IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel. COAL AGE INC. d/b/a CAI INDUSTRIES, THE BAUGHAN GROUP, INC., and GAULEY ROBERTSON, INC.

Petitioners,

v. **Docket No. 11-1404**

THE HONORABLE WARREN R. MCGRAW, et. al.

Respondents.

PLAINTIFFS' RESPONSE TO PETITION FOR A WRIT OF PROHIBITION
FROM THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA
Civil Action No., 10-C-20

Submitted by:

Stuart Calwell (WV Bar No. 595)
Melissa H. Luce (WV Bar No. 4256)
David H. Carriger (WV Bar No. 7140)
THE CALWELL PRACTICE PLLC
500 Randolph Street
Charleston, WV 25302
(304) 343-4323
Counsel for Plaintiffs/Respondents

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Respondents.

PLAINTIFFS' RESPONSE TO PETITION FOR A WRIT OF PROHIBITION

Respondents (Plaintiffs in the Circuit Court) hereby respond to and oppose the *Petition for Writ of Prohibition* filed by the Petitioners (Defendants in the Circuit Court), wherein the Petitioners argue that the trial court committed error by granting a Rule 15(a) motion, as follows:

STATEMENT OF THE CASE

This case involves a vehicle/pedestrian collision in an underground coal mine. The "vehicle" in question is a mining shuttle car made by Defendant CAI Industries and sold by Defendant Gauley-Robertson, under the direction of a parent corporation, The Baughan Group, Inc. (hereinafter, collectively referred to as "CAI.") Shuttle cars are used in underground mines to deliver coal (that has been cut by a continuous mining machine) to the "feeder," which is the starting point for an elaborate system of conveyor belts that send the coal to a prep plant located outside the mine.

The "pedestrian" in question is Jason D. O'Neal, a young underground coal miner and electrician at the Speed Mine (a subsidiary of Patriot Coal) in Kanawha County. As an

electrician in an underground coal mine, Jason O'Neal frequently worked at or near the "face" of a mining section where coal was being mined by continuous mining machines and where shuttle cars (and other mobile mining equipment) were being operated.

On June 20, 2009, Jason O'Neal was assigned to repair a roof bolting machine in the No. 1 entry (the left entry, as one faces the interior of the mine). Following the completion of the repairs, Jason O'Neal walked through one of the cross-cuts toward the No. 2 entry, in search of his section boss, Stephen "Dewayne" Hodges, to report and to get another assignment. (Mr. O'Neal did not have a radio or other communication device.) Jason O'Neal met Hodges in the No. 2 entry, and the two of them walked into a cross-cut between the No. 2 and No. 3 entries. In the cross-cut, the bottom fell out of a cardboard box Jason O'Neal had used to carry tools to and from the roof bolter. Jason O'Neal bent down to pick up his tools. While he did so, his back was turned toward the No. 2 entry and his headlamp was pointing toward the ground. The section boss, Hodges, left Jason O'Neal in this position and walked back into the No. 2 entry to give a tape measure to another miner. As Hodges left the cross-cut, a shuttle car, driven by Dennis Gwinn, was approaching, having come from the feeder in the No. 2 entry. Gwinn was oblivious to Jason O'Neal's presence in the cross-cut on the right side of the No. 2 entry. Gwinn blindly turned the shuttle car into the cross-cut, colliding with Jason O'Neal. The shuttle car came to a rest on Jason O'Neal's upper legs and pelvis.

Jason O'Neal sustained catastrophic injuries as a result of the collision. Following the collision, Mr. O'Neal was hospitalized for 10 months and underwent in excess of two dozen surgical procedures. Mr. O'Neal lost his left leg, his left pelvis, his genitalia, his anus, and his prostrate gland as a result of the collision. Mr. O'Neal has permanent colostomy and urostomy ports on his torso and is primarily confined to a hospital bed in his home. To this day, he still has

open wounds and requires daily nursing care. Jason O'Neal is 30 years old. His wife Andrea is 31 years old. They have three children: Andrew, who is 7 years old, and twins Austin and Annaleigh, who are 3 years old. The O'Neal family lives in Pratt, West Virginia.

Mr. O'Neal filed the instant case in the Circuit Court of Wyoming County on February 11, 2010.[1] Mr. O'Neal sued Defendants CAI Industries and The Baughan Group under a theory of products liability.[2] In short, Mr. O'Neal alleges that the shuttle car in question was defective insofar as it was manufactured and sold without what is commonly referred to in the mining industry as "proximity detection" technology. Such technology can be used to prevent collisions between mobile equipment and mine personnel (just like the collision in this case) by automatically shutting down the mobile equipment when it gets too close to a miner. (Appendix at pp. 100-02.) Plaintiffs allege that the U.S. mining industry has been aware of the availability of such technology for nearly a decade, that such technology was already being utilized in coal mines overseas prior to Mr. O'Neal's accident, and that the shuttle car in question was not reasonably safe for its intended use without such technology.[3]

Shortly after Plaintiffs filed their Complaint, it was removed by the Defendants to the United States District Court for the Southern District of West Virginia. The Defendants alleged there was complete diversity among all parties. Plaintiffs moved the federal district court to remand the matter. One issue that related to the potential remand of the case was the location of the

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[1] Mr. O'Neal's lawsuit also included loss of consortium claims on behalf of his wife and their three young children.

[2] Plaintiffs also asserted a so-called "deliberate intent" claim against Mr. O'Neal's employer, Speed Mining, and a negligence claim against Patriot Coal, the parent company of Speed Mining. Plaintiffs eventually dismissed their claims against Patriot Coal. Plaintiffs settled their claims against Speed Mining following a Court-ordered mediation on August 26, 2011.

[3] At the time the Complaint was filed, there was evidence that suggested that both Joy Mining, as well as CAI Industries, were responsible for the design and manufacture of the shuttle car in question. Following admissions made by CAI Industries that the CAI-related companies were responsible for the design, manufacture, and sale of the shuttle care, Plaintiffs dismissed Defendant Joy Mining.

principal place of business of Defendants CAI Industries. Plaintiffs contended it was located at CAI's office and manufacturing facility in West Virginia. Defendant CAI responded by filing the affidavit at issue by its CEO Roger Baughan, wherein Mr. Baughan pronounced that he personally directed all of the day-to-day operations of the company from his home in North Carolina. The case was ultimately remanded (on other grounds) by the federal district court back to the Circuit Court of Wyoming County on or about October, 4, 2010.

On January 21, 2011, the trial court held a scheduling conference in this matter. On or about February 2, 2011, Plaintiffs first served a *Notice of Deposition* of Defendant CAI Industries, pursuant to Rule 30(b)(7) of the West Virginia Procedure. (Appendix at p. 166, docket entry 2/16/11.) One significant purpose of the deposition was to permit Plaintiffs to ascertain whether and to what extent Defendant CAI (or any other affiliated company) had undertaken to research or utilize proximity detection technology to eliminate the hazards associated with blind spots on its mobile mining equipment. Unfortunately, due to Defendants' difficulties in scheduling (and re-scheduling) the appearances of the appropriate corporate witnesses, the depositions of Defendant CAI's multiple corporate designees were not taken by Plaitniffs/Respondents until late April and early May of 2011. (Appendix at p. 167, docket entries 3/24/11, 4/26/11, 5/13/11.)

During these depositions, Plaintiffs first learned of the nature and extent of Defendant CAI's culpable conduct with respect to its failure to include proximity detection technology. Shockingly, CAI was apparently unaware of this technology until it was sued in this lawsuit. CAI's shop manager, Randall Riddle, was designated by CAI to testify on its behalf regarding CAI's use/non-use of proximity detection technology. Riddle testified that CAI's "research" related to this important safety innovation consisted of a about five minutes spent on the Internet at some point

after this lawsuit was filed, and then about 45 minutes more on the Internet in preparation for his deposition:

> Q: Did anyone else at CAI do some additional research?
>
> A: No, not pertaining to the proximity. That was my question too ...
>
> Q: Sure. And would it be fair to say that you did more than five minutes of research this time?
>
> A: Yes.
>
> Q: Could you tell me approximately the amount of time you would have spent researching it?
>
> A: Maybe 45 minutes.

(Appendix at pp. 105-106.) It was not until Riddle researched this safety issue immediately prior to his deposition that he learned that proximity detection technology has been previously used on shuttle cars in South Africa to protect the lives of coal miners. (Appendix at p. 106.)

Furthermore, in spite of the fact that CAI was aware of the hazards posed to coal miners like Jason O'Neal, who can be virtually invisible to operators of its mobile mining equipment in certain foreseeable situations, CAI took the position that is has no obligation to integrate already-existing safety technology into its shuttle cars, unless CAI is required by law to do so:

> Q: Do you know when the first proximity detection system was approved by MSHA for use?
>
> A: No, I don't.
>
> Q: Am I correct in understanding that CAI would not offer those [systems] unless and until MSHA would require it?
>
> A: [Yes], or a customer would require it and we had an approved system.

(Appendix at pp. 106-07.) Ultimately, CAI admitted that its chosen business model does not provide it with sufficient "resources or talent" to engage in the research and development necessary to integrate such technology into its shuttle cars. (*Id.*)

At about the same time that Defendant CAI produced its corporate designees for deposition, Plaintiffs/Respondents finally received (on April 26, 2011) from counsel for the Petitioners the extent of the Defendants/Petitioners' potential insurance coverage for the O'Neals' claims.[4] (Appendix at p.134.) From Plaintiffs/Respondents' perspective, the Defendants/Petitioners were substantially underinsured relative to the potential damages in this case. (Appendix at pp. 134-36.)

This case was originally scheduled to be mediated at the end of May 2011. But all parties agreed to push back the mediation date to permit the completion of additional discovery prior to mediation. Court-ordered mediation took place on August 26, 2011. Plaintiffs/Respondents were unable to settle their claims against Defendants/Petitioners at this time.[5]

On September 1, 2011, Plaintiffs/Respondents filed a motion for leave to amend their complaint to add Roger Baughan as an individual defendant in this action. The Defendants/Petitioners filed a written objection on September 6, 2011. This matter was taken up by the trial court at its pretrial conference on September 7, 2011. At the time of the pre-trial conference, the parties had yet to depose any expert witnesses in the case. Also pending at this

[4] Defendants/Petitioners had previously failed to disclose this important information to Plaintiffs/Respondents, in spite of disclosure requirements under the federal rules (while the case pending in federal court) and later, repeated attempts to obtain this information through formal and informal discovery.

[5] As indicated above, the Plaintiffs did settle their claims against Mr. O'Neal's employer at this time.

time was a motion by the Defendants/Petitioners to exclude one of Plaintiffs/Respondents' experts,[6] or, in the alternative, for leave to add additional defense experts.

SUMMARY OF ARGUMENT

It was not clearly erroneous (nor an abuse of discretion) for the trial court to grant Plaintiffs/Respondents' motion to amend to add a new party, when there was ample evidence that the existing Defendants would not be unfairly prejudiced should the trial court grant the motion.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Plaintiffs/Respondents do not believe oral argument is necessary.

ARGUMENT

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine 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 lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower

[6]The expert in question was William Schiffbauer, a former employee of the National Institute for Occupational Safety and Health ("NIOSH") who personally developed and patented proximity detection technology for NIOSH in the late 1990s. (Appendix at pp. 101-02, 110-11.) Plaintiffs had subpoenaed Mr. Schiffbauer (a resident of Fayette County, Pennsylvania) to testify as a witness in this matter. (Appendix at p. 168, docket entries 7/20/11, 8/12/11.) However, immediately prior to Mr. Schiffbauer's deposition, Defendants moved to quash his subpoena on the grounds that Mr. Schiffbauer could not be subpoened to testify about his past employment with NIOSH without the permission of the U.S. Department of Health and Human Resources (NIOSH's "parent" agency), pursuant to certain federal regulations governing such issues. (Id., docket entry 8/15/11.) After Defendants filed said motion, Mr. Schiffbauer then agreed to be directly retained as a consultant by Plaintiffs' counsel, eliminating any need for a subpoena. Thus, he was not retained by Plaintiffs until following the original deadline for expert disclosures.

> tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 106, 483 S.E.2d 12 (1996).

As to factors (1) and (2), Petitioners have made no attempt to show that they will not be able to obtain any relief that may be appropriate on direct appeal, or that they will be damaged in a way that is not correctable on appeal. Moreover, Respondents can perceive no such irreparable harm *pendente lite*, other than the ordinary burdens of litigation present in every case.

As to factor (4), the trial court only entered a single order granting Plaintiffs' motion to amend their complaint to add an additional defendant, so it cannot be said that the trial court's ruling on the issue in question has been "oft repeated." As to factor (5), the Petitioners' do not allege that their *Petition* raises any questions of law of first impression, inasmuch as they allege that the issue in question is governed by existing case law.

As to factor (3), Petitioners assert that it was clear error for the trial court to grant Plaintiffs' motion to amend their complaint to add an additional defendant to this lawsuit. However, for the reasons set forth below, the Petitioners have failed to demonstrate that the trial court committed clear error. Rather, the Petitioners seek an extraordinary remedy merely for the purpose of having this Court substitute its judgment for the judgment of the trial court on a discretionary procedural ruling. For this reason, the Court should refuse the *Petition*.

A. It was within the sound discretion of the trial court to grant Plaintiffs/Respondents leave to amend their complaint to add an additional defendant, when doing so would not unfairly prejudice the existing Defendants/Petitioners.

"The purpose of the words 'and leave [to amend] shall be freely given when justice so requires' in Rule 15(a) W. Va. R. Civ. P., is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore, motions to amend should always be granted under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue." Syl. Pt. 5, *Lloyd's. Inc. v. Lloyd,* 225 W.Va. 377, 693 S.E.2d 451 (2010)(internal quotes and citations omitted)(alteration in original).

Here, the Plaintiffs/Respondents sought to amend their complaint in order to sue an additional defendant in their case involving catastrophic personal and derivative injuries. There can be no dispute this amendment will permit the Plaintiffs/Respondents to more fully adjudicate their claim against all potentially responsible parties. This is a particularly important result in a case such as this one, involving admittedly catastrophic injuries and substantial potential damages.

Furthermore, the trial court did not unfairly prejudice the Respondents/Defendants by permitting the amendment in issue, because the trial would have been continued anyway. Discovery in the case was significantly behind schedule, such that no experts had been deposed prior to the pretrial conference, and the Defendants had sought leave to identify additional expert witnesses. (Appendix at p. 152.) Such circumstances warranted the continuance of the trial date, regardless of whether the trial court granted the motion to amend. (See *Respondent Warren R. McGraw's Response in Opposition* at p. 4.) Thus, the Petitioners will actually *benefit* from

the continuance by being afforded time to identify additional expert witnesses. Moreover, the claims against the new defendant, Roger Baughan, are based on the same theories of liability articulated in the original complaint – claims for which the Defendants have already received ample notice and have already had the opportunity to develop a strategy to defend.

Under the totality of these circumstances, the trial court could fairly conclude that justice warranted permitting the Plaintiffs/Respondants to amend their complaint to add the additional defendant; there is certainly no evidence that suggests that it was clearly erroneous, as a matter of law, for the trial court to do so.

The Petitioners apparently misunderstand the import of this Court's rulings in *State ex rel. Vedder v. Zakaib*, 217 W.Va. 528, 618 S.E.2d 537 (2005) and *State ex. Rel. Packard v. Perry*, 221 W.Va. 526, 655 S.E. 548 (2009). In both of these cases, this Court held that it was not clear error for a trial court to *deny* a motion to amend based on the trial court's perceived lack of diligence by the moving party in making such a motion. In both cases, this Court ruled that the trial court had fairly exercised its discretion in making its ruling under Rule 15(a). In short, this Court used both cases to re-affirm the rule that a trial court *has discretion*, based on the circumstances, when ruling on a motion made pursuant to Rule 15(a).

It does not logically follow from these two cases that a trial court *must* deny a motion to amend when the party opposing the motion alleges that the moving party was dilatory in making the motion.[7] Yet that is precisely the rule that the Petitioners would have this Court adopt, in seeking their extraordinary remedy. It would have the practical effect of turning this Court's rulings in *Vedder* and *Packard* upside down; it would handcuff trial courts and prevent them

[7] In fact, this Court in *Vedder* made a point of specifically referencing *Dzinglski v. Weirton Steel Corp.*, 191 W.Va. 278, 445 S.E.2d 219 (1994), wherein it was held that a trial court did not abuse its discretion when it permitted a plaintiff to amend a complaint six and one-half years after the action was begun (and only two weeks prior to trial). *Vedder* at Footnote 6.

from exercising their sound discretion under Rule 15(a), based on totality of the circumstances that may exist in any given case.

B. The fact that Defendants/Petitioners would not be prejudiced by the proposed amendment was relevant to the trial court's analysis under Rule 15(a).

Petitioners argue that the issue of whether they have (or have not) been unfairly prejudiced by the trial court's ruling is irrelevant on the issue of whether the trial court committed error by permitting Plaintiffs/Respondents to amend their complaint. Essentially, Petitioners argue that the trial court abused its discretion by even considering the potential prejudicial effect (and the lack thereof) of its ruling on Petitioners. Petitioners assert that this Court's ruling in *Packard* supports their argument. This is not so.

In the *Packard* decision, it was noted that the petitioner (the movant below) advanced an argument that her motion to amend ought to have been granted because the respondent (the non-movant below) would not be unfairly prejudiced. *Packard*, 221 W.Va. at 539-40, 655 S.E.2d at 561-62. However, there is no record that the trial court actually made such a finding regarding lack of prejudice to the respondent. More likely, given the nature of the amendment sought, the trial court in *Packard* believed, either implicitly or explicitly, the proposed amendment would result in some degree of prejudice to the respondent doctor.

Other than this Court's mention in *Packard* that the petitioner had argued to the trial court that there would be no prejudice to the respondent doctor if the motion to amend was granted, there is no other discussion of this issue in the Court's decision. There is certainly no finding by this Court that a trial court, when considering a Rule 15(a) motion, should *ignore* the issue of prejudice to the parties when the party opposing the motion has raised the issue of the timeliness of the motion.

Indeed, the circumstances of both *Vedder* and *Packard* suggest that, in each case, the respondent (the non-movant below) was unfairly prejudiced (or, at least, that the trial court could have made such a finding). In both cases the petitioner (the movant below) sought to amend the complaint, after the litigation had been ongoing for a considerable period of time, to add a completely new claim against an already existing party (i.e., the non-movant) based on facts previously known to the petitioner.[8] Under such circumstances, the trial court in each case could have readily believed that the non-movant would be prejudiced by the amendment (i.e., adding an entirely new claim). For example, in both cases, the non-movant, who had been defending itself in the litigation based on solely the claims previously asserted, could easily be prejudiced if the movant was permitted to add a new claim and new theory of liability after a substantial period of litigation had elapsed. Although, this issue is not elaborated on in either the *Vedder* or *Packard* decision, it seems likely that the issue of prejudice to the non-movant was, in fact, given consideration by the trial court.

Here, of course, the Plaintiffs/Respondents did not move below to assert a new claim or new legal theory against an existing party. So the sort of prejudice that was, at least implicitly, an issue in *Vedder* and *Packard* is clearly not an issue for the Petitioners. Plaintiffs/Respondents' claim against Roger Baughan is based on theory of liability already set forth in the original complaint. Plaintiffs/Respondents merely seek to pursue this claim against another party. This situation is distinctly different then the situations in *Vedder* and *Packard* as discussed above. Indeed, the tenor of the Petitioners' argument, coupled with the lack of any real or imagined prejudice to the Petitioners, suggests that the Petitioners are advancing their

[8] In *Vedder*, the movant sought to add a new, separate claim for spoliation of evidence against the existing defendant. *Vedder*, 217 W.Va. at 530, 618 S.E.2d at 539. In *Packard*, the movant sought to add a new, separate claim for battery against the existing defendant. *Packard*, 221 W.Va. at 539, 655 S.E.2d at 561.

argument, not for their own benefit, but for the benefit of Roger Baughan, who has not yet even made an appearance in this action.[9]

C. Roger Baughan's affidavit, by itself, did not provide a sufficient factual basis for filing a suit against Mr. Baughan, individually. The Plaintiffs/Respondents were not dilatory in seeking their amendment, under the circumstances.

As set forth above, the issue of whether Plaintiffs/Respondents waited 18 months, 12 months, or 6 months to move to amend their complaint was neither the sole nor the controlling issue that confronted the trial court below with respect to Plaintiffs/Respondents' motion to amend. Under Rule 15(a), the trial court was obligated to weigh Petitioners' arguments against competing interests, such as Rule 15's expressed preference that a controversy be fully adjudicated on the merits and such as whether the Defendants/Petitioners would (or would not) be unfairly prejudiced by the amendment. The trial did just that and ruled in favor of permitting the amendment. Given the totality of the circumstances, it was not an abuse of discretion for the trial court to so rule. For the Petitioners to suggest otherwise is to suggest that this Court must micromanage every discretionary procedural ruling made by every trial court in this state.

Notwithstanding the fact that the length of time that Plaintiffs/Respondents' purportedly "waited" before moving to amend the complaint is not particularly germane at this juncture, given the trial court's ruling that justice would be best served by permitting the amendment, Plaintiffs/Respondents nevertheless feel compelled to briefly address this issue.

Although Plaintiffs' received Roger Baughan's affidavit from the Petitioners in May 2010, the affidavit simply indicated that Mr. Baughan exercised substantial personal control over the day-to-day operations of CAI Industries. (Appendix at pp. 125-26.) On its face, Mr.

[9] Mr. Baughan, of course, could not be heard to complain that Plaintiffs/Respondents ought to have sued him sooner than they did, so long as he was sued within the appropriate statute of limitations. This issue, of course, has not been raised by the Petitioners.

Baughan's affidavit says nothing about why the Petitioners designed, manufactured and sold shuttle cars without proximity detection systems, which was the basis for Plaintiffs/Respondents' claims against these Petitioners. Without discovery on these issues from the Defendants, there was no evidence that would suggest how or why Mr. Baughan was negligent in his personal oversight of Petitioners' business. From Plaintiffs' perspective, until such discovery was had, there was little reason to consider suing Mr. Baughan individually.[10]

As discussed previously, Plaintiffs/Respondents were able to depose certain corporate designees of Defendant/Petitioner CAI in April and May of 2011, after encountering significant delays in scheduling said depositions. It was not until this time that Plaintiffs/Respondents learned that Defendant/Petitioner CAI Industries had been virtually oblivious to the mining industry's development of proximity detection technology and, moreover, that the company was being operated pursuant to a business model that did not permit the company to research and develop such technology nor integrate such technology into its mining equipment. These shocking revelations, coupled with the Mr. Baughan's prior affidavit, wherein he acknowledges his direct, personal control of the company, established a strong evidentiary basis for Plaintiffs/Respondents' claim that Mr. Baughan was personally negligent and/or reckless in his oversight of the company, *as it related to the safety technology at issue.*

Plaintiffs/Respondents moved to amend their complaint approximately 4 months after conducting the aforementioned depositions taken pursuant to Rule 30(b)(7). This 4-month period was not, on its face, excessive. During this 4-month period, additional discovery was

[10] Plaintiffs/Respondents primary initial legal theory against the Petitioners was based on strict products liability, i.e., that the shuttle car was not reasonably safe for its intended use in underground coal mines (although the Complaint did include a perfunctory claim of negligence against the Petitioners as well). From Plaintiffs' perspective there was little reason to initially assert that Mr. Baughan, individually, was strictly liable for the defective shuttle car. It is not altogether clear that strict liability runs to an individual corporate officer, regardless of the degree of that officer's day-to-day control of a company, when it is the company itself that made and sold the defective product.

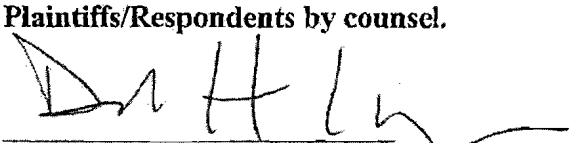
ongoing, as well as the Court-ordered mediation, which potentially could have resolved this matter in its entirety. Admittedly, Plaintiffs/Respondents filed their Rule 15(a) motion less than 1 month prior to the then-scheduled trial date. However, for the reasons discussed above, namely that no expert depositions had yet to be taken prior to the pretrial conference, it was reasonable for Plaintiffs to believe that, at that point, the trial would not go forward as planned. Indeed, such circumstances warranted the continuance of the trial date, regardless of whether the trial court would grant the motion to amend. (See *Respondent Warren R. McGraw's Response in Opposition* at p. 4.) Thus, there is simply no reason, other than for the sake of argument, for the Petitioners to assert that the timing of Plaintiffs/Respondents' motion to amend was unreasonable.

CONCLUSION

The trial court did not commit clear error by granting Plaintiffs/Respondents' motion to amend their complaint to add a new defendant, Roger Baughan, when there is evidence that Plaintiffs/Respondents have a valid claim against him and there is no evidence that the amendment would unduly prejudice the existing Defendants/Petitioners. A trial court is vested with sound discretion under Rule 15(a) to permit an amendment under just such circumstances. Neither the *Vedder* nor *Packard* cases cited by the Petitioners suggest that a trial court should or must ignore the issue of prejudice to the non-moving party, when the non-moving party has alleged that the moving party was dilatory in filing a motion pursuant to Rule 15(a). Such an interpretation of *Vedder* and *Packard* would effectively handcuff trial courts who must weigh the overall fairness of permitting a Rule 15(a) motion under the particular circumstances of each case.

To call Plaintiff/Respondent Jason O'Neal's personal injuries "catastrophic" in this case is an understatement. Mr. O'Neal's injuries are perhaps the most substantial that counsel has ever encountered. Likewise, the derivative claims of Mr. O'Neal's wife and three young children are quite substantial. Under the circumstances of this particular case, including its procedural posture and the lack of unfair prejudice to the Petitioners, it was not an abuse of the trial court's inherent discretion under Rule 15(a) to permit Plaintiffs/Respondents to amend their complaint to sue an additional defendant. Here, the Petitioners would have this Court substitute its judgment for the judgment of the trial court on a discretionary procedural ruling. This Court should decline to do so. For the foregoing reasons, Plaintiffs/Respondents requests that the aforesaid *Petition for a Writ of Prohibition* be refused and denied.

Respectfully submitted,
Plaintiffs/Respondents by counsel.



Stuart Calwell (WV Bar No. 595)
Melissa H. Luce (WV Bar No. 4256)
David H. Carriger (WV Bar No. 7140)
THE CALWELL PRACTICE PLLC
500 Randolph Street
Charleston, WV 25302
(304) 343-4323
Counsel for Plaintiffs/Respondents

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Petitioners,

v. Docket No. 11-1404

THE HONORABLE WARREN R. MCGRAW,
Judge of the 27th Judicial Circuit, and
Jason D. O'Neal, et al.,

Respondents/Plaintiffs Below.

VERIFICATION
FROM THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA
Civil Action No. 10-C-20

NOW COME the Respondents/Plaintiffs, by and through counsel, David H. Carriger, Esquire and the law firm The Calwell Practice, PLLC, pursuant to West Virginia Code § 53-1-3 and Rule 16 of the Revised Rules of the Appellate Procedure for the Supreme Court of Appeals of West Virginia, and hereby verify, under oath, that upon information and belief, the material facts as stated in the Plaintiffs' *Response to Petition for a Writ of Prohibition* are true and accurate.

David H. Carriger (W.Va. Bar No. 7140)

STATE OF West Virginia

COUNTY OF Kanawha

OFFICIAL SEAL
STATE OF WEST VIRGINIA
NOTARY PUBLIC
Nita Fox
5406 Clay Road
Spencer, WV 25276
My Commission Expires March 9, 2021

I, Nita Fox, a Notary Public in and for the State and County aforesaid, do hereby certify that David H. Carriger, whose name is signed to the above, has this day acknowledged the same before me in my said State and County.

Given under my hand this 3rd day of November, 2011

My commission expires 3/9/2021.

Notary Public

OFFICIAL SEAL
STATE OF WEST VIRGINIA
NOTARY PUBLIC
Nita Fox
5406 Clay Road
Spencer, WV 25276
My Commission Expires March 5, 2021

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THE HONORABLE WARREN R. MCGRAW, et. al.

Respondents.

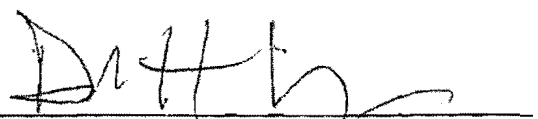
CERTIFICATE OF SERVICE

I, David H. Carriger, counsel for plaintiffs, do hereby certify that the foregoing ***"Plaintiffs' Response to Petition for a Writ of Prohibition"*** has been served on counsel of record herein on this 3rd day of November, 2011, by placing a true and exact copy in the United States Mail, postage prepaid, first class, to the following:

Thomas P Mannion, Esquire (WVSB#6694)
Cy A. Hill, Esquire (WVSB#8816)
Mannion & Gray Co., L.P.A.
122 Capitol Street, Suite 100
Charleston, WV 25301
Counsel for The Baughan Group, Incorporated, Coal Age, Incorporated and Robertson, Inc. d/b/a Gauley Robertson

Johnnie E. Brown, Esquire (WVSB# 4620)
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
James Mark Building
901 Quarrier Street
Charleston, WV 25301
Counsel for Baughan Group Inc and CAI

The Honorable Warren R. McGraw
Wyoming County Courthouse
Main and Bank Streets
P.O. Box 581
Pineville, WV 24874
Circuit Court Judge



David H. Carriger (W.Va. Bar No. 7140)
Stuart Calwell (W.Va. Bar No. 0595)
Melissa H. Luce (W.Va. Bar No.4256)
THE CALWELL PRACTICE, PLLC
500 Randolph Street
Charleston, West Virginia 25302
(304) 343-4323
304) 344-3684 facsimile