



**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**NO. 12-1072**

**ON APPEAL FROM THE CIRCUIT COURT OF  
MARSHALL COUNTY (Civil Action No. 08-C-102M)**

**OHIO POWER COMPANY and  
AMERICAN ELECTRIC POWER  
SERVICE CORPORATION,**

**Petitioners,**

**v.**

**DOCKET NUMBER: 12-1072**

**BRIAN TIMMONS, Administrator  
of the ESTATE OF LEWIS C.  
TIMMONS, Deceased,**

**Respondents.**

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**PETITIONERS' BRIEF**

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## ASSIGNMENTS OF ERROR

(1) Whether the Circuit Court erred in denying Petitioners' motion for summary judgment and motion for directed verdict based on the *Wellman* defense and granting Respondent's motion for directed verdict precluding Petitioner from presenting the *Wellman* defense to the jury?

**SUGGESTED ANSWER: Yes.**

(2) Whether the Circuit Court abused its discretion in granting Respondent leave to file an amended complaint adding American Electric Power Service Corporation ("AEPSC") as a defendant after discovery had closed?

**SUGGESTED ANSWER: Yes.**

(3) Whether the Circuit Court erred in denying Petitioners' motion for directed verdict based on Respondent's failure to introduce pleadings, admissions, discovery responses or other evidence at trial establishing Respondent's decedent's cause of death?

**SUGGESTED ANSWER: Yes.**

(4) Whether the Circuit Court abused its discretion in precluding Petitioners from offering rebuttal expert testimony to Respondent's expert testimony?

**SUGGESTED ANSWER: Yes.**

(5) Whether the Circuit Court erred in denying Petitioners' motion to set off the jury's verdict amount by the amount Respondent received through settlement with the other defendants?

**SUGGESTED ANSWER: Yes.**

(6) Whether the Circuit Court abused its discretion in awarding Respondent attorneys' fees and costs absent a finding of bad faith by Petitioners?

**SUGGESTED ANSWER: Yes.**

(7) Whether the Circuit Court abused its discretion in awarding Respondent prejudgment interest absent a finding that Petitioners failed to make a good faith effort to settle the case?

**SUGGESTED ANSWER: Yes.**

## STATEMENT OF THE CASE

Petitioner, Ohio Power Company (“OPCo”), an Ohio corporation, owns and operates the Muskingum River power station in Waterford, Ohio. Petitioner, American Electric Power Service Corporation (“AEPSC”), a New York Corporation, is a service company set up pursuant to the requirements of the Public Utilities Holding Company Act of 1935 and, at all times relevant hereto, provided various shared services to OPCo.

The Muskingum River power station is an electricity generation facility that uses hydrogen as a coolant for its generators. The hydrogen is stored in a high pressure storage system. OPCo hired an independent contractor, General Hydrogen Corporation (“General Hydrogen”), to maintain the hydrogen storage system at the Muskingum River plant and deliver hydrogen gas to that system.

Respondent’s decedent, Lewis C. Timmons (“Mr. Timmons”), was a West Virginia resident and an employee of General Hydrogen. On January 8, 2007, while Mr. Timmons was delivering compressed hydrogen to the plant’s unit 5 hydrogen storage system from the General Hydrogen tube trailer, a rupture disc in the hydrogen storage system burst, causing a release of hydrogen which then ignited. Mr. Timmons died during the explosion.

On May 1, 2008, Respondent filed suit against OPCo, AEP, Inc.<sup>1</sup>, and “AEP Ohio” in the Circuit Court of Marshall County, West Virginia asserting premises liability claims and seeking both compensatory and punitive damages. **Complaint, SCT0143-0161.**<sup>2</sup> The complaint did not name AEPSC as a defendant. Respondent’s complaint also asserted claims against General Hydrogen and CGI International, Inc. (“CGI”), who subsequently filed third party complaints joining David S. Heberling and Heberling Insurance Services, Inc. to the action.

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<sup>1</sup> OPCo is a wholly-owned subsidiary of American Electric Power Company, Inc.

<sup>2</sup> Petitioners will refer to those relevant portions in the Appendix by Bates number, such as “SCT 57,” etc.

Soon after the filing of the suit, on May 13, 2008, counsel for Mr. Timmons' estate ("Respondent") drafted a letter addressed to Abbie F. Fellrath, Esquire, "Senior Counsel, American Electric Power Service Corp." ("AEPSC"). **5/13/08 Letter, SCT0203-0214**. In his letter, Respondent's counsel stated that he believed employees of Petitioners, including Kenneth McCullough and Chuck Kidd<sup>3</sup>, had input into the decisions that allegedly led to the explosion. *Id.*

On June 6, 2008, AEP, Inc. and AEP Ohio filed motions to dismiss the complaint. AEP, Inc. averred that it was a holding company that neither owned nor operated the Muskingum River plant and was, therefore, not a proper party. **AEP, Inc. MTD, SCT0137-0140**. AEP Ohio stated that it was not a legal entity at all and was not subject to suit. Rather, AEP Ohio is a registered fictitious name owned by OPCo and Columbus Southern Power Company. **AEP Ohio MTD, SCT0167-0168**. Both motions were supported by an affidavit from Jeffrey D. Cross, Assistant Secretary of American Electric Power Company, Inc. **Cross Affidavit, SCT0163-0164**.

Respondent vigorously opposed the motions to dismiss of AEP, Inc. and AEP Ohio, even filing a motion for sanctions against Petitioners, claiming that the "the Affidavit submitted by AEP [,Inc.] and AEP Ohio is false, misleading, perjurous, and lacks any factual support..." **Respondent's Mot. for Sanctions, p. 1, SCT 0191-0202**. On October 31, 2008, the Circuit Court denied the AEP defendants' motions to dismiss. **2/23/2011 Order, SCT11-17**.

Petitioners thereafter answered the complaint, and the case subsequently proceeded through nearly two (2) years of discovery. On July 24, 2009 and December 14, 2009, Plaintiff conducted the depositions of Mr. McCullough and Mr. Kidd, respectively. Both deponents stated that they were AEPSC employees and offered testimony about their and AEPSC's role, if

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<sup>3</sup> Both Mr. McCullough and Mr. Kidd were employees of AEPSC.

any, regarding the hydrogen storage system and the work being done by General Hydrogen. **Respondent's Mot. for Leave to File Amended Complaint and Brief in Support, SCT0085-0087; 0091-0108.**

On October 19, 2009, Respondent settled its claims against General Hydrogen, CGI and Heberling for \$2,250,000.00. **Petitioners' Mot. to Apply the Set-Off and Brief in Support, SCT0386-0395; 0682-0684.**

On September 22, 2010, approximately ten (10) months after the depositions of Mr. McCullough and Mr. Kidd, and following the completion of discovery, Petitioners filed a motion for summary judgment. In their motion, Petitioners reiterated their argument that AEP, Inc. and AEP Ohio were not proper parties because AEP, Inc. did not own or operate the power station and AEP Ohio was merely a fictitious name of OPCo and not a separate, suable entity. **Petitioners MSJ and Brief in Support, SCT0685-0711.**

With regard to OPCo, Petitioners argued that because the accident occurred in Ohio, Ohio law therefore governed substantive matters, and that under Ohio law, a premises owner such as OPCo owes no duty to protect employees of independent contractors from hazards associated with the contractor's work; rather, absent certain exceptional circumstances, that duty rests exclusively with the contractor. *Wellman v. East Ohio Gas Co.*, 113 N.E.2d 629, 630, Syl. Pt. 1 (Oh. 1953). ***Id.* at SCT0693-0700.**

Due to General Hydrogen's specialized knowledge and experience relating to hydrogen, OPCo deferred to its judgment, and did not control or participate in the work. Indeed, that is why OPCo hired General Hydrogen in the first place: For its expertise in hydrogen. Since OPCo had no involvement in General Hydrogen's work or the manner in which it was done, it could not be subject to premises liability for injuries arising from that work. ***Id.***

Respondent opposed OPCo's motion for summary judgment and simultaneously filed a motion for leave to amend its complaint to assert claims against AEPSC instead of AEP, Inc. and AEP Ohio. **Respondent's Mot. for Leave to File Amended Complaint and Brief in Support, SCT0085-0087; 0091-0108.** Respondent's proposed amendment sought to introduce not only a new party—AEPSC—but also an entirely new theory of liability—ordinary negligence. To that point, the case had solely centered on premises liability matters. Furthermore, discovery had been completed. Respondent alleged that its late hour request to level claims against AEPSC was excusable, even though Respondent knew of AEPSC prior to filing suit, Petitioners had told Respondent from the beginning that AEP, Inc. and AEP Ohio were not proper parties, and Respondent had learned in depositions ten (10) months earlier that AEPSC was the correct corporate entity. **Petitioners' Opp. to Respondent's Mot. for Leave to File Amended Complaint, SCT0125-0136.**

On February 16, 2011, the Circuit Court granted AEP, Inc.'s and AEP Ohio's motions for summary judgment. On February 23, 2011, the Court granted Respondent's motion to add AEPSC as a defendant. **2/23/11 Order, SCT0011-0017.** On August 2, 2011, the Court denied OPCo's motion for summary judgment. **8/2/11 Pre-Trial Conf. Order, SCT0018-0022.**

Thereafter, the case proceeded to trial against OPCo and AEPSC on August 15, 2011, and the trial concluded on August 23, 2011. On August 22, 2011, at the close of Respondent's case-in-chief, OPCo moved for a directed verdict based on *Wellman* and its progeny; namely, that it could not be held liable for premises liability because Respondent had failed to submit evidence showing that OPCo had any control or input into how General Hydrogen performed its work. **8/22/11 Trial Transcript, pp. 50-58, SCT1219-1221.**

The Circuit Court denied OPCo's motion, stating that "the *Wellman* line of cases does apply" and that there was "sufficient evidence" to get to the jury regarding the issue of control. *Id.* at p. 58, SC1221. "One of those exceptions [to the *Wellman* rule] applied that there's sufficient evidence to go to the jury that the Defendant—Defendants had sufficient control or ability to control the situation. So that's going to all go the jury." *Id.*

The following day, on August 23, 2011, during their case-in-chief, Petitioners' sought to introduce testimony from their engineering expert, Aaron Jones, regarding certain testing Respondent's expert, Barry Newton, conducted. At trial, Mr. Newton testified that the explosion occurred because a rupture disc in the hydrogen system burst under pressure and punctured the elbow of the vent stack, allowing hydrogen to vent under a canopy. Mr. Newton further testified that if the vent stack had been made of stainless steel without elbows, it would not have been breached.

OPCo sought to elicit testimony from Mr. Jones regarding testing done by Newton which expressly rejected Newton's own theory. Respondent, however, argued that this proposed testimony by Mr. Jones was a new, previously undisclosed expert opinion, and was therefore inadmissible. **8/23/11 Trial Transcript, pp. 77-81, SCT1286-1287.** The Circuit Court agreed, precluding OPCo from offering into evidence what was plainly admissible rebuttal testimony. *Id.*

At the close of Petitioners' case-in-chief, Respondent moved for a directed verdict to preclude OPCo from presenting the *Wellman* defense to the jury. **8/23/11 Trial Transcript, pp. 102-126, SCT1292-1298.** The Circuit Court granted the motion and struck the defense—even though General Hydrogen was hired to deliver hydrogen, Mr. Timmons was a General Hydrogen employee, the delivery of hydrogen was a dangerous process, and the explosion occurred during the delivery of hydrogen—there was no specific evidence that that Mr. Timmons was delivering

hydrogen at the time of the explosion. *Id.* at pp. 125-126, SCT1298. Because there was no evidence that Mr. Timmons was engaged in an “inherently dangerous” activity—i.e. the delivery of hydrogen—the Court found that the *Wellman* defense did not apply. *Id.*

In light of that ruling, OPCo similarly moved for a directed verdict on the issue of causation, arguing that even though Mr. Timmons was a General Hydrogen employee who was working near the hydrogen storage system on the day of the explosion, there was no specific evidence that the explosion caused his death. Respondent never introduced into evidence any pleadings, admissions, responses to discovery or other documentation, such as the coroner’s report, establishing that the explosion caused Mr. Timmons’ death. While the Circuit Court held that there needed to be specific evidence that Mr. Timmons was delivering hydrogen prior to the hydrogen explosion, it did not require similar specific evidence that Mr. Timmons died as a result of that same hydrogen explosion, and denied Petitioners’ motion. **10/17/11 Order, SCT0023-0025.**

On August 26, 2011, the jury returned a verdict in favor of Respondent and against OPCo and AEPSC in the amount of \$1,998,940.00. On September 9, 2011, Petitioners filed a post-trial motion seeking to reduce or “set off” the verdict amount by the settlement amount in accordance with both West Virginia and Ohio law. **Petitioners’ Mot. to Apply the Set-Off and Brief in Support, SCT0386-0395; 0682-0684.** That same day, Respondents filed a petition for attorneys’ fees and costs as well as motion for prejudgment interest.

On December 9, 2011, the Circuit Court denied Petitioner’s motion on the grounds that Ohio law applied and that the setoff would be inappropriate under Ohio law solely because the jury did not apportion liability to General Hydrogen. **10/6/2011 Hearing Transcript, pp. 64-65, SCT1556-1557.**

On July 12, 2012, the Court awarded Plaintiff \$1,698,993.96 in attorneys' fees and costs, even though both Ohio and West Virginia follow the "American Rule" requiring each litigant to bear its own legal costs absent bad faith. **7/12/12 Order, SCT0028-0031**. The Court awarded attorneys' fees and costs to Respondent without making the necessary finding of bad faith. Further, even if legal expenses were appropriate, the amount awarded by the Circuit Court was unreasonable and not supported by competent evidence.

Finally, on July 30, 2012, the Circuit Court awarded Respondent prejudgment interest, even though under Ohio law such damages are only recoverable upon showing the losing party failed to make a good faith effort to settle the case and the prevailing party did make a good faith effort to settle the case. **7/30/12 Order, SCT0032-0034**. The Circuit Court awarded prejudgment interest without conducting the necessary evidentiary hearing to determine the lack of good faith.

On August 29, 2012, Petitioners then filed this appeal.

## SUMMARY OF ARGUMENT

The Circuit Court erred on August 2, 2011 when it denied OPCo's motion for summary judgment as to Respondent's premises liability claim. Under *Wellman* and its progeny, a premises owner owes no duty to protect employees of independent contractors from hazards arising from the work performed by the contractor.

In this case, OPCo hired General Hydrogen to perform work on its hydrogen storage system and to deliver hydrogen gas to that system. General Hydrogen recognized the dangers associated with the delivery of hydrogen and knew the various safety precautions to be taken when delivering hydrogen. Indeed, this is why OPCo hired General Hydrogen in the first place, for its experience and knowledge regarding hydrogen. The record shows that OPCo did not actively participate in the work being performed by General Hydrogen on the plant's hydrogen system, direct the manner in which the work was done, or retain control over the hydrogen system. Accordingly, OPCo owed no duty to protect Mr. Timmons from dangers arising from the work. Rather, that duty to fell exclusively to his employer, General Hydrogen. The Circuit Court therefore erred in denying OPCo's motion for summary judgment based on *Wellman* and permitting the premises liability claim to go to trial.

For the same reasons described above, the Circuit Court committed error when it denied OPCo's motion for directed verdict based on *Wellman* on August 22, 2011, and granted Respondent's motion for directed verdict on August 23, 2011, precluding OPCo from presenting a *Wellman* defense to the jury.

The Circuit Court abused its discretion on February 23, 2011 when it granted Respondent's motion for leave to amend its complaint to add a new party—AEPSC—and introduce a new legal theory—ordinary negligence—into the case. AEPSC was prejudiced by

this late joinder in the case less than six months before trial because discovery, which had been completed, had focused solely on premises liability and thus, AEPSC never had the opportunity to use the discovery process to test Respondent's ordinary negligence claim.

Moreover, AEPSC did not know, nor should it have known, that it would be named in an amended complaint, and Respondent's failure to name it was part of a deliberate strategy, not a mistake. Respondent knew of AEPSC when suit was initiated, as evidenced by its counsel's May 13, 2008 letter. Later, Respondent took the depositions of AEPSC employees who testified that AEPSC was the corporate entity involved with the hydrogen project. Nevertheless, Respondent deliberately continued to pursue claims against AEP, Inc. and AEP Ohio and waited more than two (2) years after being alerted to the defect in the identification of the parties to move to add AEPSC in their place. Finally, notice of this claim against AEPSC was received outside the statutory period.

The Circuit Court abused its discretion during trial on August 23, 2011 when it precluded Petitioners' expert Aaron Jones from offering rebuttal testimony to Respondent's expert Barry Newton's testimony. Specifically, Petitioners sought to offer testimony from Mr. Jones regarding testing done by Mr. Newton, which disproved Newton's own theory of how the explosion took place. The Circuit Court determined that this was new, and hence inadmissible expert testimony by Mr. Jones, when it was clearly just rebuttal testimony. Furthermore, because the testing was performed by Mr. Newton, it could not be argued that Respondent was surprised by this testimony.

The Circuit Court erred on October 17, 2011 when it denied Petitioners' motion for directed verdict based on the lack of causation evidence. In their motion, Petitioners argued that Respondent failed at trial to introduce any evidence, medical or otherwise, that the January 8,

2007 hydrogen explosion caused Mr. Timmons' death. In response, Respondent contended that Petitioners admitted causation in pleadings and other filings. However, Respondent never moved to admit these pleadings, or any other proof of causation such as the coroner's report, into evidence at trial, and thereby failed to establish an essential element of its claim.

The Circuit Court abused its discretion on July 12, 2012 when it awarded Respondent \$1,698,993.96 in attorneys' fees and costs. Attorneys' fees are substantive matters and hence, the law of Ohio governs this issue. Under Ohio law, the award of punitive damages does not automatically entitle a litigant to attorneys' fees; rather, the Circuit Court must conduct an independent investigation of the evidence, and determine that it supports an award of attorneys' fees above and beyond the punitive damages already recovered. For fees to be warranted, the court must find that the evidence establishes that the losing party acted vexatiously, wantonly, or in bad faith.

Here, the Circuit Court failed to conduct the necessary investigation or make the necessary finding of bad faith. The award of attorneys' fees was therefore inappropriate. Further, even assuming *arguendo* that fees were appropriate, the amount awarded by the Circuit Court was unreasonable and not supported by competent evidence. Respondent's counsel failed to keep contemporaneous time records or organized expense reports, rendering their alleged time and money spent on the case unreliable. Most importantly, Respondent's counsel's time records reflected not only time and money spent on this case, but also included that expended on the companion *McLaughlin* case as well. The Circuit Court therefore not only erred in awarded fees in the first instance, but compounded that error by permitting Respondent's counsel to recover in this case fees incurred in another case.

The Circuit Court abused its discretion on July 30, 2012 when it awarded Respondent prejudgment interest. Under Ohio law, in order to recover prejudgment interest, there must be a showing that Petitioners failed to make a good faith effort to settle the case prior to trial and the Respondent did make a good faith effort to settle the case. The Circuit Court in this case improperly awarded prejudgment interest without conducting the necessary hearing and without having any evidence showing Petitioners failed to make a good faith attempt at settlement or that Respondent did make a good faith effort to settle.

Lastly, the Circuit Court erred on December 9, 2011 when it denied Petitioners' motion to set off the jury verdict amount by the settlement amount received by Respondent from the other defendants. The application of a set-off is a procedural matter governed by the law of the forum—here, West Virginia. Under West Virginia law, Petitioners were entitled to set off the verdict amount with the settlement funds. Alternatively, even if the set-off was a substantive matter mandating application of Ohio law, Petitioners were still entitled to the set-off as the record was replete with evidence showing that General Hydrogen was “liable in tort,” a precondition under Ohio law for applying a set-off.

## **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioners respectfully submit that oral argument is necessary under Rule 18(a) of the Rules of Appellate Procedure because the decisional process would be significantly aided by oral argument.

Petitioners further submit that this appeal be set aside for oral argument pursuant to Rules 19(a)(1) and (2) of the Rules of Appellate Procedure. Rule 19(a)(1) applies to appeals contending that the Circuit Court failed to apply settled law, and Rule 19(a)(2) involves appeals claiming the Circuit Court abused its discretion. This appeal falls under both categories.

The January 8, 2007 hydrogen explosion resulted in two (2) lawsuits in different jurisdictions involving multiple parties, five (5) years of litigation, and two (2) trials. The different residencies of the parties, the place of the accident, the forum chosen, and the technical nature of the electricity generating process and the role of hydrogen in it all combined to make this case complex in both law and fact. On several occasions, the Circuit Court below failed to answer correctly these complex questions of choice of law, evidence, and damages, among others. Oral argument before this Court will assist it in better understanding these issues and ensure that the interests of justice are served.

1. **THE CIRCUIT COURT ERRED IN DENYING PETITIONERS' MOTION FOR SUMMARY JUDGMENT AND MOTION FOR DIRECTED VERDICT BASED ON THE *WELLMAN* DEFENSE AND GRANTING RESPONDENT'S MOTION FOR DIRECTED VERDICT PRECLUDING PETITIONER FROM PRESENTING THE *WELLMAN* DEFENSE TO THE JURY**

### STANDARD OF REVIEW

Circuit Court decisions granting or denying motions for summary judgment and motions for directed verdict are reviewed *de novo*. *Brannon v. Riffle*, 475 S.E.2d 97, 100 (W.Va. 1996); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Miller*, 228 W. Va. 739, 724 S.E.2d 343, 349 (2012).

### ARGUMENT

As this case involves a West Virginia resident injured in Ohio on property owned by an Ohio company, a choice of law is presented. Under West Virginia law, “[l]andowners or possessors of property owe any non-trespassing entrant a duty of reasonable care under the circumstances.” *Strahin v. Cleavenger*, 603 S.E.2d 197, 200, Syl. Pt. 5 (W.Va. 2004), quoting *Mallet v. Pickens*, 522 S.E.2d 436, Syl. Pt. 4 (W.Va. 1999). Ohio premises liability law, on the other hand, provides that:

[w]here an independent contractor undertakes to do work for another in the very doing of which there are elements of real or potential danger and one of such contractor's employees is injured as an incident to the performance of the work, no liability for such injury ordinarily attaches to the one who engaged the services of the independent contractor.

*Wellman v. East Ohio Gas Co.*, 113 N.E.2d 629, 630, Syl. Pt. 1 (Oh. 1953). To state the general rule of Ohio another way:

One who engages an independent contractor to do work for him ordinarily owes no duty of protection to the employees of such contractor, in connection with the execution of the work, who proceeds therewith knowing and appreciating that there is a condition of danger surrounding its performance.

*Id.* at Syl. Pt. 2.

Given this conflict between West Virginia and Ohio premises liability law, the Circuit Court in this case correctly held that as to all substantive matters, the law of the place of injury—here, Ohio—controls. *Paul v. National Life*, 352 S.E.2d 550, Syl. Pt. 1 (W.Va. 1986).

General Hydrogen was an independent contractor hired to deliver hydrogen to and perform maintenance on the high pressure storage system at the Muskingum River power station. **8/22/2011, Trial Transcript, pp. 71-74, SCT1124-1225.** It is clear from the testimony in this case that General Hydrogen and its employees were keenly aware of the various hazards associated with the delivery of hydrogen and knew of the safety precautions to be taken against the hazards of hydrogen. **8/23/2011, Trial Transcript, p. 25, SCT1273; Petitioners MSJ and Brief in Support, Fox and Thomas deposition transcripts, 0712-0755 SCT0685-0711.** As such, it is clear that General Hydrogen was an independent contractor that knew and appreciated the danger associated with the work it was performing at the Muskingum River power station.

Under Ohio law, “[t]he existence of a duty is fundamental to establishing actionable negligence, without which there is no legal liability.” *Frano v. Red Robin International, Inc.*, 907 N.E.2d 796, 800 (Oh.App. 2009), *quoting Adelman v. Timman*, 690 N.E.2d 1332 (Oh.App. 1997). Furthermore, under Ohio law, a premises owner owes no duty to an entrant with regard to dangers that “are known to such invitee or are so obvious and apparent to such invitee that he may reasonably be expected to discover them and protect himself against them.” *Id.*, *quoting Sidle v. Humphrey*, 233 N.E.2d 589, Syl. Pt. 1 (Oh. 1968).

The aforementioned proposition was first developed in Ohio in the *Wellman* case. In *Wellman*, the plaintiff argued that because the premises owner placed the employee of the independent contractor in proximity to the dangerous place or equipment, the owner was liable for the contractor’s employee’s safety. *Wellman*, 113 N.E.2d at 632. The Ohio Supreme Court

rejected that argument, holding that such a duty would only exist when the employees of the independent contractor were “unaware and uninformed as to a dangerous condition on the premises created by the owner or of which he had knowledge.” *Id.*

In this case, the testimony of General Hydrogen employees at trial established that they were well aware of the general dangers associated with the delivery of hydrogen and were also aware that the safety relief devices on the storage systems presented a potentially hazardous situation. In cases where the hazards to the employee of the independent contractor are the direct result of the work being done by the independent contractor, the “primary responsibility for protecting such an employee lies with his employer.” *Szotak v. Moraine Country Club, Inc.*, 872 N.E.2d 1270,1273 (Oh.App. 2007), *citing Eicher v. United States Steel Corp.*, 512 N.E.2d 1165 (Oh. 1987). Thus, under the general rule, OPCo owed no duty of care to General Hydrogen’s employees and Mr. Timmons specifically.

During this case, the Circuit Court repeatedly misapplied the *Wellman* rule, denying Petitioners’ motion for summary judgment and motion for directed verdict but granting Respondent’s motion for directed verdict. Ultimately, the Circuit Court found that *Wellman* was unavailable because there was no evidence offered at trial that Mr. Timmons was engaged in activity that would trigger the *Wellman* defense. **8/22/11 Trial Transcript, pp. 50-58, SCT1219-1221.**

This was error. First, there was sufficient evidence that the hydrogen delivery process was dangerous and that Mr. Timmons was performing this work at the time of the explosion. General Hydrogen was hired to deliver hydrogen gas, and General Hydrogen employees testified that the explosion occurred while hydrogen was being delivered. Mr. Timmons, a General Hydrogen employee, arrived at the Muskingum River power station in a General Hydrogen tube

trailer and was present at the storage system at the time of the explosion. Given that the Circuit Court found that Mr. Timmons died as a result of the explosion at the Muskingum River power station, **10/6/2011 Hearing Transcript, p. 16, SCT1508**, this circumstantial evidence is more than sufficient to establish that he was engaged in the delivery of hydrogen at the time of the explosion.

These things being true, this Court must grant OPCo's motion for summary judgment or alternatively, its Motion for Directed Verdict, or remand the case back for a new trial in which OPCo can present the *Wellman* defense to the jury.

**2. THE CIRCUIT COURT ABUSED ITS DISCRETION IN GRANTING RESPONDENT LEAVE TO FILE AN AMENDED COMPLAINT ADDING AMERICAN ELECTRIC POWER SERVICE CORPORATION AS A DEFENDANT AFTER DISCOVERY HAD CLOSED**

**STANDARD OF REVIEW**

The Circuit Court's decision to grant or deny a motion for leave to amend the pleadings is reviewed under for abuse of discretion. *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, S.E.2d 917, 921 (W. Va. 2004).

**ARGUMENT**

Under West Virginia Rule of Civil Procedure 15, in order to substitute or add a defendant and have the amended pleading relate back to the original filing date, the plaintiff must show that (1) the claim asserted arose out of the same transaction or conduct complained of in the original pleading; (2) the newly added party received notice of the filing and is not prejudiced in the delay in being named; (3) the new party knew or should have known that it would have been named absent a mistake; and (4) notice of the action and knowledge of the mistake was received by defendant within the time period prescribed for commencing an action and service of process of the original complaint.

The facts and evidence in this case established that AEPSC was prejudiced by its late joinder to the action, it did not receive timely notice of the “mistake” within the time to file and serve the original complaint, and that Respondent’s failure to name AEPSC was not a mistake but rather was part of a deliberate strategy. In light of these facts, the Circuit Court therefore abused its discretion in granting Respondent’s motion for leave to add AEPSC as a defendant.

In granting Respondent’s motion for leave the Circuit Court stated that [n]o party will be prejudiced by the timing of this amendment.” **2/23/2011 Order, SCT0014.** The Circuit Court went on to state that “many of the witnesses who have already been deposed were Service Corporation employees.” *Id.* This fact itself goes to show the prejudice suffered by AEPSC. Essentially, AEPSC’s employees were subjected to depositions at a time when it was not a party to the case and could not know the claims that it would ultimately be forced to defend. Furthermore, AEPSC’s addition to the case occurred after discovery had closed, after the parties had fully briefed their motions for summary judgment, and after all of the experts had been retained and disclosed.

Furthermore, AEPSC had absolutely no reason to know that its failure to be joined to the action was the result of a mistake nor did it receive notice of the alleged mistake within the applicable statute of limitations. At the time this case was filed, Respondent chose to file his claims against OPCo, AEP, Inc. and AEP Ohio. From the outset, AEP, Inc. and AEP Ohio attempted to educate Respondent on their identities and their roles, or lack thereof, relative to this incident. **Petitioners’ Opp. to Respondent’s Mot. for Leave to File Amended Complaint, SCT0125-0214, Exs. A & B.** In his response to the Motions to Dismiss filed by AEP, Inc. and AEP Ohio, Respondent filed a Motion for Sanctions and argued that AEP, Inc.

and AEP Ohio were attempting to commit a fraud on the Court because Respondent was so certain he had named the correct entities. **Respondent's Mot. for Sanctions, SCT0191-0202.**

Additionally, on July 24, 2009, Respondent deposed Kenneth McCullough and then deposed Chuck Kidd on December 14, 2009. Both Mr. McCullough and Mr. Kidd were employees of AEPSC. The Circuit Court relied upon these depositions as evidence of AEPSC's role in the events at issue in this case. **2/23/2011, Order, SCT0011-0017.** These depositions, however, took place approximately ten (10) months prior to Respondent's motion for leave to file amended complaint and during a time that Respondent adamantly insisted it had sued the correct parties.

In order for an amendment to relate back to the initial filing, "notice of the action, and knowledge or potential knowledge of the mistake, [must be] received by defendant within the time period prescribed for commencing an action and service of process of the original complaint." *Brooks v. Isinghood*, 213 W. Va. 675, 685 (W. Va. 2003). Here, the accident in question occurred on January 8, 2007 and the statute of limitations therefore expired on January 8, 2009. During that time period, Respondent adamantly denied that it had sued the wrong parties and at no time attempted to prosecute any claim other than a premises liability claim. As such, and for the reasons stated above, AEPSC clearly did not have notice that it would have been named in the complaint within the applicable statute of limitations.

**3. THE CIRCUIT COURT ERRED IN DENYING PETITIONERS' MOTION FOR DIRECTED VERDICT BASED ON RESPONDENT'S FAILURE TO INTRODUCE PLEADINGS, ADMISSIONS, DISCOVERY RESPONSES OR OTHER EVIDENCE AT TRIAL ESTABLISHING DECEDENT'S CAUSE OF DEATH**

**STANDARD OF REVIEW**

The appellate standard of review for the granting or denial of a motion for a directed verdict pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is *de novo*. *Brannon v. Riffle*, 475 S.E.2d 97, 100 (W.Va. 1996).

**ARGUMENT**

At the close of evidence, Petitioners moved for a directed verdict based on Respondent's failure at trial to introduce any evidence, medical or otherwise, that the January 8, 2007 hydrogen explosion caused Mr. Timmons' death. **Petitioners' Reply Brief to Respondent's Opp. to Petitioners' Mot. for Directed Verdict based on Lack of Causation Evidence, SCT1049-1054.**

In opposing Petitioners' motion for directed verdict, Respondent argued that Petitioners were judicially estopped from challenging causation because they admitted in their answer to the amended complaint that the explosion caused Mr. Timmons' death.<sup>4</sup> **Respondent's Opp. to Petitioners' Mot. for Directed Verdict based on Lack of Causation Evidence, SCT1012-1024-1054.** Respondent further argued that Petitioners' admitted causation in their opening statement. *Id.* Lastly, Respondent claimed that besides admissions, there was other evidence of causation at trial—specifically, the testimony of several witnesses. *Id.*

On October 17, 2011, the Circuit Court denied Petitioners' motion without explanation. **8/17/11 Order, ¶ 1, SCT0023-0025.** This was clear error.

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<sup>4</sup> Respondent also asserted that Petitioners admitted the explosion caused Mr. Timmons' death in various pre-trial motions and briefs. Motions and briefs are not pleadings, and they therefore cannot constitute judicial admissions. Moreover, like the pleadings, Respondent never attempted to introduce these motions and briefs into evidence at trial.

The point at issue here is an evidentiary one—did Respondent submit any evidence of causation at trial—and under West Virginia choice of law rules, evidentiary matters are governed by the law of the forum. *Forney v. Morrison*, 144 W.Va. 722, 110 S.E.2d 840 (W.Va.1959); *Kessel v. Leavitt*, 204 W.Va. 95, 511 S.E.2d 720 (W.Va.1998).

In West Virginia, “[j]udicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them.” *Wheeling–Pittsburgh Steel Corp. v. Rowing*, 205 W.Va. 286, 302, 517 S.E.2d 763, 779 (W.Va.1999)(internal citations omitted). Notably, only “deliberate, clear, and unequivocal statements of fact qualify as judicial admissions.” *Id.* “The significance of such an admission is that it will stop the one who made it from subsequently asserting any claim inconsistent therewith.” *Id.*

Here, Petitioners’ answer to Respondent’s amended complaint, which admitted that the hydrogen explosion caused Mr. Timmons’ death, constitutes a judicial admission. However, to establish a fact by way of judicial admission at trial, the pleadings must still be introduced into evidence:

Generally, admissions in pleadings cannot be regarded as evidence unless the pleadings are introduced at the trial at the proper time and in the proper way. In a case where a party to an action seeks the benefit of a statement in a pleading of his or her adversary as an admission against the interest of the adversary, the statement in the pleading must be offered in evidence before it can be used as an admission.

Amjur Evidence § 789.

Although this issue has not been directly addressed by this appeals court, Petitioners’ counsel’s research revealed numerous cases in which pleadings were only considered judicial admissions of facts where the pleadings were first introduced (or were attempted to be introduced) into evidence. *See, e.g., Stewart v. Johnson*, 209 W.Va. 476, 549 S.E.2d

670 (W.Va.2001)(finding that trial court erred by declining to admit into evidence answers defendant filed in magistrate court and circuit court); *Wheeling-Pittsburgh, supra* (court upheld administrative agency's denial of employer's request to treat averments in employee's administrative complaint as judicial admissions); *Moore v. Goode*, 180 W.Va. 78, 375 S.E.2d 549 (W.Va.1988)(finding that complaint and appearance bond in paternity action did not contain judicial admissions and therefore could not be considered as evidence of paternity); *State v. Fisher*, 18 S.E.2d 649 (W.Va.1941)(finding that admission in plea agreement "was not introduced and did not reach the jury" and therefore could not be used as a judicial admission of fact of prior conviction).

In this case, Respondent did not introduce the pleadings into evidence at trial at the proper time and in the proper way. In fact, Respondent did not attempt to introduce the pleadings into evidence at all. To the extent Respondent sought to use these pleadings as a judicial admission of causation, it was still required to introduce the pleadings into evidence at trial. If it did not do that, then it had to establish causation through some other manner, such as the coroner's report. But Respondent did not offer the autopsy report into evidence either.

Alternatively, Respondent argued that even though it did not move to admit the pleadings or the coroner's report into evidence, there was other, sufficient evidence of causation presented at trial. **Respondent's Opp. to Petitioners' Mot. for Directed Verdict based on Lack of Causation Evidence, SCT0149-1054.** Specifically, Respondent claimed that the testimony of Petitioners' corporate representative, Steven Hehr, as well as the testimony of Mr. Timmons' funeral director, established causation. *Id.* at **SCT1020-1021.** Neither witness, however, is a physician, and their opinions were therefore insufficient to prove cause of death.

Respondent also relied on the testimony of its expert, Barry Newton, who described the force and magnitude of the explosion. Like Mr. Hehr and the funeral director, though, Mr. Newton was not qualified to give competent medical causation testimony. Moreover, testimony that the explosion was powerful was a separate from whether that same explosion caused Mr. Timmons' death.

Lastly, Respondent contended that Petitioners' counsel admitted causation in his opening statement at trial. A review of the transcript, however, shows that Petitioners' counsel stated that an explosion occurred, and that Mr. Timmons lost his life. **8/16/11 Trial Transcript, p. 15, SCT1046**. Nowhere, however, did counsel state that the explosion was the proximate cause of Mr. Timmons' death. More importantly, an opening statement of counsel is not evidence, and it was Respondent's burden to prove causation, and he offered no evidence to that end.

Notably, the Circuit Court granted Respondent's motion for directed verdict barring Petitioners' from presenting the *Wellman* defense to the jury because there was no evidence submitted at trial that Mr. Timmons was delivering hydrogen at the time of the explosion. In its amended complaint, however, Respondent averred, and Petitioners then admitted in their answer, that Mr. Timmons was engaged in a filling operation when the blast happened. Nevertheless, the Circuit Court still granted Respondent's motion because neither the pleadings, nor any other proof, had been offered into evidence to establish the fact that Mr. Timmons was offloading hydrogen. The Circuit Court likewise should have granted Petitioners' motion for directed verdict due to Respondent's failure to introduce pleadings or other evidence at trial establishing causation.

The above things being true, there was no competent evidence from which the jury could have decided that the explosion caused Mr. Timmons' death, and the Circuit Court erred in not directing a verdict in favor of Petitioners.

**4. THE CIRCUIT COURT ABUSED ITS DISCRETION IN PRECLUDING PETITIONERS' FROM OFFERING REBUTTAL EXPERT TESTIMONY TO RESPONDENT'S EXPERT TESTIMONY DURING TRIAL**

**STANDARD OF REVIEW**

Circuit Court evidentiary decisions are reviewed under an abuse of discretion standard. *Moore v. Consolidated Coal Co.*, 567 S.E.2d 661, 665 (W.Va. 2002).

**ARGUMENT**

The Circuit Court erred during trial on August 23, 2011 when it precluded Petitioners' expert Aaron Jones from offering certain testimony critical of Respondent's expert's opinions. Respondent's expert, Barry Newton, testified at trial that the explosion occurred because a rupture disc in the hydrogen system burst under pressure and punctured the elbow of the vent stack, allowing hydrogen to vent under a canopy. Mr. Newton further testified that if the vent stack had been made of stainless steel without elbows, it would not have been breached.

After the conclusion of Mr. Newton's deposition, Petitioners learned that he had conducted tests that refuted these opinions. This information relating to testing, however, was not provided to Petitioners until after Mr. Newton had provided his report and been deposed. At trial, Petitioners sought to elicit testimony from Mr. Jones regarding the testing which would cast doubt on Mr. Newton's conclusions. **8/23/11 Trial Transcript, pp. 77-81, SCT1286-1287**. The Circuit Court, however, erroneously sustained Respondent's objection to this testimony on the grounds that Mr. Jones was offering a new, and previously undisclosed, expert opinion. *Id.* Mr. Jones' testimony would have been offered to rebut the trial testimony of Mr. Newton, and was

therefore plainly admissible. Further, Jones' testimony critiquing the testing performed by Mr. Newton was based upon information in the possession of Respondent, and therefore did not constitute surprise.

**5. THE CIRCUIT COURT ERRED IN DENYING PETITIONERS' MOTION TO SET OFF THE JURY'S VERDICT AWARD BY THE AMOUNT RESPONDENT HAD RECEIVED THROUGH SETTLEMENT WITH THE OTHER DEFENDANTS**

**STANDARD OF REVIEW**

Circuit Court choice of law decisions are reviewed *de novo*. *United States v. Marin*, 961 F.2d 493, 496 (4th Cir.1992).

**ARGUMENT**

On October 19, 2009, General Hydrogen, CGI International, and Heberling settled with Respondent for \$2,250,000.00. **12/23/09 Order approving settlement, SCT0001-0010**. The case subsequently proceeded to trial against Petitioners, and on August 26, 2011, the jury returned a verdict against Petitioners and awarded Respondent \$1,998,940.00 in compensatory damages.

On September 9, 2011, Petitioners filed a post-trial motion to reduce or "set off" the jury's verdict against them by the amount of the settlement in accordance with well-established West Virginia law. *Board of Educ. V. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 390 S.E.2d 796 (1990); **Petitioners' Mot. to Apply the Set-Off and Brief in Support, SCT 0386-0395; 0682-0684**.

On December 9, 2011, the Circuit Court denied Petitioners' motion, holding that Ohio law controlled the set-off issue and that unlike West Virginia law, Ohio law did not automatically provide for a set-off; rather, according to the Circuit Court, Ohio law only sets off the verdict amount by the settlement figure where the jury finds liability on the part of the

settling defendants. **12/9/11 Order, SCT0026-0027**. This was plain error for three (3) essential reasons.

First, the law of set-off relates to the remedy, not the right, and is therefore governed by the law of the forum—here, West Virginia. Restatement (Second) of Conflict of Laws § 128, Set-Off, Counterclaim or Other Defense (1971); 16 Am. Jur. 2d Conflict of Laws § 147, Setoff and Counterclaim (2012). The Circuit Court therefore should have applied West Virginia law and automatically reduced the jury’s verdict by the settlement amount.

Second, even if Ohio law did apply, the result is the same. Ohio follows the Restatement rule that forum law governs set-offs. *Second Nat. Bank of Cincinnati v. Hemingray*, 31 Ohio St. 168 (Ohio 1877); *Miller v. Bock Laundry Mach. Co.*, 64 Ohio St.2d 265, 416 N.E.2d 620 (Ohio 1980). So even if Ohio law governed in this case, Ohio law requires application of the forum’s—West Virginia’s—set-off law.

Third, and finally, even if Ohio was the forum (thereby mandating application of its own set-off law), the Circuit Court *still* should have reduced the jury’s verdict by the settlement amount because Ohio law mandated application of the set-off.

For many years, set-off law in Ohio was identical to that of West Virginia; namely, Ohio courts automatically reduced jury verdicts by any settlement amounts. *Zeigler v. Wendel Poultry Serv., Inc.*, 86 Ohio St.3d 451 615 N.E.2d (Ohio 1993). On January 27, 1997, the Ohio legislature enacted Am.Sub.H.B. No. 350, which included a revised set-off statute, R.C. § 2307.33(F). In *Fidelholtz v. Peller*, 81 Ohio St.3d 197, 690 N.E.2d 502 (Ohio 1998), the Ohio Supreme Court construed R.C. 2307.33(F) as abrogating the old rule set forth in *Zieglar* in favor of a new rule which barred set-off unless the settling defendants were “liable in tort.” *Fidelholtz*, 609 N.E.2d at 506.

In 1999, the Ohio Supreme Court declared Am.Sub.H.B. No. 350 unconstitutional in its entirety. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062 (Ohio 1999). On July 6, 2001, R.C. § 2307.33(F) and the rest of Am.Sub.H.B. No. 350 were repealed.

The *Fidelholtz* rule is accordingly no longer good law in Ohio, as it is derived from judicial construction of language in a statute that has since been repealed. *State ex rel., supra*. Set-offs in Ohio therefore revert back under the old rule, which deduct them automatically as of right. *Ziegler, supra*.

Moreover, even if *Fidelholtz* remains good law in some respects, it also requires application of the set-off. The Circuit Court misread *Fidelholtz* as requiring a *jury finding* that the settling defendants were “liable in tort.” There is no such requirement. A jury finding is just one of several ways of demonstrating liability by the settled defendants. “The determination [of whether a settling defendant is liable in tort] *may* be a jury finding, judicial adjudication, stipulations of the parties, or the release language itself.” 609 N.E.2d at 507 (emphasis supplied).

Here, Respondent settled wrongful death claims against the other defendants. Under the wrongful death statute, a party is entitled to recover “[w]henver the death of a person shall be caused by wrongful act, neglect, or default...” W. Va. Code § 55-7-5. The statute requires court approval of all wrongful death settlements. *Id.* at § 55-7-7. Accordingly, on November 20, 2009, Respondent petitioned the court for approval of the proposed settlement, averring that the settled defendants “were each responsible for numerous violations of nearly every safety standard applicable to the hydrogen systems at the Muskingum River Station.” **Respondent’s Petition for Approval of Settlement, ¶ 5, SCT0398**. Respondent also stated that “the settlement with [the settled defendants] will allow him to continue to aggressively prosecute the

claims that will fully remain against the AEP Defendants, *the more culpable* defendants.” *Id.* at ¶ 19, SCT0401 (emphasis supplied). On December 23, 2009, following a hearing where the Circuit Court heard “testimony concerning the facts and circumstances of this case,” it entered an order approving the wrongful death settlement. **12/23/09 Order, SCT0002**. Clearly, the petition’s averments, the Circuit Court’s acceptance of same, and its judicial adjudication of the wrongful death settlement are sufficient to establish fault on the part of the settling defendants, entitling Petitioners to a set-off under *Fidelholtz*.

Compensatory damages are to make an injured party whole; not enrich them. It is for this reason the set-off exists—to prevent an injured party from receiving a windfall. By denying the set-off, the Circuit Court allowed Respondent a double recovery, giving it a windfall of more than twice the compensatory damages needed to make it whole. This was manifest error.

**6. THE CIRCUIT COURT ABUSED ITS DISCRETION IN AWARDING RESPONDENT ATTORNEYS’ FEES AND COSTS AS THERE WAS NO EVIDENCE OF BAD FAITH BY PETITIONERS**

**STANDARD OF REVIEW**

The appellate standard of review for the award or denial of attorneys’ fees and costs is abuse of discretion. *Pauley v. Gilbert*, 522 S.E.2d 208, 213 (W. Va. 1999).

**ARGUMENT**

On September 9, 2011, following trial, Respondent filed a motion seeking to recover attorneys’ fees and costs from Petitioners. **Respondent’s Mot. for Attorneys’ Fees, SCT0552-0681**. On July 12, 2012, over Petitioners’ objections, the Court awarded Plaintiff \$1,698,993.96 in attorneys’ fees and costs, even though both Ohio and West Virginia follow the American Rule and there was no finding of bad faith. **7/12/12 Order, SCT0028-0034**. This ruling was plain error.

As a general matter, West Virginia follows the “American Rule,” which provides that each litigant shall bear his or her own attorneys’ fees absent a contrary rule of court or express statutory or contractual authority for reimbursement. *In re John T.*, 225 W.Va. 638, 642-643, 695 S.E.2d 868, 872-873 (W.Va.2010). This rule, however, is subject to equitable exception; namely, a court may award the prevailing litigant his or her reasonable attorneys’ fees as costs when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Messer v. Huntington Anesthesia Group, Inc.*, 222 W.Va. 410, 420, 664 S.E.2d 751, 761 (W.Va.2008).

Notably, while there are similarities between the criteria for punitive damages and the criteria for an award of attorney's fees, a jury’s award of punitive damages does not mandate an award of attorney’s fees. *Midkiff v. Huntington Nat. Bank West Virginia*, 204 W.Va. 18, 20, 511 S.E.2d 129, 131 (W.Va.1998). Rather, the court must undergo its own separate analysis of the facts to determine whether attorneys’ fees are appropriate. *Id.* The primary concern in an attorneys’ fee case in West Virginia is that the fee awarded be reasonable, and the means that a circuit judge uses to calculate a reasonable attorneys’ fee is a matter left to the judge’s discretion. *Fauble v. Nationwide Mutual Fire Ins. Co.*, 222 W.Va. 365, 372, 664 S.E.2d 706, 713 (W.Va.2008)(citations omitted).

Ohio courts, like their West Virginia counterparts, also generally follow the American Rule. *Capella III, L.L.C. v. Wilcox*, 190 Ohio App.3d 133, 143-144, 940 N.E.2d 1026, 1034 (Ohio App. 10th Dist.2010). Ohio too recognizes exceptions to this rule; in Ohio, a prevailing party may recover attorney fees where the losing party acted in bad faith, vexatiously, wantonly, obdurately or for oppressive reasons. *Spalding v. Coulson*, 104 Ohio App.3d 62, 78, 661 N.E.2d 197, 207 (Ohio App. 8th Dist.1995)(citations omitted). In addition, an aggrieved

party may recover reasonable attorney fees under Ohio law where punitive damages are awarded. *Id.* Importantly, an award of attorney fees is not mandatory in cases where punitive damages are awarded. *Karson v. Ficke*, 2002 WL 2009934, 5, 2002-Ohio-4528 (Ohio App. 9th Dist.2002). Rather, even when punitive damages are awarded, the determination of whether to award attorneys' fees still rests within the discretion of the trial court. *Meyers v. Hot Bagels Factory, Inc.*, 131 Ohio App.3d 82, 102, 721 N.E.2d 1068, 1082 (Ohio App. 1st Dist.1999). Thus, "although a jury may be asked whether they would recommend an award of attorney fees when malicious acts have led to an award of punitive damages, it is the trial court that determines what, *if any*, amount shall be awarded." *Wagoner v. Obert*, 180 Ohio App.3d 387, 413, 905 N.E.2d 694, 715 (Ohio App. 5th Dist.2008)(emphasis supplied).

Thus, both West Virginia and Ohio follow the American Rule, and both allow exceptions to that rule upon a showing of bad faith. In addition, both find that an award of punitive damages does not necessarily mandate an award of attorneys' fees.

In light of the above, it is clear that the Circuit Court erred in awarding Respondent attorneys' fees and costs under either West Virginia or Ohio law. Respondent failed to demonstrate compelling reasons justifying deviation from the American Rule and allowing Respondent to recover attorneys' fees. The imposition of punitive damages alone, without more, does not automatically entitle a litigant to fees; rather, the court must conduct an independent investigation of the evidence, and determine that it supports an award of attorney fees above and beyond the punitive damages already recovered. The Circuit Court here failed to conduct any such investigation. Indeed, there was no evidence that Petitioners acted vexatiously, wantonly, or otherwise in bad faith.

In addition, Respondent failed to meet its burden of supporting its requested fee amount with sufficient evidence. Respondent's counsel failed to proffer any evidence other than his own self-serving statement that his alleged hourly rate of \$400 an hour is consistent with the prevailing rate in the community. Further, Respondent's counsel failed to keep contemporaneous time records or organized expense reports, rendering their alleged time and money spent on this case wholly unreliable. Respondent's counsel's time records were also grossly inflated as to the time involved, and the motion for fees failed to explain the necessity of expending such time.

More importantly, Respondent's counsel submitted time records reflecting not only time and money spent on this case, but also that expended on *McLaughlin v. OPCo and AEPSC*, a parallel personal injury action they handled in Ohio court arising from the same hydrogen explosion. Respondent's motion for attorneys' fees and costs did not provide a breakdown of what time was spent on this case versus what time was spent on the companion *McLaughlin* case. Obviously, Respondent's counsel can only recover here for those hours and expenses spent on this case.

The Circuit Court thus erred in awarding attorneys' fees and costs at all, as the record was devoid of any evidence of bad faith. The Court also awarded an inflated amount which was not supported by competent evidence and potentially granted Respondent's counsel a double recovery. The attorneys' fees decision must therefore be stricken in its entirety or, alternatively, remanded back to the Circuit Court for an evidentiary hearing.

**7. THE CIRCUIT COURT ABUSED ITS DISCRETION IN AWARDING RESPONDENT PREJUDGMENT INTEREST AS THERE WAS NO EVIDENCE THAT PETITIONERS FAILED TO MAKE A GOOD FAITH EFFORT TO SETTLE THE CASE**

**STANDARD OF REVIEW**

In reviewing the Circuit Court's award of prejudgment interest, the Court of Appeals usually applies an abuse of discretion standard. Where, however, the Circuit Court's award of prejudgment interest hinges, in part, on an interpretation of decisional or statutory law, the Court of Appeals will review *de novo* that portion of the analysis. Syl. pt. 2, *Hensley v. West Virginia Dep't of Health & Human Resources*, 203 W.Va. 456, 508 S.E.2d 616 (W. Va. 1998).

**ARGUMENT**

In addition to attorneys' fees and costs, Respondent also filed a motion for prejudgment interest on September 9, 2011. **Respondent's Mot. for Prejudgment Interest, SCT0419-0425.** On July 30, 2012, the Circuit Court awarded Respondent more than \$500,000.00 in prejudgment interest. **7/30/12 Order, SCT0032-0034.** The Court correctly determined that prejudgment interest is a substantive issue, and therefore the law of the place of injury—Ohio—controls this issue.

Ohio's prejudgment interest law is set forth by statute. R.C. 1343.03(C). Prejudgment interest in Ohio is a category of compensatory damages. *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 635 N.E.2d 331 (Ohio 1994). *See also Miller v. First International Fidelity & Trust Building, Ltd.*, 165 Ohio App.3d 281, 846 N.E.2d 87, 2006-Ohio-187, ¶ 36 (Ohio App. 6th Dist. 2006)(holding that "where prejudgment interest is sought, it is just another element of damages requested upon a finding of liability").

To be entitled to prejudgment interest under Ohio law, each of the requirements set forth in R.C. 1343.03(C) must be met. First, the moving party must file a motion no later than

fourteen (14) days after entry of judgment. *Cotterman v. Cleveland Elec. Illum. Co.*, 34 Ohio St. 3d 48, 517 N.E.2d 536, Syl. Para. 1 (1987). Second, “the trial court must hold a hearing on the motion.” *Moskovitz, supra*, 635 N.E.2d at 347. Third, “the court must find that the party required to pay the judgment failed to make a good faith effort to settle.” *Id.* Finally, “the court must find that the party to whom the judgment is to be paid did not fail to make a good faith effort to settle the case.” *Id.*

There is no dispute in this case that Respondent filed a timely motion. As Petitioners pointed out to the Circuit Court during argument, the second requirement of the statute is that the court must hold a hearing. **7/11/2012 Transcript, SCT1820**. Because the statute requires the Circuit Court to make an evidentiary finding it must, therefore, receive evidence. *Moskovitz, supra*, 635 N.E.2d at 347 (“The decision is one for the court—not any longer a jury.”). In this case, Respondent chose not to call any witnesses or introduce any documents or evidence at the time the prejudgment interest issue was called for hearing. On this ground alone, the award of prejudgment interest must be overturned.

Because the Circuit Court did not accept any evidence on this issue and because the Circuit Court’s order does not contain any findings of fact, Petitioners are unable to determine what evidence the Circuit Court based its decision that prejudgment interest was proper upon. Furthermore, based on the record below, this Court cannot properly determine whether the Circuit Court’s award was proper. “Where findings of fact and conclusions of law are not sufficient as required by law, this Court has authority to remand for further consideration.” *Phillips v. Fox*, 193 W.Va. 657662, 458 S.E.2d 327, 332 (1995).

Although Petitioners believe this issue should be overturned based on the Circuit Court’s failure to hold a hearing it is also clear that the Court’s award was improper on the merits as

well. To be entitled to prejudgment interest a prevailing party must prove that it made a good faith effort to settle the case and that the opposing party did not. *Moskovitz, supra*. A party has demonstrated good faith under R.C. 1343.03(C) if it has (1) fully cooperated in discovery; (2) rationally evaluated its risks and potential liability; (3) not attempted to unnecessarily delay any of the proceedings; and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. *Kalain v. Smith*, 25 Ohio St.3d 157, 159, 495 N.E.2d 572 (Ohio 1986). A party that fails to satisfy any of the above four (4) factors has not acted in good faith. *Szitas v. Hill*, 165 Ohio App.3d 439, 846 N.E.2d 919 (Ohio App. 8th Dist. 2006).

Applying the above criteria to the facts of this case, it is clear that Petitioners acted in good faith, whereas Respondent did not. During the first attempt to settle this case, Respondent engaged in mediation with numerous defendants; however, Respondent did not invite Petitioners to participate. **7/11/2012 Transcript, SCT1820.**<sup>5</sup> Thereafter, in November 2010, Petitioners and Respondent did schedule a mediation. **7/11/2012 Transcript, SCT1820-21.** Prior to the mediation, the Petitioners requested that Respondent make a settlement demand. Contrary to accepted practice, however, Respondent refused to give Petitioners a settlement demand despite Petitioners' repeated requests. Finally, a few days before mediation, Respondent issued a demand of \$25 million. **7/11/2012 Transcript, SCT1821.** At the mediation, Petitioners discussed with the mediator all the potential issues that were at issue at that time including Petitioners motion for summary judgment that included the cap on punitive damages. In light of these issues Petitioners did not believe Respondent's demand was a reasonable starting point for negotiations. As such, Petitioners, through the mediator, asked Respondent to make a demand "in the ballpark" so that good faith negotiations could take place. Plaintiff not only refused, but

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<sup>5</sup> The references relative to the prejudgment interest issue refer to the argument of counsel as no evidence was taken and the Circuit Court relied on this argument to make its determination.

immediately broke off the mediation and left, thereby refusing to negotiate in good faith. **7/11/2012 Transcript, SCT1821-22.**

Next, the Circuit Court conducted a settlement conference with the parties on the eve of trial. This time the Respondent again extended his demand for \$25 million.<sup>6</sup> With the support of the Circuit Court, Petitioners made a responding offer of \$550,000. With this offer, Petitioners made it clear that this was an initial offer, and that they were willing to engage in further negotiations. Respondent, rather than making a meaningful counteroffer, then actually *increased* its demand by the amount equal to the amount of Petitioners' offer. **7/11/2012 Transcript, SCT1822-23.** Petitioners were then advised by the Circuit Court that Respondent had left and the settlement conference was therefore over.

Thus, the facts of this case show that Ohio's prejudgment interest law controls, that Petitioners attempted to settle the case, but that Respondent was unwilling to negotiate from its initial position of \$25 million. Further, the facts show that Respondent's demand was far in excess of the true value of the case (as demonstrated by the jury's verdict), and that when Petitioners made an initial offer in response to Respondent's demand, the Respondent, rather than continue negotiating, actually *increased* its demand, ending settlement talks. These things, when taken together, clearly demonstrate a lack of good faith on Respondent's part, and the Circuit Court therefore erred in awarding it prejudgment interest on the compensatory damage portion of the jury award.

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<sup>6</sup> Following trial, the jury awarded Plaintiff roughly \$7 million.

## CONCLUSION

First, the Circuit Court made AEPSC defend a suit it never should have been part of in the first place. The Circuit Court improperly precluded OPCo from presenting its *Wellman* defense to the jury. And finally after trial, the Circuit Court issued several post-trial rulings against both AEPSC and OPCo on damages that were without support in both fact and law. The Petitioners, AEPSC and OPCo, were prejudiced by these errors, and therefore request that the Circuit Court decisions be reversed or alternatively, that the case be remanded back to the Circuit Court so that these matters can be properly decided on their merits.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-1072

ON APPEAL FROM THE CIRCUIT COURT OF  
MARSHALL COUNTY (Civil Action No. 08-C-102M)

**OHIO POWER COMPANY and  
AMERICAN ELECTRIC POWER  
SERVICE CORPORATION,**

**Petitioners,**

v.

**DOCKET NUMBER: 12-1072**

**BRIAN TIMMONS, Administrator  
of the ESTATE OF LEWIS C.  
TIMMONS, Deceased,**

**Respondents.**

**CERTIFICATE OF SERVICE**

I, Brian R. Swiger, counsel for Petitioners Ohio Power Company and American Electric Power Service Corporation, do hereby certify that on this 7<sup>th</sup> day of January, 2013, I served **PETITIONERS OHIO POWER COMPANY and AMERICAN ELECTRIC POWER SERVICE CORPORATION'S BRIEF** upon all counsel and parties of record, via United States mail, postage prepaid, addressed as follows:

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