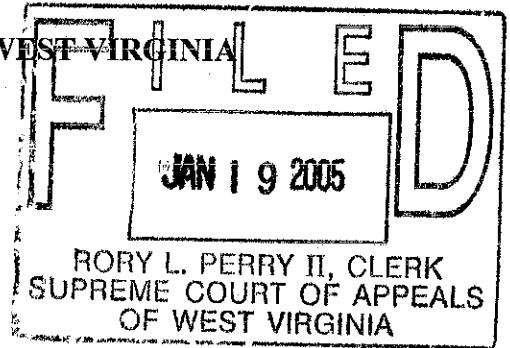


No. 31944

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



SHIRLEY CROCK and
GRACE WASHINGTON,

Appellants,

v.

HARRISON COUNTY BOARD OF EDUCATION,

Appellee.

REPLY BRIEF ON BEHALF OF APPELLANTS
SHIRLEY CROCK AND GRACE WASHINGTON

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No. 31944

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SHIRLEY CROCK and
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REPLY BRIEF ON BEHALF OF APPELLANTS
SHIRLEY CROCK AND GRACE WASHINGTON

I. THE LEGISLATURE'S INTENT IN ENACTING WEST VIRGINIA CODE §18-29-1 ET SEQ. WAS TO CREATE A NEW, DETAILED AND COMPREHENSIVE GRIEVANCE PROCEDURE.

The primary purpose of statutory construction is ascertaining the legislature's intent. *See, e.g., Snider v. West Virginia Dept. of Commerce*, 190 W.Va. 642, 441 S.E.2d 363 (1994). In this instance, the intent is clear. In 1985 when the legislature passed West Virginia Code § 18-29-1 *et seq.*, its intention was to pass a grievance procedure that would cover all education employees. West Virginia Code § 18-29-1. In its brief the Harrison County Board of Education [hereinafter as the Board or the county board] acknowledges: "In 1985, the West Virginia Legislature passed an act with the following stated purpose: ...to amend and reenact sections eight and eleven, article two, chapter eighteen-a of the Code of West Virginia."

The new grievance statute was more detailed, specific and comprehensive in scope than

any provisions in section 18A of the West Virginia Code. West Virginia Code § 18A-2-8 and §18A-2-11 apply solely to county board employees¹. In contrast, as noted in the brief of the county board, West Virginia Code § 18-29-1, (at the time it was enacted,) applied to employees of the board of regents, state institutions of higher learning, the state board of education, regional educational service agencies and multi county vocational centers as well as county school board employees. West Virginia Code § 18A-2-8 provides due process guidelines in cases of suspension and dismissal of county board employees.² Again in contrast, West Virginia Code §18-29-1 contains a grievance process which enables all education employees “to reach solutions to problems which arise between them within the scope of their respective employment relationships... .” The new procedure not only broadened the scope of the hearing process to include almost any disagreement between employee and employer, it defined four levels of the grievance procedure with due process safeguards at each step. Although it would coexist along side of the old procedures for county board employees and higher education employees, for all practical purposes, it supplanted the older system of providing due process for county board employees.

In regards to the specific issue of costs and attorney fees for grievants under this new system, the legislature was virtually silent. West Virginia Code § 18-29-8 did not address the

¹ Section 18A of the West Virginia Code is titled “School Personnel.” West Virginia Code § 18A-1-1 defines school personnel as all personnel employed by a county board of education.

² Prior to 1990 this section provided for hearings before the county board. Pursuant to the holding in *Wines v. Jefferson County Board of Education*, 213 W.Va. 379, 582 SE2d 826 (2003) decision, an employee still has the right to a pre-termination hearing before the county board.

issue of attorney fees upon appeal to the circuit court or Level IV of the grievance process, it merely disallowed fees for proceedings in levels one through three of the grievance procedure. This was in contrast to § 18A-2-11 which reflects the existence of the older procedures and provides that upon the successful appeal of a decision of a county board or a hearing examiner, a county board employee is entitled to attorney fees for **all** administrative hearings as well as appearances in court proceedings. Other grievants bringing actions pursuant to West Virginia Code § 18-29-1 were unable to request attorney fees. Then, in 1992 the legislature addressed this inequity. It amended the grievance procedure to allow a grievants who were successful in the appeal of a Level IV decision the right to reasonable attorney fees as set by the court. Having knowledge of its previous enactments, the legislature chose to leave out the proviso contained in West Virginia Code § 18A-2-11. *West Virginia Educ. Association v. Preston County Bd. of Educ.*, 171 W.Va. 38, 297 S.E.2d 444 (1982).

Although, the Harrison County Board of Education has urged this Court to supplant the statutory language contained in West Virginia Code § 18-29-8 with the language of West Virginia Code § 18A-2-11 on the basis of *noscitur a sociis*, the principle of *noscitur a sociis* is not applicable to this problem of statutory construction. *Noscitur a sociis* can be roughly translated as it is known from its associates. In applying this concept to the art of statutory construction, courts have stated that a word is known by the company it keeps and concluded that if a term is modified by different word in separate sections of a statute, that term takes on different connotations depending on the word used as a modifier (the company it keeps) *See, Keatley v. Mercer County Bd. of Educ.*, 200 W.Va. 487, 490 S.E.2d 306, 314 n. 14 (1997). None of the parties herein dispute the fact that within West Virginia Code § 18A-2-11 there is a

proviso which applies to or modifies the term reasonable attorney fees. This proviso is not ambiguous or in need of interpretation. However, the question presented to the Court today is what is the meaning of reasonable attorney fees set by the court as stated in West Virginia Code § 18-29-8. In that statute, there is no proviso keeping those terms company. The difference in modifiers lends credence to the interpretation that the phrases have different meanings.

Furthermore, *noscitur a sociis* can not be used to connect the dots between W.Va. code § 18A-2-11 and § 18-29-1. Because the terms used in West Virginia Code §18-29-8 are not sufficiently close to West Virginia Code §18A-2-11, the relationship between the proviso contained in West Virginia Code § 18A-2-11 can not accurately be referred to as “keeping company” or modifying West Virginia Code §18-29-8.³ Therefore, the principle of *noscitur a sociis* is not applicable or useful in this instance.

Similarly, the Harrison County Board’s use of statistics from the years 2002 and 2001 for cases heard before the West Virginia Education and State Grievance Board are irrelevant to the case now before the this Court. If statistics are to be used it is necessary to look at what information those numbers truly convey as well as the relevancy of that information. The statistics set forth in the appellee’s brief demonstrate that employees are highly unlikely to pursue a grievance to Level IV if unrepresented (only 46 out of 223, approximately 20% of grievants pursued their cases through level four unrepresented). The statistics also indicate that for one year, 2002, that small sample of grievants who pursued their grievances *pro se* were, as a group, not prejudiced by proceeding *pro se* at level IV. (As noted by the appellant, the statistics do not

³ A more apt description of their relationship is “a nodding acquaintance” or “cousin by marriage twice removed”.

indicate how many grievants counted as represented were representation by attorneys.) The relevancy of the information conveyed by the statistics to this matter is little to none. The statistics presented are relevant to hearings before the grievance board. This matter pertains to attorney fees for grievants who are successful upon the appeal of their grievances to the circuit court and supreme court level.

West Virginia Code § 18-29-1 *et seq.* is clear on its face and its provisions should be applied. *State v. Ivey*, 196 W.Va. 571, 474 S.E.2d 501 (1996) quoting *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). If there is ambiguity and it is necessary to construe the statute, the principles of statutory construction favor both the latter enacted statute as well as the more specific statute. *Wood County Bd. of Educ. v. Peggy Smith et al.*, 202 W.Va. 117, 502 S.E.2d 214 (1998); *Bailey v. Norfolk and Western Ry. Co.*, 206 W.Va. 654, 527 S.E.2d 516, Syl. Pt. 9 (1999). It is clear that West Virginia Code §18-29-1 is the latter enacted, the most comprehensive and the most specific statute which deals with the subject of education employee grievances. The narrow provisions of West Virginia Code § 18A-2-8 and 18A-2-11 do not supplement a later statute which is much wider in scope and coverage.⁴ Therefore, the Appellants ask that this Court apply the plain meaning of this statute and allow for reasonable attorney fees as set by the court.

II. A RULE 60(b) MOTION SHOULD NOT BE USED IN LIEU OF AN APPEAL.

In this instance, the Appellants were awarded reasonable attorney fees by Order of the

⁴ Given that the term supplemental is defined by a Black's Law Dictionary as "That which is added", earlier, more narrow statute can not supplement a later statute that the Board concedes is comprehensive and meant to amend the earlier statutes. Black's Law Dictionary 1608 (4th Ed. 1968).

Circuit Court of Harrison County dated July 30, 2002. On June 3, 2003, the Harrison County Board of Education filed a Motion pursuant to Rule 60(b). The appellants assert that although Rule 60(b) should be liberally construed to accomplish justice and is within the sound discretion of the trial court, the trial court must act within accepted legal principles. *Ross v. Meagan*, 683 F. 2d 646 (3d Cir. 1981).

The purpose behind Rule 60 is to define the circumstances under which a party may obtain relief from a final judgement. It is an attempt to preserve a balance between the sanctity of final judgements and the court's obligation to see that justice is accomplished in light of all the facts. *N.C. v. WRC* 173 W.Va. 434, 317 S.E.2d 793 (1984). Therefore relief under Rule 60 is available when the overriding interest in finality is overcome. *Harris v. Martin*, 834 F. 2d 361 (3d Cir. 1977) (quoting 7 James Wm. Moore et al., *Moore's Federal Practice*, ¶ 60.42, at 903 (2d ed. 1979)). Rule 60(b) does not confer upon the district courts a "standardless residual of discretionary power to set aside judgments." *Moolenarr v. Government of the Virgin Islands*, 822 F. 2d 1342, 1346 (3d Cir. 1987).

In attempting to create this balance some jurisdictions do not allow Rule 60(b) motions brought solely on the basis of a mistake of law any time after the appeal time has run. *See, e.g., Orner v. Shalala* 30 F.3d 1307 (10th Cir. 1996). Other jurisdictions take a more liberal view and allow motions based upon mistake of law if there has been new statutory or common law. But no jurisdictions allow a mere legal error to form the basis of Rule 60(b) motions.

In this jurisdiction, Justice Cleckley in *Powderidge Unit Owners v. Highland Prop.*, 196 W.Va. 692, 474 S.E.2d 872 (1996) discusses the "bounds of [a Rule 60(b)] Motion" under West Virginia law. The decision states: "the weight of authority supports the view that Rule 60(b)

Motions which seek merely to relitigate legal issues heard at the underlying proceeding are without merit.” 196 W.Va. at 705. Quoting from the fourth circuit decision *United States v. Williams*, the Court notes that “Where the Motion is nothing more than a request that the... Court change its mind...it is not authorized by Rule 60(b).” *United States v. Williams*, 674 F.2d 310 (4th Cir. 1982). And: A Rule 60(b) motion is “designed to address mistakes attributable to special circumstances and not merely erroneous applications of the law.” *Russell v. Delco Remy Div. of General Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995).

The Harrison County Board has asserted that: “the HCBOE filed a straightforward motion under Rule 60 and therefore the Court was well within its discretion in granting relief ... based upon a mistake of law.” The Harrison County Board did not file a straightforward motion. As a basis for the motion it did file, the Board argued that the circuit court’s initial ruling “clearly contains a clerical mistake... clearly shows the existence of a mistake as well as newly discovered evidence.” There was clerical mistake that would change the outcome of the court order.⁵ There is no mention of any new evidence in the Board’s brief or motion. From a reading of the circuit court’s decision in this matter, it is obvious that the circuit court decided to change its mind (See Attachment A). In that decision the court reviews and comments upon virtually all the recent attorney fee decisions in education cases. It notes that although this Court did not discuss attorney fees pursuant to West Virginia Code § 18-29-8 in the *Wines* decision, it was basing its reversal on that decision as well as a review of other cases. This is clearly contrary to this Court’s

⁵ In reference to the clerical mistake, there is a mistake in paragraph 12 of the circuit court’s order. However, the remainder of the order suggests that the court was well aware that it granted attorney fees under the provisions of West Virginia Code § 18-29-8, the section of the code which does not contain the cap on attorney fees. See Attachment A.

decision in the *Powderidge* case which declared that in West Virginia, as in many other jurisdictions throughout the country, mere legal error or the court changing its mind is not a basis for granting a Rule 60(b) motion .

Assuming that the Rule 60(b) Motion was granted on the basis of a mistake of law, it is incumbent upon the reviewing court to determine whether the mistake was caused by some unforeseen or extraordinary circumstance or whether it was an error that should have been appealed. The alleged mistake was that the limitation of attorney fees contained in West Virginia Code § 18A-2-11 applies to attorney fees granted pursuant to West Virginia Code § 18-29-1. Between the time of the court's initial ruling on July 30, 2002 and its reversal of that ruling on January 2004, there were no statutory changes. There was no new ruling from this Court to clarify the statutory interpretation. This was merely a matter of the court changing its mind. Therefore, it was an abuse of discretion to grant the school board's Rule 60(b) motion.

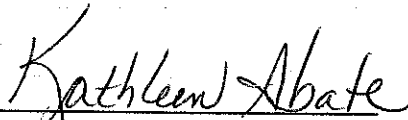
III. CONCLUSION

For the reasons stated above the appellants request that this Court grant them the relief they seek. That is, they ask that the Court reverse the Decision of the Circuit Court of Harrison County which granted the Board of Education's Motion under Rule 60(b) and held that attorney

fees sought pursuant to West Virginia Code § 18-29-8 are limited by the provisions of West Virginia Code § 18A-2-11. They further request attorney fees and costs incurred in this matter.

Dated: January 18, 2005

RESPECTFULLY SUBMITTED,
Shirley Crock and
Grace Washington
Appellants
By Counsel.



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Counsel for Appellants

TABLE OF AUTHORITIES

Page

STATUTES:

West Virginia Code §18A-1-1	2
West Virginia Code §18A-2-8	2, 5
West Virginia Code §18A-2-11	2, 3, 4, 5, 8, 9
West Virginia Code §18-29-1	1, 2, 3, 4, 5, 8
West Virginia Code §18-29-8	2, 3, 4, 7, 8, 9

WEST VIRGINIA RULES OF CIVIL PROCEDURE:

Rule 60(b) of the W.Va. Rules of Civil Procedure	5
--	---

COURT DECISIONS:

WEST VIRGINIA SUPREME COURT OF APPEALS:

<i>Bailey v. Norfolk and Western Ry. Co.</i> , 206 W.Va. 654, 527 S.E.2d 516, Syl. Pt. 9 (1999)	5
<i>Keatley v. Mercer County Bd. of Educ.</i> , 200 W.Va. 487, 490 S.E.2d 306, 314 n. 14 (1997)	3
<i>Powderidge Unit Owners Association v. Highland Properties, Ltd.</i> , 196 W.Va. 692, 474 S.E.2d 872 (1996)	6, 8
<i>Snider v. West Virginia Dept. of Commerce</i> , 190 W.Va. 642, 441 S.E.2d 363 (1994)	1
<i>State v. Elder</i> , 152 W.Va. 571, 165 S.E.2d 108 (1968)	5
<i>State v. Ivey</i> , 196 W.Va. 571, 474 S.E.2d 501 (1996)	5
<i>Wines v. Jefferson County Board of Education</i> , 213 W.Va. 379, 582 S.E.2d 826 (2003) (per curium)	2, 7

COURT DECISIONS:

WEST VIRGINIA SUPREME COURT OF APPEALS (CONTINUED):

Wood County Bd. of Educ. v. Peggy Smith et al.,
202 W.Va. 117, 502 S.E.2d 214 (1998) 5

West Virginia Educ. Association v. Preston County Bd. of Educ.,
171 W.Va. 38, 297 S.E. 2d 444 (1982) 3

OTHER JURISDICTIONS:

Harris v. Martin,
834 F. 2d 361 (3d Cir. 1977). 6

Moolenarr v. Government of the Virgin Islands,
822 F. 2d 1342, 1346 (3d Cir. 1987) 6

N.C. v. WRC
173 W.Va.434, 317 S.E.2d 793 (1984). 6

Orner v. Shalala,
30 F.3d 1307 (10th Cir. 1996) 6

Ross v. Meagan,
683 F. 2d 646 (3d Cir. 1981) 6

Russell v. Delco Remy Div.of General Motors Corp.,
51 F.3d 746, 749 (7th Cir. 1995) 7

United States v. Williams,
674 F.2d 310 (4th Cir. 1982) 7

OTHER:

Moore's Federal Practice, ¶ 60.42, at 903 (2d ed. 1979). 6

CERTIFICATE OF SERVICE

I, Kathleen Abate, hereby certify that I served the foregoing "Reply Brief on Behalf of Appellants Shirley Crock and Grace Washington" upon the parties by mailing a true copy thereof, by United States Mail, postage pre-paid, this ~~1st~~^{8th} day of January, 2005, in envelopes addressed as follows:

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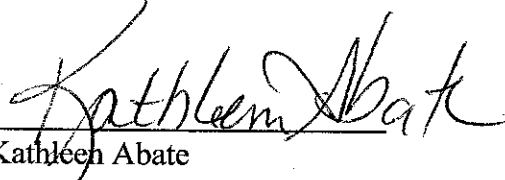
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Kathleen Abate

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

SHIRLEY CROCK and
GRACE WASHINGTON,

Appellants,

v.

Civil Action No. 00-C-154-1
Judge John Lewis Marks, Jr.

HARRISON COUNTY BOARD
OF EDUCATION,

Appellee.

**ORDER GRANTING MOTION FOR ATTORNEY FEES ON BEHALF OF
APPELLANTS SHIRLEY CROCK AND GRACE WASHINGTON**

Presently pending before the Court is a "Motion for Attorney Fees on Behalf of Appellants Shirley Crock and Grace Washington" filed herein on or about April 1, 2002. Also pending is the "Reply to Motion for Attorneys Fees on Behalf of Appellants, Shirley Crock and Grace Washington" filed herein on April 8, 2002, "Brief in Support of Motion for Attorney Fees on Behalf of Appellants Shirley Crock and Grace Washington," filed April 16, 2002, "Supplemental Brief on Issue of Attorney's Fees and Costs" filed by the Appellee on May 23, 2002," and "Supplemental Brief in Support of Motion for Attorney Fees on Behalf of Appellants Shirley Crock and Grace Washington," filed June 4, 2002. The Court notes that a hearing was conducted in this matter on April 17, 2002. Upon consideration of the appellants' motion for attorney fees, appellee's reply and the briefs in support thereof, conducting a thorough examination of the record herein, and reviewing pertinent legal authority, the Court has concluded that the appellants' motion for attorney fees should be granted.

Findings of Fact

ATTACHMENT A

1. On October 17, 2000, the Circuit Court of Harrison County, West Virginia, entered an Order Affirming Decision of Administrative Law Judge, in which the Court held that the appellee, the Harrison County Board of Education, acted properly in terminating the contracts of the appellants, Shirley Crock and Grace Washington, and subsequently reissuing new contracts to the appellants at a lower rate of pay.

2. By Order dated March 13, 2002, the West Virginia Supreme Court of Appeals reversed the decision of the Court and granted the appellants the relief requested.

3. On April 16, 2002, the Court entered a Final Order in which the Court ordered that the experience credits formerly granted to the appellants be restored and that the appellee remit to the appellants the resulting difference in increases in salary that their respective experience credits required, from July 1, 1999, forward, along with pre- and post- judgment interest as provided by statute.

4. The appellants now seek to recover attorneys fees and costs in the amount of \$20,418.70.

5. In support of said amount, the appellants have submitted an Itemization of Attorney Fees and Costs, the 1998 Survey of Law Firm Economics by Altman Weil Publications, Inc., the 2001 Survey of Law Firms Economics Executive Summary and an Affidavit of Kathleen Abate in Support of Appellants' Motion for Attorney Fees. Said documents are attached to appellants' motion as appendices.

Conclusions of Law

1. West Virginia Code § 18-29-8 provides, in part, that:

In the event that an employee or employer appeals an adverse level four

person shall substantially prevail, the adverse party or parties shall be liable to such employee, upon final judgment or order, for court costs, and for reasonable attorney's fees, to be set by the court, for representing such employee in all administrative hearings and before the circuit court and the supreme court of appeals, and shall be further liable to such employee for any court reporter's costs incurred during any such administrative hearings and court proceedings: Provided, That in no event shall such attorney's fees be awarded in excess of a total of one thousand dollars for the administrative hearings and circuit court proceedings nor an additional one thousand dollars for supreme court proceedings[.]

4. The appellee argues that West Virginia Code § 18A-2-11 applies to limit the amount of attorneys fees recoverable by the appellants to \$2,000.00, representing \$1,000.00 for administrative hearings and circuit court proceedings and \$1,000.00 for the proceedings before the West Virginia Supreme Court of Appeals. The appellee further argues that West Virginia Code § 18A-2-11 is supplemental to, and specifically modifies, the more general statutory language found in § 18-29-8.

5. West Virginia Code § 18A-2-11 was enacted in 1981 and was subsequently revised in 1985.

6. West Virginia Code § 18-29-8 was enacted in 1985 and later revised in 1992.

7. The Court notes that West Virginia Code § 18A-2-11 was enacted prior to the creation of the West Virginia Education Employees Grievance Board, as contained in West Virginia Code § 18-29-1 *et seq.*

8. The Court further notes that the 1992 revision of West Virginia Code § 18-29-8 added the paragraph regarding an employee's entitlement to the recovery of reasonable attorney fees and court costs in the event of an appeal from an adverse level four decision to the circuit court and/or the supreme court.

revised in 1985.

6. West Virginia Code § 18-29-8 was enacted in 1985 and later revised in 1992.

7. The Court notes that West Virginia Code § 18A-2-11 was enacted prior to the creation of the West Virginia Education Employees Grievance Board, as contained in West Virginia Code § 18-29-1 *et seq.*

8. The Court further notes that the 1992 revision of West Virginia Code § 18-29-8 added the paragraph regarding an employee's entitlement to the recovery of reasonable attorney fees and court costs in the event of an appeal from an adverse level four decision to the circuit court and/or the supreme court.

9. Chapters 18 and 18A of the West Virginia Code, "though not enacted at the same time, should be considered in *pari materia* and, therefore, they should be read and considered together." Smith v. Siders, 183 S.E.2d 433, 437, 155 W.Va. 193, 201 (1971)(citations omitted).

10. "[W]here two distinct statutes stand in *pari materia*, and sections thereof are in irreconcilable conflict, that section must prevail which can properly be considered as the last expression of the law making power, this without regard to the relative position of such sections in the Code." Syllabus, Board of Education of Ellsworth District v. Tyler County Court, 87 S.E. 870, 77 W.Va. 523 (1916).

11. The Court concludes that West Virginia Code §§ 18-29-8 and 18A-2-11 should be considered in *pari materia*.

12. The Court further concludes that West Virginia Code §§ 18-29-8 and 18A-2-11 are in irreconcilable conflict in that §18-29-8 allows an employee who substantially prevails

to recover a maximum of \$2,000.00 in attorney fees and § 18A-2-11 provides that said employee may recover "reasonable attorney fees."

13. The Court further concludes that West Virginia Code §18-29-8 was the last expression of the legislature in that said code section was revised in 1992 to add the paragraph, applicable to the present case, concerning an employee's recovery of reasonable attorney fees.

10. "The reasonableness of attorney's fees is generally based on broad[er] factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." Syl. Pt. 4, Aetna Casualty & Surety Co. v. Pitrolo, 176 W.Va. 190, 342 S.E.2d 156 (1986)¹

11. The Court concludes that the attorney fees and costs of appellants counsel, Ms. Kathleen Abate, in the amount of \$20,418.70, are reasonable because this case required substantial time and labor, an issue of first impression was involved, Ms. Abate's

¹The Court notes that the West Virginia Supreme Court of Appeals set forth these factors to be considered in determining the reasonableness of attorney's fees being sought against a third party. However, the Court believes that these factors are also applicable in determining the reasonableness of attorney fees in other cases as well.

customary fee is \$150.00 per hour, Ms. Abate has practiced law for almost 20 years, the majority of Ms. Abate's practice is in administrative and employment law with an emphasis in school law issues and Ms. Abate represented the appellants for approximately two and a half years.

12. The appellee argues that West Virginia Code § 18-29-8 does not provide for the recovery of office expenses in that it only refers to court costs and attorney fees. The Court finds that office expenses directly incurred in connection with a specific case, such as photocopies, postage and travel expenses, are routinely and customarily considered a portion of attorney fees. Therefore, the appellee's argument that office expenses are not recoverable under West Virginia Code § 18-29-8 fails.

13. The Court further concludes that the appellants substantially prevailed in this matter in that the West Virginia Supreme Court of Appeals granted their requested relief.

14. Therefore, the Court further concludes that the appellants are entitled to attorney fees, under West Virginia Code § 18-29-8, because the appellants substantially prevailed upon appeal and the attorney fees and costs submitted by counsel for the appellants are reasonable.

Accordingly, it is hereby ORDERED that the appellants, Shirley Crock and Grace Washington, shall recover of and from the appellee, the Harrison County Board of Education, attorney fees and costs in the amount of Twenty Thousand Four Hundred Eighteen Dollars and Seventy Cents (\$20,418.70) because the appellants substantially prevailed upon appeal and said attorney fees and costs are reasonable.

The Clerk shall provide a certified copy of this ORDER to:

Basil Legg, Jr., Esq.
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Kathleen Abate, Esq.
Cohen, Abate & Cohen, L.C.
P.O. Box 846
Morgantown, WV 26555-0846

ENTER: _____

July 30, 2002

John Lewis Marks, Jr., Circuit Court Judge

John Lewis Marks, Jr.

STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the
18th Family Court Circuit of Harrison County, West Virginia, hereby
certify the foregoing to be a true copy of the ORDER entered in the
above styled action on the 30th day of July, 2002.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix

Seal of the Court this 31st day of July, 2002

Donald L. Kopp, II
DK

Circuit Clerk
Harrison County, West Virginia