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JAN 09 2008  
BRENDA DAVIS  
CLERK CIRCUIT COURT  
MERCER COUNTY

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

PRINCETON INSURANCE AGENCY, INC.  
and KEVIN WEBB,

PLAINTIFFS,

VS.

ERIE INSURANCE COMPANY,  
ERIE INSURANCE PROPERTY  
AND CASUALTY COMPANY,  
ERIE FAMILY LIFE INSURANCE  
COMPANY, ERIE INSURANCE  
EXCHANGE, ERIE INDEMNITY  
COMPANY, CHARLES MICHAEL  
FLETCHER, and CARL OLIAN, II

CIVIL ACTION NO. 04-C-784-E

FILED  
MAY 27 2008  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

DEFENDANTS.

ORDER

On November 26, 2007, came the plaintiffs and their counsel, and came the defendants and their counsel, to argue the defendants' motion for a judgment as a matter of law or alternatively for a new trial, and to present the plaintiffs' motion for attorney's fees, filing fees, and costs of litigation. The Judgment Order accepting the jury's verdict, trebling the compensatory damages, vacating the punitive damages, and awarding interest was entered on October 26, 2007. After consideration of the pending motions, the memorandum of counsel for the parties, the evidence presented to the jury, and the argument of counsel, the Court renders the following decision.

STANDARD OF REVIEW

Upon considering a Motion for Judgment Notwithstanding the Verdict, or as it is called in Rule 50 of the West Virginia Rules of Civil Procedure, Judgment as a Matter of Law, a trial court may not enter (judgment as a matter of law) unless the court determines that the evidence is clearly insufficient to support the verdict reached by a jury in a civil case.

Gonzalez v. Conley, 199 W.Va. 288, 484 S.E.2d 171 (1997); Syl. pt. 5, Orr v. Crowder, 173

W.Va. 335, 315 S.E.2d 593 (1983), *cert. denied*, 469 U.S. 981, 105 S.Ct. 384, 83 L.Ed.2d 319 (1984); Pipemasters, Inc. v. Putnam County Commission, 218 W.Va. 512, 518, 625 S.E.2d 274, 280 (2005).

When considering a Motion for a New Trial, the court should do the following when determining whether there is sufficient evidence to support a jury verdict:

- (1) consider the evidence most favorable to the prevailing party;
- (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and
- (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved. Gonzalez, supra; Pipemasters, supra.

Unlike a Motion for a Judgment as a Matter of Law, when the Court vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. Pipemasters, supra. The Court may set aside a jury verdict even if it is supported by substantial evidence if the Court determines the verdict was against the clear weight of the evidence, was based on false evidence<sup>1</sup>, or would result in a miscarriage of justice. Id.

### DISCUSSION

The legal basis for the plaintiffs' claims arises under two statutory schemes in West Virginia. Focusing first upon the insurance code, the West Virginia legislature defines the following as an unfair method of competition and unfair or deceptive acts or practices in the business of insurance:

“(4) *boycott, coercion, and intimidation*.—No person shall enter into any agreement to commit, or by any concerted action commit, any act of boycott, coercion, or intimidation resulting in or tending

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<sup>1</sup> The Plaintiff does not allege or argue that the verdict was based on false evidence.

to result in unreasonable restraint of, or monopoly in, the business of insurance.”

West Virginia Code 33-11-4(4).

Of course, the legislature further established that no person, including but not limited to the defendants, shall engage in West Virginia in any trade practice which is defined as an unfair method of competition or an unfair deceptive act or practice in the business of insurance. West Virginia Code 33-11-3. The Plaintiffs have previously established that the West Virginia Supreme Court has consistently permitted a private cause of action for those acts defined as unfair methods of competition or deceptive or unfair acts in the business of insurance, although the West Virginia legislature did, by statute, abolish “third party claims” for unfair claims settlement practices as defined in West Virginia Code 33-11-4(9).

The West Virginia Supreme Court of Appeals, in a decision authored by Justice Maynard, held that the Unfair Trade Practices Act prohibits any “person” from engaging in an unfair method of competition or an unfair and deceptive act or practice in the business of insurance; the act also creates a “positive duty” independent of any contract, and thus a cause of action may maintained based on the violation of the statutory duty. Taylor v. Nationwide Mutual Insurance Company, 214 W.Va. 324, 589 S.E.2d 55 (W.Va. 2003). Whether the West Virginia Supreme Court would judicially adopt a private cause of action for a violation of West Virginia Code 33-11-4(4) is moot because the legislature has adopted a cause of action modeled after the federal Sherman Antitrust Act in 15 U.S.C. 1.

West Virginia enacted the “Antitrust Act; Restraint of Trade” in West Virginia Code 47-18-1 et. seq. Specifically, West Virginia Code 47-18-3 establishes unlawful contracts and combinations in restraint of trade to include, but not be limited to, the following:

(a) Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in this State shall be unlawful.

(b) Without limiting the effect of subsection (a) of this section, the following shall be deemed to restrain trade or commerce unreasonably and or unlawful:

\* \* \*

(1) A contract, combination or conspiracy between two or more persons:

\* \* \*

(C) allocating or dividing customers or markets, functional or geographic, for any commodity or service.”

\* \* \*

(3) A contract, combination or conspiracy between two or more persons refusing to deal with any other person or persons for the purpose of effecting any of the acts described in subdivisions (1) and (2) of this subsection.

The statutory prohibition against such conduct in the insurance code (West Virginia Code 33-11-4(4)) may also formulate the basis for an action under West Virginia Code 47-18-3 given that the latter prohibits all unlawful contracts, combinations and conspiracies in restraint of trade which would obviously include the former. The two statutes should certainly be read together and in *pari materia*.

West Virginia Code 47-18-9 permits a private cause of action for any person who is injured in his business or property by reason of a violation of the provisions of the article; any damages recovered shall be trebled and an award of attorneys’ fees, filing fees, and costs shall also be granted.

Finally, the West Virginia legislature in West Virginia Code 47-18-16 establishes that the state antitrust statute shall be “construed liberally” and “in harmony with ruling judicial interpretations with comparable federal antitrust statutes.” The Court shall address each of the three separate arguments which the defendants pose to formulate the basis for their motion.

### A. ANTITRUST STANDING AND ANTITRUST INJURY

The Court has reviewed the authority cited by the plaintiffs and the defendants, and concludes that the plaintiffs have proven antitrust standing and antitrust injury. The United States Supreme in Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed. 2d 149 (1982) established that the concept of what constitutes antitrust standing and an antitrust injury is precisely what the Plaintiffs proved in their case. The Court is persuaded by the language of the majority opinion (authored by Justice Brennan) and the dissent (authored by Chief Justice Rehnquist):

For example, the dissent acknowledges that "a distributor who refused to go along with the retailers' conspiracy (to injure a disfavored retailer) and thereby lost the conspiring retailers' business would ... have an action against those retailers," *post*, at 2554. The dissent characterizes this circumstance as a "concerted refusal to deal," and is thus willing to acknowledge the existence of compensable injury. But the dissent's is not the only pattern of concerted refusals to deal. If a group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists, the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions. And plainly, in evaluating the reasonableness under the antitrust laws of the psychiatrists' conduct, we would be concerned with its effects not only on the business of banking, but also on the business of the psychologists against whom that secondary boycott was directed.

See Footnote 21 of the body of the majority opinion in McCready, Id., at page 484.

Justice Rehnquist also concurred in the majority's second example quoted above when he stated as follows in his own footnote:

FN7 As pointed out by the Court, a concerted refusal to deal may take many forms....I would agree that the bank could sue in the Court's hypothetical because, as conceded by the Court, the bank's ability to compete with other banks would be adversely affected.

See Justice Rehnquist's dissent, footnote 7, McCready, Id., at page 490.

The United States Supreme Court has not reversed itself or in any way limited its holding in McCready. To the contrary, on October 15, 2007, the United States Court of Appeals for the Fourth Circuit again ratified those principles of law from McCready. In Novell Incorporated, v. Microsoft Corporation, 2007 WL 2984372 (4<sup>th</sup> Cir.) October 15, 2007, the United States Court of Appeals for the Fourth Circuit reaffirmed the principles of law, including an example from McCready specifically quoted above, by reciting as follows:

Notably, the Court (McCready) in a footnote specifically contemplates a party other than a consumer or competitor having antitrust standing: "If a group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists, the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions." *Id.* At 481 n. 21. Even if this footnote is read as dicta, it provides further evidence that the Supreme Court does not limit the universe of proper plaintiffs under § 4 as narrowly as would Microsoft. The Court's decision not to adopt a bright-line rule the next year in *AGC* bolsters this conclusion. *See 459 U.S. at 536.*

*See Novell, Id.*, at page 9.

To the contrary, the Fourth Circuit again ratified the following longstanding principles of law established in McCready by stating as follows:

...the Supreme Court has recognized that 'in enacting § 4(,) Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations.' *See McCready, 457 U.S. at 472. The broad language of the statute, 'and the avowed breadth of the congressional purpose, caution ( ) us not to cabin § 4 in ways that will defeat its broad remedial objective.'* *Id. at 477.*

*See Novell, Id.*, at page 11, (*Emphasis Added*)

The above principles are consistent with the West Virginia Legislature advising the judiciary that the West Virginia Antitrust Act should be "liberally" construed and in harmony with decisions regarding the federal Antitrust Act.

The cases cited by the defendants do not trump the decisions from the United States Supreme Court and Fourth Circuit cited and quoted above.

## B. CONCERTED ACTION

The Court concludes that the plaintiffs have proven two (2) forms of concerted activity to justify the requirements of concerted action for an antitrust claim. The first is concerted activity between one or more of the defendants and one or both plaintiffs, and the second is concerted activity between two or more of the corporate and reciprocal defendants who were not wholly owned subsidiaries.

### 1. Concerted Activity Between the Defendant(s) and Plaintiff(s)

The legal doctrine enunciated by the United States Supreme Court in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 88 S.Ct. 1891, 20 L.E.2d 892 (1968) establishes that each plaintiff could clearly charge and prove with evidence a combination of activity between itself and the defendants to sustain an antitrust claim. This legal concept was again ratified by the United States Supreme Court in Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S.Ct. 2731 (1984) when it gave a history of the former doctrine in support of its abolition of the conspiracy between a parent and a wholly owned subsidiary. Copperweld, supra, at 765-766, 2739.

The significance of this doctrine cannot be overstated: regardless of whether or not the United States Supreme Court would ever abolish a combination or conspiracy between a parent and *any* affiliated subsidiary or other affiliated company, if a plaintiff can prove that the plaintiff was a part of a combination or conspiracy, unwilling or not, with a defendant in restraint of trade, then an antitrust claim may be maintained by that injured plaintiff.

The Court concludes that there was substantial evidence to prove that the Plaintiff Kevin Webb, unwillingly, participated in a combination or conspiracy with the defendants to restrain trade. Plaintiff Kevin Webb testified that contrary to the industry norm, he did ultimately and reluctantly provide the defendants (in care of Defendant Charles Michael Fletcher) a summary of the production information from the Princeton Insurance Associates, Inc./State Auto production reports. He wrote the information on a napkin during the October 15, 2003, meeting at Bob Evans. This fact was corroborated by the testimony of defendant Charles Michael Fletcher, both in his deposition and at trial. This was information for the defendants to determine whether, and enforce that, the majority of the business was being placed with the corporate and reciprocal defendants. Plaintiff Kevin Webb testified that the total numbers he produced through September 2003, established that although it was close, State Auto showed receiving slightly more new business than the defendants, but, when the Rita Kidd book of business brought from Murphy Insurance was factored out of the total numbers, the overwhelming majority of the new business walking through the "front door" of the agencies was placed with the Erie corporate and reciprocal defendants.

The above evidence of plaintiff Kevin Webb participating in the conspiracy or combination with the defendants was further corroborated by the December 16, 2003 tape recorded conversation with defendant Carl Olian:

Mr. Olian: I stressed that last year when we met with you in January, and then Mike discussed that issue in May with you. It's going to -- without that information and knowing what's been done with that and seeing a little bit of production this year, at least through November, we have 94,000 in new business that's been sent our way, it may be difficult for you Kevin just to look at it this way, but it's going -- we're going to be hard pressed to convince anyone at home office that the majority of new business coming into your agency or coming through your front door, however you want to say it, since there apparently is two separate entities inside

that same building, that it's going to be hard pressed to convince anybody that the majority of that new business that walks into that door is not going to state auto verses us.

Mr. Webb: Now, let me ask you a question, I didn't just start writing new business with Erie just because it walked in the door. I give Erie what Erie asked for, so I wrote business within the spirit of the AWARE Program, so if it come in and it wasn't within the spirit of that AWARE Program, I did not write it with Erie.

Mr. Olian: Okay. When you're saying within the spirit of the AWARE Program, I think I know what you're saying, but clarify that for me.

Mr. Webb: Well, you know, you said you didn't want business with claims, you didn't want bad business, you wanted -- you wanted, basically, the premium business, and you wanted -- you wanted multiple-policy business. So we spent the biggest portion of the year re-underwriting the F and M book of business and taking Erie quality homes and putting -- and matching it up with auto, and I talked with Mike about this too. You know, he was kind of concerned that we were lopsided from what he was seeing in the home production verses automobile production, but I showed him that roughly 70 percent of that homeowner business that we wrote had a multi-policy discount attached to it. And I had the numbers, I had the policies and showed him. So, basically, the spirit of the AWARE Program was to have two policies with somebody, and so, you know, I've spent the biggest portion of time doing that. And the new business I placed with Erie, it was not the bottom percentage of the barrel. I give them the premium business that they asked for." (December 16, 2003 tape recorded conversation, Plaintiffs' exhibit 23)

The evidence above proves the inclusion of the Plaintiff Kevin Webb into the combination or conspiracy to reduce business going to State Auto Insurance Companies, and thus sustains the Perma Life Mufflers and Copperweld definition of concerted activity or combination for purposes of an antitrust claim.

## 2. Concerted Activity Between Three of the Defendants

Prior to the decision in Copperweld, *supra*, the United States Supreme Court endorsed the legal concept that a parent and a wholly owned subsidiary *could* conspire to violate the Sherman and Clayton antitrust acts. (See the history of the former doctrine in a case by case analysis in Copperweld, *supra*, at 759 - 766, 2735 - 2739) But, in Copperweld, the Court stated that:

Review of this case calls directly into question whether the coordinated acts of a parent and its wholly owned subsidiary can, in a legal sense contemplated by section 1 of the Sherman Act, constitute a combination or conspiracy. Copperweld Corp. v. Independence Tube Corp., *supra*, 759, 2735.

The Supreme Court went on to specifically confine its ruling in Copperweld as follows:

We limit our inquiry to the narrow issue squarely presented: whether a parent and a wholly owned subsidiary are capable of conspiring in violation of (section) 1 of the Sherman Act. *We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.*

Copperweld Corp., *supra*, at 767, 2739. (*Emphasis added*).

Thus, for 23 years since Copperweld, a federal civil conspiracy or concerted action could occur between corporations or entities which are affiliated, but are not parent corporations and wholly owned subsidiaries. Copperweld is valid legal precedent today.

Although there is no case law applying the Copperweld doctrine to a violation of West Virginia Code 33-11-4(4), it is likely that the West Virginia Supreme Court of Appeals would apply same. The West Virginia Supreme Court of Appeals recognized the Copperweld doctrine in a claim under West Virginia Code 47-18-1, et. seq., the "West Virginia Antitrust Act", in Gray v. Marshall County Board of Education, 367 S.E.2d 751 (W.Va. 1991). The West Virginia Supreme Court endorsed the principles of law enunciated in Copperweld, ruling

that a parent and a *wholly owned subsidiary* cannot conspire with each other because they are a single firm; the Court also ruled that a corporation and its employees cannot conspire with each other because the corporation acts through its employees. Gray v. Marshall County Board of Education, *supra*, 756 and 757.

The Court instructed the jury as follows:

**L.05.** You are instructed the Defendant Erie Insurance Exchange, Defendant Erie Indemnity Company, and Defendant Erie Family Life Insurance Company were entities which were capable of conspiring with each other or acting in concert, provided that you find that these entities were separate economic actors;...

The Court concludes that there was substantial evidence to establish that defendants Erie Indemnity Company, Erie Family Life Insurance Company, and Erie Insurance Exchange were not wholly owned subsidiaries of any other defendant or entity. Furthermore, there was substantial evidence that those defendants were separate economic actors, and not merely a single firm.

The defendant Erie Insurance Exchange was a Pennsylvania "reciprocal" company which was not wholly owned by any other defendant in this case. A reciprocal is a non-corporate entity wherein the policyholders all own an interest in the company. Since the other defendants could be but a small subset of several thousand policyholders of Erie Insurance Exchange, it was impossible for the other defendants to be deemed as even a *majority* owner of said company.

The defendant Erie Indemnity Company was a publicly traded corporation on the NASDAQ Stock Market. It was not a wholly owned subsidiary of any other defendant, but it was subject to the regulations imposed on a publicly traded company, including the Securities and Exchange Commission and the Sarbanes/Oxley Act of 2002.

The defendant Erie Family Life Insurance Company was a publicly traded corporation on the NASDAQ Stock Market. It was not a wholly owned subsidiary of any other defendant, but it was subject to the regulations imposed on a publicly traded company, including the Securities and Exchange Commission and the Sarbanes/Oxley Act of 2002. It was owned only 21.6% by the defendant Erie Indemnity Company and 53.5% by the Erie Insurance Exchange. The other stockholders included public shareholders and directors.

The Court therefore concludes that there was sufficient evidence to establish concerted activity to support an antitrust claim.

### C. COERCION OR INTIMIDATION (AND BOYCOTT)

The defendants last argue that the plaintiffs did not prove coercion or intimidation, and thus the plaintiffs did not prove the elements of their claim. The Court disagrees.

As stated above, West Virginia Code 47-18-3(a) establishes a general prohibition for an unlawful combination (conspiracy) in restraint of trade; same is specifically supported by West Virginia Code 33-11-4(4) which defines an improper restraint of trade or concerted action under West Virginia's insurance law-it prohibits boycott, intimidation, or coercion which unreasonably restrains the business of insurance. Furthermore, West Virginia Code 47-18-3(b)(3) establishes a prohibition of a combination or conspiracy between individuals who "refuse to deal" with another person for the purpose of allocating customers or markets. The state statute is similar, if not identical, to the federal Sherman Antitrust Act in 15 U.S.C. 1, *et. seq.*, but the two are distinct and separate.

In the case before the Court, the jury was instructed on the issue in the Court's Charge to the Jury at section L.07.

L.07. You are instructed that if you believe from a preponderance of evidence that those Defendants who are

capable of concerted activity or of conspiring, concerted or conspired together and **boycotted**, coerced or intimidated the Plaintiffs and that same resulted in the Plaintiffs losing their contracts with the Erie corporate and reciprocal Defendants, and that the loss of those contracts was unreasonable restraint of trade, then you may award a verdict in favor of the Plaintiffs. Furthermore, if you believe from a preponderance of the evidence that those Defendants who were capable of concerted activity or conspiring, concerted or conspired together and **boycotted**, coerced or intimidated the Plaintiffs and that such **boycott**, coerced or intimidation would tend to cause an unreasonable restraint of the business of insurance and that such **boycott**, coercion or intimidation resulted in the Plaintiffs losing their contracts with Erie corporate and reciprocal Defendants, then you may render a verdict in favor of the Plaintiffs. (**Emphasis added**).

As indicated by the United States Supreme Court in Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed. 2d 149 (1982), a "refusal to deal" is a viable antitrust cause of action. The specific examples used by the majority of the Court and Justice Rehnquist in his dissent illustrate that the plaintiffs' case is on point with the intentions of Congress and the United States Supreme Court. In fact, Justice Rehnquist, as acknowledged by the majority in McCready, called the "refusal to deal" a "boycott."

Beyond the cause of action for "refusal to deal" (which is a boycott), the plaintiffs certainly presented evidence that the defendants were guilty of coercion or intimidation. For example, in McCready, the United States Supreme Court in the majority opinion made reference to the fact that "McCready did not yield to Blue Shield's *coercive* pressure, and bore Blue Shield's sanction in the form of an increase in the net cost of her psychologist's services." (Id., at 483.) The insurance company (Blue Shield of Virginia) refused to pay for a psychologist's services although Blue Shield would pay for the same services if provided by a psychiatrist, and Mrs. McCready paid for same out of her pocket. Her cause of action was

sustained by the United States Supreme Court, and the refusal of the insurance company to pay her was deemed "coercive."

The acts of the defendants in the case at bar to compel the plaintiffs to produce production reports and production information, and to compel the plaintiffs to place the majority of the business with them (and not State Auto) was certainly coercive and intimidating, and against the concept of "fair competition." The fact that the defendants carried out their threats of termination, and thereby ultimately "refused to deal" with (boycott) the Plaintiffs, does not eradicate their tactics leading up to the termination.

The Court concludes that there was sufficient and substantial evidence that the defendants refused to deal with (boycott), coerced, or intimidated the plaintiffs, and that such supports the antitrust claim.

#### D. CONCLUSION

Taking the evidence in a light most favorable to the plaintiffs, the motion for a new trial should be denied since there was abundant evidence to support the jury's verdict for the plaintiffs. Furthermore, after weighing the evidence, the Court concludes that the verdict was not against the clear weight of the evidence, based on false evidence, or would result in a miscarriage of justice. To the contrary, there was sufficient evidence to support the verdict presented during the trial and the jury obviously carefully considered the evidence, even rejecting one of the plaintiffs' claims. The jury awarded a more conservative amount of damages (given the range presented by the plaintiffs' expert), and only provided a one to one ratio for punitive damages. (The punitive damages were vacated by the Court upon agreement of the parties since the compensatory damages were trebled.) There is no basis to interfere with the jury's verdict for the compensatory damages, and the Judgment Order should stand.

**ATTORNEY'S FEES, FILING FEES, COSTS OF LITIGATION**

The plaintiffs further move this Court to award reasonable attorney's fees, filing fees, and reasonable costs of litigation. The plaintiffs cite the decision of Landmark Baptist Church v. Mutual Insurance Company, 199 W.Va. 312, 484 S.E.2d 195 (W.Va. 1997) for the Court's guidance in the factors to consider in an award of attorney's fees. The Court upon review of those factors provided by law finds as follows:

1. Counsel for the plaintiffs has expended substantial time and labor in this case and the itemized list of time on counsel's time sheet, 353.75 hours, is reasonable, in light of the volume of discovery, the number of pretrial motions, the five (5) days of trial, which started on September 18, 2007, and finished on September 24, 2007, and the post trial motions;
2. The case presents difficult issues which are not as regularly presented in this Court as other types of cases;
3. The case required counsel to possess substantial skills as a litigator to properly perform the legal services, especially given the volume of discovery, the volume of exhibits, and the difficulty of the issues presented;
4. Counsel maintains an active and lucrative practice of law which includes contingency fee and hourly fee work, and by expending the time involved to litigate this case, counsel forfeited substantial opportunities to earn sums from other work;
5. The hourly fee requested by counsel (\$200.00) is customary and reasonable in light of the relevant fees charged by attorneys with a reputation for handling complex litigation; counsel's customary hourly rate in most cases is \$250.00 per hour, which incorporates his overhead, postage, supplies, secretaries, utilities, insurance, and other expenses. He does not charge separately for paralegal time, nor does he charge for postage

and copies; within an already reasonable hourly rate, counsel supplies these other needed expenses at no extra cost to the clients, but yet which are costs that some other firms bill separately for;

6. Counsel's fee arrangement in this case is based on a contingency fee arrangement, but the Court finds that it is not appropriate to award a contingency fee against the defendants, but an hourly fee should be awarded; although the hourly fees are substantially less, the plaintiffs do not object to this finding and conclusion of the Court;

7. The case was substantial in discovery, pretrial motions, trial preparation, actual trial time, and post trial motions; the circumstances imposed a need upon counsel which demanded substantial time to successfully litigate the case. The defendants made no offer of any settlement prior to the trial, and did not respond to the plaintiffs' pretrial offer to settle;

8. The amount involved in this case was substantial and the results in this case were favorable to the plaintiffs;

9. Counsel has significant experience as a litigator in the courtroom, having been a former part-time assistant prosecuting attorney in the late 1980s and early 1990s, engaging in complex litigation such as medical negligence cases, products liability cases, and recently the litigation representing businesses against the West Virginia Parkways, Economic Development and Tourism Authority which successfully resulted in the Circuit Court of Kanawha County, West Virginia, enjoining the increase in tolls on the West Virginia Turnpike, thereby reducing same to their pre-January 1, 2006, rates (counsel's hourly rate in that case was \$200.00 per hour); counsel also regularly represents individuals in complex domestic cases involving child custody, shared parenting, large asset cases, and significant spousal support cases. Counsel has had a number of cases heard by the West Virginia

Supreme Court wherein significant law was established, including, but not limited to, Bailey v Black, 394 S.E.2d 58 (W.Va. 1990) (former "dram shop" type case-liability for the sale of alcohol to an intoxicated person); Anderson v Moulder, 394 S.E.2d 61 (W.Va. 1990) (liability for the sale of alcohol to a minor-also discusses concurrent negligence doctrine frequently cited by Courts); Peak v Ratcliff, 185 W.Va. 548, 408 S.E.2d 300 (W.Va. 1991) (standard established for officer liability in a police chase resulting in an accident); and Heldreth v Marrs, 188 W.Va. 481, 425 S.E.2d 157 (1992) (Cause of action for negligent infliction of emotional distress established). Counsel has had numerous other appeals in addition to the above, including one involving a covenant-not-to-compete, Appalachian Laboratories, Inc. v. Bostic, 359 S.E.2d 614 (W.Va. 1987) (employee restrictive covenant deemed unenforceable by the West Virginia Supreme Court). The Court finds that counsel's experience, reputation and ability is excellent;

10. The case is one which is not particularly desirable, given that it is not of the nature frequently heard in court, and is very complex to litigate;

11. Counsel has had a relationship with the plaintiffs in this case for a period in excess of three (3) years; counsel has represented Mr. Webb in other matters over a period in excess of twelve (12) years;

12. The requested award of attorney's fees in this case, \$70,749.00, is comparable to awards in other cases involving complex litigation, such as medical malpractice cases and products liability cases.

The Court concludes that the plaintiffs should be awarded the sum of \$70,749.00 as attorney's fees, and that the plaintiffs have incurred \$11,686.79 in filing fees and reasonable costs of the litigation of this case, which the Court finds reasonable.

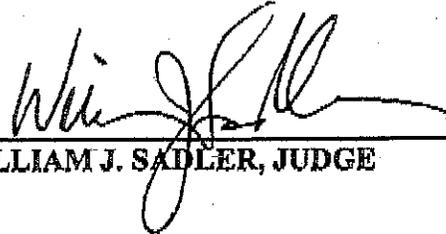
**RULING**

Based upon the foregoing evidence, findings and conclusions, it is therefore **ADJUDGED, ORDERED, and DECREED** that the defendants' motion for judgment as a matter of law or alternatively for a new trial is **DENIED**, and the judgment previously granted and reflected in the **JUDGMENT ORDER** entered October 26, 2007, shall remain in force.

It is further **ORDERED** that the plaintiffs are hereby granted a judgment against the defendants, jointly and severally, for the sum of \$70,749.00 in reasonable attorney's fees and \$11,686.79 in filing fees and reasonable costs of litigation. It is also **ORDERED** that the above judgment for attorney's fees and filing fees/reasonable costs of litigation shall accrue post-judgment interest (simple only), and not prejudgment interest, and that the rate shall be that as established as that provided above pursuant to West Virginia Code 56-6-31 (the rate set in January 2007, was 9.75%).

Finally, it is **ORDERED** that the clerk shall remove this case from the docket of the Court and submit a certified copy of this **ORDER** to counsel of record.

**ENTERED** this the 9<sup>th</sup> day of January, 2008.



**WILLIAM J. SADLER, JUDGE**

THE FOREGOING IS A TRUE COPY OF A DOCUMENT  
ENTERED IN THIS OFFICE ON THE 9<sup>th</sup> DAY  
OF January 2008  
DATED THIS 10<sup>th</sup> DAY OF February  
2008

BRENDA DAVIS CLERK OF THE  
CIRCUIT COURT OF MENAGER COUNTY WV

  
HER DEPUTY