts' opinions.

On June 14, 2019, Boal filed a Motion for Sanctions and to Compel Compliance with Court Order and Motion to Compel Complete Answers to Interrogatories and a Motion to Select Alternative Date for Trial. A hearing on the aforementioned motions was noticed to be held on August 8, 2019. A.R. at 178. At the hearing, for reasons unrelated to the discovery motion, the circuit court granted Boal's Motion to Select Alternative Date for Trial and directed the court's clerk to work with counsel to prepare a Second Amended Scheduling Order. A.R. at 199. The clerk and counsel engaged in dialogue which resulted in the preparation and entry of a Second

Amended Scheduling Order. Significantly, in the order, the date for disclosure of Petitioners' trial expert opinions continued to be August 9, 2019 and the order explicitly required Petitioners' to disclose "supplemental trial experts' opinions" by that date. A.R. at 411. Petitioners failed to disclose their experts' opinions prior to the deadline and, in fact, allowed months to pass without disclosing their experts' opinions.

By correspondence of October 23, 2019, Petitioners' counsel produced a preliminary report of Andrew Smith, CPA, which counsel indicated would establish the embezzlement, which has no relevance to Respondent Boal's liability in this matter. Counsel indicated that Petitioners' standard of care expert would provide a report after Mr. Smith's report was finalized. A.R. at 523. In response, by correspondence of November 7, 2019, Counsel for Respondent Boal advised counsel for Petitioner that the report of Petitioners' standard of care expert report was three months past due at that point and objected to the untimeliness of Petitioners' production of their expert reports. A.R. at 703.

Six months after the August 9, 2019 deadline had passed, having received no notice of any justification for Petitioners' failure to comply with the deadline, on February 4, 2020, Boal filed a Motion in Limine to Preclude Expert Testimony, asserting as the basis Petitioners' flagrant disregard of the very explicit August 9, 2019 deadline for the disclosure of "supplemental expert opinions". A.R. at 397. Despite the filing of the Motion in Limine, Petitioners continued to ignore the deadline and did not disclose the opinions of their liability expert. Petitioners responded to the Motion in Limine asserting inane, vacuous and woefully inadequate excuses for their failure to timely disclose their expert's opinions. *Inter alia,* plaintiffs advanced an assertion that a retainer check and certain other documents had been sent

to Charles Russo on July 15, 2019, but provided no justification or any information whatsoever as to why Petitioners did not attempt to obtain an opinion from Mr. Russo until almost one year later. They also made the alarming claim that Respondents are somehow responsible for Petitioners' obviously dilatory conduct, because Boal requested a two week extension of time to gather and produce documents in order to respond to Petitioners' request for production of documents when the request was not even served on Boal until November 22, 2019, four months after the August 9 disclosure deadline. Ultimately, Boal did provide the documents on January 6, 2020. Although Petitioners claim that these documents were necessary to develop their expert opinion, that contention is utterly vacuous. Plaintiffs still did not serve their expert report for an additional five months after the documents were produced. And when they did serve their expert report on June 23, 2020 (ten months after the August 9 deadline), it literally made no mention of the documents in question. See Report of Expert Charles Russo, dated June 1, 2020 (the "Report"). A.R. at 479. In the meantime, Petitioners never requested an extension of the disclosure deadline, they never sought leave from the circuit court to file an untimely disclosure; nor did they offer any excuse or explanation for the flagrant disregard of the circuit court's scheduling orders; nor any apology to the circuit court for missing the deadline by 10 months. Petitioners have exhibited utter contumacy for the circuit court's authority to fix deadline; as though the deadlines imposed by the Court was not binding and they were free to establish their own deadlines for the disclosure of their experts' opinions.

Aside from the egregious untimeliness of its disclosure, the Expert Report is incomprehensible, prolix, disorganized and confused. Not surprisingly, it is based on nothing of record. The Report is divorced from any reasoned discussion of the standard of care and duties

owed by Boal under the circumstances. Over 14 pages of the Report are devoted to a recitation of various accounting and tax preparer standards without any discussion as to how they are relevant in light of the evidence to Petitioners' claims against Boal. The expert sets forth "Findings" beginning on page 28 of the Report, which essentially consist of an additional recitation of the various standards pertaining to accountants and tax preparers. A.R. at 496. Throughout this additional recitation of standards, the expert sets forth conclusory statements that "Boal & Associates" either did not comply, or that "there is no indication" that "Boal & Associates" did comply with the standards, but is not premised on any evidence

On July 13, 2020, Boal filed a Motion to Strike Plaintiffs' Expert Disclosure based on Petitioners' failure to request leave from the circuit court to file the untimely Report and the substantive inadequacies permeating the Report. Petitioners filed no written opposition to the Motion to Strike. The Motion was heard on August 3, 2020.

Following the hearing, the circuit court issued an order dated August 4, 2020 striking Plaintiffs' expert disclosure and the Petition currently before this Court followed. A.R. at 1.[1] On August 26, 2020 Boal amended the motion for summary judgment that had been filed several months earlier to assert as a ground for the entry of judgment that the circuit court's August 4, 2020 Order striking the expert disclosure foreclosed plaintiffs from presenting any standard of care expert testimony in support of their claim for accounting malpractice, and, in substance, precluded plaintiffs from making out a *prima facie* case at trial. Instead of awaiting a ruling on that dispositive motion, Petitioners proceeded with a Petition for Writ of Prohibition in this

[1] While Boal's Motion to Strike is the subject of the circuit court's August 4, 2020 Order that serves as the basis for the instant Petition, Petitioners inexplicably failed to include a copy of the motion in the Appendix. As such, a true and correct copy of Boal's Motion to Strike Plaintiffs' Expert Disclosure is attached hereto as Exhibit 1.

Court. The Petition does not properly invoke the Court's original jurisdiction. It is utterly baseless and must be refused.

III. SUMMARY OF ARGUMENT

Petitioners have not established any arguable basis whatsoever for this Court to issue an extraordinary Writ of Prohibition, as the circuit court did not exceed its legitimate powers in granting Respondent Boal's Motion to Strike Respondents' Expert Disclosures, where Petitioners disclosed its expert's opinions ten months after the deadline established by two scheduling orders and where Petitioners' initial disclosure of two expert witnesses did not include any substantive facts or opinions of the expert witnesses to which either expert was expected to testify. It is well-settled that the circuit court has the inherent authority to enter orders controlling their dockets, and a decision to strike an expert witness disclosure for failing to meet a court mandated deadline is within the unique province of the circuit court. Such a ruling is entirely within the circuit court's proper exercise of discretion, and, therefore, cannot be a basis to invoke this Court's original jurisdiction. Further, the circuit court's exercise of jurisdiction was faultless. An order precluding expert testimony is appropriate where the record demonstrates "a pattern of gross, if not willful, neglect of circuit court orders and failure to respond to motions." *Sheely v. Pinion*, 490 S.E.2d 291, 297 (W.Va. 1997) (per curiam). In the instant matter, the record clearly demonstrates that Petitioners engaged in a pattern of contumacy with respect to the circuit court's scheduling orders. Petitioners had every opportunity to seek relief from the disclosure deadline for expert testimony, but neither did so, nor even requested leave from the circuit court to make their belated disclosure out of time. Instead, they essentially flagrantly ignored the deadline. Their excuses are patently frivolous; as is their after the fact

pretextual assertion that the circuit court entered the order striking their belated disclosure out of bias against counsel. Thus, the circuit court's order of August 4, 2020 striking Petitioners' expert disclosure was a proper exercise of discretion under the circumstances, and not reflective of any personal animus harbored by the circuit judge. In fact, Petitioners have already litigated, and lost a motion to recuse the circuit judge based upon a spurious claim of bias against counsel and should not preside over this matter. The Petition must be refused.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents respectfully submit that oral argument before this Court is unnecessary under West Virginia Rule of Appellate Procedure 18(a) because, *inter alia,* the Petition for a Writ of Prohibition is frivolous.

V. ARGUMENT

A. Petitioners Fail To Remotely Meet The Standards For The Issuance Of An Extraordinary Writ Of Prohibition

"A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W.Va. Code,* 53-1-1." Syl. Pt. 1, *State ex rel. Thrasher Eng'g, Inc. v. Fox*, 624 S.E.2d 481 (W.Va. 2005); Syl. Pt. 2, *State ex rel. Kees v. Sanders,* 453 S.E.2d 436 (W.Va. 1994); Syl. Pt. 1, *State ex rel. United Hosp. Ctr., Inc. v. Bedell,* 484 S.E.2d 199 (W.Va. 1997). The ruling in this case striking an expert disclosure submitted without justification or excuse ten (10) months after he due date established in a scheduling order entered by the circuit court is the epitome of discretionary ruling that is not an appropriate occasion on which to invoke the circuit court's original jurisdiction.

Further, in determining whether to issue a writ of prohibition on the basis that the circuit court exceeded its legitimate powers, this Court examines five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the circuit court's order is clearly erroneous as a matter of law; (4) whether the circuit court's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the circuit court's order raises new and important problems or issues of law of first impression. Syl. Pt. 4, in part, *State ex rel. Hoover v. Berger,* 483 S.E.2d 12 (W.Va. 1996). None of these factors are met here. Review of the averments set forth in the Petition against this five-part standard demonstrates that the Petition is frivolous.

Under the first *Hoover* factor, Petitioners clearly do have an opportunity to appeal the decision of the circuit court after entry of a final order. Indeed, it is likely that a dispositive order on Respondent's pending Motion for Summary Judgment is imminent. In any event, however the case terminates in the current court, Petitioners would clearly be entitled to appeal the August 4, 2020 order post-judgment -- assuming they lose.

Regarding the second *Hoover* factor, Petitioners lose in lower court because of the circuit court's order granting the motion to strike Petitioners' expert disclosure, that error is eminently correctable on appeal. Put simply, an adverse judgment is capable of being reversed.

The remaining *Hoover* factors auger heavily against issuance of a writ of prohibition. The circuit court was plainly acting within its discretion to impose sanctions under West Virginia Rule of Civil Procedure 16(f) by striking Petitioners' untimely expert disclosures. The ruling was clearly correct as discussed more fully herein. The circuit court's order is not an oft repeated

error, no doubt because litigants typically do not simply flagrantly disregard due dates fixed by routine scheduling orders. Nor does the order manifest persistent disregard for either procedural or substantive law. Quite to the contrary, the circuit court's ruling is designed to enforce well-settled procedural rules, specifically Rule 16(b), which importantly authorizes the circuit court to enter scheduling orders covering a panoply of subjects. Needless to say, disclosure dates for expert witnesses have long been regarded as appropriate subjects for inclusion in scheduling orders entered in our circuit courts. And. Rule 16(f) explicitly authorizers the circuit court to enter sanctions for failures of compliance. Lastly, the circuit court's order does not raise problems or issues of law of first impression. *See Sheely v. Pinion* 490 S.E.2d 291 (W.Va. 1997), *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 451 S.E.2d 721, 727 (W.Va. 1994), discussed *infra*.

B. The Circuit Court Was Acting Within Its Discretion Under Rule 16(f) To Strike Petitioners' Expert Witness Disclosures Provided Ten Months After The Deadline Set Forth In The Two Scheduling Orders

The circuit court was acting within its discretion under West Virginia Rule of Civil Procedure 16(f) to impose sanctions by striking Petitioners' expert witness disclosures provided after the expiration of the deadline set forth in two scheduling orders. A December 6, 2018 case scheduling order set forth a May 9, 2019 deadline for the Petitioners "to disclose trial experts". On May 1, 2019, Petitioners disclosed the identities of two experts, both certified public accountants, but did not provide any substantive facts or opinions of the expert witnesses to which either expert was expected to testify, render the disclosure utterly deficient.[2] An August 9, 2019 deadline for Petitioners' disclosure of "supplemental expert opinions" was established by

[2] W.Va.R.Civ.P. 26(b)(4)(A) provides, in part, that a party must state the "subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion".

two scheduling orders, however, Petitioners did not disclose their liability expert's opinions until June 3, 2020, ten months after the deadline and five months after Respondents filed a Motion in Limine to Preclude Expert Testimony.[3] Petitioners never sought an extension or modification of the August 9, 2020 deadline. Petitioners have conducted themselves as though the deadline imposed by the Court was optional and that Petitioners could establish their own deadline for the disclosure of their experts' opinions. Clearly, Petitioners' conduct here was subject to sanctions under Rule 16(f).

The West Virginia Rules of Civil Procedure were designed to secure just, speedy and inexpensive determinations in every action, for all parties to the action. *See* W.Va. R.Civ.P. 1. Rule 16 "is the principal source of the powers and tools that... courts are to use to achieve the fundamental purpose articulated by Rule 1 of the...Rules of Civil Procedure: securing 'the just, speedy, and inexpensive determination of every action and proceeding.'" James Wm. Moore, 3 *Moore's Federal Practice, 3d Edition* § 16.03 (2007). To achieve these goals, Rule 16(b) mandates that the trial court "shall ... enter a scheduling order" establishing time frames for the joinder of parties, the amendment of pleadings, the completion of discovery, the filing of dispositive motions, and generally guiding the parties toward a resolution of the case. *See State ex rel. Pritt v. Vickers,* 588 S.E.2d 210, 215 (W.Va. 2003) ("Under Rule 16(b), it is mandatory that trial courts enter a scheduling order that limits the time to join parties, amend pleadings, file and hear motions, and complete discovery.").

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[3] By correspondence of November 7, 2019, Counsel for Respondent Boal advised counsel for Petitioners that the report of Petitioners' standard of care expert report was three months past due and objected to the untimeliness of Petitioners' production of their expert reports. No response was received from Petitioners' counsel.

Logically it follows that, when a scheduling order establishes cutoff dates, including discovery, "[i]f a party cannot meet a scheduling order deadline, Rule 16(b) specifically requires leave of court to modify the scheduling order." *State ex rel. Pritt v. Vickers*, 588 S.E.2d 210, 215–16 (W.Va. 2003) citing Cleckley, David & Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 16(b), at 356 (3d ed. 2008). Moreover, West Virginia Rule of Civil Procedure 16(f) provides, in pertinent part, that, "[i]f a party or party's attorney fails to obey a scheduling or pretrial order . . . the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others, any of the orders provided in Rule 37(b)(2)(B), (C), and (D)." A party who fails to designate experts prior to the deadline set forth in a Rule 16 scheduling order is precluded from presenting expert testimony. *See State ex rel. State Farm Fire & Cas. Co. v. Madden,* 451 S.E.2d 721, 727 (W.Va. 1994) (holding that "the circuit court was acting within his discretion under [Rule 16(f)] by refusing to allow [defendant] to designate experts after the expiration of the deadlines established in the scheduling order."); *Sheely v. Pinion,* 490 S.E.2d 291, 296 (W.Va. 1997) (per curiam) (affirming the trial court's preclusion of plaintiff's expert "as a sanction for failing to comply with the expert disclosure deadline in the scheduling order."); *McCoy v. CAMC, Inc.*, 557 S.E.2d 378, 382 (W.Va. 2001) (holding it was within the circuit court's discretion "to refuse to allow a party to designate or substitute an expert witness after the expiration of the deadline set forth in the scheduling order.").

Petitioners assert that because Boal has not, and cannot, show that they have been prejudiced by Petitioners' late disclosures, the circuit court erred in striking their disclosures. Prejudice (or lack thereof) to Boal, however, is not a proper consideration where the circuit court

was acting under its Rule 16(f) authority. [4] Petitioners direct this Court to Syllabus Pt. 5 of *Prager v. Meckling*, 310 S.E.2d 852 (W.Va. 1983) where this Court set forth "factors to be considered in determining whether the failure to supplement discovery requests under Rule 26(e)(2) of the Rules of Civil Procedure should require exclusion of evidence related to the supplementary material" including "prejudice or surprise in fact of party against whom the evidence is to be admitted." The *Prager* test has no applicability here.[5] This was not a matter involving a failure to supplement discovery responses under Rule 26(e)(2). This was a situation where Petitioners wholly ignored a deadline set forth in a scheduling order. Petitioners did not disclose their liability expert's opinions until June 3, 2020—ten months after the August 9, 2019 deadline for Petitioners' disclosure of "supplemental expert opinions." The circuit court was acting within the discretion given to it under Rule 16(f) to impose sanctions for failing to comply with the expert disclosure deadline in the scheduling order.

Seemingly oblivious to the notion of court-ordered deadlines, Petitioners suggest that "disclosure of an expert opinion and the basis for that opinion may continue up until *a reasonable amount of time before trial.*" Petition at 11. As this Court recognized in *Hulmes v. Catterson,* 388 S.E.2d 313 (W.Va. 1989) and subsequently in *Kincaid v. S. W. Virginia Clinic, Inc.*, 475 S.E.2d 145 (W.Va. 1996), the "reasonable time before trial" rule was modified by the 1988 amendments to the West Virginia Rules of Civil Procedure, and applies only in the absence of a specific deadline set forth in a Rule 16 scheduling order. Thus the "reasonable time before trial" rule is wholly inapplicable here.

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[4] Boal has indeed been prejudiced in their ability to prepare a defense and impaired in their ability to obtain a defense expert opinion.

[5] Notably, *Prager* was decided prior to the 1988 amendment to Rule 16 which provided for the entry of a scheduling order.

In *Hulmes*, this Court reversed a circuit court's dismissal of a medical malpractice action for failure to comply with discovery orders directing the disclosure of information regarding expert witnesses, as the dismissal occurred prior to the amendment of Rule 16.[6] In a per curiam opinion, this Court, quoting *Michael v. Henry,* 354 S.E.2d 590 (W.Va. 1987), stated:

> Under W.Va.R.Civ.P. 26(b)(4)(A)(i), a party is required to disclose to another party the identity of persons whom that party intends to call as expert witnesses at trial only when that party has determined within a reasonable time before trial who his expert witnesses will be.

Hulmes, 388 S.E.2d at 315. However, the *Hulmes* Court prefaced its ruling by observing that the "reasonable time before trial" rule was modified by the amendment of Rule 16 of the West Virginia Rules of Civil Procedure, effective October 31, 1988 (after the events in *Hulmes* took place). Thus, the Court indicated that a scheduling order under Rule 16, as amended, would be controlling in the future. *Id.* at 315–16; *see also Kincaid*, 475 S.E.2d at 148.[7] Accordingly, under *Hulmes* and its progeny, the August 9, 2019 deadline set forth in two scheduling orders in this case was mandatory. Petitioners ask this Court to wholly disregard Judge Tucker's scheduling order and instead accept their expert disclosures on their terms and at a time of their choosing. To countenance such conduct would render Rule 16 meaningless and would surely lead to the exact chaos in our trial courts that scheduling orders and rules of procedure were intended to prevent.

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[6] Rule 16 was amended to provide for a variety of scheduling and planning techniques, including time limits for completion of discovery.

[7] This Court's decision in *State ex rel. Tallman v. Tucker*, 769 S.E.2d 502 (W.Va. 2015) is utterly distinguishable for the reasons set forth *infra*. Notably, the supplemental expert witness disclosures in that case were made a mere fifteen (15) days after the end of discovery and were tardy because of the opposing party's own ineptitude. Petitioners' citation to *State ex rel. Krivchenia v. Karl*, 600 S.E.2d 315 (W.Va. 2004) is also misplaced. That case dealt with the qualifications of the party's expert witness, not the timeliness of expert witness disclosures.

Additionally, Petitioners supplemental expert disclosures are substantively deficient under the West Virginia Rules of Civil Procedure. The "primary purpose" of the required disclosure of expert opinions "is to permit the opposing party to prepare an effective cross-examination...A lawyer even with the help of his/her own expert frequently cannot anticipate the particular approach the opponent's expert will take or the data on which the expert will base his/her judgment." *See*, Cleckley, Davis, & Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 26(b)(4)(A)(i)[2], at 665 (3d ed. 2008). The conclusory statements of Mr. Russo clearly fail to provide notice to Boal of the expert testimony expected to be elicited at trial by Petitioners. The conclusory statements presented in the Report utterly fail to provide notice to Boal of the substance of Mr. Russo's opinions, the factual bases therefor, or the grounds upon which his opinions are based, such that Boal is impaired in their ability to defend against Petitioners' claims. Over 14 pages of the Report are devoted to a recitation of various accounting and tax preparer standards without any discussion as to how or if they apply (which they do not) to Petitioners' claims against Boal. Mr. Russo then sets forth "Findings" beginning on page 28 of the Report, which essentially consist of an additional recitation of the various standards pertaining to accountants and tax preparers. Throughout this additional recitation of standards, Mr. Russo sets forth conclusory statements that "Boal & Associates" either did not comply, or that "there is no indication" that "Boal & Associates" did comply, with the standards. Mr. Russo states no factual bases for his conclusions. Such types of conclusory statements by an expert, lacking any detail or explanation, have been determined to be insufficient. *See Kincaid v. Southern West Virginia Clinic Inc., supra.* at 148 ("Such a summary [that defendants failed to timely diagnose plaintiff's decedent's condition] cannot be said to 'state the subject matter on

which the expert is expected to testify' or to 'state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.'" *citing* W.Va.R.Civ.P. 26(b)(4)(A)).

C. Petitioners Have Failed To Establish That The Order Striking Petitioners' Expert Disclosures Was Clearly Erroneous

It is well-settled that a decision to strike an expert disclosure filed ten (10) months late, with no excuse or justification, is an appropriate exercise of the circuit court's discretion. Fundamentally, the order imposed a sanction for failure to comply with the circuit court's scheduling order, and a flagrant one at that. Such orders are proper. Syl. Pt. 1, *Bell v. Inland Mut. Ins. Co.*, 332 S.E.2d 127 (W.Va. 1985), *cert. denied sub nom. Camden Fire Ins. Ass'n v. Justice,* 474 U.S. 936, (1985) ("The imposition of sanctions by a circuit court under *W. Va. R. Civ. P.* 37(b) for the failure of a party to obey the court's order to provide or permit discovery is within the sound discretion of the court and will not be disturbed upon appeal unless there has been an abuse of that discretion.").

This Court's decision in *Sheely v. Pinion*, 490 S.E.2d 291 (W.Va. 1997) (per curiam) is particularly instructive. In that case, the circuit court precluded the plaintiffs from calling expert witnesses as a Rule 16(f) sanction for failing to comply with the expert witness disclosure deadline in the scheduling order. Quoting the seminal decision of *Bartles v. Hinkle*, 472 S.E.2d 827 (1996), the Court affirmed, noting that "'[o]n the appeal of sanctions, the question is not whether we would have imposed a more lenient penalty had we been the trial court, but whether the trial court abused its discretion in imposing the sanctions.'" *Sheely*, 490 S.E.2d at 295. The Court held preclusion of expert testimony was appropriate given the record in the case demonstrated "a pattern of gross, if not willful, neglect of circuit court orders and failure to

respond to motions." *Id.* at 297. Like Petitioners' here, the plaintiffs in that case, failed to comply with the expert disclosure deadline set forth in the scheduling order, failed to respond to multiple discovery requests and, as this Court stated, "showed no interest in [the] litigation" until the circuit court imposed sanctions. *Id. See also State ex rel. State Farm Fire & Cas. Co. v. Madden,* 451 S.E.2d 721, 727 (W.Va. 1994) ("[T]he circuit court was acting within its discretion ... by refusing to allow [the defendant] to designate experts after the expiration of the deadlines established in the scheduling order."); *Woolwine v. Raleigh General Hospital,* 460 S.E.2d 457 (W.Va. 1995) (per curiam) (affirming dismissal of action for failing to identify experts).

Here, the record below reveals not only a pattern of willful neglect of circuit court orders and discovery deadlines on the part of Petitioners, but also a display of arrogance, if not outright contumacy, and complete lack of accountability that should not be countenanced by this Court, particularly where the Petitioners never sought an extension of the deadlines set forth in the circuit court's multiple scheduling orders, nor offered an explanation for their dilatory conduct. Incredibly, they do not even attempt to provide this Court with any explanation for their neglect in handling of this matter. Instead, they interject the baseless accusation that the circuit court's decision was motivated by personal animus—an argument this Court has previously considered and rejected.

Kincaid v. Southern West Virginia Clinic, Inc., 775 S.E.2d 145 (1996) (per curiam), in which this Court affirmed dismissal of the action for the plaintiff's repeated failure to comply with multiple orders related to expert witness disclosure and discovery, is also on point. *Kincaid* was a medical malpractice case in which the plaintiff alleged that the defendant physicians failed to properly diagnose and treat his wife. Approximately one month after the suit was filed, the

defendants served interrogatories requesting Rule 26(b)(4) information regarding expert witnesses. Following multiple motions to compel discovery, a brief extension, multiple dispositive motions and entry of a scheduling order directing the plaintiff to provide expert disclosures by a date certain, the plaintiff belatedly filed his expert witness disclosures. Like those here, the disclosures in *Kincaid* were not only late but were substantively deficient and consisted of the names of an oncologist and gynecologist and provided no further information. The circuit court held oral argument on the defendants' pending motions and ordered the plaintiff to supplement his expert witness disclosure, warning that noncompliance may result in dismissal. Subsequently, plaintiff filed additional expert witness disclosures identifying four experts but again offered no details regarding the basis for their conclusions and opinions. Ultimately, the circuit court dismissed the case based on the plaintiff's repeated failure to cooperate in the discovery process and the inadequate expert witness disclosures.

On appeal, this Court affirmed the dismissal. The Court's decision was based upon the following factors: (1) the plaintiff's failure to object to the initial scheduling order setting forth the time frame for discovery; (2) the circuit court granted a total of five months in extensions of time to provide the expert witness disclosures; and, (3) when the supplemental disclosures were eventually made, they consisted of nothing more than names of doctors and conclusory statements. The circumstances presented here are even more egregious. Indeed, there have been no less than three scheduling orders specifically setting forth the deadline by which Petitioners were to have disclosed their experts' opinions. Petitioners have never sought an extension of the disclosure deadline and, instead, have simply let the deadlines pass with no acknowledgement or explanation. Notwithstanding, Petitioners finally submitted the Report ten months after the

court-imposed deadline consisting of nothing more than a vacuous recitation of impertinent standards and baseless conclusions. Moreover, for no less than three years and despite the filing of a motion to compel, Petitioners' response to Boal's interrogatory specifically seeking information concerning Petitioners' experts' opinions has remained outstanding. Petitioners have never sought an extension from opposing counsel or from the circuit court. Instead, Petitioners have inexplicably ignored deadlines.

Under these circumstances, and consistent with West Virginia law, the Petitioners have failed to demonstrate that the circuit court's order striking their expert disclosures was clearly erroneous.

D. The Order In Question Is Faithful To A Proper Regard For Procedural Law

As the foregoing discussion demonstrates, the inclusion of a due date for expert disclosures was a proper procedural feature of the circuit court's Rule 16(b) scheduling order, and the order striking the belated disclosure for a flagrant deviation from the due date fixed in the scheduling order was a proper exercise of the authority vested in the circuit court under Rule 16(f). Because they cannot refute the circuit court's authority under Rule 16, Petitioners raise another case, which is utterly inapposite, and they shamefully launch a personal, *ad hominen* attack on the circuit judge. Petitioners cite to *State ex rel. Tallman v. Tucker*, 769 S.E.2d 502 (W.Va. 2015), in which the defendant counsel successfully challenged a ruling of the same circuit judge that entered the ruling here. Petition at p. 15-16. In *Tucker*, the plaintiff asserted medical negligence claims against the defendant doctor related to the death of her husband. The circuit court's scheduling order provided that the plaintiff was to disclose her experts by May 31, 2013 and the defendant was to disclose his experts by July 12, 2013. The discovery deadline

was January 24, 2014. The plaintiff disclosed her experts almost six weeks late (not ten months late), and by agreement of the parties, the defendant was provided an extension in kind. In a subsequent letter addressed to counsel for the plaintiff, the defendant acknowledge receipt of the expert disclosures but indicated that they were insufficient under Rule 26(b)(4) and requested supplemental disclosures by November 18, 2013.[8] Even though the defendant had not received the supplemental disclosures, he filed his expert disclosures on November 15, 2013. On November 19, 2013, the defendant filed a motion to preclude the testimony of the plaintiff's expert or to compel complete expert witness disclosure. While this motion was pending, the circuit court entered a new scheduling order extending the discovery deadline to July 14, 2014. Subsequently, on June 3, 2014, the plaintiff served the supplemental disclosure of her expert. After deposing plaintiff's expert, the defendant's experts reviewed the deposition transcript and rendered supplemental opinions. Consequently, on July 29, 2014, the defendant served the plaintiff with a supplemental expert witness disclosure. The plaintiff then filed a motion to exclude the opinions set forth in the defendant's supplement disclosure on the basis that the disclosure was made after the disclosure deadline. The circuit court granted the motion and the defendant filed a petition for a writ of prohibition. This Court issued a writ of prohibition, finding that "the late and inadequate disclosure by Ms. Powell was the cause of Dr. Tallman's inability to fully disclose the opinions of his experts within the initial and subsequent discovery cut-off dates" and that "[h]ad Ms. Powell presented her expert witness disclosure in compliance with Rule 26(b)(4), as required by the initial scheduling order and within the time period of the

[8] The plaintiff's initial expert disclosure was strikingly similar to Petitioners' initial expert disclosures herein, in violation of W.Va.R.Civ.P. 26(4)(b)(A), as plaintiffs disclosure merely identified the names of their experts without disclosing the subject matter on which the experts were expected to testify and the substance of the facts and opinions and a summary of the grounds for each opinion.

scheduling order.....Dr. Tallman could have timely deposed Dr. Milewski and thereafter rendered a timely expert witness disclosure without having to provide a supplemental disclosure." *Id.* at 718.

Tucker bears absolutely no similarity to the dilatory conduct of Petitioners in this case. Here, unlike in *Tucker,* counsel exhibited utter contumacy for the scheduling order by failing to disclose their experts' opinions in violation of and in utter disregard for deadlines set forth in the circuit court's multiple scheduling orders. Unlike *Tucker,* the ten month delay by Petitioners in disclosing their experts' was not caused by any conduct of Respondent Boal. If anything, *Tucker* underscores the importance of a plaintiff's side of the case to make a timely disclosure that is full and complete regarding identity and substance. The matter at hand provides the perfect example where a plaintiff's side of the case has utterly failed to do so. Not only were Petitioners' expert disclosures ten months late, but the conclusions and opinions therein were completely devoid of any basis in the facts and circumstances of the case.

Tucker is indubitably inapposite to this case. The circuit court's order granting Respondent Boal's motion to strike Petitioners' expert disclosure in this matter hardly constitutes "a persistent disregard for procedural law" based upon her ruling in *Tucker.* Petitioners' argument to the contrary is completely meritless.[9]

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[9] Petitioners also assert the argument that the circuit court has denied Petitioners their due process rights. Petition at p. 17-19. The argument consists of a brief, generic discussion of due process requirements but Petitioners fail to identify what specifically it is that the circuit court has done to deny them those rights. Instead, in the same vein as their personal animus claims, they vaguely assert that the circuit court has refused to allow them to present some unidentified motions and to be heard at some unidentified hearings. They fail to point to any specific motion or instance in which the circuit court refused to allow them to be heard. Indeed, the record evidence below belies Petitioners assertions; Petitioners were afforded the opportunity to present their case at every hearing. Even more troubling, despite having almost a month to do so, Petitioners did not file a written response to Boal's motion to strike.

E. Under The Law Of The Case Doctrine, This Court Should Reject Petitioners' Allegations Of Personal Animus By The Circuit Court

Pervading the current Petition is the bold contention that the circuit court judge's decision to strike Petitioners' expert witness disclosures was somehow motivated by bias or personal animosity toward the Petitioners' counsel. This is not the first time that Petitioners have attempted to play the "personal animus" card in this matter. This same assertion served as the basis for Petitioners' previous motion filed in August 2017 seeking disqualification of the circuit court judge. In accordance with W.Va.Tr.Ct.R. 17.01, the motion was referred to this Court. This Court denied Petitioners' request for the circuit court judge's disqualification by order dated October 11, 2017. See Exhibit B. Thus, Petitioners' claim that the circuit court judge is not able to preside over the within matter in an impartial manner due to personal animus has already been litigated and rejected by this Court. Based on the "law of the case" doctrine, Petitioners cannot relitigate these same issues on a subsequent appeal.

Fundamental to American law is the "law of the case" doctrine. The law of the case doctrine "generally prohibits reconsideration of issues which have been decided in a prior appeal in the same case, provided that there have been no material changes in the facts since the prior appeal, such issues may not be litigated in the trial court or re-examined in a second appeal." 5 Am. Jr. 2d *Appellate Review* § 605 (1995). This Court has firmly embraced the law of the case doctrine: "[W]hen a question has been definitively determined by this Court, its decision is conclusive on parties, privies and courts, including this Court, upon a second appeal and it is regarded as the law of the case." Syl. Pt. 1, *Mullins v. Green*, 115 S.E.2d 320 (W.Va. 1960); *see also Maze v. Bennett*, 184 S.E. 564, 565 (W.Va. 1936) ("The decision of this court on a particular point on a former hearing will be regarded as the law of the case on a second appeal,

unless new pleadings and new evidence adduced in the subsequent trial call for a different judgment."); Syl. Pt. 5, *Kaufman v. Catzen,* 130 S.E. 292 (W.Va. 1925) ("A decision of this court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the circuit court and on subsequent appeal."). Thus, this Court should adhere to its own previous rulings in any subsequent appellate proceedings in the same matter.

Petitioners seek to relitigate the same issues that were previously before this Court by way of the recusal motion filed in August 2017. The basis for the recusal motion was that the circuit court judge has a personal bias or prejudice towards Petitioners and/or their counsel. Petitioners' arguments were two-fold: (1) the circuit court judge is also the judge for related criminal proceedings against Anderson and (2) Petitioners' counsel offered public support for a judicial candidate that the circuit court judge defeated to win re-election. This Court rejected their arguments and denied the motion for disqualification, *to wit*, "[u]pon review of said motion and the responses thereto, and in accordance with Trial Court Rule 17.01(c), the Chief Justice has determined that Judge Tucker's disqualification from presiding over the above-styled case is not warranted." See Exhibit 2.

The instant Petition rehashes many of the same arguments that Petitioners raised by way of their previous motion. If there is any doubt about the identity of arguments, a comparison of the content of their recusal motion with the instant Petition demonstrates as much. The arguments presented on pages 5, 6, 13 and 14 of the Petition, to the effect that the circuit court has demonstrated personal animus towards Petitioners and their counsel, are virtually identical to the arguments presented by Petitioners' recusal motion. Petitioners expressly incorporate their prior motion—"[s]uch animus is reflected in Petitioners [*sic*] prior recusal request" and include

the entirety of that motion in the Appendix Record. Petitioners point to no additional claimed bases to support any sort of personal animus that they have previously alleged and which were rejected by this Court.

Aside from the fact that this Court should not properly consider Petitioners' recycled arguments, Petitioners' suggestion that the circuit court judge had ruled against them under these circumstances because of some sort of perceived bias is a red herring. This Court has emphasized that the standard for recusal is an objective standard and that there must be a factual basis for questioning a judge's impartiality. *Tennant v. Marion Health Care Found., Inc.*, 459 S.E.2d 374, 386 (W.Va. 1995). "[W]e ask how things appear to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person." *Id.* Petitioners' accusations are not grounded in fact. Rather, they are typical of Petitioners' haphazard approach to this litigation.

Over the course of this unnecessarily protracted litigation, Petitioners have refused to acknowledge, let alone accept responsibility for, their dilatory conduct. In that same vein, rather than attributing an adverse ruling to their own neglect, on appeal, Petitioners have cherry-picked statements made by Judge Tucker in an appalling effort to shift the blame. It is astonishing that it seems to have never occurred to Petitioners that, rather than personal animus, the circuit court judge's rulings are based upon Petitioners' callous disregard for procedure and discovery deadlines over the course of this litigation. Clearly, nothing described in the Petitioners' prior recusal motion or the Petition even comes close to suggesting some personal animus on the part of the circuit court judge towards Petitioners' counsel.

VI. CONCLUSION

This Court should not issue a Writ of Prohibition pertaining to circuit court's August 4, 2020 order, as the circuit court did not commit clear error in granting Respondents' motion to strike Petitioners' expert disclosures, where the disclosures were woefully untimely and substantively deficient. Further, the record is devoid of any evidence to support the allegation that the circuit court judge's order was motivated by personal animus against Petitioners' counsel. This Court has already rejected Petitioners' claims of personal animus when it denied a prior motion to recuse the circuit court judge's order of October 11, 2017 and thus, under the doctrine of the law of the case, this Court should not revisit such claims.

Respectfully submitted:

Date: October 12, 2020

By: _____

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHRISTOPHER CHAFIN, and CHEAT LAKE URGENT CARE, PLLC,

Petitioners,

v.

THE HONORABL SUSAN B. TUCKER, Judge of the Circuit Court of the Seventeenth Judicial Circuit, DAVID ANDERSON, BRIAN R. BOAL and BOAL & ASSOCIATES, P.C., GILLEN ENTERPRISES, LLC, AFFORDABLE CONTRACTORS, LLC, and BUILD IT, LLC

Respondents.

Docket No. 20-0685

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, true and accurate copies of the foregoing *Respondents' Brian Boal and Boal & Associates, P.C. Brief* were served to counsel and all other parties to this appeal via electronic mail:

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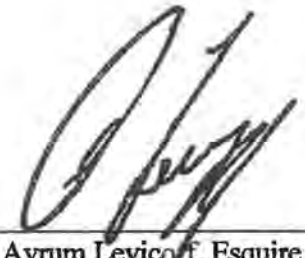
By: 

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IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

CHRISTOPHER CHAFIN, CHEAT LAKE URGENT CARE, PLLC,	)	Civil Action No.: 16-C-547
Plaintiffs,	)	The Hon. Susan B. Tucker
v.	)	
DAVID ANDERSON, BRIAN R. BOAL and BOAL & ASSOCIATES, P.C., GILLEN ENTERPRISES, LLC, AFFORDABLE CONTRACTORS, LLC, and BUILD IT, LLC	)	
Defendants.	)	**Jury Trial Demanded**

MOTION TO STRIKE PLAINTIFFS' EXPERT DISCLOSURE

Defendants Brian R. Boal and Boal & Associates, P.C. ("Boal") request that this Court strike the expert disclosure of Plaintiffs' accounting expert Charles Russo, for at least two primary reasons. First, the disclosure was untimely, in total derogation of the deadline set forth in the Court's scheduling orders; in fact it was made no less than 10 months beyond the due date established by the Court; Secondly, even if it were not egregiously untimely, the disclosure, which consists of a report of the expert, is incomprehensible and confusing, contains only conclusory statements, fails to state the substance of the facts or opinions and sets forth numerous accounting and tax preparation standards without any discussion as to their applicability.

1. In their Second Amended Complaint, the Plaintiffs assert six separate counts against Boal arising out of alleged deviations from the standard of care presumably applicable to the practice of accounting. The gist of the allegations are two-fold. First, Plaintiffs allege that Boal failed to ensure that Cheat Lake Urgent Care ("CLUC") paid the estimated quarterly income tax due with respect to income earned by Plaintiff Chafin. Plaintiffs implicitly allege a lack of

EXHIBIT 1

contemporaneous knowledge that the withheld amounts were not paid to the IRS, as Plaintiffs aver, without identifying any specific date, that "Later plaintiffs discovered" that the withheld estimated tax payments were not paid to the IRS of the state of West Virginia. Second, Plaintiffs allege that Boal failed to detect defalcations allegedly committed by Defendant David Anderson.

2. A Case Scheduling Order dated December 6, 2018 established a May 9, 2019 deadline for the Plaintiffs' "to disclose trial experts". On May 1, 2019, Plaintiffs disclosed the identities of two experts, both certified public accountants, but did not disclose the substance of the facts and opinions to which either expert is expected to testify. The Court's procedure requires that the disclosure of expert witnesses comply with W.Va.R.Civ.P. 26(b)(4)(A), which provides, in part, that a party must state the "subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion". Consequently, the Plaintiffs' disclosure was utterly deficient.

3. Pursuant to an Amended Case Scheduling Order and a Second Amended Case Scheduling Order, Plaintiffs' were required to supplement trial experts' opinions by August 9, 2019. Plaintiffs utterly disregarded this deadline and failed to disclose their liability expert's opinions, the bases for the opinions, nor the facts or evidence upon which the opinions are based. Plaintiffs never sought leave of Court to extend the deadline, did not provide notice to the Court that they could not comply with the deadline, nor have they ever offered any justification as to why they could not comply with the deadline.

4. Six months after the August 9, 2019 deadline passed, having received no notice of any justification for Plaintiffs' failure to comply with the deadline, on February 4, 2020, Defendant Boal filed a Motion in Limine to Preclude Expert Testimony which sets forth a detailed discussion

concerning the various scheduling conferences and case scheduling order deadlines, as well as argument concerning Plaintiffs' blatant disregard for the Court's imposed deadline, which Boal incorporates by reference and which is attached hereto as Exhibit A. Despite the filing of the Motion in Limine, Plaintiffs continued to ignore the deadline and did not disclose the opinions of their liability expert. Plaintiffs responded to the Motion in Limine asserting inane, vacuous and woefully inadequate excuses for their failure to disclose their expert's opinions, including an assertion that a retainer check and certain other documents had been sent to Charles Russo on July 15, 2019, but provided no justification or any information whatsoever as to why Plaintiffs did not attempt to obtain an opinion from Mr. Russo until almost one year later. Even more alarming is Plaintiffs' claim that Defendants are somehow responsible for Plaintiffs' dilatory conduct because Boal requested a two week extension of time to gather and produce thousands of pages of documents in order to respond to Plaintiffs' request for production of documents served on Boal on November 22, 2019, four months after the August 9th deadline, which Plaintiffs claimed were necessary to submit to their expert for review. Plaintiffs' incredibly accused Boal of engaging in "gamesmanship" in requesting this negligible amount of additional time to produce the voluminous documents, when in fact, it is Plaintiffs that flagrantly ignored multiple court orders and failed to timely conduct discovery (during the four year pendency of this case), in order to obtain documents to submit to their experts. See Plaintiffs' Response in Opposition to Motion in Limine attached at Exhibit B.

5. It was not until June 3, 2020, four months after Defendants filed its motion in limine, that Plaintiffs unilaterally disclosed the report of Charles Russo dated June 1, 2020. Plaintiffs never requested leave from the Court to file this untimely report, nor offered any explanation or an apology to the Court for the 10 month delay. Discovery closed on January 29,

2020. Defendants have not had an opportunity to depose Plaintiffs or apprise their own expert as to Plaintiffs' theories of liability. Plaintiffs have conducted themselves as though the deadline imposed by the Court was optional and that Plaintiffs could establish their own deadline for the disclosure of their experts' opinions. For this reason alone, Charles Russo should be precluded from testifying at trial. *See State ex rel. State Farm Fire & Cas. Co. v. Madden*, 451 S.E.2d 721, 727 (W.Va. 1994) (Circuit court acted within its discretion under W.Va.R.Civ.P. 16 in refusing to permit a defendant to present expert testimony beyond the deadline in the scheduling order).

6. Apart from the egregious untimeliness of its submission, the report of Charles Russo, is incomprehensible, prolix, disorganized and confused. The report is divorced from any reasoned discussion of the standard of care and duties owed by Boal under the circumstances. Over 14 pages of the report are devoted to a recitation of various accounting and tax preparer standards without any discussion as to how or if they apply to Plaintiffs' claims against Defendant Boal. *See* Charles Russo report attached at Exhibit C, p. 15-28. Mr. Russo sets forth "Findings" beginning on page 28 of his report, which essentially consist of an additional recitation of the various standards pertaining to accountants and tax preparers. Throughout this additional recitation of various standards, Mr. Russo, without stating any factual bases therefor, sets forth conclusory statements that "Boal & Associates" either did not comply with the standards or that "there is no indication" that Boal & Associates complied with the standards.

7. Plaintiffs' expert's conclusory statements utterly fail to provide notice to Boal of the substance of his opinions, the factual bases therefor, nor the grounds upon which his opinions are based, such that Boal is impaired in their ability to defend against Plaintiffs' claims. The "primary purpose" of the required disclosure of expert opinions "is to permit the opposing party to prepare an effective cross-examination...A lawyer even with the help of his/her own expert

frequently cannot anticipate the particular approach the opponent's expert will take or the data on which the expert will base his/her judgment." *See*, Cleckley, Davis, & Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 26(b)(4)(A)(i)[2], at 665 (3d ed. 2008). The conclusory statements of Mr. Russo clearly fail to provide notice to Boal of the expert testimony expected to be elicited at trial by Plaintiffs. Such types of conclusory statements by an expert, lacking any detail or explanation, have been determined to be insufficient. *See Kincaid v Southern West Virginia Clinic Inc., supra.* at 148 ("Such a summary [that defendants failed to timely diagnose plaintiff's decedent's condition] cannot be said to 'state the subject matter on which the expert is expected to testify' or to 'state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.'" *citing* W.Va.R.Civ.P. 26(b)(4)(A)).

8. The standards recited by Charles Russo are not germane to any of the Plaintiffs' claims against Defendant Boal. The accounting standards, IRS code sections and US Treasury regulations which Mr. Russo claims were violated deal with tax preparation standards which are not applicable to the claims of Cheat Lake Urgent Care, as said claims are for lost profits as a result of Defendant Anderson's embezzlement and do not deal with the preparation of income tax returns for the partnership. Likewise, Plaintiff Chafin's claims concerning Boal's alleged failure to pay Chafin's income taxes do not involve the preparation of Chafin's personal income tax returns. As such, the conclusory opinions offered by Mr. Russo concerning Boal & Associates' failure to follow standards regarding the preparation of income tax returns are not relevant to Plaintiffs' claims.

9. Defendant Boal additionally requests the Court to examine the report of Charles Russo not only for the purpose of determining whether the conclusions offered therein bear any

relevance to the issues concerning whether Boal deviated from the applicable standard of care in the context of the allegations lodged against it by Plaintiffs, but also in order to assess whether Mr. Russo's opinions would be admissible at trial under W.Va. R. Evid. 702, which requires that the testimony, "assist the trier of fact to understand the evidence or to determine a fact in issue.." . Arguably, the conclusory statements offered by Mr. Russo do not meet the requirements of Rule 702 and summary judgment would be warranted, given that expert testimony is necessarily required in order for Plaintiffs to make out a prima facie case against Boal.

10. Given the complete confusion and deficiencies of Mr. Russo's report, Plaintiffs still have not made an adequate disclosure. Defendants are prejudiced in their ability to prepare a defense and impaired in their ability to obtain a defense expert opinion. Additionally, the Court's ability to assess the report in association with a motion for summary judgment or to rule on the admissibility of Mr. Russo's testimony at trial will be severely impaired.

11. For all of the above reasons, the report of Charles Russo should be stricken and Mr. Russo should be precluded from testifying at trial.

Date: July 13, 2020

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IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

CHRISTOPHER CHAFIN, CHEAT LAKE URGENT CARE, PLLC,

Plaintiffs,

v.

DAVID ANDERSON, BRIAN R. BOAL and BOAL & ASSOCIATES, P.C., GILLEN ENTERPRISES, LLC, AFFORDABLE CONTRACTORS, LLC, and BUILD IT, LLC

Defendants.

Civil Action No.: 16-C-547

The Hon. Susan B. Tucker

Jury Trial Demanded

MOTION IN LIMINE TO PRECLUDE EXPERT TESTIMONY

Defendants Brian R. Boal and Boal & Associates, P.C. by and through this Court to preclude Plaintiffs from introducing expert testimony. As more fully set forth below, the Plaintiffs have blatantly ignored the requirements of the Court's scheduling orders entered in accordance with W.Va.R.Civ.P. 16 by failing to file a disclosure which delineates the scope and substance of the opinions that they intend to introduce through one or more experts in the field of accounting that they claim to have engaged in this case. They have also ignored discovery served upon them by counsel for Boal over one and a half years ago requesting disclosure of detailed information regarding the substance, content and support for expert opinions that they presumably intend to introduce in the case.

1. In their Second Amended Complaint, the Plaintiffs assert six separate counts against Boal arising out of several alleged deviations from the standards of care presumably applicable to the practice of accounting. Over a period of years from approximately 2003 to 2013, Boal provided various types of accounting services for Cheat Lake Urgent Care and tax preparation

services for Christopher Chafin and his wife. On October 27, 2016, Plaintiff Christopher Chafin commenced this action against Defendant David Anderson, subsequently filed an Amended Complaint against Boal and later filed a Second Amended Complaint naming Cheat Lake Urgent Care as a Plaintiff. The averments of Plaintiffs' Second Amended Complaint presumably arise out of Boal's alleged breach of duty. The gist of the allegations are two-fold. First Plaintiffs allege that Boal failed to ensure the payment by Cheat Lake of estimated quarterly income payments with respect to income earned by Chafin from the practice. Second, they allege that Boal departed from the applicable standard of care by failing to detect defalcations allegedly committed by Co-Defendant David Anderson.

2. On Dec 6, 2018, the Court conducted a scheduling conference in accordance with W.Va.R.Civ.P 16(a). As a result of the conference, the Court entered a Case Scheduling Order dated December 6, 2018, a copy of which is attached at Exhibit A. The order set forth a May 9, 2019 deadline for the Plaintiffs' "to disclose trial experts". On May 1, 2019, Plaintiffs disclosed the identities of two experts, both certified public accountants, but did not disclose the substance of the facts and opinions to which either expert is expected to testify. The Court's procedure requires that the disclosure of expert witnesses comply with W.Va.R.Civ.P. 26(b)(4)(A), which provides, in part, that a party must state the "subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion". Consequently, the Plaintiffs' disclosure was utterly deficient.

3. Following a scheduling conference held on June 18, 2019, the Court issued an Amended Case Scheduling Order on June 19, 2019, requiring Plaintiffs to "supplement trial experts' opinions" by August 9, 2019. See June 19, 2019 Order attached at Exhibit B.

4. In addition to the requirements of the Scheduling Orders, on May 25, 2017, Defendants had served Interrogatories and Request for Production of Documents on Plaintiffs. Interrogatory No. 10 requested information concerning Plaintiffs' experts' opinions, which reads, in part; "With respect to any expert witness that you expect to call at trial; (a) Give a complete statement of all opinions expressed by that expert and reasons and basis therefore." Plaintiffs have failed to produce the information requested by Interrogatory No. 10 concerning their experts' opinions.

5. Defendants' filed a Motion for Sanctions and to Compel Compliance with Court Order and Motion to Compel Complete Answers to Interrogatories and a Motion to Select Alternative Date for Trial. A hearing on the aforementioned motions was noticed to be held on August 8, 2019. At the hearing, for reasons unrelated to the discovery motion, the Court granted Defendants' Motion to Select Alternative Date for Trial and directed the Court's clerk to work with counsel to prepare a Second Amended Scheduling Order. The clerk and counsel engaged in dialogue which resulted in the preparation and entry of a Second Amended Scheduling Order. Significantly, in the order, the date for disclosure of Plaintiffs' trial expert opinions continued to be August 9, 2019 and the order explicitly required Plaintiffs' to disclose "supplemental trial experts' opinions" by that date. See Second Amended Scheduling Order at Exhibit C.

6. It has been over five months since the deadline passed for Plaintiffs' disclosure of their experts' opinions. Plaintiffs have flagrantly disregarded the terms of the Second Amended

Scheduling Order by failing to disclose Plaintiffs' experts' opinions by the August 9, 2019 deadline.

7. West Virginia Rule of Civil Procedure 16(f) provides, in pertinent part that, "If a party or party's attorney fails to obey a scheduling or pretrial order . . . the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others, any of the orders provided in Rule 37(b)(2)(B), (C), and (D)." A party who fails to designate experts prior to the deadline set forth in a Rule 16 scheduling order is precluded from presenting expert testimony. *See State ex rel. State Farm Fire & Cas. Co. v. Madden*, 451 S. E. 2d 721, 727 (W.Va. 1994) (Circuit court acted within its discretion under W.Va.R.Civ.P. 16 in refusing to permit a defendant to present expert testimony beyond the deadline in the scheduling order).

8. In this instance, the court has entered multiple scheduling orders not only to name experts, but to disclose opinions. Plaintiffs' failure to comply with the initial Scheduling Order, the Amended Scheduling Order and the Second Amended Scheduling Order by failing to disclose Plaintiffs' expert opinion testimony severely prejudices Defendants' ability to defend against Plaintiffs' claims, which are unclear and vague. Without being apprised of Plaintiffs' theories of liability, the Defendants are prejudiced in their ability to prepare a defense against Plaintiffs' claims, which would include obtaining an expert opinion to proffer opinions regarding the viability of plaintiffs' claims. Discovery closed on January 29, 2020, and Defendants have not had an opportunity to depose Plaintiffs' experts absent their expert reports.

9. The trial is scheduled to take place in June, 2020. There has been an egregious non-compliance by Plaintiffs in failing to comply with the aforementioned Scheduling Orders. As a

result, Plaintiffs should be precluded from introducing any expert testimony at trial. *See Madden, supra.*

WHEREFORE, Defendants respectively request that this Honorable Court grant the within Motion in Limine to preclude Plaintiffs' introduction of expert testimony at trial.

Date: February 4, 2020

By: _____

Avrum Levicoff, Esquire
W.Va. I.D. #: 4549
The Levicoff Law Firm, P.C.
4 PPG Place, Suite 200
Pittsburgh, PA 15222
412-434-5200 – Phone
4 12-434-5203 – Facsimile

Counsel for Defendants, Brian R. Boal and Boal & Associates, PC

EXHIBIT A

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

CHRISTOPHER CHAFIN, CHEAT LAKE URGENT CARE, PLLC,

Plaintiffs,

v.

CIVIL ACTION NO. 16-C-547

JUDGE SUSAN B. TUCKER

DAVID ANDERSON, BRIAN R. BOAL, BOAL & ASSOCIATES, PC, GILLEN ENTERPRISES, LLC, AFFORDABLE CONTRACTORS, LLC and BUILD IT, LLC,

Defendants.

SCHEDULING ORDER

The following schedule will apply to and govern the above-captioned action. In the absence of a specific date or deadline for a given activity, it is anticipated that such activity will be scheduled and conducted within a reasonable time prior to trial and prior to any scheduled activity which logically precede it in accordance with the WEST VIRGINIA RULES OF CIVIL PROCEDURE and the WEST VIRGINIA TRIAL COURT RULES.

Trial Date and Time:	**January 14, 2020 at 9:00 a.m.**
Estimated length of trial:	**7 Days**
Jury or non-jury:	**Jury**
Jury Deposit/Amount:	**$1,500.00 (per party)** **Paid at the Final Pre-Trial Hearing**
Final Pre-Trial Hearing Date and Time:	**January 3, 2020 at 10:00 a.m.** All parties, persons with settlement authority, and lead counsel **MUST** attend the Pre-Trial Hearing.
Discovery Deadline:	**November 29, 2019**

EXHIBIT A

Mediation Deadline:	**December 6, 2019** All parties, persons with settlement authority, and lead counsel **MUST** attend the Mediation. The parties shall pay equally the costs of the mediation, unless otherwise agreed, or ordered.
Preliminary Fact Witnesses Exchanged:	**January 15, 2019**
Party with burden of proof to disclose trial experts:	**May 1, 2019**
Party without burden of proof to disclose trial experts:	**June 12, 2019**
Medical Examination/Property Inspection deadline:	**n/a** All examinations, record review, or inspections by experts shall be completed by this date. Reports from such examinations or inspections shall be provided by the expert to the opposing party **no less than two weeks** following the date the examination, review, or inspection is conducted.
Dispositive Motions/Motions *In Limine:*	**September 30, 2019**
Responses to Motions:	**October 7, 2019**
Replies to Motions:	**October 14, 2019**
Hearing on Dispositive Motions:	**October 18, 2019 at 11:00 a.m.**
Jury Instructions, Proposed *Voir Dire*, Verdict Forms, Final Lists of Fact and Expert Witnesses, and Final Exhibit Lists:[1]	**January 3, 2020**
Objections to Proposed *Voir Dire*, Verdict Forms, Final Lists of Fact and Expert Witnesses, and Final Exhibit Lists:	**January 10, 2020**

[1] The original is to be filed with the Circuit Clerk, with a Microsoft Word version sent *via* email to Judge Tucker's Judicial Law Clerk at esha.sharma@courtswv.gov.

Jury Instruction Conference Deadline:	**January 3, 2020**
Objections to Jury Instructions:	**January 3, 2020**

The parties must send a Microsoft Word version of all FINAL and AGREED UPON Jury Instructions, as well as Objections not resolved *via* email to Judge Tucker's Judicial Law Clerk. [1]

In the event this case proceeds to trial, the Court will conduct a Jury Instructions Conference at which the Court will consider all objections to proposed Jury Instructions and revise the Court's Charge to the Jury. The date and time of the conference will established at the Court's Final Pre-Trial Conference.

The **TRIAL DATE and FINAL PRE-TRIAL CONFERENCE DATE and TIME** may **NOT** be adjusted without Court approval. However, the remaining dates may be adjusted by agreement of counsel so long as there is some form of documentation of the agreement. The agreed upon adjusted deadlines shall then be distributed to all counsel of record.

The Clerk of this Court shall provide a copy of this Order to all counsel of record.

Entered this 6th day of December, 2018.

Susan B. Tucker

SUSAN B. TUCKER, CHIEF JUDGE

ENTERED: Dec 6, 2018

DOCKET LINE 72 Jean Friend, Clerk

EXHIBIT B

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

CHRISTOPHER CHAFIN, CHEAT LAKE URGENT CARE, PLLC,

Plaintiffs,

v.

CIVIL ACTION NO. 14-C-547

JUDGE SUSAN B. TUCKER

DAVID ANDERSON, BRIAN R. BOAL, BOAL & ASSOCIATES, PC, GILLEN ENTERPRISES, LLC, AFFORDABLE CONTRACTORS, LLC and BUILD IT, LLC,

Defendants.

AMENDED SCHEDULING ORDER

The following schedule will apply to and govern the above-captioned action. In the absence of a specific date or deadline for a given activity, it is anticipated that such activity will be scheduled and conducted within a reasonable time prior to trial and prior to any scheduled activity which logically precede it in accordance with the WEST VIRGINIA RULES OF CIVIL PROCEDURE and the WEST VIRGINIA TRIAL COURT RULES.

Trial Date and Time:	March 24 2020 at 9:00 a.m.
Estimated length of trial:	7 Days
Jury or non-jury:	Jury
Jury Deposit Amount:	$1,500.00 (per party) Paid at the Final Pre-Trial Hearing
Final Pre-Trial Hearing Date and Time:	March 13, 2020 at 1:30 p.m. All parties, persons with settlement authority, and lead counsel MUST attend the Pre-Trial Hearing.
Discovery Deadline:	November 29, 2019

EXHIBIT B

Mediation Deadline:	December 6, 2019 All parties, persons with settlement authority, and lead counsel **MUST** attend the Mediation. The parties shall pay equally the costs of the mediation, unless otherwise agreed, or ordered.
Preliminary Fact Witnesses Exchanged:	January 15, 2019
Party with burden of proof to supplement trial experts' opinions:	August 9, 2019
Party without burden of proof to disclose trial experts:	September 27, 2019
Medical Examination/Property Inspection deadline:	n/a All examinations, record review, or inspections by experts shall be completed by this date. Reports from such examinations or inspections shall be provided by the expert to the opposing party no less than two weeks following the date the examination, review, or inspection is conducted.
Dispositive Motions/Motions *In Limine*:	February 21, 2020
Responses to Motions:	February 28, 2020
Replies to Motions:	March 6, 2020
Jury Instructions, Proposed *Voir Dire*, Verdict Forms, Final Lists of Fact and Expert Witnesses, and Final Exhibit Lists:[1]	February 28, 2020
Objections to Proposed *Voir Dire*, Verdict Forms, Final Lists of Fact and Expert Witnesses, and Final Exhibit Lists:	March 6, 2020
Jury Instruction Conference Deadline:	March 13, 2020
Objections to Jury instructions:	March 13, 2020

[1] The original is to be filed with the Circuit Clerk, with a Microsoft Word version sent *via* email to Judge Tucker's Judicial Law Clerk at erin.sharma@courtswv.gov.

The parties must send a Microsoft Word version of all FINAL and AGREED UPON Jury Instructions, as well as Objections not resolved *via* email to Judge Tucker's Judicial Law Clerk.[1]

In the event this case proceeds to trial, the Court will conduct a Jury Instructions Conference at which the Court will consider all objections to proposed Jury Instructions and revise the Court's Charge to the Jury. The date and time of the conference will established at the Court's Final Pre-Trial Conference.

The **TRIAL DATE** and **FINAL PRE-TRIAL CONFERENCE DATE** and **TIME** may **NOT** be adjusted without Court approval. However, the remaining dates may be adjusted by agreement of counsel so long as there is some form of documentation of the agreement. The agreed upon adjusted deadlines shall then be distributed to all counsel of record.

The Clerk of this Court shall provide a copy of this Order to all counsel of record.

Entered this 17th day of June 2019.

SUSAN B. TUCKER, CHIEF JUDGE

ENTERED Jun 19 2019
DOCKET 100 Jean Frank, Clerk

EXHIBIT C

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

CHRISTOPHER CHAFIN, CHEAT LAKE URGENT CARE, PLLC,

Plaintiffs,

v.

DAVID ANDERSON, BRIAN R. BOAL and BOAL & ASSOCIATES, P.C., GILLEN ENTERPRISES, LLC, AFFORDABLE CONTRACTORS, LLC, and BUILD IT, LLC

Defendants.

Civil Action No.: 16-C-547

The Hon. Susan B. Tucker

Jury Trial Demanded

SECOND AMENDED SCHEDULING ORDER

The following schedule will apply to and govern the above-captioned action. In the absence of a specific date or deadline for a given activity, it is anticipated that such activity will be scheduled and conducted within a reasonable time prior to trial and prior to any scheduled activity which logically precede it in accordance with the WEST VIRGINIA RULES OF CIVIL PROCEDURE and the WEST VIRGINIA TRIAL COURT RULES.

Trial Date and Time:	June 23, 2020 at 9:00 a.m.
Estimated length of trial:	The trial is expected to commence on June 23, 2020 and continue through June 26, 2020
Jury or non-jury:	Jury
Jury Deposit/Amount:	$1,500.00 (per party) Paid at the Final Pre-Trial Hearing
Final Pre-Trial Hearing Date and Time:	June 8, 2020 at 11:00 a.m.
	All parties, persons with settlement authority, and lead counsel MUST attend the Pre-Trial Hearing.

EXHIBIT C

Discovery Deadline:	January 29, 2020
Mediation Deadline:	February 6, 2020
	All parties, persons with settlement authority, and lead counsel MUST attend the Pre-Trial Hearing.
Preliminary Fact Witnesses Exchanged:	March 15, 2020
Party with burden of proof to supplemental trial experts' opinions:	August 9, 2019
Party without burden of proof to disclose trail experts:	September 27, 2019
Medical Examination/Property Inspection deadline:	N/A
	All examinations, record review, or inspections by experts shall be completed by this date. Reports from such examinations or inspections shall be provided by the expert to the opposing party no less than two weeks following the date the examinations, review, or inspection is conducted.
Dispositive Motions/Motions *In Limine*:	May 18, 2020
Responses to Motions:	May 25, 2020
Replies to Motions:	June 1, 2020
Jury Instructions, Proposed *Voir Dire*, Verdict Forms, Final Lists of Facts and Expert Witnesses and Final Exhibit Lists[1]:	May 18, 2020

[1] The original is to be filed with the Circuit Clerk, with a Microsoft Word version sent *via* email to Judge Tucker's Judicial Law Clerk at [redacted]

Objections to Jury Instructions, Proposed *Voir Dire*, Verdict Forms, Final Lists of Facts and Expert Witnesses and Final Exhibit Lists: May 25, 2020

The Parties must send a Microsoft Word Version of all FINAL and AGREED UPON Jury Instructions as well as Objections not resolved via email to Judge Tucker's Judicial Law Clerk.

Jury Instruction Conference Deadline: June 8, 2020

In the event this case proceeds to trial, the Court will conduct a Jury Instructions Conference at which the Court will consider all objections to proposed Jury Instructions and revise the Court's Charge to the Jury. The date and time of the conference will establish at the Court's Final Pre-Trial Conference.

The **TRIAL DATE** and **FINAL PRE-TRIAL CONFERENCE DATE** and **TIME** may **NOT** be adjusted without Court approval. However, the remaining dates may be adjusted by agreement of counsel so long as there is some form of documentation of the agreement. The agreed upon adjusted deadlines shall then be distributed to all counsel or record.

The Clerk of this Court shall provide a copy of this Order to all counsel of record.

Entered this 14th day of August 2019.

Susan B. Tucker

SUSAN B. TUCKER, CHIEF JUDGE

ENTERED: Aug 14 2019

DOCKET LINE 105 Jeff Rent. Clerk

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

CHRISTOPHER CHAFIN, CHEAT LAKE URGENT CARE, PLLC,

Plaintiffs,

v.

DAVID ANDERSON, BRIAN R. BOAL and BOAL & ASSOCIATES, P.C., GILLEN ENTERPRISES, LLC, AFFORDABLE CONTRACTORS, LLC, and BUILD IT, LLC

Defendants.

Civil Action No.: 16-C-547

The Hon. Susan B. Tucker

Jury Trial Demanded

ORDER OF COURT

AND NOW, this _____ day of _____, 2020, Defendants' Motion in Limine to Preclude Introduction of Expert Testimony is hereby GRANTED. Plaintiffs shall be precluded from introducing into evidence any expert testimony at the trial in this matter.

_____

Judge Susan B. Tucker

[LO787117.3]

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

CHRISTOPHER CHAFIN, CHEAT LAKE URGENT CARE, PLLC,

Plaintiffs,

v.

DAVID ANDERSON, BRIAN R. BOAL and BOAL & ASSOCIATES, P.C., GILLEN ENTERPRISES, LLC, AFFORDABLE CONTRACTORS, LLC, and BUILD IT, LLC

Defendants.

Civil Action No.: 16-C-547

The Hon. Susan B. Tucker

Jury Trial Demanded

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing ***Motion in Limine to Preclude Expert Testimony*** upon the following counsel via Electronic Mail:

James A. Gianola, Esquire
jgianola@gbbjlaw.com
John F. Gianola, Esquire
john.gianola@gbbjlaw.com
Jason Wingfield, Esquire
jwingfield@gbbjlaw.com
Gianola, Barnum, Bechtel, and Jecklin P.C.
1714 Mileground Road
Morgantown, WV 26505

Counsel for Plaintiffs

Raymond H Yackel, Esquire
raymondyackel@aol.com
Law Office of Raymond H. Yackel
162 Chancery Row
Morgantown, WV 26505

Counsel for David Anderson

Date: February 4, 2020

By: _____

Avrum Levicoff, Esquire
W.Va. I.D. #: 454
The Levicoff Law Firm, P.C.
4 PPG Place, Suite 200
Pittsburgh, PA 15222
412-434-5200 – Phone
412-434-5203 – Facsimile

Counsel for Defendants, Brian R. Boal and Boal & Associates, PC

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
Division 1

CHRISTOPHER CHAFIN, and
CHEAT LAKE URGENT CARE, PLLC,

Plaintiffs,

v.

CIVIL ACTION NO. 16-C-547
Honorable Susan B. Tucker

DAVID ANDERSON,
BRIAN R. BOAL,
BOAL & ASSOCIATES, PC.,
GILLEN ENTERPRISES, LLC,
AFFORDABLE CONTRACTORS, LLC, and
BUILD IT, LLC,

Defendants.

RESPONSE IN OPPOSITION TO DEFENDANTS BRIAN R. BOAL AND BOAL & ASSOCIATES' MOTION IN LIMINE TO PRECLUDE EXPERT TESTIMONY and DEFENDANT DAVID ANDERSON'S MOTION ADOPTING MOTION IN LIMINE FILED BY DEFENDANTS BRIAN R. BOAL AND BOAL & ASSOCIATES, PC

The Plaintiffs, Christopher Chafin ("Chafin") and Cheat Lake Urgent Care, PLLC ("CLUC"), hereby provides their response to the Defendants' Motion in Limine to Preclude Expert Testimony:

1. The Defendants' Motion adequately states the procedural progression of this case as it relates to the filing of the complaints and the multiple scheduling orders.

2. The Defendants' chief concern is the timeliness of the disclosure of expert opinions and reports.

3. The Defendants fail to adequately inform the Court of all the events that have transpired.

4. Accordingly, a timeline is provided:

EXHIBIT
B

a. On April 26, 2018, David Anderson was sentenced in Criminal Case No: 14-F-49. A part of the sentence awarded required him to deposit with the Clerk fifty thousand dollars ($50,000.00). This was never done.

b. On May 1, 2019, the Plaintiffs disclosed their expert witnesses as Andrew Smith, CPA and Charles Russo, PhD, CPA.

c. On July 15, 2019, a check for the retainer and documents associated with this case were provided to Mr. Russo. The documents provided included every document produced in discovery.

d. On July 19, 2019, case documents were sent to Mr. Smith. The documents provided included every document produced in discovery.

e. August 12, 2019, counsel for the Plaintiffs directed a subpoena duces tecum to be served on the local branch of the IRS as ordered by this Court. Service was ultimately refused.

f. On August 13, 2019, a letter from Mr. Yackel demanding billing records from "Sage" was received by Plaintiffs' counsel.

g. Counsel for the Plaintiffs directed subpoenas duces tecum to Greenway Health, LLC and Sage Software, Inc. seeking the records sought by Mr. Yackel. No documents were obtained.

h. On September 25, 2019, Mr. Smith provided his first invoice of $5,250.00.

i. On October 16, 2019, counsel for the Plaintiffs provided the responses to Mr. Yackel.

j. On October 23, 2019, follow up was conducted with the IRS to determine the location of documents requested pertaining to estimated tax payments submitted on behalf of Plaintiff Chafin. The results of that conversation were forwarded to all counsel.

k. On October 23, 2019, a preliminary report from the damages expert was provided to counsel.

l. On October 24, 2019, Mr. Yackel sent correspondence again seeking information for accounts receivable after January 1, 2013.

m. On November 7, 2019, Mr. Levicoff sent correspondence acknowledging receipt of the Plaintiffs' preliminary report and the plan to provide the final results to the standard of care expert but objecting to the untimeliness of the Plaintiffs' disclosures.

n. On November 12, 2019, Mr. Levicoff directed a subpoena duces tecum to be served on Lambright and Gutta, PLLC (the accounting firm for the Plaintiffs after Boal and Associates, P.C.), seeking tax information from 2003 through the filing of this case. Included in this request would have been accounts receivable.

o. On November 12, 2019, Plaintiffs' counsel conferred with Mr. Smith. Mr. Smith needed additional information in order to complete his work. That information included quickbook files in the possession of Defendant Boal and Associates, P.C.

p. On November 15, 2019, Plaintiffs' counsel received the second invoice for Mr. Smith's work for $10,500.00.

q. On November 22, 2019, Plaintiffs' counsel served on Mr. Levicoff their First Combined Discovery Requests seeking the information identified by Mr. Smith.

r. On December 9, 2019, a Notice of Deposition was issued for Christopher and Mary Chafin's deposition.

s. On December 16, 2019, Cynthia O'Donnell, Esq. requested an extension in preparing responses to the discovery requests. Counsel for the Plaintiffs acquiesced, acknowledging that the information was crucial to the expert's examination.

t. On January 3, 2020, Ms. O'Donnell contacted Plaintiffs' counsel again seeking an extension. Although none was necessary, Plaintiffs' counsel agreed.

u. On January 6, 2020, Ms. O'Donnell produced the discovery. Of the items sought was Quickbook files for Defendant Affordable Contractors, LLC. Mr. Yackel objected to the production of these documents.

v. On January 16, 2020, Plaintiffs' counsel caused to be served on Mr. Yackel those discovery requests seeking production of Quickbook files for Defendant Affordable Contractors, LLC.

w. On January 23, 2020, after having met to prepare and just one business day prior to, counsel for Boal and Associates, P.C.

unilaterally cancelled the deposition scheduled for Christopher and Mary Chafin.

x. Upon review of the Quickbooks files, it was identified that ABMS, Inc. was a former medical billing provider. A subpoena was issued on January 24, 2020, by the Plaintiffs seeking the documentation that Mr. Yackel desired.

y. On February 7, 2020, Plaintiffs' counsel (not the Plaintiffs) paid Mr. Smith's invoice and provided the documents requested.

z. On February 7, 2020, Plaintiffs' counsel received Mr. Levicoff's Motion in Limine to Preclude Expert Testimony.

aa. On February 18, 2020, admittedly thirty-two (32) days after having been served with Requests for Admissions, answers the same though by operation of law these had already been admitted. Further, Mr. Yackel moved the Court for an additional thirty (30) days to respond to the remaining discovery. No responses have been received.

bb. On February 28, 2020, Plaintiffs' counsel contacted Mr. Yackel authorizing the extension sough and seeking a limited release of the Quickbook files. Specifically, the correspondence stated:

Ray,

Good morning. I have no objection to your request for extension. I do note that the timing of your motion is conspicuous given that the discovery was propounded upon your client January 16, 2020. Thereafter, Mr. Levicoff filed his Motion for Summary Judgment and noticed a hearing for March 13, 2020. Your extension would make the discovery sought (which

is instrumental in providing a proper and thorough report to Mr. Levicoff) due the following Tuesday. Coincidence?

Notwithstanding, I am writing to ask that Defendant Boal be allowed to release and produce the documents previously identified as BOAL 005592-006724 in addition to the quickbooks files associated with Defendant Affordable Contractors, LLC. This would require nothing in terms of effort on your part considering those items are already in production form and in the possession of co-defendants. If there is an issue of concern, I would be willing to enter an agreed protective order, if appropriate. I believe that refusal to allow production, given the "coincidence" above, would simply be viewed as obstructive. Moreover, having this information now would allow an analysis sooner rather than later, thereby ameliorating some of Defendant Boal's concerns.

Please let me know your position on this at your earliest convenience.

Jason

cc. No response has been received to the above correspondence. Further, the Quickbooks documents provided by Boal indicated that "Sage" had not been used by the medical practice for quite some time prior to Anderson's departure.

dd. On March 10, 2020 (though dated March 9, 2020) Mr. Yackel provided Defendant David Anderson's Motion Adopting Motion in Limine Filed by Defendants Brian R. Boal and Boal & Associates, P.C. joining in the motion to preclude the Plaintiffs' use of their experts.

ee. Also on March 10, 2020, Plaintiffs' counsel contacted the IRS to determine the status of the account files for Plaintiff Chafin as requested by Ms. O'Donnell.

5. The delay in providing the expert reports desired by the Defendants is attributable, at least in part, to the Defendants themselves.

6. Because of the degree of negligence involved, the Plaintiffs lacked the resources necessary to hire the proper experts and to keep them working.

7. The documents necessary to produce an opinion have not been provided in a timely fashion.

8. It is clear that the Defendants have engaged in gamesmanship and obfuscation designed to waste the resources of the Plaintiffs. Now, they complain that their efforts have been successful.

9. If Defendant Anderson had deposited with the Clerk of the Circuit Court the moneys he was ordered to, the Plaintiffs could have petitioned this Court for relief and release of those funds to engage their experts sooner.

10. Despite having a preliminary report for almost five months, Mr. Yackel still has not disclosed any expert or report that he intends to use. Mr. Levicoff has not disclosed an expert report.

11. The Defendants fail to cite to any actual harm or prejudice they have suffered. Despite alleging in Paragraph 8 of the Motion in Limine to Preclude Expert Testimony that the allegations are "unclear and vague," counsel makes a complete and concise summary of the allegations in Paragraph 1.

12. The Plaintiffs acknowledge the delay in producing the reports desired by the Defendants, but the Defendants fail to acknowledge their role in creating the delay or the additional facts necessary to completely adjudicate this issue.

13. Accordingly, the Plaintiffs ask this Court to allow discovery to continue or amend its scheduling order to accommodate the proper litigation of this matter and to deny the relief sought by the Defendants.

Christopher Chafin,
By Counsel,

Jason E. Wingfield, Esq. (W.Va. Bar # 12582)
Gianola, Barnum, Bechtel, & Jecklin, L.C.
1714 Mileground
Morgantown, West Virginia 26505
(304) 291-6300
jwingfield@gbbllaw.com

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
Division 1

CHRISTOPHER CHAFIN, and
CHEAT LAKE URGENT CARE, PLLC,

Plaintiffs,

v.

CIVIL ACTION NO. 16-C-547
Honorable Susan B. Tucker

DAVID ANDERSON,
BRIAN R. BOAL,
BOAL & ASSOCIATES, PC.,
GILLEN ENTERPRISES, LLC,
AFFORDABLE CONTRACTORS, LLC, and
BUILD IT, LLC,

Defendants.

CERTIFICATE OF SERVICE

I, Jason E. Wingfield, certify that on March 11, 2020, I served a copy of Plaintiff's **Response in Opposition to Defendants Brian R. Boal And Boal & Associates' Motion in Limine to Preclude Expert Testimony and Defendant David Anderson's Motion Adopting Motion in Limine by Defendants Brain R. Boal and Boal & Associates, PC** by facsimile and U.S. Mail to:

Avrum Levicoff
The Levicoff Law Firm, P.C.
4 PPG Place
Suite 200
Pittsburgh, PA 15222
Facsimile: (412) 434-5203
Counsel for Defendants Brian Boal and Boal & Associates PC

Raymond H. Yackel
Law Office of Raymond H. Yackel
162 Chancery Row
Morgantown, WV 26505
Facsimile: (304) 296-1524
Counsel for Defendant David Anderson

Jason E. Wingfield, Esq. (W.Va. Bar # 12582)
Gianola, Barnum, Bechtel, & Jecklin, L.C.
1714 Mileground
Morgantown, West Virginia 26505
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jwingfield@gbbjlaw.com

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
Division 1

CHRISTOPHER CHAFIN, and
CHEAT LAKE URGENT CARE, PLLC,

Plaintiffs,

v.

CIVIL ACTION NO. 16-C-547
Honorable Susan B. Tucker

DAVID ANDERSON,
BRIAN R. BOAL,
BOAL & ASSOCIATES, PC.,
GILLEN ENTERPRISES, LLC,
AFFORDABLE CONTRACTORS, LLC, and
BUILD IT, LLC,

Defendants.

PLAINTIFFS' EXPERT REPORT DISCLOSURE

The Plaintiffs, Christopher Chafin ("Chafin") and Cheat Lake Urgent Care, PLLC ("CLUC"), hereby provides their Expert Witness' Report Disclosure:

1. Andrew Smith, CPA
   Smith and Associates, CPA's and Consultants, PLLC
   426 Drummond Street
   Morgantown, West Virginia 26505

   Mr. Smith has reviewed the available documents in this matter and provided an opinion estimate on the damages attributable to the Defendants.[1]

2. Charles J. Russo, PhD, CPA
   408 Acton Way
   Bel Air, Maryland 21015

[1] See Exhibit 1.

EXHIBIT
C

Mr. Russo has reviewed the available documents in this matter and provided an on Defendants Boal and Boal & Associates, PC deviation from the professional standard of care.[2]

3. The Plaintiff reserves the right to supplement this request as necessary.

Christopher Chafin,
Cheat Lake Urgent Care,
By Counsel,

Jason E. Wingfield (Esq. WV Va. Bar # 12582)
Gianola, Barnum, Bechtel, & Jecklin, L.C.
1714 Mileground
Morgantown, West Virginia 26505
(304) 291-6300
jwingfield@gbbjlaw.com

[2] See Exhibit 2.

Charles J. Russo, PhD, CPA, CMA, CVA
292 Canterbury Road, Suite P
Bel Air, MD 21014
Phone: 410-698-7400
Email: chuck@tussopohcpa.com

June 1, 2020

Mr. Jason Wingfield, Esq.
Gianola, Barnum, Bechtel, & Jecklin, LC
1714 Mileground Road
Morgantown, West Virginia 26505

Dear Mr. Wingfield:

Objective

I was engaged to perform

1. Calculation of economic damages that Christopher Chafin and Cheat Lake Urgent Care, LLC may have suffered in connection with the acts committed by defendants David Anderson, Brian R. Boal, Boal and Associates, PC, Gillen Enterprises, LLC, Affordable Contractors, LLC, and Built-It, LLC as described in Civil Action No. 16-C-547.
2. Assistance with evaluating the merits of the accounting malpractice claim against Boal and Associates, PC, including reviewing relevant professional standards, and accountants work papers of financial statements or tax returns that are the subject of the malpractice claim as described in Civil Action No. 16-C-547.
3. Provide expert witness testimony related to the above referenced proceeding.

Scope

Upon further discussion with, we agreed that I would not calculate economic damages. Economic damages were estimated in reports by Smith & Associates CPAs & Consultants, PLLC, of Morgantown, West Virginia and by Michael D. Kirkpatrick, CPA, Forensic Accountant of Morgantown, West Virginia. Both are included as appendices to this report.

This engagement provides an evaluation of the merits of the accounting malpractice claim against Boal and Associates, PC, including reviewing relevant professional standards, financial statements or tax returns, while considering the estimates of economic damages in the two forensic accounting reports noted above.

Parties

Plaintiffs:

1. Christopher Chafin, a resident of Morgantown, West Virginia.
2. Cheat Lake Urgent Care, PLLC (CLUC), located in Morgantown, West Virginia.

Defendants:

1. David Anderson, a resident of Preston County, West Virginia.
2. Brian R. Boal, a resident of Oakland Maryland, who has provided accounting and tax services in Monongalia County, West Virginia.

3. Boal & Associates, PC, a professional corporation located in Oakland, Maryland, which has provided accounting and tax services in Monongalia County, West Virginia.
4. Gillen Enterprises, LLC (Gillen Enterprises), a former West Virginia LLC located in Bruceton Mills, West Virginia.
5. Affordable Contractors, LLC (Affordable Contractors), a former West Virginia LLC located in Morgantown, West Virginia.
6. Built It, LLC (Build It), a former West Virginia LLC located in Morgantown, West Virginia.

Company Background of Cheat Lake Urgent Care, LLC

Cheat Lake Urgent Care, PLLC is a physician practice providing emergency services and general practice. The Company files Form 1065 U.S. Return of Partnership Income each calendar year. The Company uses NAICS Code 621111, Offices of Physicians (except Mental Health Specialists). The Company is located at 710 Venture Drive, Morgantown, West Virginia 26508. Forms 1065 use the cash basis of accounting. On Forms 1065 through 2013 there were three LLC members, Christopher Chafin, David M. Anderson, and Joseph M. Herzog each with a one third interest. Beginning in 2014, Cheat Lake Urgent Care, PLLC Form 1065 there were two LLC members, Christopher Chafin and Joseph M. Herzog, each with a 50 percent interest.

I examined tax returns Forms 1065 for the years 2007-2014. I was not provided with compiled financial statements or engagement letters for accounting or tax services.

Background from Second Amended Complaint

The following was stated in paragraphs 14-25 in the Second Amended Complaint dated December 15, 2017:

Plaintiff Christopher Chafin and Defendant Anderson were partners and co-owners (along with a third individual) of a medical practice in the Morgantown area known as Cheat Lake Urgent Care. Defendant Boal and his accounting firm Defendant Boal & Associates were retained by Cheat Lake Urgent Care to provide accounting and tax services to Cheat Lake Urgent Care. Boal and Boal Associates provided services and made representations regarding accounting, tax, and financial information to Chafin and CLUC. Defendants Boal and Boal & Associates, also were retained by Chafin to provide personal accounting and tax services.

In providing accounting services to Cheat Lake Urgent Care, Defendants Boal and Boal & Associates handled payroll, with the withholding of salary in order to pay federal and state taxes, and the filing and paying of taxes. Boal and Boal & Associates maintained one or more registers for CLUC bank accounts which tracked and recorded deposits and withdrawals from CLUC banking and/or checking accounts. At all relevant times, Defendant Boal was a signatory on the bank accounts of Cheat Lake Urgent Care with the authority to issue checks charged on that account. In 2013, Defendant Anderson was accused of embezzling upwards of $500,000 from Cheat Lake Urgent Care.

Defendants Boal and Boal & Associates, through past practices and as well as statements lead Plaintiff to believe that a portion of Plaintiff Christopher Chafin's salary had been withheld in order to pay at least a portion of his income taxes. Later Plaintiff discovered that while money had been withheld from his pay check, payments had not been made to the IRS or the state of West Virginia. Plaintiffs later discovered that while money had been withheld from Chafin's pay check, the attendant payments had not been made to the IRS or the State of West Virginia. Based upon statements by Defendant Anderson, Defendant Boal and Defendant Boal & Associates, Defendant denies that plaintiff had been led to believe that he had complied with all requirements, tax liabilities, and payments. Since then, the IRS has attempted to collect and is in the process of collecting money from Plaintiff because of the failure to pay the withheld amounts.

The following counts were listed in the Second Amended Complaint:

Count 1: Malpractice by Defendants Boal and Boal & Associates
Count 2: Breach of the CLUC Contract by Defendants Boal and Boal and Associates
Count 3: Breach of the Chafin Contract by Defendants Boal and Boal & Associates
Count 4: Negligence by Defendants Boal and Boal & Associates
Count 5: Negligent Misrepresentation by Defendants Boal and Boal & Associates
Count 6: Breach of Defendant Boal's Fiduciary Duty
Count 7: Breach of Contract by Defendant Anderson
Count 8: Breach of Defendant Anderson's Fiduciary Duty
Count 9: Fraud by Defendant Anderson
Count 10: Unjust Enrichment of Defendant Anderson
Count 11: Unjust Enrichment of Gillen Enterprises
Count 12: Unjust Enrichment of Affordable Contractors
Count 13: Unjust Enrichment of Build It

Indictment

The Circuit Court of Monongalia County, West Virginia indicted David Anderson on nine counts as follows:

Count 1: Embezzlement in excess of $1,000.00 by removing cash from deposits, totaling approximately $56,730.50.
Count 2: Embezzlement in excess of $1,000.00 by removing money from CLUC accounts by issuing checks for personal use and taking out lines of credit
Count 3: Embezzlement in excess of $1,000.00 by removing cash from deposits, with the intent to permanently deprive CLUC of said money, totaling approximately $78,449.63.
Count 4: Embezzlement in excess of $1,000.00 by removing money from CLUC accounts by issuing checks for personal use and taking out lines of credit.
Count 5: Embezzlement in excess of $1,000.00 by removing cash from deposits, totaling approximately $67,047.27.
Count 6: Embezzlement in excess of $1,000.00 by removing money from CLUC accounts by issuing checks for personal use and taking out lines of credit.
Count 7: Fraudulent Scheme of embezzlement in excess of $1,000.00 by means of fraudulent pretenses, representations or promises, as part of a common scheme or plan,

by submitting more work hours than he actually worked totaling approximately $77,520.00.

Count 8: Fraudulent Scheme of embezzlement in excess of $1,000.00 by means of fraudulent pretenses, representations or promises, as part of a common scheme or plan, by submitting more work hours than he actually worked totaling approximately $75,480.00.

Count 9: Fraudulent Scheme of embezzlement in excess of $1,000.00 by means of fraudulent pretenses, representations or promises, as part of a common scheme or plan, by submitting more work hours than he actually worked totaling approximately $58,320.00.

Guilty Plea by Anderson

In a plea agreement dated November 15, 2016, Anderson pled guilty to embezzlement under counts one, two, and three of the indictment. Each were felony counts. The Victim Impact Statement dated January 9, 2017 restitution was requested as follows:

Restitution is requested as follows:

Cash posted in journals 2010	**$ 56,934.50**
Cash posted in journals 2011	**$ 78,265.52**
Bank fees	**$ 8,307.80**
Payment to Lowe's	**$ 3,168.73**
Payments to Centra Visa	**$ 11,422.49**
Payments to Cabela's	**$ 40,564.28**
Staples	**$ 1,536.25**
Office Depot	**$ 1,892.88**
Amerigas	**$ 630.18**
Guardian Insurance	**$ 14,306.70**
Teresa Anderson payroll	**$ 19,052.80**
Advance Me	**$ 65,000.00**
Hall Booth Smith	**$ 14,263.15**
Wages Paid to Mr. Anderson	**$ 211,320.00**
Gillen Enterprises	**$ 39,000.00**
Mark Everett, Esq Attorney Fees	**$ 10,000.00**
Michael Kirkpatrick Forensic Account Fees	**$ 5,000.00**
Loan to Mr. Anderson	**$ 112,496.00**
Remainder included in Forensic Audit	**$ 124,161.47**
Total	**$ 817,321.95**

Restitution is to be paid and forwarded to:

Chest Lake Urgent Care
Attn: Christopher Chafin
710 Venture Dr
Morgantown WV 26508

Forensic Accountant Report, Smith & Associates CPAs & Consultants, PLLC

I was provided with a draft restitution calculation dated May 5, 2020 from Andrew Smith, CPA of Smith & Associates CPAs & Consultants, PLLC, Morgantown, West Virginia. Total estimated restitution was $2,179,000.

Based on my analysis of financial documents and Quickbooks file you provided to me in this matter:

(in thousands)	estimated restitution calculation	
Excessive Repairs	$	47
Net Due from others		113
Unnecessary Items:		
A) Credit Card Debt		28
B) Local bank and other debt		478
C) Overdraft items		29
D) Interest costs		21
Theft		192
Guaranteed payments		600
Excessive:		
A) Office Supplies		57
B) Billing Services		169
C) Bank fees		30
Unpaid partner tax liabilities		200
Employee medical		5
Patient cash payments		203
Unidentified check		7
Total estimated restitution calculation	$	2,179

Other items noted included:

- Large volume of documents approaching 10,000 pages reviewed.
- Two medical bills totaling $1,090 for T. Anderson were paid.
- Anderson card was found with charges from Dish Network, Amazon, ATM (total $471).
- Paid invoice records contain a significant number of past due notices and indications of credit card revocation by suppliers.
- CLUC was a profitable venture, dire cash position in 2013.
- Much of the misappropriation occurred in 2011 and 2012.
- See attached selected comparative analysis.

A selective comparative analysis was included on page two of the Smith report and included:

1. Guaranteed payments increased from $438, 539 in 2010 to $829,309 in 2011. Anderson has $185,642 of that increase.
2. Billing services was $49,615 in 2020 and dropped to $2,538 in 2011.
3. Office expense was $12,409 in 2010 and increased to $23,755 in 2011.
4. Theft recorded in 2012 of $192, 559.
5. Due from others recorded in 2011 of $112,496.
6. Due from Affordable Contractors and due from Gillen recorded at $55,000 and $9,000 respectively.
7. Due from Anderson recorded in 2010 at $21,996.

8. Credit cards payable increased from $3,764 in 2009 to $18,575 in 2011.
9. Notes payable increased from $53,319 in 2009 to $270,616 in 2011.

Forensic Accountant Report, Michael D. Kirkpatrick, CPA

A forensic review of potential asset misappropriation for the calendar year 2012 was performed by Michael D. Kirkpatrick, CPA, Forensic Accountant of Morgantown, West Virginia. The report is dated January 24, 2013. The forensic review included an analysis of financial records and interviews of key people. Kirkpatrick reviewed databases from Monongalia County. West Virginia to identify businesses affiliated with Dr. David M. Anderson in addition to those previously provided by Dr. Chafin (Gillen Enterprises, LLC; Built It, LLC; University Partners, LLC; and Affordable Contractors, LLC). Kirkpatrick interviewed the following individuals:

- Dr. Christopher M. Chafin, managing partner, CLUC
- Brian R. Boal, CPA
- Cinda Savage, Boal & Associates, CPAs
- Heather Bartholomew, CLUC

From the Kirkpatrick report Executive Summary:

CLUC financial records for 2012 maintained by Brian R. Boal, CPA, were reviewed on January 14, 2013, for suspicious transactions related to Dr. Anderson and Boal was interviewed.

Cinda Savage, Boal & Associates, CPAs, was telephonically interviewed on January 17, 2013, concerning payroll payments to Teresa L. Anderson.

Heather Bartholomew, CLUC, was interviewed on January 16, 2013. She also provided for review copies of the 2012 CLUC Journal Cash Analysis Reports and duplicate deposit tickets for the CLUC bank account at Centra Bank/United Bank.

CLUC financial records from Clear Mountain Bank, Huntington National Bank, and Centra Bank/United Bank for 2012 were reviewed for suspicious transactions.

The AdvanceMe, Inc. Future Receivables Purchase and Sale Agreement #138476 was reviewed on January 17, 2013.

Based on the results of this forensic review for calendar year 2012, suspicious payments of $163,073.00 and suspicious deposits of $46,803.30 were identified. Additionally, CLUC 2012 cash receipts of $63,047.27 were identified as not being deposited in the normal course of business to the CLUC Centra Bank/United Bank primary operating account. CLUC also paid $60,573.00 during 2012 on the AdvanceMe, Inc. Future Receivables Purchase and Sale Agreement while still owing $68,167.40.

Kirkpatrick Report Findings:

The Kirkpatrick report found the existence of a possible misappropriation of CLUC assets in 2012 by Dr. David M. Anderson of at least $179,316.97 as follows:

Type of Transaction	Amount
Payments to Dr. David M. Anderson	$39,800.00
Payments to Teresa L. Anderson (gross)	9,456.00
Payments to Gillen Enterprises, LLC	62,000.00
Payments to Build It, LLC	2,000.00
Payments to Affordable Contractors, LLC	9,500.00
Payments to Jim Wilson	10,350.00
Payments to Lowe's Business Account	4,417.00
Payments to Cabela's Visa	10,050.00
Payments to Cardmember Services	15,500.00
Undeposited Cash From Operations	63,047.27
Payments From Dr. David M. Anderson	(26,784.44)
Unidentified Income to CLUC	(20,018.86)
Net Total	$179,316.97

The Kirkpatrick report only covers calendar year 2012, but these are the types of transactions that occurred over multiple years. The summary of evidence supporting his findings included:

Review of online databases for Monongalia County, WV and the WV Secretary of State

A review of online databases for the Monongalia County, WV, Clerk and the West Virginia Secretary of State on January 9, 2013, established that Dr. Anderson was affiliated with the following businesses in addition to CLUC: Affordable Contractors, LLC; Build It, LLC; Gillen Enterprises, LLC; and University Partners, LLC.

Kirkpatrick interview of Dr. Christopher M. Chafin, managing partner of CLUC, January 9, 2013

On October 12, 2012, and January 9, 2013, Dr. Christopher M. Chafin, CLUC managing partner, was interviewed. He advised that CLUC is a partnership with three partners: Dr. David M. Anderson, Dr. Christopher M. Chafin, and Dr. Joseph M. Hartzog. Dr. Anderson has served as the managing partner from January 23, 1997, until January 7, 2013. In this capacity, Dr. Anderson essentially ran all the financial and business affairs of CLUC. In January 2013, Dr. Anderson was voted out as managing partner and replaced by Dr. Chafin. Dr. Chafin advised that in the CLUC partnership agreement there is a clause that the managing partner cannot pay large business expenses in excess of $5,000.00 without the approval of the other partners. He believes that money coming into the CLUC business enterprise is not staying within the CLUC business enterprise and has been misappropriated by Dr. Anderson. He believes that Dr. Anderson has diverted CLUC money to himself; to Dr. Anderson-affiliated business entities not associated with CLUC; to payments to his wife, Teressa L. Anderson; and to payments to credit cards controlled by him for expenses not for the benefit of CLUC. Dr. Chafin specifically mentioned payments to Dr. Anderson-affiliated businesses Gillen Enterprises, LLC; Build It, LLC; and Affordable Contractors, LLC, and to credit cards with Lowe's, Cabela's, and Centra Bank/United Bank. Additionally, Dr. Chafin advised that on February 28, 2012, Dr. Anderson had entered into an agreement with AdvanceMe, Inc. that pledged $128,740.00 in CLUC credit card payments to AdvanceMe, Inc. in exchange for an immediate payment to CLUC of $91,964.00. Dr. Chafin believed that Dr. Anderson had misappropriated a significant percentage of the money from AdvanceMe, Inc. Dr. Chafin said that CLUC employees have told them they have done things they are uncomfortable with, such as depositing CLUC checks into Dr. Anderson-affiliated companies. Dr. Chafin advised that Dr. Anderson is going through a divorce from his wife Teressa L. Anderson. He has discovered that Teressa L. Anderson has been receiving regular payments of approximately $500.00 every pay period from CLUC for many years for no known business reason.

Kirkpatrick interview of Brian R Boal, January 14, 2013

Brian R. Boal, CPA, was interviewed on January 14, 2013, and advised that he has been the CPA for CLUC for a number of years. He is also the CPA for Dr. David M. Anderson, former managing partner of CLUC, as well as a number of Dr. Anderson's business ventures that are unrelated to CLUC. As the managing partner of CLUC, Dr. Anderson was the CLUC partner almost exclusively involved in its financial management and with whom he interacted related to the financial matters of CLUC. His firm provides bookkeeping/write-up and tax services for CLUC. He also has check signing authority for CLUC and pays the majority of the bills for CLUC using "machine written" checks. He does not audit CLUC. Boal explained that Dr. Anderson also maintained checks that he hand wrote to pay "small" expenses that occurred as well as to pay credit card bills. Usually Dr. Anderson did not provide documentation supporting these payments. Normally, Dr. Anderson would mail bills to him approximately every two weeks, and he would write checks to pay them. All income for CLUC was deposited in Morgantown; he did not make any bank deposits for CLUC. The principals of CLUC, Dr. Anderson, Dr. Chris Chafin, and Dr. Mike Hartzog, are paid a recurring "guaranteed payment," similar to a salary, which is based on an hourly billing rate and the number of hours reported as worked. During 2012, several payments related to Dr. Anderson, which did not appear to be business expenses of CLUC, came into his office without supporting documentation. These included payments to Dr. Anderson beyond his "guaranteed payment," payments to business entities affiliated with Dr. Anderson (Gillen Enterprises; Built It, LLC; Affordable Contractors), payment to an individual named Jim Wilson, and payments on Lowe's, Cabela's, and Centra Bank (Cardmember Service) credit cards. He attempted to obtain supporting documentation from Dr. Anderson but was unsuccessful in doing so. Similar types of payments were also made in 2011. Boal stated that when these types of CLUC payments to came into his office without an explanation, they were booked to a "holding account" called "shareholder loan" for Dr. Anderson. Dr. Anderson never told him these payments were loans, he just needed an offsetting account against which to book the expense. He has asked Dr. Anderson about these payments, but Dr. Anderson has not provided him with any explanation for them. Therefore, he does not know what these payments are. Additionally, during 2012 payments were received by CLUC from Dr. Anderson without explanation. He booked these payments as credits against the "shareholder loan" "holding account" he had set up for Dr. Anderson. He does not know why Dr. Anderson made these payments. During 2012 there was also income booked from unidentified sources. He unsuccessfully attempted to determine the source of this income from Dr. Anderson.

Kirkpatrick telephone interview of Cinda Savage on January 17, 2013.

Cinda Savage, Boal and Associates CPAs, was telephonically interviewed on January 17, 2013. She said that she handles the payroll for CLUC for Boal and Associates. Based on the number of each employee's workhours provided to her from CLUC, she calculates the gross and net pay for the employee, prepares the net pay for direct deposit into the employee's bank account, and then accounts for the pay in CLUC's financial records. Teresa L. Anderson, wife of CLUC partner Dr. David M. Anderson, was regularly paid a salary from CLUC in 2012. She paid Teresa Anderson based on the number of hours worked reported to her and Anderson's established hourly wage rate of $16.00 per hour. From January 1, 2012 through July 18, 2012, Anderson was paid $400.00 gross per pay period based on 25 hours worked per pay period. From August 1, 2012 through November 21, 2012, Anderson was paid $384.00 gross per pay period based on 24 hours worked per pay period. This resulted in a total gross payment to Anderson in 2012 of $9,456.00 and a total net payment of $8,666.74.

Kirkpatrick interview of Heather Bartholomew, January 16, 2013

Heather Bartholomew, CLUC, was interviewed on January 16, 2013, and advised that she is the person responsible at CLUC for maintaining records relating to payments received from patients (including cash, check, and credit card payments) and posting them to the appropriate accounts. As part of these responsibilities, she notes the amount of cash received daily, and enters it appropriately. During 2012, cash and checks from patients, were provided to CLUC then-managing partner Dr. David M. Anderson for preparation of a deposit slip. She was normally the person to go to Centra Bank/United Bank to make the deposit. She deposited what Dr. Anderson gave her. While Dr. Anderson was managing partner in 2012 she cannot recall ever depositing any cash into the bank. She does not know what happened to the cash that was taken in by CLUC from its patients.

Kirkpatrick review of calendar year 2012 transactions from Centra Bank/United Bank account #0040031942

Calendar year 2012 financial transactions for the CLUC bank account at Centra Bank/United Bank, account #0040031942, as shown on the computerized account register maintained by Brian R. Boal, CPA, were reviewed on January 14, 2013, for suspicious transactions that might not have been in furtherance of the business aims of CLUC. The following suspicious transactions were noted:

Type of Transaction	Amount
Payments to Teresa L. Anderson (net)	$8,666.74
Payments to Lowe's Business Account	4,417.00
Payments to Cabela's Visa	10,050.00
Payments to Cardmember Service	15,500.00
Payment to Affordable Contractors	9,500.00
Payment From Dr. David M. Anderson	(10,000.00)
Unidentified Income	(10,000.00)
Net Total	$28,133.74

Kirkpatrick review of calendar year 2012 transactions from Clear Mountain Bank account #2864428

Calendar year 2012 financial transactions for the CLUC bank account at Clear Mountain Bank, account #2864428, as shown on the computerized account register maintained by Brian R. Boal, CPA, were reviewed on January 14, 2013, for suspicious transactions that might not have been in furtherance of the business aims of CLUC. In addition to the following, proceeds in the amount of $91,964.00 from the AdvanceMe, Inc. loan were deposited to this account on March 8, 2012. Within 47 days of the deposit of the AdvanceMe, Inc. loan proceeds, a total of $44,000.00 was paid to Build It, LLC ($2,000.00) and Gillen Enterprises, LLC ($42,000.00) from this account. The following suspicious transactions were noted:

Type of Transaction	Amount
Payment to Dr. David M. Anderson	$2,200.00
Payment to Build It, LLC	2,000.00
Payments to Gillen Enterprises, LLC	42,000.00
Payment to Jim Wilson	10,350.00
Payments From Dr. David M. Anderson	(16,784.44)
Unidentified Income	(10,018.86)
Net Total	$29,746.70

Kirkpatrick review of calendar year 2012 transactions from Huntington National Bank account #01191204510

Calendar year 2012 financial transactions for the CLUC bank account at Huntington National Bank, account #01191204510, as shown on the computerized account register maintained by Brian R. Boal, CPA, were reviewed on January 14, 2013, for suspicious transactions that might not have been in furtherance of the business aims of CLUC. Within 36 days of the receipt of the AdvanceMe, Inc. loan proceeds on March 8, 2012, $16,000.00 was paid to Dr. Anderson from this account. The following suspicious transactions were noted:

Type of Transaction	Amount
Payments to Dr. David M. Anderson	$37,600.00
Payment to Gillen Enterprises, LLC	20,000.00
Net Total	$57,600.00

Kirkpatrick review of calendar year 2012 Journal Cash Analysis Reports for CLUC and duplicate deposit tickets for Centra Bank/United Bank account #0040031942

Copies of the calendar year 2012 Journal Cash Analysis Reports for CLUC and duplicate deposit tickets for the CLUC bank account at Centra Bank/United Bank, account #0040031942, maintained by CLUC employee Heather Bartholomew were reviewed on January 17, 2013, to compare CLUC cash receipts and cash deposits for 2012. The following was noted concerning cash deposits:

Type of Transaction	Amount
Total Cash Receipts CY 2012	$65,345.27
Total Cash Deposits at Centra Bank/United Bank	(2,298.00)
Undeposited Cash CY 2012	$63,047.27

The AdvanceMe, Inc. Future Receivables Purchase and Sale Agreement #138746

A photocopy of the AdvanceMe, Inc. Future Receivables Purchase and Sale Agreement #138476 was reviewed on January 17, 2013. This agreement was dated February 28, 2012, and shows the seller as Cheat Lake Urgent Care, PLLC (CLUC), dba David M. Anderson MD. Pursuant to this Agreement, AdvanceMe, Inc. paid CLUC, dba David M. Anderson MD $91,964.00 in exchange for $128,740.40 in future credit card receivables from CLUC, dba David M. Anderson MD. Per the Agreement, 50% of the future CLUC dba David M. Anderson MD credit card receivables are to be remitted to

AdvanceMe, Inc. until the amount of $128,740.40 has been paid. Additionally, CLUC, dba David M. Anderson MD paid an administrative services fee of $5,517.84 to AdvanceMe, Inc. The Agreement is signed by David M. Anderson and Christopher M. Chafin.

Kirkpatrick Report Findings

Kirkpatrick found that Dr. David M. Anderson misappropriated at least $179,316.97 through unauthorized payments to himself, unauthorized payments to business entities and individuals affiliated with him, and through conversion of CLUC cash receipts. Additionally, Dr. Anderson obligated CLUC to a Future Receivables Purchase and Sale Agreement with AdvanceMe, Inc. that resulted in CLUC paying $60,573 during 2912. Within 47 days of the deposit of the AdvanceMe, Inc. loan proceeds of $91,964 on March 8, 2012, a total of $60,000 was laid to Dr. Anderson ($16,000), to Build It, LLC ($2,000), and Gillen Enterprises, LLC ($42,000) from CLUC bank accounts. At the time of the Kirkpatrick report, CLUS still owed $68,167.40 on the Agreement.

Boal's responses to Chafin's First Set of Discovery Requests and Interrogatories

Interrogatory No. 1

I was provided with Interrogatories and responses of Brian R. Boal signed May 9, 2018. This included interrogatories, responses, requests for production, and requests for admission. Interrogatory No. 1 asked for contact information for Brian Boal.

Response:

Brian R. Boal, CPA
Boal and Associates, PC
c/o The Levicoff Law Firm, PC
4 PPG Place, Suite 200
Pittsburgh, PA 15222

Interrogatory No. 2
Interrogatory No. 2 asked communications with Chafin regarding Dr. Chafin's personal tax returns and CLUC tax returns, including tax withheld from Chafin's distributions from CLUC.

Response:

Defendants object to this discovery request as Brian Boal cannot possibly recall the details of every communication he had with Chafin. Boal had numerous conversations with Mrs. Chafin in order to obtain the necessary documentation to prepare Dr. and Mrs. Chafin's personal income taxes. Relative to the withholdings from distributions, the gist of the understanding between Boal and Chafin was that, when adequate funds were available, Boal would make estimated payments on the Chafin's personal income taxes. Neither the amount in distribution payments nor the amount withheld from those sums were determined by Boal. When funds were not available to make the estimated payments, it was communicated to Dr. Chafin, and Boal believes it was thoroughly explained to Dr. Chafin, that if the tax liability was greater than the estimated payments, Dr. Chafin would be responsible to pay the tax liability. Boal prepared the Dr. and Mrs. Chafin's income tax returns, and provided the returns to them before they were filed. Even a cursory examination of the face of the returns would indicate the shortfall between the amount of tax due and the amount of estimated payments made. Any greater specificity would require resort to the available documentations, including the returns themselves. Thus, by way of further response, see the income tax returns produced with the accompanying Responses to Requests for the Production of Documents.

Interrogatory No. 3

Describe in detail the services You provided to Chafin and CLUC.

Response:

Defendants prepared federal and state income tax returns for Dr. Chafin and for Cheat Lake Urgent Care for tax years 2004 through 2013. Defendants provided payroll and bookkeeping services to CLUC, including payroll and accounts payable. When Cheat Lake experienced significant cash flow problems, the same required regular communication with Cheat Lake staff members discussing which outstanding bills were most pressing and needed paid first. In fact, in those times, Defendants even withheld their own invoices to Cheat Lake for professional services, knowing that there were insufficient funds to cover existing bills. Defendants also contacted and worked with Cheat Lake's vendors in order to negotiate payment arrangements on outstanding bills.

Interrogatory No. 4

Identify each and every person for whom you are aware, that provided accounting services, tax services, book keeping services, or other attendant services to Christopher Chafin and/or CLUC. Include in your answer any of your employees, contractors, or consultants:

Response:

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
Division 1

CHRISTOPHER CHAFIN, and
CHEAT LAKE URGENT CARE, PLLC,

Plaintiffs,

v. **CIVIL ACTION NO. 16-C-547**
Honorable Susan B. Tucker

DAVID ANDERSON,
BRIAN R. BOAL,
BOAL & ASSOCIATES, PC.,
GILLEN ENTERPRISES, LLC,
AFFORDABLE CONTRACTORS, LLC, and
BUILD IT, LLC,

Defendants.

PLAINTIFFS' EXPERT REPORT DISCLOSURE

The Plaintiffs, Christopher Chafin ("Chafin") and Cheat Lake Urgent Care, PLLC ("CLUC"), hereby provides their Expert Witness' Report Disclosure:

1. Andrew Smith, CPA
   Smith and Associates, CPA's and Consultants, PLLC
   426 Drummond Street
   Morgantown, West Virginia 26505

   Mr. Smith has reviewed the available documents in this matter and provided an opinion estimate on the damages attributable to the Defendants.[1]

2. Charles J. Russo, PhD, CPA
   408 Acton Way
   Bel Air, Maryland 21015

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[1] See Exhibit 1.

Mr. Russo has reviewed the available documents in this matter and provided an on Defendants Boal and Boal & Associates, PC deviation from the professional standard of care.[2]

3. The Plaintiff reserves the right to supplement this request as necessary.

Christopher Chafin,
Cheat Lake Urgent Care,
By Counsel,

Jason E. Wingfield, Esq. (W.Va. Bar # 12582)
Gianola, Barnum, Bechtel, & Jecklin, L.C.
1714 Mileground
Morgantown, West Virginia 26505
(304) 291-6300
jwingfield@gbbjlaw.com

[2] See Exhibit 2.

Charles J. Russo, PhD, CPA, CMA, CVA
292 Canterbury Road, Suite P
Bel Air, MD 21014
Phone: 410-698-7400
Email: chuck@tussopohcpa.com

June 1, 2020

Mr. Jason Wingfield, Esq.
Gianola, Barnum, Bechtel, & Jecklin, LC
1714 Mileground Road
Morgantown, West Virginia 26505

Dear Mr. Wingfield:

Objective

I was engaged to perform

1. Calculation of economic damages that Christopher Chafin and Cheat Lake Urgent Care, LLC may have suffered in connection with the acts committed by defendants David Anderson, Brian R. Boal, Boal and Associates, PC, Gillen Enterprises, LLC, Affordable Contractors, LLC, and Built-It, LLC as described in Civil Action No. 16-C-547.
2. Assistance with evaluating the merits of the accounting malpractice claim against Boal and Associates, PC, including reviewing relevant professional standards, and accountants work papers of financial statements or tax returns that are the subject of the malpractice claim as described in Civil Action No. 16-C-547.
3. Provide expert witness testimony related to the above referenced proceeding.

Scope

Upon further discussion with, we agreed that I would not calculate economic damages. Economic damages were estimated in reports by Smith & Associates CPAs & Consultants, PLLC, of Morgantown, West Virginia and by Michael D. Kirkpatrick, CPA, Forensic Accountant of Morgantown, West Virginia. Both are included as appendices to this report.

This engagement provides an evaluation of the merits of the accounting malpractice claim against Boal and Associates, PC, including reviewing relevant professional standards, financial statements or tax returns, while considering the estimates of economic damages in the two forensic accounting reports noted above.

Parties

Plaintiffs:

1. Christopher Chafin, a resident of Morgantown, West Virginia.
2. Cheat Lake Urgent Care, PLLC (CLUC), located in Morgantown, West Virginia.

Defendants:

1. David Anderson, a resident of Preston County, West Virginia.
2. Brian R. Boal, a resident of Oakland Maryland, who has provided accounting and tax services in Monongalia County, West Virginia.

EXHIBIT
2

3. Boal & Associates, PC, a professional corporation located in Oakland, Maryland, which has provided accounting and tax services in Monongalia County, West Virginia.
4. Gillen Enterprises, LLC (Gillen Enterprises), a former West Virginia LLC located in Bruceton Mills, West Virginia.
5. Affordable Contractors, LLC (Affordable Contractors), a former West Virginia LLC located in Morgantown, West Virginia.
6. Built It, LLC (Build It), a former West Virginia LLC located in Morgantown, West Virginia.

Company Background of Cheat Lake Urgent Care, LLC

Cheat Lake Urgent Care, PLLC is a physician practice providing emergency services and general practice. The Company files Form 1065 U.S. Return of Partnership Income each calendar year. The Company uses NAICS Code 621111. Offices of Physicians (except Mental Health Specialists). The Company is located at 710 Venture Drive, Morgantown, West Virginia 26508. Forms 1065 use the cash basis of accounting. On Forms 1065 through 2013 there were three LLC members, Christopher Chafin, David M. Anderson, and Joseph M. Herzog each with a one third interest. Beginning in 2014, Cheat Lake Urgent Care, PLLC Form 1065 there were two LLC members, Christopher Chafin and Joseph M. Herzog, each with a 50 percent interest.

I examined tax returns Forms 1065 for the years 2007-2014. I was not provided with compiled financial statements or engagement letters for accounting or tax services.

Background from Second Amended Complaint

The following was stated in paragraphs 14-25 in the Second Amended Complaint dated December 15, 2017:

Plaintiff Christopher Chafin and Defendant Anderson were partners and co-owners (along with a third individual) of a medical practice in the Morgantown area known as Cheat Lake Urgent Care. Defendant Boal and his accounting firm Defendant Boal & Associates were retained by Cheat Lake Urgent Care to provide accounting and tax services to Cheat Lake Urgent Care. Boal and Boal Associates provided services and made representations regarding accounting, tax, and financial information to Chafin and CLUC. Defendants Boal and Boal & Associates, also were retained by Chafin to provide personal accounting and tax services.

In providing accounting services to Cheat Lake Urgent Care, Defendants Boal and Boal & Associates handled payroll, with the withholding of salary in order to pay federal and state taxes, and the filing and paying of taxes. Boal and Boal & Associates maintained one or more registers for CLUC bank accounts which tracked and recorded deposits and withdrawals from CLUC banking and/or checking accounts. At all relevant times, Defendant Boal was a signatory on the bank accounts of Cheat Lake Urgent Care with the authority to issue checks charged on that account. In 2013, Defendant Anderson was accused of embezzling upwards of $500,000 from Cheat Lake Urgent Care.

Defendants Boal and Boal & Associates, through past practices and as well as statements lead Plaintiff to believe that a portion of Plaintiff Christopher Chafin's salary had been withheld in order to pay at least a portion of his income taxes. Later Plaintiff discovered that while money had been withheld from his pay check, payments had not been made to the IRS or the state of West Virginia. Plaintiffs later discovered that while money had been withheld from Chafin's pay check, the attendant payments had not been made to the IRS or the State of West Virginia. Based upon statements by Defendant Anderson, Defendant Boal and Defendant Boal & Associates, Defendant denies that plaintiff had been led to believe that he had complied with all requirements, tax liabilities, and payments. Since then, the IRS has attempted to collect and is in the process of collecting money from Plaintiff because of the failure to pay the withheld amounts.

The following counts were listed in the Second Amended Complaint:

Count 1: Malpractice by Defendants Boal and Boal & Associates
Count 2: Breach of the CLUC Contract by Defendants Boal and Boal and Associates
Count 3: Breach of the Chafin Contract by Defendants Boal and Boal & Associates
Count 4: Negligence by Defendants Boal and Boal & Associates
Count 5: Negligent Misrepresentation by Defendants Boal and Boal & Associates
Count 6: Breach of Defendant Boal's Fiduciary Duty
Count 7: Breach of Contract by Defendant Anderson
Count 8: Breach of Defendant Anderson's Fiduciary Duty
Count 9: Fraud by Defendant Anderson
Count 10: Unjust Enrichment of Defendant Anderson
Count 11: Unjust Enrichment of Gillen Enterprises
Count 12: Unjust Enrichment of Affordable Contractors
Count 13: Unjust Enrichment of Build It

Indictment

The Circuit Court of Monongalia County, West Virginia indicted David Anderson on nine counts as follows:

Count 1: Embezzlement in excess of $1,000.00 by removing cash from deposits, totaling approximately $56,730.50.
Count 2: Embezzlement in excess of $1,000.00 by removing money from CLUC accounts by issuing checks for personal use and taking out lines of credit
Count 3: Embezzlement in excess of $1,000.00 by removing cash from deposits, with the intent to permanently deprive CLUC of said money, totaling approximately $78,449.63.
Count 4: Embezzlement in excess of $1,000.00 by removing money from CLUC accounts by issuing checks for personal use and taking out lines of credit.
Count 5: Embezzlement in excess of $1,000.00 by removing cash from deposits, totaling approximately $67,047.27.
Count 6: Embezzlement in excess of $1,000.00 by removing money from CLUC accounts by issuing checks for personal use and taking out lines of credit.
Count 7: Fraudulent Scheme of embezzlement in excess of $1,000.00 by means of fraudulent pretenses, representations or promises, as part of a common scheme or plan.

by submitting more work hours than he actually worked totaling approximately $77,520.00.

Count 8: Fraudulent Scheme of embezzlement in excess of $1,000.00 by means of fraudulent pretenses, representations or promises, as part of a common scheme or plan, by submitting more work hours than he actually worked totaling approximately $75,480.00.

Count 9: Fraudulent Scheme of embezzlement in excess of $1,000.00 by means of fraudulent pretenses, representations or promises, as part of a common scheme or plan, by submitting more work hours than he actually worked totaling approximately $58,320.00.

Guilty Plea by Anderson

In a plea agreement dated November 15, 2016, Anderson pled guilty to embezzlement under counts one, two, and three of the indictment. Each were felony counts. The Victim Impact Statement dated January 9, 2017 restitution was requested as follows:

Restitution is requested as follows:

Cash posted in Journals 2010	**$ 56,934.50**
Cash posted in Journals 2011	**$ 78,265.52**
Bank fees	**$ 8,307.80**
Payment to Lowe's	**$ 3,168.73**
Payments to Centra Visa	**$ 11,422.49**
Payments to Cabela's	**$ 40,564.28**
Staples	**$ 1,536.25**
Office Depot	**$ 1,892.88**
Amerigas	**$ 636.18**
Guardian Insurance	**$ 14,306.70**
Teresa Anderson payroll	**$ 19,052.80**
Advance Me	**$ 65,800.80**
Hall Booth Smith	**$ 14,263.15**
Wages Paid to Mr. Anderson	**$ 211,320.80**
Gillen Enterprises	**$ 39,000.00**
Mark Everett, Esq Attorney Fees	**$ 10,000.00**
Michael Kirkpatrick Forensic Account Fees	**$ 5,000.00**
Loan to Mr. Anderson	**$ 112,496.00**
Remainder included in Forensic Audit	**$ 124,161.47**
Total	**$ 817,321.95**

Restitution is to be paid and forwarded to:

Cheat Lake Urgent Care
Attn: Christopher Chafin
710 Venture Dr
Morgantown WV 26508

Forensic Accountant Report, Smith & Associates CPAs & Consultants, PLLC

I was provided with a draft restitution calculation dated May 5, 2020 from Andrew Smith, CPA of Smith & Associates CPAs & Consultants, PLLC, Morgantown, West Virginia. Total estimated restitution was $2,179,000.

Based on my analysis of financial documents and Quickbooks file you provided to me in this matter:

(in thousands)	estimated restitution calculation	
Excessive Repairs	$	47
Net Due from others		113
Unnecessary Items:		
A) Credit Card Debt		28
B) Local bank and other debt		478
C) Overdraft items		29
D) Interest costs		21
Theft		192
Guaranteed payments		600
Excessive:		
A) Office Supplies		57
B) Billing Services		169
C) Bank fees		30
Unpaid partner tax liabilities		200
Employee medical		5
Patient cash payments		203
Unidentified check		7
Total estimated restitution calculation	$	2,179

Other items noted included:

- Large volume of documents approaching 10,000 pages reviewed.
- Two medical bills totaling $1,090 for T. Anderson were paid.
- Anderson card was found with charges from Dish Network, Amazon, ATM (total $471).
- Paid invoice records contain a significant number of past due notices and indications of credit card revocation by suppliers.
- CLUC was a profitable venture, dire cash position in 2013.
- Much of the misappropriation occurred in 2011 and 2012.
- See attached selected comparative analysis.

A selective comparative analysis was included on page two of the Smith report and included:

1. Guaranteed payments increased from $438, 539 in 2010 to $829,309 in 2011. Anderson has $185,642 of that increase.
2. Billing services was $49,615 in 2020 and dropped to $2,538 in 2011.
3. Office expense was $12,409 in 2010 and increased to $23,755 in 2011.
4. Theft recorded in 2012 of $192, 559.
5. Due from others recorded in 2011 of $112,496.
6. Due from Affordable Contractors and due from Gillen recorded at $55,000 and $9,000 respectively.
7. Due from Anderson recorded in 2010 at $21,996.

8. Credit cards payable increased from $3,764 in 2009 to $18,575 in 2011.
9. Notes payable increased from $53,319 in 2009 to $270,616 in 2011.

Forensic Accountant Report, Michael D. Kirkpatrick, CPA

A forensic review of potential asset misappropriation for the calendar year 2012 was performed by Michael D. Kirkpatrick, CPA, Forensic Accountant of Morgantown, West Virginia. The report is dated January 24, 2013. The forensic review included an analysis of financial records and interviews of key people. Kirkpatrick reviewed databases from Monongalia County, West Virginia to identify businesses affiliated with Dr. David M. Anderson in addition to those previously provided by Dr. Chafin (Gillen Enterprises, LLC; Built It, LLC; University Partners, LLC; and Affordable Contractors, LLC). Kirkpatrick interviewed the following individuals:

- Dr. Christopher M. Chafin, managing partner, CLUC
- Brian R. Boal, CPA
- Cinda Savage, Boal & Associates, CPAs
- Heather Bartholomew, CLUC

From the Kirkpatrick report Executive Summary:

CLUC financial records for 2012 maintained by Brian R. Boal, CPA, were reviewed on January 14, 2013, for suspicious transactions related to Dr. Anderson and Boal was interviewed.

Cinda Savage, Boal & Associates, CPAs, was telephonically interviewed on January 17, 2013, concerning payroll payments to Teresa L. Anderson.

Heather Bartholomew, CLUC, was interviewed on January 16, 2013. She also provided for review copies of the 2012 CLUC Journal Cash Analysis Reports and duplicate deposit tickets for the CLUC bank account at Centra Bank/United Bank.

CLUC financial records from Clear Mountain Bank, Huntington National Bank, and Centra Bank/United Bank for 2012 were reviewed for suspicious transactions.

The AdvanceMe, Inc. Future Receivables Purchase and Sale Agreement #138476 was reviewed on January 17, 2013.

Based on the results of this forensic review for calendar year 2012, suspicious payments of $163,073.00 and suspicious deposits of $46,803.30 were identified. Additionally, CLUC 2012 cash receipts of $63,047.27 were identified as not being deposited in the normal course of business to the CLUC Centra Bank/United Bank primary operating account. CLUC also paid $60,573.00 during 2012 on the AdvanceMe, Inc. Future Receivables Purchase and Sale Agreement while still owing $68,167.40.

Kirkpatrick Report Findings:

The Kirkpatrick report found the existence of a possible misappropriation of CLUC assets in 2012 by Dr. David M. Anderson of at least $179,316.97 as follows:

Type of Transaction	Amount
Payments to Dr. David M. Anderson	$39,800.00
Payments to Teresa L. Anderson (gross)	9,456.00
Payments to Gillen Enterprises, LLC	62,000.00
Payments to Build It, LLC	2,000.00
Payments to Affordable Contractors, LLC	9,500.00
Payments to Jim Wilson	10,350.00
Payments to Lowe's Business Account	4,417.00
Payments to Cabela's Visa	10,050.00
Payments to Cardmember Services	15,500.00
Undeposited Cash From Operations	63,047.27
Payments From Dr. David M. Anderson	(26,784.44)
Unidentified Income to CLUC	(20,018.86)
Net Total	$179,316.97

The Kirkpatrick report only covers calendar year 2012, but these are the types of transactions that occurred over multiple years. The summary of evidence supporting his findings included:

Review of online databases for Monongalia County, WV and the WV Secretary of State

A review of online databases for the Monongalia County, WV, Clerk and the West Virginia Secretary of State on January 9, 2013, established that Dr. Anderson was affiliated with the following businesses in addition to CLUC: Affordable Contractors, LLC; Build It, LLC; Gillen Enterprises, LLC; and University Partners, LLC.

Kirkpatrick interview of Dr. Christopher M. Chafin, managing partner of CLUC, January 9, 2013

On October 12, 2012, and January 9, 2013, Dr. Christopher M. Chafin, CLUC managing partner, was interviewed. He advised that CLUC is a partnership with three partners: Dr. David M. Anderson, Dr. Christopher M. Chafin, and Dr. Joseph M. Hartzog. Dr. Anderson has served as the managing partner from January 23, 1997, until January 7, 2013. In this capacity, Dr. Anderson essentially ran all the financial and business affairs of CLUC. In January 2013, Dr. Anderson was voted out as managing partner and replaced by Dr. Chafin. Dr. Chafin advised that in the CLUC partnership agreement there is a clause that the managing partner cannot pay large business expenses in excess of $5,000.00 without the approval of the other partners. He believes that money coming into the CLUC business enterprise is not staying within the CLUC business enterprise and has been misappropriated by Dr. Anderson. He believes that Dr. Anderson has diverted CLUC money to himself; to Dr. Anderson-affiliated business entities not associated with CLUC; to payments to his wife, Teressa L. Anderson; and to payments to credit cards controlled by him for expenses not for the benefit of CLUC. Dr. Chafin specifically mentioned payments to Dr. Anderson-affiliated businesses Gillen Enterprises, LLC; Build It, LLC; and Affordable Contractors, LLC, and to credit cards with Lowe's, Cabela's, and Centra Bank/United Bank. Additionally, Dr. Chafin advised that on February 28, 2012, Dr. Anderson had entered into an agreement with AdvanceMe, Inc. that pledged $128,740.00 in CLUC credit card payments to AdvanceMe, Inc. in exchange for an immediate payment to CLUC of $91,964.00. Dr. Chafin believed that Dr. Anderson had misappropriated a significant percentage of the money from AdvanceMe, Inc. Dr. Chafin said that CLUC employees have told them they have done things they are uncomfortable with, such as depositing CLUC checks into Dr. Anderson-affiliated companies. Dr. Chafin advised that Dr. Anderson is going through a divorce from his wife Teressa L. Anderson. He has discovered that Teressa L. Anderson has been receiving regular payments of approximately $500.00 every pay period from CLUC for many years for no known business reason.

Kirkpatrick interview of Brian R Boal, January 14, 2013

Brian R. Boal, CPA, was interviewed on January 14, 2013, and advised that he has been the CPA for CLUC for a number of years. He is also the CPA for Dr. David M. Anderson, former managing partner of CLUC, as well as a number of Dr. Anderson's business ventures that are unrelated to CLUC. As the managing partner of CLUC, Dr. Anderson was the CLUC partner almost exclusively involved in its financial management and with whom he interacted related to the financial matters of CLUC. His firm provides bookkeeping/write-up and tax services for CLUC. He also has check signing authority for CLUC and pays the majority of the bills for CLUC using "machine written" checks. He does not audit CLUC. Boal explained that Dr. Anderson also maintained checks that he hand wrote to pay "small" expenses that occurred as well as to pay credit card bills. Usually Dr. Anderson did not provide documentation supporting these payments. Normally, Dr. Anderson would mail bills to him approximately every two weeks, and he would write checks to pay them. All income for CLUC was deposited in Morgantown; he did not make any bank deposits for CLUC. The principals of CLUC, Dr. Anderson, Dr. Chris Chafin, and Dr. Mike Hartzog, are paid a recurring "guaranteed payment," similar to a salary, which is based on an hourly billing rate and the number of hours reported as worked. During 2012, several payments related to Dr. Anderson, which did not appear to be business expenses of CLUC, came into his office without supporting documentation. These included payments to Dr. Anderson beyond his "guaranteed payment," payments to business entities affiliated with Dr. Anderson (Gillen Enterprises; Built It, LLC; Affordable Contractors), payment to an individual named Jim Wilson, and payments on Lowe's, Cabela's, and Centra Bank (Cardmember Service) credit cards. He attempted to obtain supporting documentation from Dr. Anderson but was unsuccessful in doing so. Similar types of payments were also made in 2011. Boal stated that when these types of CLUC payments to came into his office without an explanation, they were booked to a "holding account" called "shareholder loan" for Dr. Anderson. Dr. Anderson never told him these payments were loans, he just needed an offsetting account against which to book the expense. He has asked Dr. Anderson about these payments, but Dr. Anderson has not provided him with any explanation for them. Therefore, he does not know what these payments are. Additionally, during 2012 payments were received by CLUC from Dr. Anderson without explanation. He booked these payments as credits against the "shareholder loan" "holding account" he had set up for Dr. Anderson. He does not know why Dr. Anderson made these payments. During 2012 there was also income booked from unidentified sources. He unsuccessfully attempted to determine the source of this income from Dr. Anderson.

Kirkpatrick telephone interview of Cinda Savage on January 17, 2013.

Cinda Savage, Boal and Associates CPAs, was telephonically interviewed on January 17, 2013. She said that she handles the payroll for CLUC for Boal and Associates. Based on the number of each employee's workhours provided to her from CLUC, she calculates the gross and net pay for the employee, prepares the net pay for direct deposit into the employee's bank account, and then accounts for the pay in CLUC's financial records. Teresa L. Anderson, wife of CLUC partner Dr. David M. Anderson, was regularly paid a salary from CLUC in 2012. She paid Teresa Anderson based on the number of hours worked reported to her and Anderson's established hourly wage rate of $16.00 per hour. From January 1, 2012 through July 18, 2012, Anderson was paid $400.00 gross per pay period based on 25 hours worked per pay period. From August 1, 2012 through November 21, 2012, Anderson was paid $384.00 gross per pay period based on 24 hours worked per pay period. This resulted in a total gross payment to Anderson in 2012 of $9,456.00 and a total net payment of $8,666.74.

Kirkpatrick interview of Heather Bartholomew, January 16, 2013

Heather Bartholomew, CLUC, was interviewed on January 16, 2013, and advised that she is the person responsible at CLUC for maintaining records relating to payments received from patients (including cash, check, and credit card payments) and posting them to the appropriate accounts. As part of these responsibilities, she notes the amount of cash received daily, and enters it appropriately. During 2012, cash and checks from patients, were provided to CLUC then-managing partner Dr. David M. Anderson for preparation of a deposit slip. She was normally the person to go to Centra Bank/United Bank to make the deposit. She deposited what Dr. Anderson gave her. While Dr. Anderson was managing partner in 2012 she cannot recall ever depositing any cash into the bank. She does not know what happened to the cash that was taken in by CLUC from its patients.

Kirkpatrick review of calendar year 2012 transactions from Centra Bank/United Bank account #0040031942

Calendar year 2012 financial transactions for the CLUC bank account at Centra Bank/United Bank, account #0040031942, as shown on the computerized account register maintained by Brian R. Boal, CPA, were reviewed on January 14, 2013, for suspicious transactions that might not have been in furtherance of the business aims of CLUC. The following suspicious transactions were noted:

Type of Transaction	Amount
Payments to Teressa L. Anderson (net)	$8,666.74
Payments to Lowe's Business Account	4,417.00
Payments to Cabela's Visa	10,050.00
Payments to Cardmember Service	15,500.00
Payment to Affordable Contractors	9,500.00
Payment From Dr. David M. Anderson	(10,000.00)
Unidentified Income	(10,000.00)
Net Total	$28,133.74

Kirkpatrick review of calendar year 2012 transactions from Clear Mountain Bank account #2864428

Calendar year 2012 financial transactions for the CLUC bank account at Clear Mountain Bank, account #2864428, as shown on the computerized account register maintained by Brian R. Boal, CPA, were reviewed on January 14, 2013, for suspicious transactions that might not have been in furtherance of the business aims of CLUC. In addition to the following, proceeds in the amount of $91,964.00 from the AdvanceMe, Inc. loan were deposited to this account on March 8, 2012. Within 47 days of the deposit of the AdvanceMe, Inc. loan proceeds, a total of $44,000.00 was paid to Build It, LLC ($2,000.00) and Gillen Enterprises, LLC ($42,000.00) from this account. The following suspicious transactions were noted:

Type of Transaction	Amount
Payment to Dr. David M. Anderson	$2,200.00
Payment to Build It, LLC	2,000.00
Payments to Gillen Enterprises, LLC	42,000.00
Payment to Jim Wilson	10,350.00
Payments From Dr. David M. Anderson	(16,784.44)
Unidentified Income	(10,018.86)
Net Total	$29,746.70

Response:

Defendants object to this discovery request as Brian Boal cannot possibly recall the details of every communication he had with Chafin. Boal had numerous conversations with Mrs. Chafin in order to obtain the necessary documentation to prepare Dr. and Mrs. Chafin's personal income taxes. Relative to the withholdings from distributions, the gist of the understanding between Boal and Chafin was that, when adequate funds were available, Boal would make estimated payments on the Chafin's personal income taxes. Neither the amount in distribution payments nor the amount withheld from those sums were determined by Boal. When funds were not available to make the estimated payments, it was communicated to Dr. Chafin, and Boal believes it was thoroughly explained to Dr. Chafin, that if the tax liability was greater than the estimated payments, Dr. Chafin would be responsible to pay the tax liability. Boal prepared the Dr. and Mrs. Chafin's income tax returns, and provided the returns to them before they were filed. Even a cursory examination of the face of the returns would indicate the shortfall between the amount of tax due and the amount of estimated payments made. Any greater specificity would require resort to the available documentations, including the returns themselves. Thus, by way of further response, see the income tax returns produced with the accompanying Responses to Requests for the Production of Documents.

Interrogatory No. 3

Describe in detail the services You provided to Chafin and CLUC.

Response:

Defendants prepared federal and state income tax returns for Dr. Chafin and for Cheat Lake Urgent Care for tax years 2004 through 2013. Defendants provided payroll and bookkeeping services to CLUC, including payroll and accounts payable. When Cheat Lake experienced significant cash flow problems, the same required regular communication with Cheat Lake staff members discussing which outstanding bills were most pressing and needed paid first. In fact, in those times, Defendants even withheld their own invoices to Cheat Lake for professional services, knowing that there were insufficient funds to cover existing bills. Defendants also contacted and worked with Cheat Lake's vendors in order to negotiate payment arrangements on outstanding bills.

Interrogatory No. 4

Identify each and every person for whom you are aware, that provided accounting services, tax services, book keeping services, or other attendant services to Christopher Chafin and/or CLUC. Include in your answer any of your employees, contractors, or consultants:

Response:

1. Kim Gutta CPA
2. Lambright & Gutta of Morgantown, West Virginia
3. Brian R. Boal, CPA, Boal & Associates, PC
4. Cinda Savage, Boal & Associates, PC

Interrogatory No. 5
Interrogatory No. 5 requested information with respect to any expert witness Boal expected to call at trial.

Response: Defendants do not know yet what experts they may call at trial.

Request for Admissions in Chafin's First Set of Discovery Requests and Interrogatories

The Request for Admissions included seven items.

1. Defendant David Anderson embezzled money from CLUC.
2. Brian R. Boal individually did not provide tax or accounting services to Christopher Chafin. Boal & Associates provided tax services to Christopher Chafin. Neither Boal & Associates nor Brian R. Boal provided accounting services to Christopher Chafin.
3. Brian R. Boal individually did not provide tax and accounting services to Cheat Lake. Boal & Associates provided tax and accounting services to Cheat Lake.
4. Brian R. Boal individually did not provide tax or accounting services to Christopher Chafin. Boal & Associates provided tax services to Christopher Chafin.
5. Boal & Associates P.C. provided tax and accounting services to CLUC.
6. Brian R. Boal is the owner and managing partner of Boal & Associates, PC
7. Boal & Associates prepared the payroll for CLUC.

West Virginia Board of Accountancy Rules

The West Virginia Board of Accountancy Board Rules and Rules of Professional Conduct can be found online at https://www.boa.wv.gov/About/StatutesRules.asp. The Rules of Professional Conduct are located in Section 1-1-19.

§1-1-19. Rules of Professional Conduct.

19.1. Independence, Integrity, and Objectivity.

19.1.a. A licensee or substantial equivalency practitioner shall be independent in the performance of professional services.

19.1.b. In the performance of any professional service, a licensee or substantial equivalency practitioner shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others.

19.2. General Standards; Accounting Principles.

19.2.a. A licensee or substantial equivalency practitioner shall:

19.2.a.1. Undertake only those professional services that the licensee or substantial equivalency practitioner can reasonably expect to complete

19.5.a. A licensee or substantial equivalency practitioner shall not commit an act that discredits the public accounting profession.
19.5.b. A licensee or substantial equivalency practitioner shall not seek to obtain clients by advertising or other forms of solicitation that are false, misleading, or deceptive. Solicitation by the use of coercion, over-reaching, or harassing conduct is prohibited.

AICPA Code of Professional Conduct

Section 1.130.010 Knowing Misrepresentations in the Preparation of Financial Statements or Records.

.01 Threats to compliance with the "integrity and Objectivity Rule [1.100.001] would not be at an acceptable level and could not be reduced to an acceptable level by the application of safeguards and the member would be considered to have knowingly misrepresented facts in violation of the "Integrity and Objectivity Rule" if the member

a. Makes or permits or directs another to make, materially false and misleading entries in an entity's financial statements or records.
b. Fails to correct an entity's financial statements or records that are materially false and misleading when the member has the authority to record the entries, or
c. Signs, or permits or directs another to sign a document containing materially false and misleading information.

Section 1.400.040 Negligence in the Preparation of Financial Statements or Records

.01 A member shall be considered in violation of the "Acts Discreditable Rule" [1.400.001] if the member, by virtue of his or her negligence, does any of the following:

a. Makes, or permits or directs another to make, materially false and misleading entries in the financial statements or records of an entity.
b. Fails to correct an entity's financial statements that are materially false and misleading when the member has the authority to record an entry.
c. Signs, or permits or directs another to sign, a document containing materially false and misleading information.

AICPA AR-C Section 60 General Principles for Engagements Performed in Accordance with Statements on Standards for Accounting and Review Services (SSARS)

Source: Statements on Standards in Accounting and Review Services (SSARS No. 21; SSARS No. 23; SSARS No. 24

Ethical Requirements

Paragraph A14 The AICPA Code of Professional Conduct establishers the fundamental principles of professional ethics, which include the following:

- Responsibilities

1. Kim Gutta CPA
2. Lambright & Gutta of Morgantown, West Virginia
3. Brian R. Boal, CPA, Boal & Associates, PC
4. Cinda Savage, Boal & Associates, PC

Interrogatory No. 5
Interrogatory No. 5 requested information with respect to any expert witness Boal expected to call at trial.

Response: Defendants do not know yet what experts they may call at trial.

Request for Admissions in Chafin's First Set of Discovery Requests and Interrogatories

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1. Defendant David Anderson embezzled money from CLUC.
2. Brian R. Boal individually did not provide tax or accounting services to Christopher Chafin. Boal & Associates provided tax services to Christopher Chafin. Neither Boal & Associates nor Brian R. Boal provided accounting services to Christopher Chafin.
3. Brian R. Boal individually did not provide tax and accounting services to Cheat Lake. Boal & Associates provided tax and accounting services to Cheat Lake.
4. Brian R. Boal individually did not provide tax or accounting services to Christopher Chafin. Boal & Associates provided tax services to Christopher Chafin.
5. Boal & Associates P.C. provided tax and accounting services to CLUC.
6. Brian R. Boal is the owner and managing partner of Boal & Associates, PC.
7. Boal & Associates prepared the payroll for CLUC.

West Virginia Board of Accountancy Rules

The West Virginia Board of Accountancy Board Rules and Rules of Professional Conduct can be found online at https://www.boa.wv.gov/About/StatutesRules.asp. The Rules of Professional Conduct are located in Section 1-1-19.

§1-1-19. Rules of Professional Conduct.

19.1. Independence, Integrity, and Objectivity.

19.1.a. A licensee or substantial equivalency practitioner shall be independent in the performance of professional services.

19.1.b. In the performance of any professional service, a licensee or substantial equivalency practitioner shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others.

19.2. General Standards; Accounting Principles.

19.2.a. A licensee or substantial equivalency practitioner shall:

19.2.a.1. Undertake only those professional services that the licensee or substantial equivalency practitioner can reasonably expect to complete

with professional competence;

19.2.a.2. Exercise due professional care in the performance of professional services;

19.2.a.3. Adequately plan and supervise the performance of professional services; and

19.2.a.4. Obtain sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed.

19.2.b. A licensee or substantial equivalency practitioner who performs auditing, review, compilation, management advisory, tax, or other professional services shall comply with the recognized professional standards applicable to the services.

19.2.c. A licensee or substantial equivalency practitioner shall not (1) express an opinion or state affirmatively that the financial statements or other financial data of any entity are presented in conformity with generally accepted accounting principles or (2) state that he or she is not aware of any material modifications that should be made to the statements or data in order for them to be in conformity with generally accepted accounting principles, if the statements or data contain any departure from any accounting principle promulgated by bodies designated to establish the principles that has material effect on the statements or data taken as a whole. If, however, the statements or data contain a departure and the licensee or substantial equivalency practitioner can demonstrate that due to unusual circumstances the financial statements or data would otherwise have been misleading, the licensee or substantial equivalency practitioner can comply with the Rule by describing the departure and its approximate effects with the principle would result in a misleading statement.

19.3. Responsibilities to Clients.

19.3.a. Except as provided in Section 16 of this Rule, a licensee or substantial equivalency practitioner shall not disclose any confidential client information without the specific consent of the client. This Rule shall not be construed (i) to relieve a licensee or substantial equivalency practitioner of its professional obligations under subdivisions 19.2.b and 19.2.c of this Rule, (ii) to affect in any way the obligation to comply with a validly issued and enforceable subpoena or summons, (iii) to prohibit review of a licensee's or substantial equivalency practitioner's professional practice under Section 14 of this Rule, or (iv) to preclude a licensee or substantial equivalency practitioner from initiating a complaint with or responding to any inquiry made by a recognized investigative or disciplinary body. Members of a recognized investigative or disciplinary body and professional practice reviewers shall not use to their own advantage or disclose any licensee's or substantial equivalency practitioner's confidential client information that comes to their attention in carrying out their official responsibilities. However, this prohibition shall not restrict the exchange of information with a recognized investigative or disciplinary body or affect, in any way, compliance with a validly issued and enforceable subpoena or summons.

19.4. Responsibilities to Colleagues [RESERVED].

19.5. Other Responsibilities and Practices.

19.5.a. A licensee or substantial equivalency practitioner shall not commit an act that discredits the public accounting profession.
19.5.b. A licensee or substantial equivalency practitioner shall not seek to obtain clients by advertising or other forms of solicitation that are false, misleading, or deceptive. Solicitation by the use of coercion, over-reaching, or harassing conduct is prohibited.

AICPA Code of Professional Conduct

Section 1.130.010 Knowing Misrepresentations in the Preparation of Financial Statements or Records.

.01 Threats to compliance with the "integrity and Objectivity Rule [1.100.001] would not be at an acceptable level and could not be reduced to an acceptable level by the application of safeguards and the member would be considered to have knowingly misrepresented facts in violation of the "Integrity and Objectivity Rule" if the member

a. Makes or permits or directs another to make, materially false and misleading entries in an entity's financial statements or records.
b. Fails to correct an entity's financial statements or records that are materially false and misleading when the member has the authority to record the entries, or
c. Signs, or permits or directs another to sign a document containing materially false and misleading information.

Section 1.400.040 Negligence in the Preparation of Financial Statements or Records

.01 A member shall be considered in violation of the "Acts Discreditable Rule" [1.400.001] if the member, by virtue of his or her negligence, does any of the following:

a. Makes, or permits or directs another to make, materially false and misleading entries in the financial statements or records of an entity.
b. Fails to correct an entity's financial statements that are materially false and misleading when the member has the authority to record an entry.
c. Signs, or permits or directs another to sign, a document containing materially false and misleading information.

AICPA AR-C Section 60 General Principles for Engagements Performed in Accordance with Statements on Standards for Accounting and Review Services (SSARS)

Source: Statements on Standards in Accounting and Review Services (SSARS No. 21; SSARS No. 23; SSARS No. 24

Ethical Requirements

Paragraph A14 The AICPA Code of Professional Conduct establishers the fundamental principles of professional ethics, which include the following:

- Responsibilities

- The public interest
- Integrity
- Objectivity and independence
- Due care
- Scope and nature of services.

Paragraph A15. Due care requires the accountant to discharge professional responsibilities with competence and have the appropriate capabilities to perform the engagement and enable an appropriate accountant's report to be issued, if applicable.

Paragraph A16. Quality Control (QC) section 10, A Firm's System of Quality Control, sets out the firm's responsibilities to establish and maintain its system of quality control for engagements performed in accordance with SSARS and establish policies and procedures designed to provide it with reasonable assurance that the firm and its personnel comply with relevant ethical requirements, including those pertaining to independence.

Acceptance and Continuance of Client Relationships and Engagements Performed in Accordance with SSARSs

Paragraph A44. QC section 10 requires the firm to obtain information considered necessary in the circumstances before accepting an engagement with a new client, when deciding whether to continue an existing engagement, and when considering acceptance of a new engagement with an existing client. Information such as the following assists the engagement partner in determining whether the conclusions reached regarding the acceptance and continuance of client relationships and engagements in accordance with SSARSs are appropriate:

- The integrity of the principal owners, key management, and those charged with governance of the entity
- Whether the engagement team is competent to perform the engagement and has the necessary capabilities, including time and resources
- Whether the firm and the engagement team can comply with relevant ethical requirements
- Significant findings or issues that have arisen during the current or previous engagement and their implications for continuing the relationship.

Paragraph A45. If the engagement partner has cause to doubt management's integrity to a degree that is likely to affect proper performance of the engagement, it is not appropriate to accept the engagement, unless required by law or regulation, because doing so may lead to the accountant being associated with the entity's financial statements in an inappropriate manner.

Paragraph A52. The accountant is entitled to rely on management to provide all relevant information for the engagement. The form of the information provided by management for the purpose of the engagement will vary in different engagement circumstances. In broad terms, it will comprise records, documents, explanations, and other information relevant to the preparation of the financial statements in accordance with the financial reporting framework adopted by management. The information provided may include, for example, information about management's assumptions, intentions, or plans underlying development of accounting estimates

needed to prepare the financial statements in accordance with the applicable financial reporting framework.

AICPA AR-C Section 60A General Principles for Engagements Performed in Accordance with Statements on Standards for Accounting and Review Services

Source: SSARS No. 21; SSARS No. 23

Acceptance and Continuance of Client Relationships and Engagements

Section .25 The accountant should not accept an engagement to be performed in accordance with SSARSs if

a. The accountant has reason to believe that relevant ethical requirements will not be satisfied;
b. The accountant's preliminary understanding of the engagement circumstances indicates that the information needed to perform the engagement is likely to be unavailable or unreliable; or
c. The accountant has cause to doubt management's integrity such that it is likely to affect the performance of the engagement.

Section .26 As a precondition for accepting an engagement to be performed in accordance with SSARSs, the accountant should

c. obtain the agreement of management that it acknowledges and understands its responsibility

i. for the selection of the financial reporting framework to be applied in the preparation of financial statements.

ii. for the design, implementation, and maintenance of internal control relevant to the preparation and fair presentation of the financial statements that are free from material misstatement, whether due to fraud or error, unless the accountant decides to accept responsibility for such internal control.

iii. for preventing and detecting fraud.

iv. for ensuring that the entity complies with laws and regulations applicable to its activities.

v. for the accuracy and completeness of the records, documents, explanations, and other information, including significant judgments provided by management for the preparation of financial statements.

vi. to provide the accountant with

(1) access to all information of which management is aware that is relevant to the preparation and fair presentation of the financial statements, such as records, documentation, and other matters.

(2) additional information that the accountant may request from management for the purpose of the engagement.
(3) unrestricted access to persons within the entity of whom the accountant determines it necessary to make inquiries

Paragraph A45. If the engagement partner has cause to doubt management's integrity to a degree that is likely to affect proper performance of the engagement, it is not appropriate to accept the engagement, unless required by law or regulation, because doing so may lead to the accountant being associated with the entity's financial statements in an inappropriate manner.

Paragraph A50. In accordance with this section, the accountant is required to obtain the agreement of management on management's responsibilities in relation to the financial statements as a condition precedent to accepting the engagement. In smaller entities, management may not be well-informed about what those responsibilities are, including those arising in applicable law or regulation. In order to obtain management's agreement on an informed basis, the accountant may find it necessary to discuss those responsibilities with management in advance of seeking management's agreement on its responsibilities.

Paragraph A51.The accountant is entitled to rely on management to provide all relevant information for the engagement. The form of the information provided by management for the purpose of the engagement will vary in different engagement circumstances. In broad terms, it will comprise records, documents, explanations, and other information relevant to the preparation of the financial statements in accordance with the financial reporting framework adopted by management. The information provided may include, for example, information about management's assumptions, intentions, or plans underlying development of accounting estimates needed to prepare the financial statements in accordance with the applicable financial reporting framework.

AICPA AR-C Section 70 General Principles for Engagements Performed in Accordance with Statements on Standards for Accounting and Review Services

Source: SSARS No. 21; SSARS No. 23

The Preparation Engagement
Paragraph .03 An engagement to prepare financial statements is a nonattest service and does not require a determination about whether the accountant is independent of the entity.

Paragraph .04 In addition, an engagement to prepare financial statements does not require the accountant to verify the accuracy or completeness of the information provided by management or otherwise gather evidence to express an opinion or a conclusion on the financial statements or otherwise report on the financial statements.

Preparing Financial Statements
Paragraph .17 If the accountant becomes aware that the records, documents, explanations, or other information, including significant judgments, used in the preparation of the financial

statements are incomplete, inaccurate, or otherwise unsatisfactory, the accountant should bring that to the attention of management and request additional or corrected information.

Paragraph A13. The statement on each page of the financial statements, including related notes, is intended to avoid misunderstanding on the part of users with respect to the accountant's involvement with the financial statements. The statement is made at management's discretion, and the accountant or the accountant's firm name is not required to be included. The accountant is concerned that the indication is not misleading. Examples of a statement on each page of the financial statements include the following:

- No assurance is provided on these financial statements.
- These financial statements have not been subjected to an audit or review or compilation engagement, and no assurance is provided on them.

Other statements that convey that no assurance is provided on the financial statements would also be acceptable

Paragraph A22. Exhibit-Illustrative Engagement Letter, selected paragraphs included in a client engagement letter for a compilation engagement:

We are not required to, and will not, verify the accuracy or completeness of the information you will provide to us for the engagement or otherwise gather evidence for the purpose of expressing an opinion or a conclusion. Accordingly, we will not express an opinion or a conclusion or provide any assurance on the financial statements.

Our engagement cannot be relied upon to identify or disclose any financial statement misstatements, including those caused by fraud or error, or to identify or disclose any wrongdoing within the entity or noncompliance with laws and regulations.

Management Responsibilities in a standard engagement letter for unaudited compiled financial statements:

The engagement to be performed is conducted on the basis that management acknowledges and understands that our role is to prepare financial statements in accordance with accounting principles generally accepted in the United States of America. Management has the following overall responsibilities that are fundamental to our undertaking the engagement to prepare your financial statements in accordance with SSARSs:

a. The selection of accounting principles generally accepted in the United States of America as the financial reporting framework to be applied in the preparation of the financial statements

b. The design, implementation, and maintenance of internal control relevant to the preparation and fair presentation of financial statements that are free from material misstatement, whether due to fraud or error

c. The prevention and detection of fraud

d. To ensure that the entity complies with the laws and regulations applicable to its activities

e. The accuracy and completeness of the records, documents, explanations, and other information, including significant judgments, you provide to us for the engagement to prepare financial statements

f. To provide us with:

i. Documentation, and other related information that is relevant to the preparation and presentation of the financial statements,

ii. Additional information that may be requested for the purpose of the preparation of the financial statements, and

iii. Unrestricted access to persons within ABC Company of whom we determine necessary to communicate.

The financial statements will not be accompanied by a report. However, you agree that the financial statements will clearly indicate that no assurance is provided on them.

AICPA AR-C Section 80 Compilation Engagements

The Compilation Engagement

.02 Because a compilation engagement is not an assurance engagement, a compilation engagement does not require the accountant to verify the accuracy or completeness of the information provided by management or otherwise gather evidence to express an opinion or a conclusion on the financial statements.

Independence

.07 The accountant must determine whether the accountant is independent of the entity.

Compilation Procedures

.14 If, in the course of the engagement, the accountant becomes aware that the records, documents, explanations, or other information, including significant judgments, provided by management are incomplete, inaccurate, or otherwise unsatisfactory, the accountant should bring that to the attention of management and request additional or corrected information. (Ref: par. A18)

.15 If the accountant becomes aware during the course of the engagement that

a. The financial statements do not adequately refer to or describe the applicable financial reporting framework (Ref: par. A19);

b. Revisions to the financial statements are required for the financial statements to be in accordance with the applicable financial reporting framework; or

c. The financial statements are otherwise misleading, the accountant should propose the appropriate revisions to management.

.16 The accountant should withdraw from the engagement and inform management of the reasons for withdrawing if (Ref: par. A22–A23)

a. The accountant is unable to complete the engagement because management has failed to provide records, documents, explanations, or other information, including significant judgments, as requested, or

b. Management does not make appropriate revisions that are proposed by the accountant or does not disclose such departures in the financial statements, and the accountant determines to not disclose such departures in the accountant's compilation report.

Compilation Procedures (Ref: par. .14–.16, .26, and .32)
.18 The accountant is not required to make inquiries or perform other procedures to verify, corroborate, or review information supplied by the entity. However, the accountant may have performed such inquiries or procedures and the results of those inquiries or procedures, knowledge gained from prior engagements, or the financial statements themselves may cause the accountant to become aware that information provided by management is incorrect, in complete, or otherwise unsatisfactory.

Client Responsibilities in a compilation engagement

The client has the following overall responsibilities that are fundamental to our undertaking the engagement in accordance with SSARSs:

c. The design, implementation, and maintenance of internal control relevant to the preparation and fair presentation of the financial statements that are free from material misstatement, whether due to fraud or error
d. The prevention and detection of fraud
f. The accuracy and completeness of the records, documents, explanations, and other information, including significant judgments, you provide to us for the engagement

Firm Responsibilities in a compilation engagement

The firm is not required to, and will not, verify the accuracy or completeness of the information provided by the client for the engagement or otherwise gather evidence for the purpose of expressing an opinion or a conclusion. Accordingly, the firm will not express an opinion, a conclusion, nor provide any assurance on the financial statements. A compilation engagement cannot be relied upon to identify or disclose any financial statement misstatements, including those caused by fraud or error, or to identify or disclose any wrongdoing within the entity or noncompliance with laws and regulations.

AICPA Statements on Standards in Tax Services (SSTSs)
Relevant paragraphs from SSTS No. 3 Certain Procedural Aspects of Preparing Returns

Introduction

1. This statement sets forth the applicable standards for members concerning the obligation to examine or verify certain supporting data or to consider information related to another taxpayer when preparing a taxpayer's tax return.

Statement

2. In preparing or signing a return, a member may in good faith rely, without verification, on information furnished by the taxpayer or by third parties. However, a member should not ignore the implications of information furnished and should make reasonable

inquiries if the information furnished appears to be incorrect, incomplete, or inconsistent either on its face or on the basis of other facts known to the member. Further, a member should refer to the taxpayer's returns for one or more prior years whenever feasible.

3. If the tax law or regulations impose a condition with respect to deductibility or other tax treatment of an item, such as taxpayer maintenance of books and records or substantiating documentation to support the reported deduction or tax treatment, a member should make appropriate inquiries to determine to the member's satisfaction whether such condition has been met.
4. When preparing a tax return, a member should consider information actually known to that member from the tax return of another taxpayer if the information is relevant to that tax return and its consideration is necessary to properly prepare that tax return. In using such information, a member should consider any limitations imposed by any law or rule relating to confidentiality.

Explanation

5. The preparer's declaration on a tax return often states that the information contained therein is true, correct, and complete to the best of the preparer's knowledge and belief based on all information known by the preparer. This type of reference should be understood to include information furnished by the taxpayer or by third parties to a member in connection with the preparation of the return.
6. The preparer's declaration does not require a member to examine or verify supporting data; a member may rely on information furnished by the taxpayer unless it appears to be incorrect, incomplete, or inconsistent. However, there is a need to determine by inquiry that a specifically required condition, such as maintaining books and records or substantiating documentation, has been satisfied and to obtain information when the material furnished appears to be incorrect, incomplete, or inconsistent. Although a member has certain responsibilities in exercising due diligence in preparing a return, the taxpayer has the ultimate responsibility for the contents of the return. Thus, if the taxpayer presents unsupported data in the form of lists of tax information, such as dividends and interest received, charitable contributions, and medical expenses, such information may be used in the preparation of a tax return without verification unless it appears to be incorrect, incomplete, or inconsistent either on its face or on the basis of other facts known to a member.
7. Even though there is no requirement to examine underlying documentation, a member should encourage the taxpayer to provide supporting data where appropriate. For example, a member should encourage the taxpayer to submit underlying documents for use in tax return preparation to permit full consideration of income and deductions arising from security transactions and from pass-through entities, such as estates, trusts, partnerships, and S corporations.
8. The source of information provided to a member by a taxpayer for use in preparing the return is often a pass-through entity, such as a limited partnership, in which the taxpayer has an interest but is not involved in management. A member may accept the information provided by the pass-through entity without further inquiry, unless there is reason to believe it is incorrect, incomplete, or inconsistent, either on its face or on the basis of other facts known to the member. In some instances, it may be appropriate for a member to advise the taxpayer to ascertain the nature and amount of possible exposure to tax

deficiencies, interest, and penalties by taxpayer contact with management of the pass-through entity.

SSTS No. 6, Knowledge of Error: Return Preparation and Administrative Proceedings

Relevant Paragraphs

4. A member should inform the taxpayer promptly upon becoming aware of an error in a previously filed return, an error in a return that is the subject of an administrative proceeding, or a taxpayer's failure to file a required return. A member also should advise the taxpayer of the potential consequences of the error and recommend the corrective measures to be taken. Such advice and recommendation may be given orally. The member is not allowed to inform the taxing authority without the taxpayer's permission, except when required by law.

5. If a member is requested to prepare the current year's return and the taxpayer has not taken appropriate action to correct an error in a prior year's return, the member should consider whether to withdraw from preparing the return and whether to continue a professional or employment relationship with the taxpayer. If the member does prepare such current year's return, the member should take reasonable steps to ensure that the error is not repeated.

6. If a member is representing a taxpayer in an administrative proceeding with respect to a return that contains an error of which the member is aware, the member should request the taxpayer's agreement to disclose the error to the taxing authority. Lacking such agreement, the member should consider whether to withdraw from representing the taxpayer in the administrative proceeding and whether to continue a professional or employment relationship with the taxpayer.

8. It is the taxpayer's responsibility to decide whether to correct the error. If the taxpayer does not correct an error, a member should consider whether to withdraw from the engagement and whether to continue a professional or employment relationship with the taxpayer. Although recognizing that the taxpayer may not be required by statute to correct an error by filing an amended return, a member should consider whether a taxpayer's decision not to file an amended return or otherwise correct an error may predict future behavior that might require termination of the relationship.

11. If a member believes that a taxpayer may face possible exposure to allegations of fraud or other criminal misconduct, the member should advise the taxpayer to consult with an attorney before the taxpayer takes any action.

14. If a member becomes aware of the error while performing services for a taxpayer that do not involve tax return preparation or representation in an administrative proceeding, the member's responsibility is to advise the taxpayer of the existence of the error and to recommend that the error be discussed with the taxpayer's tax return preparer. Such recommendation may be given orally.

§ 10.21 Knowledge of client's omission.

A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission.

§ 10.22 Diligence as to accuracy.

(a) In general. A practitioner must exercise due diligence —

(1) In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters;

§ 10.34 Standards with respect to tax returns and documents, affidavits and other papers.

(a) Tax returns.

(1) A practitioner may not willfully, recklessly, or through gross incompetence —

(i) Sign a tax return or claim for refund that the practitioner knows or reasonably should know contains a position that —

(A) Lacks a reasonable basis;

(B) Is an unreasonable position as described in section 6694(a)(2) of the Internal Revenue Code (Code) (including the related regulations and other published guidance); or

(C) Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).

(ii) Advise a client to take a position on a tax return or claim for refund, or prepare a portion of a tax return or claim for refund containing a position, that

(A) Lacks a reasonable basis;

(B) Is an unreasonable position as described in section 6694(a)(2) of the Code (including the related regulations and other published guidance); or

(C) Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).

(2) A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted willfully, recklessly, or through gross incompetence.

(d) Relying on information furnished by clients. A practitioner advising a client to take a position on a tax return, document, affidavit or other paper submitted to the Internal Revenue Service, or preparing or signing a tax return as a preparer, generally may rely in good faith without verification upon information furnished by the client. The practitioner may not, however, ignore the implications of information furnished to, or actually known

by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.

§ 10.51 Incompetence and disreputable conduct.

(a) *Incompetence and disreputable conduct.* Incompetence and disreputable conduct for which a practitioner may be sanctioned under §10.50 includes, but is not limited to —

§ 10.51 (a)(8) Misappropriation of, or failure properly or promptly to remit, funds received from a client for the purpose of payment of taxes or other obligations due the United States.

Internal Revenue Code Section 6694
Understatement of taxpayer's liability by a tax return preparer

IRC Sec. 6694 (b) Understatement due to willful or reckless conduct

(1) In general. Any tax return preparer who prepares any return or claim for refund with respect to which any part of an understatement of liability is due to a conduct described in paragraph (2) shall pay a penalty with respect to each such return or claim in an amount equal to the greater of—

(A) $5,000. or

(B) 75 percent of the income derived (or to be derived) by the tax return preparer with respect to the return or claim.

(2) Willful or reckless conduct: Conduct described in this paragraph is conduct by the tax return preparer which is—

(A) a willful attempt in any manner to understate the liability for tax on the return or claim, or

(B) a reckless or intentional disregard of rules or regulations.

Regs. Sec. 1.6694-1 Section 6694 penalties applicable to tax return preparers.

Regs. Sec. 1.6694-1(e) Verification of information furnished by taxpayer or other party -

(1) In general. For purposes of sections 6694(a) and (b) (including demonstrating that a position complied with relevant standards under section 6694(a) and demonstrating reasonable cause and good faith under §1.6694-2(e), the tax return preparer generally may rely in good faith without verification upon information furnished by the taxpayer. A tax return preparer also may rely in good faith and without verification upon information and advice furnished by another advisor, another tax return preparer or other party (including another advisor or tax return preparer at the tax return preparer's 's firm). The tax return preparer is not required to audit, examine or review books and records, business operations, documents, or other evidence to verify independently

information provided by the taxpayer, advisor, other tax return preparer, or other party. The tax return preparer, however, may not ignore the implications of information furnished to the tax return preparer or actually known by the tax return preparer. The tax return preparer must make reasonable inquiries if the information as furnished appears to be incorrect or incomplete. Additionally, some provisions of the Code or regulations require that specific facts and circumstances exist (for example, that the taxpayer maintain specific documents) before a deduction or credit may be claimed. The tax return preparer must make appropriate inquiries to determine the existence of facts and circumstances required by a Code section or regulation as a condition of the claiming of a deduction or credit.

Regs. Sec. 1.6694-3 Penalty for understatement due to willful, reckless, or intentional conduct.

Regs. Sec. 1.6694-3 (a) In general -

(1) Proscribed conduct. A tax return preparer is liable for a penalty under section 6694(b) equal to the greater of $5,000 or 50 percent of the income derived (or to be derived) by the tax return preparer if any part of an understatement of liability for a return or claim for refund that is prepared is due to -

(i) A willful attempt by a tax return preparer to understate in any manner the liability for tax on the return or claim for refund; or

(ii) Any reckless or intentional disregard of rules or regulations by a tax return preparer.

(2) Special rule for corporations, partnerships, and other firms. A firm that employs a tax return preparer subject to a penalty under Section 6694(b) (or a firm of which the individual tax return preparer is a partner, member, shareholder or other equity holder) is also subject to penalty if, and only if -

(i) One or more members of the principal management (or principal officers) of the firm or a branch office participated in or knew of the conduct proscribed by section 6694(b);

(ii) The corporation, partnership, or other firm entity failed to provide reasonable and appropriate procedures for review of the position for which the penalty is imposed; or

(iii) The corporation, partnership, or other firm entity disregarded its reasonable and appropriate review procedures through willfulness, recklessness, or gross indifference (including ignoring facts that would lead a person of reasonable prudence and competence to investigate or ascertain) in the formulation of the advice, or the preparation of the return or claim for refund, that included the position for which the penalty is imposed.

Regs. Sec. 1.6694-3 (c) Reckless or intentional disregard.

(c) Reckless or intentional disregard.

> (1) Except as provided in paragraphs (c)(2) and (c)(3) of this section, a preparer is considered to have recklessly or intentionally disregarded a rule or regulation if the preparer takes a position on the return or claim for refund that is contrary to a rule or regulation (as defined in paragraph (f) of this section) and the preparer knows of, or is reckless in not knowing of, the rule or regulation in question. A preparer is reckless in not knowing of a rule or regulation if the preparer makes little or no effort to determine whether a rule or regulation exists, under circumstances which demonstrate a substantial deviation from the standard of conduct that a reasonable preparer would observe in the situation.

Regs. Sec. 1.6694-3 (d) Example 1

A taxpayer provided Preparer T with detailed check registers reflecting personal and business expenses. One of the expenses was for domestic help, and this expense was identified as personal on the check register. T knowingly deducted the expenses of the taxpayer's domestic help as wages paid in the taxpayer's business. T is subject to the penalty under section 6694(b).

Findings

Compilation of Financial Statements and Breach of Duty of Care

One significant difference between claims involving audits and those involving compilations or reviews is the way that breach of duty of care is to be evaluated. Generally Accepted Auditing Standards (GAAS) do not apply to compilation and review engagements. The standards for compilation and review engagements are the Statements on Standards for Accounting and Review Services (SSARS). The AICPA has re-codified the SSARS into AICPA AR-C Section 60, AR-C Section 60A, AR-C Section 70, AR-C Section 80, and AR-C Section 90.

Not all services provided by CPAs are audits. A review provides much less assurance than an audit, and a compilation provides no assurance as to the accuracy of the financial statements. A compilation report should explicitly state that it does not provide the assurance of an audit or a review. AICPA AR-C Section 70 General Principles for Engagements Performed in Accordance with Statements on Standards for Accounting and Review Services paragraph .04 states that an engagement to prepare financial statements does not require the accountant to verify the accuracy or completeness of the information provided by management or otherwise gather evidence to express an opinion or a conclusion on the financial statements. In preparing financial statements, AR-C Section 70, paragraph .17 states, if the accountant becomes aware that the records, documents, explanations, or other information, including significant judgments, used in the preparation of the financial statements are incomplete, inaccurate, or otherwise unsatisfactory, the accountant should bring that to the attention of management and request additional or corrected information. There is no indication that Boal & Associates brought such matters to the attention of management.

Engagement Letters and Breach of Duty of Care

Standard client engagement letters state that the firm is not required to, and will not, verify the accuracy or completeness of the information provided to the firm by the client for the engagement or otherwise gather evidence for the purpose of expressing an opinion or a conclusion. In a compilation engagement, the firm does not express an opinion or a conclusion or provide any assurance on the financial statements. Standard compilation engagement letters also state that the compilation engagement cannot be relied upon to identify or disclose any financial statement misstatements, including those caused by fraud or error, or to identify or disclose any wrongdoing within the entity or noncompliance with laws and regulations.

AICPA AR-C Section 80 paragraph .14 states that if, in the course of the engagement, the accountant becomes aware that the records, documents, explanations, or other information, including significant judgments, provided by management are incomplete, inaccurate, or otherwise unsatisfactory, the accountant should bring that to the attention of management and request additional or corrected information. Paragraph .15 states that if the accountant becomes aware during the course of the engagement that the financial statements are otherwise misleading, the accountant should propose the appropriate revisions to management. There is no indication that Boal & Associates brought such matters to the attention of management.

In a compilation engagement, the accountant is not required to make inquiries or perform other procedures to verify, corroborate, or review information supplied by the entity. However, the accountant may have performed such inquiries or procedures and the results of those inquiries or procedures, knowledge gained from prior engagements, or the financial statements themselves may cause the accountant to become aware that information provided by management is incorrect, in complete, or otherwise unsatisfactory. There is no indication that Boal & Associates performed such inquiries.

In the AICPA Code of Professional Conduct Section 1.130.010 Knowing Misrepresentations in the Preparation of Financial Statements or Records paragraph .01 and Section 1.400.040 Negligence in the Preparation of Financial Statements or Records both state that the member would be considered to have knowingly misrepresented facts in violation of the "Integrity and Objectivity Rule" and/or the "Acts Discreditable Rule" if the member

d. Makes or permits or directs another to make, materially false and misleading entries in an entity's financial statements or records.
e. Fails to correct an entity's financial statements or records that are materially false and misleading when the member has the authority to record the entries, or
f. Signs, or permits or directs another to sign a document containing materially false and misleading information.

AICPA AR-C Section 60A, Section .25 paragraph (c) states that the accountant should not accept a client engagement to be performed in accordance with SSARSs if the accountant has cause to doubt management's integrity such that it is likely to affect the performance of the engagement. Section 26 paragraph (c) states that a precondition for accepting an engagement to be performed in accordance with SSARSs, the accountant should obtain the agreement of management that it acknowledges and understands its responsibility

ii. for the design, implementation, and maintenance of internal control relevant to the preparation and fair presentation of the financial statements that are free from material misstatement, whether due to fraud or error, unless the accountant decides to accept responsibility for such internal control.
iii. for preventing and detecting fraud.
iv. for ensuring that the entity complies with laws and regulations applicable to its activities.
v. for the accuracy and completeness of the records, documents, explanations, and other information, including significant judgments provided by management for the preparation of financial statements.

Paragraph A45 states that if the engagement partner has cause to doubt management's integrity to a degree that is likely to affect proper performance of the engagement, it is not appropriate to accept the engagement, unless required by law or regulation, because doing so may lead to the accountant being associated with the entity's financial statements in an inappropriate manner.

If doubt of management's integrity is likely to affect proper performance of the engagement, the accountant should disengage the client. Boal & Associates made no attempt to disengage from David Anderson or from the CLUC engagements.

AICPA Statements on Standards for Tax Services (SSTS) No. 3 Certain Procedural Aspects of Preparing Returns

In preparing or signing a return, a member may in good faith rely, without verification, on information furnished by the taxpayer or by third parties. However, a member should not ignore the implications of information furnished and should make reasonable inquiries if the information furnished appears to be incorrect, incomplete, or inconsistent either on its face or on the basis of other facts known to the member. Further, a member should refer to the taxpayer's returns for one or more prior years whenever feasible.

If the tax law or regulations impose a condition with respect to deductibility or other tax treatment of an item, such as taxpayer maintenance of books and records or substantiating documentation to support the reported deduction or tax treatment, a member should make appropriate inquiries to determine to the member's satisfaction whether such condition has been met.

When preparing a tax return, a member should consider information actually known to that member from the tax return of another taxpayer if the information is relevant to that tax return and its consideration is necessary to properly prepare that tax return. In using such information, a member should consider any limitations imposed by any law or rule relating to confidentiality.

A preparer's declaration on a tax return states that the information contained therein is true, correct, and complete to the best of the preparer's knowledge and belief based on all information known by the preparer. The preparer's is not required to examine or verify supporting data; a member may rely on information furnished by the taxpayer unless it appears to be incorrect, incomplete, or inconsistent.

However, there is a need to determine by inquiry that a specifically required condition, such as maintaining books and records or substantiating documentation, has been satisfied and to obtain information when the material furnished appears to be incorrect, incomplete, or inconsistent. Although a member has certain responsibilities in exercising due diligence in preparing a return, the taxpayer has the ultimate responsibility for the contents of the return. Thus, if the taxpayer presents unsupported data in the form of lists of tax information, such as dividends and interest received, charitable contributions, and medical expenses, such information may be used in the preparation of a tax return without verification unless it appears to be incorrect, incomplete, or inconsistent either on its face or on the basis of other facts known to a member.

The Smith & Associates report estimated $2,179,000 in restitution to CLUC from embezzlement across multiple years. Based on multiple transactions listed in the Smith & Associate report, and the Kirkpatrick report, the information used in the return should have appeared to Mr. Boal and Boal & Associates to be incorrect, incomplete, or inconsistent either on its face or on the basis of facts known by Mr. Boal. There was an obligation to investigate, but Boal & Associates did not investigate information that appeared incorrect, incomplete, or inconsistent on its face.

AICPA SSTS No. 6, Knowledge of Error: Return Preparation and Administrative Proceedings

If a member becomes aware of the error while performing services for a taxpayer that do not involve tax return preparation or representation in an administrative proceeding, the member's responsibility is to advise the taxpayer of the existence of the error and to recommend that the error be discussed with the taxpayer's tax return preparer. If the client refuses to fix the error, the CPA should disengage from the client. Boal & Associates did not disengage from CLUC with errors that were known or should have been known.

Treasury Circular 230

Under Circular 230 § 10.21 Knowledge of client's omission, if a tax practitioner knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission. There is no indication that Boal & Associates discussed such matters with the management of CLUC.

Under Circular 230 § 10.22 Diligence as to accuracy, a practitioner must exercise due diligence in preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters. Tax returns filed over the years were inaccurate due to embezzlement. For every year involving embezzlement, the tax returns were materially misstated. Boal & Associates did not exercise due diligence in preparing and filing of tax returns for those years.

Under Circular 230 § 10.34 Standards with respect to tax returns and documents, affidavits and other papers, a practitioner may not willfully, recklessly, or through gross incompetence sign a

tax return or claim for refund that the practitioner knows or reasonably should know contains a position that lacks a reasonable basis: is an unreasonable position as described in Section 6694(a)(2) of the Internal Revenue Code (Code) (including the related regulations and other published guidance); or is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance). A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted willfully, recklessly, or through gross incompetence. There were multiple transactions over many years that were fraudulent, and therefore lacked reasonable basis and would be considered unreasonable positions under Section 6694(a)(2) of the Code.

In relying on information furnished by clients, a tax preparer, generally may rely in good faith without verification upon information furnished by the client. The practitioner may not, however, ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete. Mr. Boal ignored the implications of information furnished to, or actually known by, Mr. Boal, and there is no indication that he made reasonable inquiries where the information as furnished appeared to be incorrect on its face.

Incompetence and disreputable conduct regarding individual tax returns of Dr. Chafin

Circular 230 § 10.51(a)(8) states that incompetence and disreputable conduct for which a practitioner may be sanctioned under §10.50 includes, but is not limited to misappropriation of, or failure properly or promptly to remit, funds received from a client for the purpose of payment of taxes or other obligations due the United States. Dr. Chafin claims that withholdings from his LLC guaranteed payments were not remitted to the IRS or the state of West Virginia.

IRC Sec. 6694 (b) Understatement due to willful or reckless conduct

Any tax return preparer who prepares any return or claim for refund with respect to which any part of an understatement of liability is due to a conduct described as willful or reckless in paragraph (2) is subject to penalties of $5,000, or 75 percent of the income derived (or to be derived) by the tax return preparer with respect to the return or claim. Paragraph 2 describes willful or reckless conduct by a tax preparer as a willful attempt in any manner to understate the liability for tax on the return or claim, or a reckless or intentional disregard of rules or regulations. If Mr. Boal was aware of said embezzlement, his conduct as a tax preparer would likely be interpreted as willful or reckless by the IRS.

Regs. Sec. 1.6694-1 Section 6694 penalties applicable to tax return preparers.

Under Regs. Sec. 1.6694-1(e) Verification of information furnished by taxpayer or other party, for purposes of sections 6694(a) and (b) (including demonstrating that a position complied with relevant standards under section 6694(a) and demonstrating reasonable cause and good faith under §1.6694-2(e), the tax return preparer generally may rely in good faith without verification

upon information furnished by the taxpayer. A tax return preparer also may rely in good faith and without verification upon information and advice furnished by another advisor, another tax return preparer or other party (including another advisor or tax return preparer at the tax return preparer's 's firm). The tax return preparer is not required to audit, examine or review books and records, business operations, documents, or other evidence to verify independently information provided by the taxpayer, advisor, other tax return preparer, or other party. The tax return preparer, however, may not ignore the implications of information furnished to the tax return preparer or actually known by the tax return preparer. The tax return preparer must make reasonable inquiries if the information as furnished appears to be incorrect or incomplete. Mr. Boal and Boal & Associates ignored implications of information furnished by CLUC There is no indication that Boal & Associates made reasonable inquiries that the information appeared incorrect.

Additionally, some provisions of the Code or regulations require that specific facts and circumstances exist (for example, that the taxpayer maintain specific documents) before a deduction or credit may be claimed. The tax return preparer must make appropriate inquiries to determine the existence of facts and circumstances required by a Code section or regulation as a condition of the claiming of a deduction or credit. Boal & Associates did not make appropriate inquiries.

Regs. Sec. 1.6694-3 Penalty for understatement due to willful, reckless, or intentional conduct.

Under Regs. Sec. 1.6694-3 (a), a tax return preparer is liable for a penalty under section 6694(b) equal to the greater of $5,000 or 50 percent of the income derived (or to be derived) by the tax return preparer if any part of an understatement of liability for a return or claim for refund that is prepared is due to a willful attempt by a tax return preparer to understate in any manner the liability for tax on the return or claim for refund; or any reckless or intentional disregard of rules or regulations by a tax return preparer. Under Regs. Sec. 1.6694-3 (c) Reckless or intentional disregard is defined as follows:

> (1) Except as provided in paragraphs (c)(2) and (c)(3) of this section, a preparer is considered to have recklessly or intentionally disregarded a rule or regulation if the preparer takes a position on the return or claim for refund that is contrary to a rule or regulation (as defined in paragraph (f) of this section) and the preparer knows of, or is reckless in not knowing of, the rule or regulation in question. A preparer is reckless in not knowing of a rule or regulation if the preparer makes little or no effort to determine whether a rule or regulation exists, under circumstances which demonstrate a substantial deviation from the standard of conduct that a reasonable preparer would observe in the situation.

Under Regs. Sec. 1.6694-3 (d) Example 1, a taxpayer provided Preparer T with detailed check registers reflecting personal and business expenses. One of the expenses was for domestic help, and this expense was identified as personal on the check register. T knowingly deducted the expenses of the taxpayer's domestic help as wages paid in the taxpayer's business. T is subject to the penalty under Section 6694(b).

There were many nondeductible personal expenses of Dr. Anderson that were run through the Company. Detail of suspicious transactions is provided in the Smith & Associates restitution calculation report and in the Kirkpatrick report. Boal and Associates is likely subject to penalties under Section 6694(b).

Restrictions

This report is intended solely for the use of Dr. Christopher Chafin, Cheat Lake Urgent Care, PLLC, and their legal counsel and should not be used for any other purpose without my prior permission for each occasion.

Respectfully submitted,

Charles J. Russo, PhD, CPA, CMA, CPA
Charles J. Russo, PhD, CPA

Source Documents

1. AICPA Code of Professional Conduct effective December 15, 2014, updated through June 2019.
2. AICPA AR-C Section 60, General Principles for Engagements Performed in Accordance with Statements on Standards for Accounting and Review Services, December 15, 2015.
3. AICPA AR-C Section 60A, General Principles for Engagements Performed in Accordance with Statements on Standards for Accounting and Review Services, December 15, 2015.
4. AICPA AR-C Section 70, Preparation of Financial Statements, December 15, 2015.
5. AICPA AR-C Section 80 Compilation Engagements, December 15, 2015.
6. AICPA Statements on Standards for Tax Services 1-7, AICPA, Jan 1, 2010.
7. Brian R. Boal, Defendant Responses to Chafin's First Set of Discovery Requests, May 9, 2018.
8. Cheat Lake Urgent Care, PLLC Operating Agreement,
9. Amendments changing managing member from Anderson to Chafin
10. Cheat Lake Urgent Care, PLLC tax returns Forms 1065 for tax years 2007-2014.
11. David Anderson Indictment for Case No. 14-F-49, dated January 10, 2014
12. Estimated restitution calculation report, Smith & Associates CPAs & Consultants, PLLC, March 5, 2020.
13. Forensic Review of Potential Asset Misappropriation for calendar year 2012. Michael D. Kirkpatrick, CPA, Forensic Accountant, January 24, 2013.
14. Internal Revenue Code Sec 6694 Understatement of taxpayer's liability by a tax return preparer.
15. Treasury Department Circular No. 230 Regulations Governing Practice before the Internal Revenue Service, June 12, 2014.
16. Treasury Regulations 1.6694-1 Section 6694 penalties applicable to tax return preparers.
17. Treasury Regulations 1.6694-3 Penalty for understatement due to willful, reckless, or intentional conduct.
18. Second Amended Complaint, Civil Action No. 16-C-547, signed December 15, 2017.
19. Victim Impact Statement, David Anderson, Case 14-F-49, Offense of Embezzlement, January 9, 2017.

Appendix 1: Kirkpatrick Report

Appendix 2: Smith and Associates Report

SMITH & ASSOCIATES CPAs & CONSULTANTS, PLLC
426 Drummond Street Morgantown, WV 26505
Cell: (304) 676-0930 Office: (304) 599-1142 Fax: (304) 599-1135
andrew@smithcpapllc.com
www.smithcpapllc.com

March 5, 2020

Jason Wingfield, Attorney
1714 Mileground Road
Morgantown, WV 26505

DRAFT

RE: Chest Lake Urgent Care

Dear Jason,

Based on my analysis of financial documents and Quickbooks file you provided to me in this matter:

(in thousands)	estimated restitution calculation
Excessive Repairs	$ 47
Net Due from others	113
Unnecessary Items:	
A) Credit Card Debt	28
B) Local bank and other debt	478
C) Overdraft items	29
D) Interest costs	21
Theft	192
Guaranteed payments	600
Excessive:	
A) Office Supplies	57
B) Billing Services	169
C) Bank fees	30
Unpaid partner exc liabilities	200
Employee medical	5
Patient cash payments	203
Unidentified check	7
Total estimated restitution calculation	$ 2,179

Other Items Noted:

- Large volume of documents approaching 10,000 pages reviewed.
- Two medical bills totaling $1,090 for T. Anderson were paid.
- Anderson card was found with charges from Dish Network, Amazon, ATM (total $471)
- Paid invoice records contain a significant number of past due notices and indications of credit revocation by suppliers.
- CLUC was a profitable venture, dire cash position in 2013
- Much of the misappropriation occurred in 2011 and 2012.
- See attached selected comparative analysis

Sincerely,

Andrew C. Smith CPA
Smith & Associates, CPAs & Consultants, PLLC

EXHIBIT
Holder
1

DRAFT

Selected Comparative Analysis

1. Guaranteed payments increased from $438,539 in 2010 to $829,309 in 2011. Anderson has $185,642 of that increase.
2. Billing services was $49,615 in 2010 and dropped to $2,538 in 2011.
3. Office expense was $12,409 in 2010 and increased to $23,755 in 2011.
4. Theft recorded in 2012 of $192,559.
5. Due from others recorded in 2011 of $112,496.
6. Due from Affordable Contractors and due from Gillen recorded at $55,000 and $9,000 respectively.
7. Due from Anderson recorded in 2010 at $21,996
8. Credit cards payable increased from $3,764 in 2009 to $18,575 in 2011.
9. Notes payable increased from $53,319 in 2009 to $370,616 in 2011.

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
Division 1

CHRISTOPHER CHAFIN, and
CHEAT LAKE URGENT CARE, PLLC,

Plaintiffs,

v.

CIVIL ACTION NO. 16-C-547
Honorable Susan B. Tucker

DAVID ANDERSON,
BRIAN R. BOAL,
BOAL & ASSOCIATES, PC.,
GILLEN ENTERPRISES, LLC,
AFFORDABLE CONTRACTORS, LLC, and
BUILD IT, LLC,

Defendants.

CERTIFICATE OF SERVICE

I, Jason E. Wingfield, certify that on June 3, 2020, I served a copy of **Plaintiffs' Expert Report Disclosure** by U.S. Mail to:

Avrum Levicoff
The Levicoff Law Firm, P.C.
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Counsel for Defendant David Anderson

Jason E. Wingfield, Esq. (W.Va. Bar # 12582)
Gianola, Barnum, Bechtel, & Jecklin, L.C.
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jwingfield@gbbjlaw.com

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

CHRISTOPHER CHAFIN, CHEAT LAKE URGENT CARE, PLLC,

Plaintiffs,

v.

DAVID ANDERSON, BRIAN R. BOAL and BOAL & ASSOCIATES, P.C., GILLEN ENTERPRISES, LLC, AFFORDABLE CONTRACTORS, LLC, and BUILD IT, LLC

Defendants.

Civil Action No.: 16-C-547

The Hon. Susan B. Tucker

Jury Trial Demanded

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing ***Motion to Strike Plaintiffs' Expert Disclosure*** upon the following counsel via email:

James A. Gianola, Esquire
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Counsel for David Anderson

Date: July 13, 2020

By: _____

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Counsel for Defendants, Brian R. Boal and Boal & Associates, PC

ADMINISTRATIVE ORDER

SUPREME COURT OF APPEALS OF WEST VIRGINIA

RE: CHRISTOPHER CHAFIN V. DAVID ANDERSON, BRIAN R. BOAL, AND BOAL & ASSOCIATES, PC, MONONGALIA COUNTY CIRCUIT COURT CASE NO. 16-C-547

The Honorable Susan B. Tucker, Judge of the Seventeenth Judicial Circuit, has advised the Chief Justice of the Supreme Court of Appeals that Plaintiff Christopher Chafin, by counsel James A. Gianola and the law firm of Gianola, Barnum, Bechtel & Jecklin, L.C., has filed a motion for her disqualification from the above-styled case. Judge Tucker has further advised that Defendants Brian R. Boal and Boal & Associates, PC, by counsel Avrum Levicoff and The Levicoff Law Firm, P.C., filed a response in opposition thereto. Judge Tucker has requested that Plaintiff's motion be denied.

Upon review of said motion and the responses thereto, and in accordance with Trial Court Rule 17.01(c), the Chief Justice has determined that Judge Tucker's disqualification from presiding over the above-styled case is not warranted.

IT IS, THEREFORE, ORDERED, that the motion for disqualification is denied, and that Judge Tucker be, and she hereby is, directed to continue to preside over the above-styled case.

IT IS FURTHER ORDERED, that the Circuit Clerk of Monongalia County record this Order in the Office of said Clerk and provide copies of the same to all parties of record or their counsel.

ENTERED: OCTOBER 11, 2017

EXHIBIT 2

ALLEN H. LOUGHRY II
Chief Justice