



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

NO. 12-1072

OHIO POWER COMPANY AND AMERICAN ELECTRIC POWER COMPANY,

Petitioner,

v.

BRIAN TIMMONS, ADMINISTRATOR OF THE
ESTATE OF LEWIS C. TIMMONS,

Respondents.

BRIEF OF THE RESPONDENT

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1. **The Circuit Court correctly denied Petitioners' various "*Wellman*" motions since Petitioner failed to prove facts sufficient to create an issue under that case, (even as Petitioner interpreted it); moreover, Ohio does not, as Petitioner claims, immunize those who maliciously cause wrongful deaths under *Wellman* anyway. Other reasons of record also support the decision below.**
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4. **The Circuit Court properly excluded Petitioners' undisclosed expert opinions during their examination of Aaron Jones and furthermore, Petitioners never proffered the opinion into the record, meaning the opinion, whatever it was, is *still undisclosed*.**
5. **The Circuit Court's set-off decision is certainly correct under Ohio law, which was applied in the case at Petitioners' insistence. Under West Virginia law, which would control had Petitioners not insisted otherwise, the issue is more complex, but the set-off should still be denied on the specific facts of this case.**
6. **The Circuit Court's decision to award attorney's fees is correct under Ohio and West Virginia law, in light of the malicious misconduct of the Petitioners.**
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CROSS ASSIGNMENT OF ERROR

- 1. The attorney fee multiplier of 1.25, selected by the trial court, was too low given the circumstances under which the work was performed and the applicable *Pitrolo* factors. The 2.0 multiplier requested by the Respondent was proper and should have been approved. Likewise, the hourly rates requested by Petitioner were reasonable and proper and should not have been reduced by the trial judge.**

IV. STATEMENT OF THE CASE

Petitioners appeal from a jury verdict finding them, Ohio Power Company and American Electric Power Service Corporation (“AEP”), liable for the wrongful death of Lewis Timmons. But AEP’s appeal *does not deny killing Lewis Timmons, or even doing so with actual malice*. Instead, AEP skips that point entirely and proceeds to a series of circuitous legal issues through which AEP expects this Court to allow it to evade any responsibility for its wrongdoing, and then to be awarded a profit on the litigation over the wrongful death it caused.

Both pre-trial and during trial, AEP persistently accused a subcontractor of being wholly responsible for the wrongful death of Lewis Timmons, while denying any responsibility of its own. AEP secured a multi-million dollar pre-trial settlement from the subcontractor and settlements from two other entities that were only tangentially related to what occurred. After fully presenting its defense of blame-everyone-but-us at trial in this case, the jury concluded that AEP was 100% responsible for Mr. Timmons’ death and guilty of actual malice. The jury awarded approximately \$2,000,000.00 in compensatory damages and \$5,000,000.00 in punitive damages. AEP’s appeal seeks to avoid any payment whatsoever to the survivors of Lewis Timmons, and also, to turn a profit on the litigation by 1) retaining its pre-trial settlement with the subcontractor and others; 2) offsetting its compensatory exposure by inducing this Court to leapfrog to whatever state law benefits AEP on a given issue; 3) evading its liability for attorney’s fees, concededly expended because of its inexcusable conduct and 4) avoiding any meaningful punitive damages by prevailing in this Court’s Case 12-0968.

Most remarkably, AEP intends to accomplish all of this while *conceding* that it caused the death of Lewis Timmons through its malicious misconduct. Because AEP’s arguments in support of this extraordinary litigation exacta are without merit under the applicable law and

because those arguments are wholly at odds with substantial justice, Respondent respectfully asks that Appellants' assignments of error be REJECTED by this Court in their entirety.

A. FACTUAL HISTORY

a. AEP fails to cite to record evidence for its evidentiary claims, referring only to its counsel's commentary.

As a threshold matter, Mr. Timmons points out that AEP's brief does not cite to evidence or record facts in its "Statement of the Case." Instead, AEP simply cites to rehashing briefs and arguments of counsel, purportedly as evidence of what the proof was at trial. *See e.g.* Petitioner's Brief at 4-8. This is wholly insufficient, since it does not allow the Court (or Respondents) to know what actual evidence, if any, is being relied upon by AEP in prosecuting its appeal. *Cf.* W.Va.R.App.Pro. 10(c)(4). On the extremely rare occasions when any testimony is referenced by AEP, it is either not trial testimony, or not supportive of the statements in the brief.

For example, AEP's first assignment of error relates to an Ohio case called *Wellman v. East Ohio Gas Co.*, 113 N.E.2d 629 (1953). The case, discussed below, is highly fact-dependent, but AEP cites *no record evidence of facts submitted to the jury on Wellman's elements*. Instead, AEP's statement of the case refers only to its lawyers' arguments and recitations of their *views* of the evidence. Petitioner's Brief at 6-7. AEP's repeated citations to its lawyers' comments are circular and un-illuminating.¹ Petitioner's brief simply ignores W.Va.R.App.Pro. 10(c)(4), requiring appropriate citations to the record. This transgression unfairly hampers the Appellee's Response and this Court's analysis, and warrants rejection of the appeal.

¹ Even when AEP purports to cite to "trial transcript," it turns out to be citing only a section where its lawyers were talking about their opinions of the law and facts, as opposed to testimony or evidence that would be validly considered by the judge or a jury. This is legal solipsism: AEP's counsel backs up counsel's recitation of evidence to this Court by citing counsel's recitations before the lower court.

b. AEP's conscious indifference to safety causes a lethal explosion.

On January 8th, 2007, a cloud of hydrogen gas detonated at AEP's Muskingum River Power Plant, injuring ten workers, killing Lewis Timmons, and heavily damaging the power plant itself. Mr. Timmons was working for a company called CGI that filled hydrogen tanks. The massive explosion was the result of AEP's utter disregard of industry regulations, explicit warnings, and common sense. R. at 2099, 2113, 1217, 599, 1194; 1201, 844-53. AEP possessed ample knowledge to forestall this disaster, but refused to act on it. R. at 2113, 1964-65, 1967-68, 2028-31.

Power plants use hydrogen as a coolant for the electric generators. Because hydrogen gas is highly explosive and much lighter than air, hydrogen must be stored in open areas, away from buildings and personnel. R. at 599-601. Hydrogen tanks must be well-ventilated so that the hydrogen can dissipate harmlessly if it escapes. R. at 2092, 2106, 2108. If hydrogen is not vented properly, it concentrates into an explosive cloud. R. at 2101-02, 2111, 2110, Supplemental R. at 2306.

Hydrogen storage systems therefore require short, strong, straight, stainless steel vent pipes pointed to open air. *Id.* AEP disregarded this safety rule despite repeated warnings of its importance. R. at 2101, 2102, 2103-04, 1964-70, 2025, 2046. AEP kept its Muskingum River hydrogen system pinned against the plant walls and under a roof adjacent to a work area. R. at 2103, 2110, Supplemental R. at 2302. Even worse, Appellees utilized bent, thin-walled copper vent stacks that were insufficient and wrongly designed. R. at 1962, 1967-68, 2103-05.

In light of the defense AEP attempted to mount, it is highly significant that AEP controlled these faulty aspects of the hydrogen system and no one else had the right to change them. R. at 2065-66. Moreover, AEP had been specifically offered a regular maintenance

contract to fix these problems which it refused. Of even greater significance, in light of AEP's selected assignments of errors, is the following key fact: no witness or evidence ever linked the explosion to any action of Lewis Timmons. In fact, AEP expressly abandoned any effort to show that Lewis Timmons' actions contributed to the explosion. Record at 2120-2121 and 2128.²

These key issues were cleared up on the first day of trial when AEP's own corporate representative admitted that AEP owned the system, AEP was responsible for it, AEP knew what was wrong with it and AEP did not get it fixed:

Q. My question to you is: There was plenty of information available in foresight, before the Muskingum River explosion happened, to let the company know that the system was in a dangerous condition, wasn't there?

A. There was incidences in the system that would lead you to believe that the systems can be dangerous if they don't have stainless steel vent stacks.

Q. Likewise, there was information that roofs can be dangerous, too?

A. Well, it's not stated in the Beller memo. I mean, to answer your question specifically.

Q. It's stated in the safety Incident Brief?

A. It's stated in the safety Incident Brief that they are not going back with their roof system.

Q. And that's something that Ohio Power Company knew, correct?

A. That's something that was stated in the incident brief, so they would have this incident brief in Ohio Power company, correct.

Q. *So in light of the fact that the company had in foresight information that the system at Muskingum River was in a dangerous condition, the company should take responsibility for that, shouldn't they?*

A. *Oh, wait a second. Ask that question over again.*

Q. *Yes. In light of the fact that long before the Muskingum River explosion happened, the company had information that showed that copper should not be used, stainless steel should be, and that the roofs presented a danger, the company should take responsibility for what happened, shouldn't it?*

A. *Yeah, I mean, the company owns those systems.*

Q. *In fact, the company -- it's company property, isn't it?*

A. *That's correct.*

R. at 2047-48 (emphasis supplied). Mr. Hehr, testifying on behalf of both Petitioners (R. at 1983), further admitted that it was the Petitioners who had the duty to fix the problems with the

² AEP attempts and then abandons its attempt to show Lewis Timmons caused the explosion.

system due to its ownership and control of the system:

Q. Okay. Now, I want to make sure that I had your answer straight. Ohio Power Company had to authorize any repairs that were going to be done on the system, correct?

A. Correct.

Q. A couple other things, then I promise we're finished here. Certainly, Ohio power Company had an obligation to keep its plant in a reasonably safe condition, correct?

A. Yes, I agree with that.

Q. And the power company had a duty to maintain the equipment that was present at its facility in a reasonably safe condition?

A. I agree with that, yes.

Q. And it has an obligation to maintain it in accordance with all applicable laws and regulations, right?

A. Correct, yes.

Q. And it certainly has an obligation to implement an effective preventative maintenance program for all its equipment, correct?

A. Yes.

Q. And it also has a duty in having a hydrogen system to use piping, tubing and fitting that is suitable for hydrogen service, correct?

A. Correct.

Q. And likewise, it has a duty to perform workplace hazard assessments throughout the plant, correct?

A. Correct.

Record at 2075-76;³ *see also* Record at 1246-47. Petitioners' brief omits any reference to this record evidence (or any other evidence) in its attempt to make out a "no duty" defense in its brief.

The full facts were even worse than AEP's testimony showed. Before the explosion, AEP had *already* caused a major hydrogen explosion at another one of its plants. Sixteen months earlier, the same kind of hydrogen system at AEP's Kammer Plant (in Marshall County) exploded. AEP's own "Safety Incident Brief" arising from that explosion describes how defects, nearly identical to those at Muskingum River, caused a nearly identical explosion. The

³ While an effort was made by Petitioners to claim that they "authorized" CGI to repair the system, Petitioners were eventually forced to concede that they declined the service contract they were offered and did not pay to have the system fixed. Record at 1242-46. They likewise conceded that it was beyond CGI's scope of ability to remove the roof.

similarities included soft copper vents instead of the proper stainless steel and a confining roof. R. at 1112-13, 2102-03. AEP's own "Safety Incident Brief" credited sheer luck that no employees were in the area to be hurt or killed. *Id.* R. at 1112, 2305. A memo by AEP safety engineer Jim Beller later explained the dangers in detail. R. at 599-603. Beller specifically mentioned that "most of our hydrogen tube racks are much closer to plant buildings than Kammer's" – highlighting the danger. *Id.* AEP disregarded the lessons of the Kammer explosion and made no meaningful changes at Muskingum River. R. at 2048-50.

Even worse, *several* prior explosions and fires in AEP hydrogen systems forearmed Appellees with detailed knowledge of how the explosion would happen, but Appellees *still* refused to take the necessary actions to prevent the Muskingum River explosion. *See, e.g.*, R. at 1144, 2024-26, 2030-31, 2035-36, 599. Copper vent pipes had already failed on a similar hydrogen system at another AEP plant and several other hydrogen fires were reported. R. at 599-603. Long before Mr. Timmons was killed, AEP's safety department *contemplated* the fatal consequences of failing to act: "the prospect of a very large hydrogen cloud igniting off an adjacent flame jet is disturbing." R. at 599.

Even worse, company managers eventually admitted that AEP intentionally compromised maintenance and safety in order to keep plants "running lean." Supplemental R. at 2304. AEP was forced to admit on cross-examination that it did not accept a third-party proposal to fix the hydrogen systems and make them safe. R. at 1245-46, Supplemental R. 2303, 2050-54, 1245-46, 873. A purchasing manager's memo specifically cautioned AEP against "patch repair jobs as a band-aid to what really needs to be addressed when there is more time and/or more money to fix it right," referring specifically to the need to systematize maintenance of the hydrogen systems. Supplemental R. at 2303.

In the aftermath of the explosion that killed Mr. Timmons, the Occupational Safety and Health Administration (R. at 844-853) cited AEP for nine separate violations of federal law, 8 of them serious and one of them willful. *Id.*⁴ See also, R. at 1216-17. After the explosion, AEP rebuilt the Muskingum River system according to the regulations – placing it hundreds of feet from buildings and personnel, with stainless-steel vent lines and no roof. But it nonetheless denied any liability for its actions in the face of overwhelming contrary evidence.

Facing certain litigation over the disaster it had caused, AEP began attempting to pin the explosion on a contractor, CGI. Safety officials from the company released public statements and even gave so-called industry safety briefings around the country relating a deliberately misleading story about the explosion that tended to exonerate AEP and indict CGI.⁵ AEP's investigation did not identify any of AEP's failures as relevant or reference the comprehensive evidence of safety violations detailed above. Both before and after the explosion, AEP's safety department acted as a risk-management/insurance-defense apparatus – more concerned with evading responsibility than preventing harm. R. at 1240, 1249 (AEP attempted to have its corporate representative testify that CGI had been “found” to be at fault *by AEP* during AEP's own sham investigation. The testimony was excluded as rank hearsay).

As a result of AEP's conscious disregard for the life of Lewis Timmons, who lived with his son Brian and grandson Austin, he lost his life, his retirement years, and everything else he

⁴ The Circuit Court would later *exclude* the evidence of the OSHA citations on the grounds that OSHA citations are “irrelevant and inadmissible” in contravention of *Coleman Estate v. RM Logging*, 222 W.Va. 357, 360, 664 S.E.2d 698, 701 (2008) and *Coleman Estate ex rel. Coleman v. R.M. Logging, Inc.*, 226 W. Va. 199, 204, 700 S.E.2d 168, 173 (2010) as well as *Ryan v. Clonch Indus., Inc.*, 219 W. Va. 664, 674, 639 S.E.2d 756, 766 (2006); *cf.* Record at 14. (Order holding in advance of trial that OSHA citations are “not relevant and not admissible”).

⁵ See e.g. Power, “Lessons Learned from a Hydrogen Explosion,” in which an AEP safety manager ignores AEP's violations in an effort to case blame on CGI. http://www.powermag.com/o_and_m/Lessons-Learned-from-a-Hydrogen-Explosion_1857.html

had on January 8th, 2007. His brothers and sister, his three sons, and several grandchildren lost a devoted father, brother, and grandfather who played an important role in the life of his family in Tyler County, West Virginia. R. 498-502. His unnecessary and foreseeable death left a hole in the lives of these West Virginians that cried out for justice.

The jury delivered just that and its verdict should stand.

B. PROCEDURAL HISTORY

Lewis Timmons' son Brian, a correctional officer at the Salem Industrial Home for Youth and the Administrator of his father's estate, filed suit against AEP and CGI, the parties who appeared to be responsible at the time, in May of 2008. Investigation had revealed many of the deficiencies in the Muskingum River system, but crucial pieces of extremely damning evidence, including the Kammer Safety Incident Brief, the Beller Memo, and the Caten Memo had not yet emerged, as AEP was concealing those facts with its publicity campaign. *See supra*, note 5, R. at 1112, 599 and 594. AEP made those shocking documents no part of its own internal investigation, or its safety briefings.

Notwithstanding the evidence in its possession, its confession to the applicable OSHA violations and its promises to fix the system, AEP denied any responsibility whatsoever for the consequences of its misconduct. Supplemental R. at 2143-2259; 2260-2300. OSHA had found more than just copious violations of safety standards by AEP, it also found "0% good faith" on the part of AEP's safety program and "Incomplete, ineffective or no existing safety and health program. Specifically, in the area of hydrogen safety" as well as "Serious, Repeat or Willful Violations . . . related to an accident." Record at 0444. In fact, AEP was much more interested in extracting payments from CGI and other companies for damage to its plant than addressing the injury and wrongful death claims. This has been a consistent strategy of the company across a

range of injuries and wrongful deaths it has caused. *See e.g.* Brief for Respondents in Case No. 11-1512 (relating AEP's efforts to pin the wrongful death it caused in that case on a subcontractor through serious litigation misconduct). AEP had sole possession of the key evidence and testimony that would later condemn it at trial, and knew the full extent of its responsibility for what had occurred. Plaintiff, CGI and two other Defendants, Western Supply and Matrix Metals (a manufacturer and distributor of components of the hydrogen system), were comparatively left in the dark.

Extensive discovery and motion practice took place pre-trial. Also prior to trial, Petitioner resolved his claims against Mr. Timmons' employer, CGI, in a good faith settlement. CGI had warned AEP about the danger of the system and therefore had potential liability to its employee, Timmons, for exposing him to the danger. AEP had also made cross-claims against CGI, as well as independent lawsuits in other state and federal courts and cross claims against a manufacturer and a distributor of various components of its hydrogen system. Those claims were also settled before the trial in this case.

In October of 2010, after extensive procedural wrangling about which of AEP's numerous corporate entities was a proper party, a motion to amend the Complaint was granted bringing American Electric Power Service Corporation into the case, essentially in lieu of AEP, Inc. AEP had contended that AEPSC employs actual safety personnel and corporate management who acted or failed to act on the hydrogen systems, whereas AEP, Inc. simply holds money for the other AEP entities and employs no one. All AEP entities were represented by the same lawyers throughout – first Ed Smallwood and Michael Leahy at Swartz Campbell, then later by Brian Swiger and Michael Leahy of Jackson & Kelly.

After the amended complaint was permitted, discovery continued, including dozens of depositions, extensive document discovery and corporate representative depositions – including one for AEPSC. AEPSC *never asked the trial court for additional time* to do anything to prepare for trial, or indicated it was unfairly prejudiced as a result of “coming into the case late.” R. at 2137-42. Its lawyers and employees and AEP’s in-house legal department all remained the same as those representing the other AEP defendants throughout. In fact, the issue of the amended complaint simply disappeared until it came out of the grab-bag from which AEP’s assignments of error emerged.

As mentioned above, the trial judge ultimately excluded the comprehensive OSHA citations and AEP’s confessions from evidence at trial. Essentially, the trial judge allowed AEP to attempt to have it both ways, agreeing to one set of facts with OSHA, while pushing another angle in the Circuit Court. R. at 1217. The Court also denied *res judicata* effect to a jury verdict handed down in Ohio finding that Ohio Power Company had intentionally caused the explosion. Petitioners’ stratagem to deny what it knew to be true put the Plaintiff to hideous and unnecessary expense in litigating the case (R. at 28-31), since the facts themselves, the OSHA citations, and the prior trial all established AEP’s liability beyond a shadow of a doubt.

1. Trial Proceedings

At trial, the Circuit Court further handicapped the Plaintiff’s case in several respects. The Circuit Court excluded crucial evidence, such as the OSHA citations, that demonstrated not only AEP’s culpability, but also its mendacity in denying liability. R. at 844-853. The Circuit Court also applied Ohio’s burden of proof in respect to punitive damages – a burden of clear and convincing evidence as to both the fact and the amount of damages. Supplemental R. at 2301. Mr. Timmons’ strong case nonetheless survived the enhanced burden and earned the verdict.

Cause of Mr. Timmons death was not an issue at trial and was admitted. It was admitted in numerous pretrial pleadings and in opening statement. Record at 1026, 1028, 1030, 1032, 1034, 1036, 1038, 1040 (As an example AEP stated: “*no party has denied the fact that Lewis Timmons was killed as a result of the hydrogen explosion*”), 1041, 1042, 1043, 1044, 1046, and 1048. Cause of death was admitted by AEP under oath in open court before the jury, through Defendants’ corporate representative. Record at 1048. Plaintiff presented testimony, without objection, from his expert that Mr. Timmons was killed by the explosion. Record at 2090. The fact, insisted on by AEP, that the explosion caused Mr. Timmons “immediate death,” was critical to their motion for summary judgment seeking to exclude survivorship damages for pre-death pain and suffering. Record at 698. AEP sought to exclude autopsy photos on the basis that cause of death was undisputed. *But see generally*, Coroner’s Repor, Record at 487-497. Finally, Petitioners admitted it in their brief before this Court for good measure. Petitioners’ Brief at 3.

Nonetheless, despite the undisputable fact that this explosion killed Mr. Timmons, the copious evidence presented, the repeated admissions of that obvious fact, the long-standing legal principle that a jury verdict will not be disturbed where substantial justice has been done, AEP comes before this Court asking it to find that the jury was wrong to say Mr. Timmons was killed in this explosion. The same year this case went to trial in Marshall County, AEP earned substantial sanctions for serious litigation misconduct in another Marshall County case (now being considered by this Court). It is evident that those sanctions did not chasten AEP’s urge to abuse court processes. *See generally* Brief for Respondents in Case No. 11-1512.

The jury’s categorical rejection of AEP’s case is not the only illustration of its empty, baseless and downright malicious behavior. For example, AEP’s attorney failed to *even deny liability as to Ohio Power Company* in his opening statement, leading to a hotly-contested

motion for directed verdict at that stage. Supplemental R. at 2303. Moreover, AEP, despite a massive expenditure of time and money preparing an expert, failed to call an expert on the liability issues surrounding the hydrogen system, despite having prepared and identified an expert.⁶ In closing, *AEP could not even bear to ask the jury to find in favor of Ohio Power Company*. R. at 1346. Finally, during AEP's own case, Kenneth McCollough, an AEP safety manager, testified frankly that safety advice from his department was *not followed for financial reasons*. R. at 1925.⁷

During trial, AEP attempted to introduce expert testimony that had never been disclosed pretrial through its metallurgist, Aaron Jones. An objection to the undisclosed nature of the testimony was sustained by the trial court. AEP gave up on the issue and *never proffered the testimony orally or in writing, by counsel or through the witness*. Accordingly, it is still undisclosed and there is no record support for AEP's contention that it has been prejudiced. Predictably, AEP cites to no proffer and explains no prejudice. Petitioner's Brief at 25-26.

The jury accordingly found AEP 100% negligent in causing the death of Lewis Timmons. The jury further determined, by clear and convincing evidence, that the negligence of AEP was so aggravated and egregious that punitive damages were appropriate. R. at 1194-1202. AEP's effort to blame CGI was categorically rejected as CGI was found 0% negligent. *Id.* The survivors of Lewis Timmons were awarded a total of \$1,975,000.00 in wrongful death damages. The jury also specifically found that the Plaintiff should recover his attorney's fees. *Id.*

⁶ Instead, American Electric Power hired only a metallurgist to testify to a bizarre and unsupportable theory of causation that went nowhere and which they do not press on appeal.

⁷ For reasons of space and because the point is made, further record citations regarding the clear guilt of Petitioners are omitted. However, if any doubt remains, Mr. Timmons refers the Court to the testimony of Dennis Kovach, a one-time 30(b) representative of Service Corporation who capitulated virtually without equivocation on all liability issues in the case. Kovach at R. 1926-1951 (testimony substantially conceding all liability issues).

The case proceeded to a punitive phase. AEP's arguments during the punitive phase are relevant for how they undermine AEP's own argument that Ohio law should apply to any part of this case. During the punitive phase, AEP was eager to *stress its connection to West Virginia* in order to intimidate the jury with an argument about job losses, plant closures, and environmental legislation. Counsel asked an AEP accountant the following questions:

Q. And is it your testimony that the commitments and contingencies regarding the environmental portion of that 10-K are 1 point 5 to 2 billion dollars?

A. That was in the 10-Q.

Q. 10-Q. Okay. And what plants does Ohio Power Company have an ownership in in the State of West Virginia?

20 A. I know that they have ownership in Kammer, the Muskingum River. I don't know all of the -- some that are wholly owned, but I don't know that off the top of my head right now.

Q. Do you know whether they have an ownership or interest in the Sporn Plant?

A. Yes, they do.

Q. Do you know whether they have an ownership or interest in the Kammer Plant?

A. Yes.

Q. Is Ohio Power Company evaluating the feasibility of keeping any plants that it currently owns operational beyond 2014?

A. All plants are being evaluated in regards to current and proposed environmental legislation.

....

Q. Okay. As it stands today are certain units at the Kammer Plant scheduled to close as of 2014?

A. Yes. And that's disclosed in the second quarter 10-K as well as, I believe, the 10-K.

Q. As of today, are there certain units at the Sporn Plant in New Haven, West Virginia, that are scheduled to close as of 2014?

A. The exact -- they are all under evaluation. I cannot speak specifically to that exact date. Every plant is under evaluation.

Q. Okay. The 1 point 5 to 2 billion dollars that you mentioned, does Ohio Power Company have the cash on hand right now to make those expenditures if it deems necessary?

A. Ohio Power Company would have to go out and borrow in order to make those improvements.

Q. Okay. And their ability to borrow is that -- as you indicated earlier, partially based on their financial well-being?

A. Which impacts their credit rating, and their ability -- and how much their cost is to borrow.

R. at 1423 (emphasis supplied). This testimony specifically emphasized AEP's extensive contacts with West Virginia, albeit for the nefarious purpose of terrorizing the jury about plant closures. Behind the scenes of course, AEP was demanding that it be judged only by Ohio law, wherever Ohio law was more favorable to it and by West Virginia law where West Virginia was more favorable to it. *Cf.* Petitioner's Brief at 15-18 with Petitioner's Brief at 26-29. AEP continues this effort in this appeal.

The Circuit Court permitted AEP's appeal to local fear and prejudice over potential job losses in West Virginia over Plaintiff's objection. This doubtless suppressed the magnitude of the verdict, as few issues are more sensitive than jobs in this economy. But Brian Timmons prevailed before the jury nonetheless.

2. Post-trial Proceedings

After trial, the Petitioners made no motion under Rule 59(b) seeking a new trial. The only post trial Rule 50 motion by AEP concerned the issue of cause of death. Accordingly, all other alleged errors that could have been used in support of a new trial motion are abandoned. *Miller v. Triplett*, 203 W.Va. 351 (1998), Syl. Pt 3.

The judgment, after the reduction of the punitive damages, was supplemented with appropriate interest and an award of attorney's fees, after full litigation of those issues, including the availability of discovery on the issues as well as full briefing and evidentiary hearing. *See generally*, Record at 1641-1889. In respect to the attorney fee issue, AEP *specifically abandoned* any challenge to the appropriateness of the hours worked by the Plaintiff's attorneys in the case. Record at 1806-07. Contrary to the position it takes now, AEP *directly conceded to the trial court judge* that he had discretion to award fees in this case: "[THE COURT]: It's discretionary. It's in the discretion of the Court whether it will or will not award attorneys' fees, correct? MR.

LEAHEY; That's correct, Your Honor." Record at 1814.

At the hearing on the amount of fees, even AEP's supposed expert conceded that all of the claimed hours and expenses ultimately awarded by the Court were necessary for the prosecution of the *Timmons* case. R. at 1796-97, 1758-60.⁸ AEP's sole attack on the fee application at the trial court level was to call an unqualified expert with a store-bought credential to issue opinions he could not substantiate on topics about which he knew nothing. R. at 1754-65, 1798-1800. The fee application was, by contrast, supported by detailed documentation in Mr. Timmons' Petition for Fees and its Supplement, and by comprehensive testimony from the managing partner of the lead law firm for Plaintiff. Record at 552-684, 372-376, 1643-1746. Remarkably, AEP makes no citations to the factual record on the attorney fee issue at all – its entire treatment of the issue consists of unsubstantiated commentary and assertion by counsel, totally untethered to the evidentiary record. Petitioner's Brief at 12 and 29-32. AEP's presentation below was no more credible, but having admitted that the trial court had discretion to award fees, one might expect AEP to identify something specific it challenged about the decision below, or to point to record support for its position, but AEP is content to generically allege error.

After trial the Circuit Court opened discovery on pre-judgment interest, which, under the Ohio law the Circuit court deemed applicable, is available upon a finding that the defendant failed to make good faith efforts to settle the case. Detailed evidence was submitted and made of record in advance of the pre-judgment interest hearing, establishing the negotiation history of the

⁸ As the trial court succinctly put it:

the Court FINDS that all of the expenses claimed by Plaintiff herein were both reasonable and necessary to the successful prosecution of the instant civil action. To the extent that any expenditure of the subject monies may have also inured to the benefit in *McLaughlin* is of no moment in deciding Plaintiff's petition.

Record at 0030.

case and the undisputed facts that AEP never offered more than \$550,000.00 to settle this egregious case of wrongful death that predictably resulted in a verdict of approximately \$7,000,000.00, attorney's fees of over \$1,600,000.00, expenses of over \$400,000.00 and interest totaling several additional hundreds of thousands of dollars. Record at 427-525. AEP was afforded the opportunity to submit evidence before and after the evidentiary hearing and submitted nothing to which it points to undermine the Circuit court's discretionary decision to award prejudgment interest. *See* Record at 427-525.

AEP also moved to offset the compensatory award by the pre-trial settlement obtained by Plaintiff (in the hopes of paying *nothing* for what it had done), a motion the Circuit Court denied on Ohio law grounds, while the Plaintiff contended the offset should be denied under West Virginia law or Ohio law. The trial court explained that under clear Supreme Court of Ohio law, where a pre-trial settlement is reached with a litigant who is found at trial to have no liability, no offset or credit is permitted to the actual tortfeasors. Under West Virginia law the issue is more complex, but the trial court did not reach that issue since AEP had demanded Ohio law all along.

Following the entry of a final order in Circuit Court, this appeal was filed by AEP. In its appeal, AEP seeks an opinion that dances it through a game of legal musical chairs. AEP asks that the music stop on Ohio law, and then West Virginia law, and then back again, whenever it spots a rule that might lead to its escape from any penalty for causing Lewis Timmons' wrongful death with actual malice. Along the way, AEP finds no time to address the factual record below, citing almost exclusively to its briefs and attorneys' argument, while ignoring the testimony, exhibits, and orders of the circuit court – in short, the Record. For the reasons set forth below, Brian Timmons asks that each of AEP's assignments of error be REJECTED.

V. SUMMARY OF THE ARGUMENT

Assignment No. 1: *Wellman*

With respect to Petitioner's *Wellman* motions, they were all properly denied for multiple reasons. First, AEP failed to put on evidence sufficient to even trigger *Wellman*, which deals with injuries caused by the work of an independent contractor. AEP cites to nothing in the record establishing that the explosion occurred as a result of Mr. Timmons' work and indeed, there is nothing there. Moreover, the *Wellman* case is subject to specific exceptions, including one that states that where the property owner controls the instrumentality of the harm, as was clearly the case here, the property owner remains liable.

Beyond this, the jury's ultimate conclusion that AEP's conduct was the sole cause of Mr. Timmons' death, and that CGI was guilty of no negligence at all, fatally undermines the idea that *Wellman* could help AEP. Finally, since AEP does not challenge the jury's conclusion that AEP caused this death maliciously and with conscious disregard for Mr. Timmons' life, it bears an insurmountable burden, in that, if somehow AEP could convince this Court that, in Ohio, a company can kill a West Virginian with actual malice and simply walk away without liability under *Wellman*, such law would be anathema to myriad important public policies of the state of West Virginia, such that *Wellman* would not be applied in our courts under the rule of *Mills v. Quality Trucking*.

Assignment No. 2: Amended Complaint

AEP's assignment of error regarding the amended complaint holds no water whatsoever, since AEP was not in the least prejudiced by the substitution of a different corporate entity and AEP identifies no prejudice in its brief. AEP points to the scheduling order and states that

discovery closed, but evasively fails to mention that discovery continued on both sides well after the deadline, including key discovery that AEPSC participated in, *such as its own corporate deposition*. AEP never asked the trial court for any additional time to do discovery, make motions or prepare for trial because it was represented by the same lawyers defending the same corporate coffers on the same facts as before the amendment.

Assignment No. 3: Cause of Death

AEP aggressively abuses this Court's time and resources by raising a cause of death issue. The explosion killed Mr. Timmons beyond a shadow of a doubt, likely instantly. AEP specifically capitalized on that fact pre-trial, seeking to exclude autopsy photos as irrelevant and to eliminate any claim for pre-death pain and suffering on account of instant death. AEP admitted to cause of death in countless pleadings. Moreover, the jury heard evidence, without objection, from Plaintiff's engineer and an admission from AEP's own corporate representative that the explosion killed Mr. Timmons.

Assignment No. 4: Undisclosed Opinion

AEP's effort to introduce a completely undisclosed opinion during its expert's testimony was properly rebuffed by the trial judge. As a threshold issue, AEP never bothered to proffer the opinion, whatever it was, and it remains unknown, making any analysis of prejudice impossible, even if it was somehow error to exclude it. But there is no such error. AEP's expert disclosed three opinions prior to trial that were the subject of intense motion *in limine* scrutiny. Then, without any prior notice, AEP attempted to bring out a new opinion at trial. There was obviously ample time to disclose or at least proffer the opinion - whatever it was - but AEP never did. The trial court therefore ruled properly.

Assignment No. 5: Set Off

The issue of set off is a simple “sauce-for-the-goose” situation. AEP repeatedly insisted that Ohio law govern the case, over Plaintiff’s objections. When AEP suddenly realized that Ohio’s set-off law was less favorable than that of West Virginia, it decided that *this one particular issue* should be decided under West Virginia law. Given the trial court’s decision to apply Ohio law across the board at AEP’s behest, it was certainly correct to deny the set-off, which is not available under Ohio law when the settling defendant is found not liable at trial. This Court should find that AEP made its bed on the set off issue and must lie in it.

However, the trial court’s decision to apply Ohio law across the board may not be a given, as that decision was incorrect. *See* Brief of Petitioner in Case No. 12-0968. Should this Court so find in case 12-0968, it would not be required to, but may elect to consider a novel question of set-off law for West Virginia, namely: when a settling defendant pays settlements to both the plaintiff and the defendant, and is subsequently found to have no liability at trial, who should receive the *inevitable* windfall that results? AEP claims the wrongdoer should effectively receive *all* the money paid by CGI – keeping what it received and getting a set-off for what Mr. Timmons received. Mr. Timmons’ suggestion is that, in that limited scenario, where there must be a windfall (since CGI was found to be without fault), the windfall should go to the victim and not the wrongdoer.

Assignment No. 6: Attorney’s Fees

Since AEP acted with conscious disregard for Mr. Timmons’ life and actual malice, the decision of the jury, and the judge, that attorney’s fees should be awarded should stand. Both Ohio and West Virginia law provide for attorney’s fees to be available in such cases and the egregious conduct of the Petitioners fully justified that relief. Moreover, AEP challenges aspects

of the attorney fee award in its brief despite having specifically waived those issues at the trial court level and those challenges should be rejected as well. However, as set forth in Respondent's Cross-Assignment of Error, the 1.25 multiplier selected by the trial court was too low, and this Court should increase it in view of the *Pitrolo* factors. In addition, the Court should allow the hourly rates originally requested by Petitioner, which were well within the appropriate range and should not have been reduced by the trial court.

Assignment No. 7: Prejudgment Interest

AEP owes prejudgment interest under both West Virginia law and Ohio law. AEP never offered more than \$550,000.00 to settle a case the jury fixed at nearly \$7,000,000.00 and which, even after the incorrect striking of the punitive award, bears a judgment of over \$3,500,000.00. AEP's internal documentation showed it valued the case at several million dollars but it simply refused to make any seven-figure offers, seeking instead to be declared somehow immune from liability for its misconduct. AEP's offers failed to show good faith and AEP's undocumented ramblings about the negotiation history fail to shake the reasoned foundation of the Circuit Court's discretionary decision on the issue. Furthermore, under West Virginia law, interest would be automatic anyway.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Settled law is against AEP on all of its Assignments of Error making this case appropriate for Rule 19 argument. AEP is challenging primarily discretionary decisions of the circuit court that are also suitable for Rule 19 treatment. The only issue suitable for Rule 20 treatment is conditional and relates to what this position of this Court might make if it elects to apply West Virginia law to the setoff issue. As set forth in the argument below, the circumstances of this

case may call for an exception and/or modification of *Zando*. To the extent the Court considers that, as opposed to simply making AEP lie in the bed it chose in respect to the application of Ohio law, that sole issue would be appropriate for Rule 20 treatment.

In light of the overall complexity of the factual record and the magnitude of the case and its issues, Respondent submits that oral argument of the case is appropriate regardless of whether it is to receive Rule 19 or Rule 20 treatment.

VII. ARGUMENT

- 1. The Circuit Court correctly denied Petitioners' various "*Wellman*" motions since Petitioner failed to prove facts sufficient to create an issue under that case, even as Petitioner interpreted it; moreover, Ohio does not, as Petitioner claims, immunize those who maliciously cause wrongful deaths from liability under *Wellman* anyway. Other reasons of record also support the decision below.**

AEP's initial assignment of error prefigures its entire appellate strategy of avoiding the trial record and this Court's revised rules. AEP never cites to relevant testimony or facts of record in support of its asserted error, leaving the Respondent and the Court to guess at where AEP proved anything it asserts now on appeal.

Wellman v. East Ohio Gas, 113 N.E.2d 629 (Ohio 1953), explains that where a subcontractor causes an injury to its own employee, it cannot blame the premises owner if the premises owner did not control the work or the instrumentality of the harm.⁹ Assuming *Wellman* applies at all, AEP never proved any link between the explosion and Mr. Timmons' work – no witness testified that Mr. Timmons work in filling the hydrogen tanks caused or contributed to the explosion. Accordingly, AEP never proved sufficient facts to bring the case into *Wellman*

⁹ Before analyzing Petitioners' contention, it bears mentioning that only Ohio Power Company was the premises owner and therefore *Wellman* could not possibly help AEPSC. R. at 2075-76. AEPSC did not even file a *Wellman* summary judgment motion.

(and as shown below, even if the case came into *Wellman's* reach, exceptions would take it out).¹⁰ The suggestion that some general comments from other CGI employees established any knowledge of Mr. Timmons, much less anything about what caused the explosion in the first place fails completely to establish the elements of a *Wellman*-style defense. AEP expressly gave up on trying to connect the explosion to Mr. Timmons' work. Record at 2120-2121 and 2128.¹¹ Moreover, AEP's suggestion that some negligence of CGI in respect to the rupture disk's replacement at a remote time caused the explosion does not survive the jury's finding of zero percent negligence against CGI.

Furthermore, Brian Timmons established that AEP maintained control at all times over the instrumentality that caused the explosion – the hydrogen storage system – and went beyond that, showing that AEP specifically refused service contracts to repair and maintain the system. Record at 1242-46. The facts of record trigger a well-known exception to *Wellman* described in *Hirschbach v. Cincinnati Gas & Electric Co.*, 452 N.E.2d 326 (Ohio 1983) – the premises owner remains liable where it controls the instrumentality of harm. Here, AEP *always* controlled the instrumentality that caused the explosion – the hydrogen system - and AEP “refused to eliminate the hazard” by refusing the service contracts offered. *Id.* at 208; R. at *e.g.* 2050-51, 2075. The

¹⁰ *Wellman* detailed how extensively and obviously the fault lay with the subcontractor in that case and how clearly it was established that the subcontractor caused the problem:

There was testimony strongly indicating that the pipe fitter proceeded improperly in attempting to remove the cap in that he cut the iron rods strapping the cap before loosening the bolts to permit the escape of any gas which might have accumulated behind the cap. At the time of his injury, plaintiff was standing in the trench a short distance back of the pipe fitter and talking to other Fithian employees.

Id. at 631. No testimony linking Mr. Timmons' death to the work he was supposed to perform that day, as opposed to the grossly negligent design and maintenance of the system by AEP, caused the explosion.

¹¹ AEP attempts and then abandons its attempt to show Lewis Timmons caused the explosion.

retention of control over the hydrogen system is, as a matter of clear Ohio law, a form of “active participation through the exertion or retention of control of a critical variable in the working environment.” *Sopkovich v. Ohio Edison Co.*, 693 N.E.2d 233, 243 (1998). By refusing to move the hydrogen system out from under the roof, refusing to install adequate venting and make recommended repairs, AEP controlled the instrumentalities that caused the explosion.

Ohio Power Company admitted they had a duty to keep the hydrogen system in a safe condition and that it belonged to them at trial as well. The admission was made through the corporate representative at trial and therefore binds Ohio Power Company. Record at 2075-76. R. at 1983. A litigant cannot take one position in court and then change it later for convenience. *See generally, Riggs v. W. Virginia Univ. Hospitals, Inc.*, 221 W. Va. 646, 656 S.E.2d 91 (2007). Ohio Power Company cannot tell the jury it has these duties during trial to appear sensible and responsible at trial, and then on appeal suddenly state that, no, it has no duties after all.

Finally, given the egregious nature of AEP’s actions, if AEP could somehow convince this Court that *Wellman* immunized such conduct, the choice-of-law rules of *Paul v. National Life*, 177 W.Va. 427, 352 S.E.2d 550 (1986) and *Mills v. Quality Trucking*, 203 W.Va. 621, 510 S.E.2d 280 (1998), would be triggered. Nothing would be more contrary to “pure morals or abstract justice” than allowing a company that caused a wrongful death with actual malice (AEP) to escape liability in favor of placing responsibility on an entity (CGI) that was determined to be *not negligent at all*. Such an injustice would clearly be an “evil example” “harmful to [our] own people.” *Nadler v. Liberty Mutual*, 188 W.Va. 329, 338, 424 S.E.2d 256, 265 (1992).

- 2. The Circuit Court’s decision to allow an amended complaint was routine and in no way prejudicial to Petitioners, who seriously misled the Court in their Brief by failing to disclose that extensive discovery took place *after* the amended complaint was filed and that no request was ever made by Petitioners for relief from any deadlines as a result of the amendment.**

Longstanding law in West Virginia holds that amendments to pleadings should be liberally permitted when justice requires. In this case, the byzantine corporate structure of American Electric Power's various entities resulted in a routine amendment to clarify which subdivisions of the larger company were most directly involved in the events that killed Lewis Timmons. No prejudice to the defense of the case resulted and none was identified by AEP in its brief.

The applicable law states that:

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.

Syllabus Point 3, *Rosier v. Garron, Inc.*, 156 W.Va. 861, 199 S.E.2d 50 (1973); *see also Brooks v. Isinghood*, 213 W. Va. 675, 679, 584 S.E.2d 531, 535 (2003); *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, 216 W. Va. 656, 658, 609 S.E.2d 917, 919 (2004). AEPSC received ample opportunity to prepare its case, participated in discovery through the same law firm and never asked for any continuances or other relief as a result of the timing of the amended complaint. R. at 2136-42. AEPSC did not seek extraordinary relief, as it was evident the intimate relationship between it and AEP, Inc., and the remaining time before trial would result in no prejudice being possible, much less provable. Record at 1954-55, 2005-2016, 2029-2032, 2043-49.

AEPSC suggests the depositions of some witnesses occurred when AEPSC was not a party to the case, but it did not seek to re-depose anyone, nor make use of any errata process to correct unwitting errors because none existed. Furthermore, as the safety department of AEP, AEPSC was fully conscious of its involvement in the matter as it was the source of many

documents produced in the case even before it became a party officially. AEPSC's designated Dennis Kovach to be AEPSC's corporate representative and he testified about his investigation into the explosion pre-suit, making any claim of unfair surprise to AEPSC unsupportable. AEPSC made no request to disclose additional experts, as a result of the amendment or if it did, it withdrew the request without seeking a ruling.

Finally, AEPSC is a wholly-owned subsidiary of AEP, Inc. and a sister company to Ohio Power Company. AEPSC not only provides safety consultations throughout the AEP system, it employs the corporate leadership of AEP, Inc., itself. In other words, AEPSC and AEP, Inc., are simply two aspects of the same company, with AEP, Inc., holding the money, while AEPSC employs the people who do the work, or not, as the case may be. In any event, the amendment was technical in nature and AEPSC fails to show anything that would have gone differently had it not been allowed.

3. Cause of death in the case was undisputed in the case and remains undisputed, per Petitioners' own brief at, e.g., page 3 ("Mr. Timmons died during the explosion"). Moreover, proof of this undisputed fact was introduced at multiple points during trial.

As detailed in the statement of facts above, AEP never disputed cause of death in the case. In fact, AEP expressly relied on its admission of cause of death in seeking the exclusion of certain evidence and certain elements of summary judgment. R. at 698 (asserting that the explosion caused Mr. Timmons "immediate death" such that no pain and suffering claim would succeed"). R. at 1040. AEP admitted it in its brief *before this court*. Petitioners Brief at 3. Copious other record citations exist for the admission of this obvious and undisputed fact. Record at 1026, 1028, 1030, 1032, 1034, 1036, 1038, 1040 (where AEP stated: "*no party has denied the fact that Lewis Timmons was killed as a result of the hydrogen explosion*"), 1041, 1042, 1043, 1044, 1046, and 1048.

AEP's corporate representative admitted the cause of the death on the stand and Mr. Timmons put on testimony to that effect as well, both pieces of testimony came in without objection or cross-examination. Record at 1048, 2090. A party cannot take one position in the trial court and then fabricate a new one for purposes of appeal to gain a tactical advantage. *Riggs, supra*. Accordingly, AEP's appeal on the cause of death issue should be rejected as lacking any legal basis and a transparent attempt to game the system and work a substantial injustice.

AEP's total failure to object to the testimony of Hehr and Newton is equally fatal to this assignment of error. A party must object to the introduction of evidence or waive any error based on its admission. *State v. Bragg*, 140 W.Va. 585, 87 S.E.2d 689 (1955) ("An error in the admission of evidence not objected to by the defendant is deemed waived by him"). AEP is attempting to challenge, for the first time on appeal, the competence of Mssrs. Hehr and Newton to testify as to cause of death, then have this Court retroactively exclude their testimony, and *then* declare the evidence "insufficient". But that is something AEP had to challenge at the time or forever hold its peace. Of course, in respect to its own corporate representative admitting to cause of death, AEP is stuck anyway, as there is no question that a party has a right to concede any issue and Mr. Hehr's competence as a physician is not the issue, it is enough that he testified on behalf of AEP in making the concession. R. at 1953 (Mr. Hehr called "as though on cross examination of the adverse party"), R. at 1983 (AEP counsel confirms Hehr represents defendants).

The reasons are plain – if this Court allows AEP's stratagem, every litigant could hold its evidentiary challenges to be heard in the first instance in this Court after it sees how the case comes out, choosing from the entire record instead of only those areas that were the subject of timely objections. The result would be chaotic, inefficient and make a game of appellate practice.

The existing rule of *Bragg* – that you have to make your objection at the time the evidence comes in or hold your peace, is a cornerstone of sound judicial administration. AEP’s assignment of error should be rejected.

4. The trial court properly excluded Petitioners’ undisclosed expert opinions during their examination of Aaron Jones and furthermore, never proffered the opinion into the record, meaning the opinion, whatever it was, is *still undisclosed*.

As set forth above, AEP never proffered the supposedly improperly excluded opinion of Aaron Jones. AEP likewise did not disclose it pre-trial and the law on this is very clear:

The discovery rules are based on the belief that each party is more likely to get a fair hearing when it knows beforehand what evidence the other party will present at trial. This allows for each party to respond to the other party's evidence, and it provides the jury with the best opportunity to hear and evaluate all of the relevant evidence, thus increasing the chances of a fair verdict.

Graham v. Wallace, 214 W. Va. 178, 185, 588 S.E.2d 167, 174 (2003). As the Court concluded in *Graham*: “we agree with Mr. Graham that he was unfairly surprised by Dr. Hutt's testimony, and that this testimony was irrelevant and prejudicial.” Mr. Timmons would still be surprised today by this opinion, since Mr. Jones has never uttered it to him or his counsel or written it in a disclosed report.

AEP cites only to a question it asked and brief colloquy on the objection from the Record. It fails to cite to any proffer of the testimony (there was none) and fails to even explain or describe what the testimony would have been or how it would have supposedly “cast doubt” on Plaintiff’s expert opinions. As the trial judge noted, AEP never asked Plaintiff’s expert about this subject when he was testifying, AEP preferred to use it as a matter of pure unfair surprise during its case-in-chief. It is impossible to even evaluate how whatever-it-was might have affected the trial except to say that given the total collapse of AEP’s position on every liability

issue, the opinion would have to have been a doozy. Accordingly, AEP has nothing to work with here and this assignment of error should be REJECTED.

5. The trial court's set-off decision is certainly correct under Ohio law which was applied in the case at Petitioners' insistence. Under West Virginia law, which would control had Petitioners not insisted otherwise, the issue is more complex, but the set-off was properly refused on the specific facts of this case.

AEP assigns error in respect to the set-off issue because, on this issue, Ohio law appears less favorable to it than West Virginia law. Having insisted on Ohio law throughout the case, AEP suddenly becomes interested in the public-policy exception under *Mills v. Quality Trucking*, but the interest exists for this issue only. Cf. AEP's Brief in Case No. 12-0968 at 6 ("the Circuit Court . . . correctly ordered that Ohio law was to apply to all areas of substantive law").

In Ohio, where a settling party goes on the verdict form and is found to have no liability, no credit is given for that settling party's pretrial payments. The Ohio Supreme Court has explained that a credit is only available where the settling party is determined to be "liable in tort":

Accordingly, we hold that former R.C. 2307.32(F) (now R.C. 2307.33[F]) entitles a defendant to set off from a judgment funds received by a plaintiff pursuant to a settlement agreement with a co-defendant where there is a determination that the settling co-defendant is a person "liable in tort." A person is "liable in tort" when he or she acted tortiously and thereby caused harm. The determination may be a jury finding, a judicial adjudication, stipulations of the parties, or the release language itself.

Fidelholtz v. Peller, 690 N.E.2d 502, 507 (1998). In this case, the jury expressly determined, after full litigation of the issue, that CGI was *not negligent at all* in causing Mr. Timmons' damages. CGI admitted no liability at the time it made its payment, and, as the Ohio Court noted, parties settle cases for many reasons other than their actual liability: "Defendants settle for many

reasons, such as the avoidance of bad publicity and litigation costs, the possibility of an adverse verdict, and the maintenance of favorable commercial relationships.” *Id.* at 505.

Ohio’s law on this subject amounts to a wrinkle in the law of set off that West Virginia has never addressed directly. Essentially, Ohio recognizes that when a settlement is paid by a party who is not liable at all, a windfall necessarily occurs. The question is where should it fall? Ohio has determined it should go to the victim, and not the wrongdoer:

The rationale underpinning these holdings is that where only one of several defendants was responsible for the injury, that defendant would have been obligated to pay the entire damage amount if the settling party had not settled. Thus, the former should not reap the benefit of a settlement by the latter.

Id. at 505-06. In other words, the choice is between an enhanced recovery for the victim, or an undeserved discount for the wrongdoer. In this case, where the settling defendant, CGI, is determined to be not at fault, no setoff is available under Ohio law. AEP, incredibly, claims that *Fieldholtz* has been overruled since 1999, a proposition for which it cannot cite even one opinion, in Ohio’s comparatively-massive appellate system, in nearly fifteen years.

Accordingly, AEP switches gears from its position in Case No. 12-0968, where this Court will observe AEP insisting that Ohio law governs this case, and claims that as to the set off issue only, West Virginia law governs. This sleight-of-hand is performed by stating that set off “relates to the remedy, not the right” and therefore forum law controls – citing a Restatement. Petitioner’s Brief at 27. But AEP fails to explain how caps on damages – which also pertain to the remedy, not the right, would not also be swept in under this logic – and it is caps on damages from Ohio that AEP demands this Court apply in Case No. 12-0968. AEP’s Brief in 12-0968 at 6-7. Expediency for AEP is the only logic.

AEP specifically demanded the application of Ohio law and therefore may not change its position now (AEP to the Circuit Court: “*this Court must apply the substantive laws of the state*

of Ohio whenever a conflict exists between the laws of West Virginia and Ohio.” Defendant’s Memorandum in Support of its Motion for Summary Judgment. R. at 687-688) and got its way.¹² Accordingly, it is not entitled to switch gears in the middle of the trial or on appeal when it suddenly discovers that the law it insisted on is not to its liking. *Riggs, supra*.

Syllabus Point 7 of *Board of Education of McDowell County v. Zando, Martin & Milstead, Inc.*, states West Virginia’s general rule that a pretrial settlement will be credited against the verdict. The language of *Zando* is unconditional, but if this Court does permit AEP to switch to West Virginia law on this point, Respondent submits that this Court should consider one of the following potential modifications to the rule of *Zando*, in order to advance the fairness of our system in cases like this one:

1. Where a settling tortfeasor is determined to have no liability at trial, the settlement paid constitutes a windfall that should go to the victim, rather than the tortfeasor who caused the injuries, *modifying Board of Education of McDowell County v. Zando*.
2. Where a settling tortfeasor is determined to have no liability at trial, the settlement paid will still be credited to the parties judged to be at fault, *unless those parties acted with actual malice*, in which case no set-off shall be made available to the party who has so acted, *modifying Board of Education of McDowell County v. Zando*.

The first rule would straightforwardly adopt Ohio’s system, whereby there must be a determination that the settling tortfeasor is at fault to allow the set-off. This rule promotes the purposes of the tort system by making sure that responsibility to pay verdicts falls where the jury places the actual responsibility and not elsewhere. The risk of enhanced recovery by victims is outweighed by the risk that wrongdoers will cause harm and escape responsibility.

¹² Mr. Timmons, by contrast, made it clear that where Ohio law might prevent his recovery for the wrong against him and his family, West Virginia law should apply under *Mills v. Quality Trucking*. R. at 0109-0110, specifically raising that point in writing when the trial court and AEP began utilizing Ohio law in this case.

The second rule is a more stringent version, in which this Court would hold that where a litigant is found liable for the worst category of civil wrong – a tort committed with actual malice – it shall not be eligible for a windfall credit from a settling party that is determined to have no liability. This rule essentially holds that the law will not come to the aid of an intentional and malicious wrongdoer where the law could choose instead to benefit the victim of such misconduct.

This case well-illustrates the need for such a rule. The jury determined that AEP was solely responsible for Mr. Timmons' death. Nonetheless, AEP, having collected millions itself from CGI in a pretrial settlement, now wants to receive the benefit of the smaller share of CGI's insurance policy that was paid over to Mr. Timmons' survivors. The result, if this Court allowed it, would be that AEP *profits from this litigation* – first by extracting a settlement from CGI (later determined to have no liability), then by receiving a credit from CGI's settlement with Mr. Timmons that wipes out its liability. To allow a litigant that caused the death of a West Virginian, with malice, to essentially make money on the litigation would be contrary to the principles of equity and fairness that underlie West Virginia's set-off law, more than justifying the modifications suggested above, if necessary.

Or this Court can simply choose to make AEP lie in the bed it made for itself and live with the Ohio law it demanded. R. at 687-688. Brief in 12-0968 at 6, 9. In either case, no set off should be permitted and this assignment of error should be rejected.

6. The trial court's decision to award attorney's fees is correct under Ohio and West Virginia law, in light of the malicious misconduct of the Petitioners.

It is black-letter law in Ohio that where the jury finds a defendant liable for punitive damages, it may also assess attorney's fees against that Defendant:

“It is an established principle of law in this state that punitive damages may be awarded in tort cases involving fraud, insult or malice. * * * ” *Columbus Finance v. Howard* (1975), 42 Ohio St.2d 178, 183, 327 N.E.2d 654 [71 O.O.2d 174]; *Roberts v. Mason* (1859), 10 Ohio St. 277; *Saberton v. Greenwald* (1946), 146 Ohio St. 414, 66 N.E.2d 224 [32 O.O. 454]. Where punitive damages are proper, the aggrieved party may also recover reasonable attorney fees as compensatory damages. *Columbus Finance v. Howard, supra*, 42 Ohio St.2d at 183, 327 N.E.2d 654; *Roberts v. Mason, supra*; *Peckham Iron Co. v. Harper* (1884), 41 Ohio St. 100, paragraph three of the syllabus; *Davis v. Tunison* (1959), 168 Ohio St. 471, 155 N.E.2d 904 [7 O.O.2d 296], paragraph three of the syllabus.

Davis v. Owen, 26 Ohio App. 3d 62, 63, 498 N.E.2d 202, 203 (1985); *see also Brookover v. Flexmag Indus., Inc.*, 2002 WL 1189156, 2002-Ohio 2404 at ¶ 223 (Ohio App. 4th Dist. 2002). (“A trial court may award attorney fees to a plaintiff who prevails on a claim for punitive damages.”). As this Court determined last year in *Quicken Loans, Inc. v. Brown*, -- W.Va. --, -- S.E.2d --, 2012 WL 5897495 (Nov. 21, 2012), the attorney’s fees are considered part of the compensatory award in Ohio as well. *Davis, supra*.

AEP first attempts to muddle the issue by describing the general “American Rule,” which is not applicable in this situation, per *Davis* and *Brookover*. Petitioner’s Brief at 30-31. It also relies heavily on West Virginia citations, forgetting that it *demande*d Ohio law, and *Riggs*, which disallows the tactic of jumping from one legal position to another during a litigation, as exigencies require.

It is difficult to respond to the balance of AEP’s argument because it is so completely underdeveloped. It consists of about two-and-a-half pages of attorney commentary with minimal citation to anything, and no citation at all to the extensive record from the hearing on attorney’s fees that the Circuit Court conducted. AEP asserts, without more, that there were no “compelling reasons” for the Circuit Court’s decisions, without addressing the maliciously caused death, or the jury’s specific finding that attorney’s fees should be awarded. It asserts, without more, that the Court failed to conduct an “independent investigation” into the issue, without mentioning that

Judge Hummel heard hours of testimony and reviewed hundreds of pages of briefs and exhibits in connection with the attorney fee hearing. R. at *e.g.* 1641-1815, 552-684, 372-75.

AEP simply disregards the new Appellate Rules, which call for “appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. The Court may disregard errors that are not adequately supported by specific references to the record on appeal.” W.Va.R.App.Pro. 10(c)(7). AEP makes a generic, un-sourced, unanalyzed, un-cited claim that Mr. Timmons’ attorney’s testimony regarding their work is “self-serving” and a bald assertion that the time claimed was “inflated” or “[un]explained.” The exhibits and testimony in fact explained these matters in detail, and it is illegitimate for AEP to send the Court and Mr. Timmons hunting through thousands of pages in the hope of discovering what AEP really means or is specifically objecting to – even AEP seems to admit it has nothing here, referring to one of its own objections as something that “potentially” occurred. Petitioner’s Brief at 32. AEP did admit that the trial Court had discretion to award fees. R. at 1814.

Accordingly this assignment of error should be rejected.

- 7. The trial court’s decision to award prejudgment interest is also correct under both Ohio and West Virginia law, in light of the Petitioners’ failure to make offers to settle remotely close to the value of the case (Ohio law) and because prejudgment interest would be automatic under West Virginia law.**

Prejudgment interest would be available essentially automatically under West Virginia law. *See generally, Grove By & Through Grove v. Myers*, 181 W. Va. 342, 382 S.E.2d 536 (1989). In this case, the trial court required Mr. Timmons to make a showing that AEP had not attempted to settle the case in good faith, a prerequisite to an award of prejudgment interest.

under Ohio law. *See Peyko v. Frederick*, 495 N.E.2d 918 (1986); *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331 (1994).

Mr. Timmons submitted numerous pages of briefing and substantial exhibits supporting his position. R. at 419-551, 1815-1828. An evidentiary hearing was held and the Court had direct knowledge of some of the negotiations from conducting a settlement conference personally. AEP's claim that the Court "did not accept any evidence" is bizarre. Petitioner's Brief at 34. The written exhibits were filed and made of record with the trial court in advance of the hearing pursuant to court process. They are in the Record before this Court. R. at 419-551, 1815-1828. There is no requirement that the evidence be testimonial in either West Virginia or Ohio law.¹³ AEP apparently believes where it doesn't bother to submit evidence, no evidentiary hearing can occur.

The record was clear that AEP never offered more than \$550,000.00 to settle the case during its entire history. R. 1821-23. This offer was made through the trial judge himself and both counsel included it as the only one discussed in the papers or at the hearing – there was no other offer. AEP scheduled an entire mediation at which it made no offer, after getting Mr. Timmons to travel from Tyler County to Charleston to be insulted. AEP's own counsel related his client's failure to make any offer. R. 1821. Interestingly, AEP does make some record citations in this portion of its Brief, but claims that Mr. Timmons walked out of mediation

¹³ Witnesses were called live at the hearing on other issues, and AEP had every opportunity to call anyone it wanted to make any record it wanted and failed to do so. The phenomenon of litigants failing to make any efforts or showings at a hearing, and then claiming on appeal that so little went on that it was not really a "hearing," is occurring with increasing frequency in West Virginia and AEP seems to be leaning on this strategy in more than one appeal. *See e.g.* Respondent's Brief in Case No. 11-1512 at e.g. 9-10, 15-16, 30-32 (AEP had a detailed hearing on discovery sanctions, with every opportunity to make its case, and did not, then claimed on appeal there was no hearing because facts were not established testimonially, but rather through documents and references to actions taking place before the Court itself).

without any citation to anything and Mr. Timmons did *not* walk out of any mediation before being told AEP had nothing further to say to him. In any event, AEP's version of the settlement proceedings is only supported by the record insofar as it agrees with the above and contains uncited assertions of fact – such as the claim that Mr. Timmons walked out – that should be disregarded as not of record.

Ultimately, the trial court concluded that AEP's settlement highest settlement offer, made only at the eve of trial, and representing a fraction of the judgment even with the punitive damages taken away, and a tiny fraction of the jury's award did not reflect a good faith effort to resolve the case. The trial court presided over the case and therefore acquainted itself extremely well with the facts and circumstances, including AEP's total lack of any credible defense to wrongful death of a wage earner. The decision to award prejudgment interest, on those facts, is well within the judge's discretion, again applying the Ohio law on which AEP insisted. *Peyko, supra, Moskovitz, supra.*

VIII. CROSS ASSIGNMENT OF ERROR

- 1. The trial court erred in awarding only a 1.25 multiplier in this case when Petitioner's request of 2.0 was well-substantiated under the law. Moreover, the trial court should not have reduced the Petitioner's requested rates, which were reasonable and proper.**

The trial court's attorney-fee order included two errors, one relating to the multiplier the trial court used and one relating to attorney rates it approved. The Petitioner requested a reasonable multiplier of 2.0 for this case in light of the extreme risk and expense involved in this type of contingent-fee case. This multiplier request rested on the expense risk of the case (nearly a half-million dollars advanced, together with thousands of hours of attorney time) and the risk of loss in a disputed-liability wrongful death case involve technical and scientific evidence.

These circumstances were carefully made of record by Mr. Timmons, through a detailed Petition for Attorney's Fees, together with its supplements. R. at 552-684 and 372-75. Petitioner also put on lengthy and detailed testimony regarding the factors under both the Ohio law, which tracks the disciplinary rules and West Virginia's *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986). R. at 1641-1815. The testimony established that this type of litigation was extremely risky when undertaken on a contingent fee basis and that the counsel Mr. Timmons retained performed with a high degree of skill. The tremendous amount of time, money and technical expertise that had to be brought to bear to conduct depositions across the country, make numerous visits to an engineering site where all the artifacts of the explosion were kept, perform scientific testing on metal fatigue and explosion issues and ultimately prevail in the case warranted an enhanced fee multiplier to properly compensate the risks.

The trial court agreed, but limited the multiplier to 1.25, instead of the reasonable 2.0 multiplier that was requested. Mr. Timmons submits that in light of the extraordinary contentiousness of the litigation – even now, AEP concedes it killed Lewis Timmons with malice, but seeks to pay nothing, via its positions in this appeal, and Brian Timmons' appeal – a 2.0 multiplier is the minimum necessary to fairly compensate the risks his counsel took in prosecuting the case, as well as the other related factors in connection with the results obtained and skill necessary to handle a five-year litigation of this magnitude. *See e.g. Faieta v. World Harvest Church*, 891 N.E.2d 370, 413, affirmed, 2008-Ohio3140 (2008). In *Faieta*, the court observed that in contingent fee cases, “the lawyer takes on a large part of the financial risk of a case because if the case is resolved against the client, the lawyer will not receive any compensation for his or her work on the case” and that where a litigant faces sharply-disputed liability and risk of losing the case and complex issues and a defendant capable of hiring the

most competent defense counsel, a multiplier of 2.0 is appropriate. *Id.* (In *Faieta*, the plaintiffs actually sought a 3.0 multiplier but the Court awarded 2.0 for the reasons stated). Accordingly, Mr. Timmons submits that this case's exceeding difficulty and contentiousness, the risk of loss, the enormous expenses advanced and the power of his adversary to fight "til the last dog dies" warranted at least the 2.0 multiplier he requests and he asks that this Court Order that that figure be used.

In addition, the trial court reduced, without explanation, the reasonable hourly rate schedule sought by Mr. Timmons, at a rate of \$400 per hour for each attorney involved, except for James G. Bordas, Jr. whose rate was \$425 per hour. Extensive evidence supported these figures. R. at 1697-1704, 611-667, 560-566 (testimony of Bordas & Bordas' managing partner in regard to the previous approval of these rates in other cases at earlier times than this one, detailed affidavits regarding time invested, and briefing and testimony on the reputation and prior accomplishments of counsel in addition to the risks of this type of case).

The trial court, without explanation, "docked" these rates for various attorneys by various amounts without explanation – sometimes in very unexpected fashions, such as reducing the rate for Rodney Windom, an attorney of some thirty-years experience and standing, to a rate commensurate with associate attorneys. Seven years earlier, several of the attorneys were approved for rates approaching \$400 in *Boggs v. Camden-Clark Memorial Hospital*, in a 2006 Order, made of record, that survived aggressive efforts at reversal in this Court. R. at 678-680. Since that time, not only inflation, but the growth in the skill, experience and reputation of the attorneys involved well-warranted the increase in rates sought in this case in 2012. Mr. Timmons submits that the original rate of \$400 for the "docked" attorneys was reasonable for the work in this case and the ultimate fee award should be based on those figures and not the reduced

amounts. Justices of this Court have observed that even higher fees of as much as \$500, are not per se unreasonable.¹⁴

IX. CONCLUSION

WHEREFORE, Respondent respectfully requests that the Petitioner's Assignments of Error be REJECTED and the pertinent decisions of the trial court be AFFIRMED. In respect to his Cross-Assignment of Error, Respondent asks that this Court direct the Circuit Court to recalculate the fee award using Respondent's reasonable requested rates and a fair multiplier of 2.0 for the risk involved in this matter.

Very Respectfully submitted,

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¹⁴ In light of the facts of the case *sub judice* and the egregiousness of Jean K.'s conduct, the attorney's fees requested by Michael T., which range from \$165 to \$250 per hour are not, *per se*, unreasonable. See *Horkulic v. Galloway*, 222 W.Va. 450, 466, 665 S.E.2d 284, 300 (2008) (Davis, J., concurring) (observing that attorney's fees of \$500 per hour were not *per se* unreasonable). *In re John T.*, 225 W. Va. 638, 648, 695 S.E.2d 868, 878 (2010).

CERTIFICATE OF SERVICE

Service of the foregoing ***BRIEF OF THE RESPONDENT and SUPPLEMENTAL APPENDIX*** was had upon the Petitioners herein by mailing a true and correct copy thereof, by Federal Express, postage prepaid, this 20th day of February, 2013, to the following:

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