**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

| | | |
|---|---|---|
| **IN THE MATTER OF THE APPLICATION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY FOR APPROVAL OF THEIR ENERGY EFFICIENCY AND PEAK DEMAND REDUCTION PROGRAM PORTFOLIO PLANS FOR 2017 THROUGH 2019** | ) | **Case No. 16-0743-EL-POR** |

**THE COMPANIES' EXPEDITED MOTION TO STRIKE PORTIONS OF INTERVENOR WITNESSES' FILED TESTIMONY AND TO PRECLUDE FUTURE TESTIMONY RELATED TO PREVIOUSLY LITIGATED ISSUES**

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("Companies") respectfully move the Public Utilities Commission of Ohio ("Commission") to strike the Intervenor witnesses' filed testimony (and to preclude any subsequent testimony and/or evidence) that addresses the following energy efficiency issues, which were stipulated, litigated, and decided by the Commission in its March 31, 2016 Opinion and Order in Case No. 14-1297-EL-SSO: (i) the Companies' goal to achieve 800,000 MWh of energy efficiency savings annually; (ii) the eligibility of all cost-effective programs for shared savings; and (iii) the Companies' $25 million after-tax annual shared savings cap.

The testimony that should be stricken includes the following:

1. Ohio Manufacturers' Association Energy Group ("OMAEG") Witness John Seryak ("Seryak"): page 3, line 23 through page 4, line 3; page 4, lines 8-9; page 5, lines 5-14; page 10, lines 12-16;

2. Office of the Ohio Consumers' Counsel ("OCC") Witness John Spellman ("Spellman"): page 7, lines 3-7; page 8, lines 3-7; page 18, lines 8-9; page 41, line 1 through page 47, line 20; page 48, line 4 through page 50, line 2; page 69, line 9 through page 70, line 7;

3. Ohio Environmental Council and Environmental Defense Fund ("OEC/EDF") Witness Trish Demeter ("Demeter"): page 3, lines 8-10; page 3, line 14 through page 5, line 19;

4. Environmental Law & Policy Center ("ELPC") Witness John Paul Jewell ("Jewell"): page 3, lines 1-2; page 5, lines 1-2; page 35, lines 18-19; and

5. Natural Resources Defense Council ("NRDC") Witness Chris Neme ("Neme"): page 19, line 277 through page 23, line 349; page 41, lines 638-640.[1]

Because the administrative hearing on the Companies' proposed Energy Efficiency and Peak Demand Reduction Plans is less than three weeks away, the Companies request an expedited ruling pursuant to O.A.C. 4901-1-12(C). The reasons for this Motion are set forth in the attached Memorandum In Support.

[1] A more detailed illustration of the filed testimony that should be stricken is attached as Exhibit A.

September 23, 2016

Respectfully submitted,

/s/ *Erika Ostrowski*

Carrie M. Dunn (#0076952)
Counsel of Record
Erika Ostrowski (#0084579)
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
Telephone: 330-761-2352
Facsimile: 330-384-3875
cdunn@firstenergycorp.com
eostrowski@firstenergycorp.com

Kathy J. Kolich (#0038555)
Kolich & Associates, LLC
1521 Hightower Drive
Uniontown, Ohio 44685
Telephone: 330-316-2378
kjklaw@yahoo.com

Michael R. Gladman (#0059797)
JONES DAY
325 John H. Hall McConnell Blvd.,
Suite 600
Columbus, Ohio 43215
Telephone: 614-281-3865
Facsimile: 614-451-4196
mrgladman@jonesday.com

Attorneys for Ohio Edison
Company, The Cleveland Electric
Illuminating Company, and The
Toledo Edison Company

## MEMORANDUM IN SUPPORT

### TABLE OF CONTENTS

## MEMORANDUM IN SUPPORT

## I. INTRODUCTION

Intervenors OMAEG, OCC, OEC/EDF, ELPC, and NRDC (collectively, "Intervenors"), each filed testimony in this proceeding seeking to overturn the Commission's determinations in Case No. 14-1297-EL-SSO ("ESP IV Case") that the Companies shall: (i) strive to achieve over 800,000 MWh of energy efficiency savings annually; (ii) count all cost-effective programs for shared savings; and (iii) increase their after-tax annual shared savings cap to $25 million (the "Litigated Issues").[2] The Commission should reject the Intervenors' attempt to reopen the Litigated Issues for three main reasons.

***First***, any attempt to relitigate these issues violates the doctrine of collateral estoppel, as they were stipulated, litigated, and decided in the Commission's March 31, 2016 Opinion and Order ("ESP IV Order"). Opening the door to new attacks on the Commission's well-reasoned order would unnecessarily waste the Commission's and the parties' time and resources and could result in inconsistent rulings and confusion.

***Second***, the Litigated Issues are the subject of certain Intervenors' applications for rehearing in the ESP IV Case. Any further consideration of those issues is expressly reserved for the Commission in that case.

***Third***, the Commission's determination of the Litigated Issues was the result of a comprehensive and complex negotiation and settlement among various parties to the ESP IV Case who represented diverse interests, including Commission Staff ("Staff"). Each Intervenor had a chance to participate in the settlement process, and each had ample opportunity to address

---

[2] *In The Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide For a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Pub. Util. Comm. No. 14-1297-EL-SSO ("ESP IV").

the Litigated Issues through briefing and during the hearing. Permitting Intervenors to selectively attack the Commission's determination of those issues would undermine both the settlement process and the integrity of the comprehensive settlement reached in the ESP IV Case.

For these reasons, the Commission should strike all of Intervenors' testimony filed in this proceeding that addresses the Litigated Issues and should preclude any further testimony and/or evidence from Intervenors on those issues.

## II. BACKGROUND

### A. Stipulated ESP IV.

On August 4, 2014, the Companies filed an application with the Commission pursuant to R.C. § 4928.141 to provide for a standard service offer for the period of June 1, 2016 through May 31, 2019 through an electric security plan ("ESP"). Together, the Companies and various parties submitted four stipulations and recommendations regarding the terms of the proposed ESP. Taken together, the application and the stipulations were referred to as the "Stipulated ESP IV."[3]

The parties involved in the discussions and settlement process represented diverse interests, "including the Companies, a municipality, competitive suppliers, commercial customers, industrial consumers, labor unions, small businesses, advocates for low and moderate income residential customers, and Staff."[4] As the Commission held, the stipulations that arose from the discussions and ultimate settlement amongst these parties were "the product of serious bargaining among capable, knowledgeable parties."[5]

---

[3] ESP IV Order at 9.
[4] *Id.* at 43.
[5] *Id*.

### B. Third Supplemental Stipulation And Recommendation.

Of particular importance here, those parties negotiated, executed, and submitted to the Commission a Third Supplemental Stipulation and Recommendation dated December 1, 2015 ("Third Stipulation"), that provided in pertinent part with respect to the Litigated Issues:

1. The Companies will "strive to achieve over 800,000 MWh of energy savings annually, subject to customer opt outs";

2. "Cost-effective energy efficiency programs shall be eligible for shared savings"; and

3. "The after-tax annual shared savings cap shall be increased from $10 million to $25 million and shall continue to be recovered in Rider DSE." [6]

### C. The ESP IV Order.

The Commission carefully analyzed the proposed application, including all terms and conditions of the proposed stipulations and recommendations, in order to determine whether the stipulations were reasonable and in the public interest, as well as whether the Stipulated ESP IV was more favorable in the aggregate than the expected results of a market-rate offer ("MRO") under R.C. § 4928.142.[7] On March 31, 2016, the Commission published its 122-page ESP IV Order, finding that the Stipulated ESP IV was reasonable and ordering that the Stipulated ESP IV, with certain modifications not material here, be approved and adopted.[8]

In doing so, the Commission determined that the Stipulated ESP IV—including the Third Stipulation—was reasonable by applying a standard of review endorsed by the Ohio Supreme Court.[9] Specifically, the Commission analyzed whether the stipulations: (1) were the product of

---

[6] ESP IV, Case No. 14-1297-EL-SSO, Third Supplemental Stipulation and Recommendation (Dec. 1, 2015) at 11-12.
[7] ESP IV Order at 118-122.
[8] *Id.* at 121.
[9] *Id.* at 39-40; *see also Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 629 N.E.2d 423 (1994).

serious bargaining among capable, knowledgeable parties; (2) as a package, benefited ratepayers and the public interest; and (3) violated any important regulatory principles or practices.[10] The Commission's ultimate task was to determine whether the stipulations, "which embodie[d] considerable time and effort by the signatory parties, [were] reasonable and should be adopted."[11] After holding a lengthy evidentiary hearing and multiple public hearings, the Commission held that the Stipulated ESP IV met the criteria for adoption and was reasonable.[12]

**D. The Litigated Issues.**

As set forth below, each of the three Litigated Issues was fully litigated and decided in the ESP IV Case.

**1. The 800,000 MWh goal.**

The Third Stipulation provides that the Companies will strive to achieve 800,000 MWh of energy efficiency savings annually. This provision was litigated extensively.[13] The Commission considered the parties' positions, acknowledging and summarizing the Companies' agreement to implement "mechanisms and programs to promote future resource diversity,"

---

[10] ESP IV Order at 39-40.
[11] *Id.*
[12] *Id.* at 120-121. The evidentiary hearing in ESP IV was held from August 31, 2015 until October 29, 2015, and from January 14, 2016 until January 22, 2016. Public hearings were held on January 12, 2015 (Akron), January 15, 2015 (Toledo), and January 20, 2015 (Cleveland).
[13] *See, e.g.*, ESP IV, Fifth Supplemental Testimony of Eileen Mikkelsen (Dec. 1, 2015) at 4 (addressing the Companies' 800,000 MWhs goal); ESP IV, Hearing Tr. Vol. XXXVI (Jan. 14, 2016) at 7535:1-7540:1 (Mikkelsen Cross) (discussing 800,000 MWh goal under the Third Stipulation); *id.* at 7861:23-7873:10; ESP IV, Staff Initial Brief (Feb. 16, 2016) at 7 (arguing ESP IV is in the public interest because, among other reasons, the Companies committed to pursuing a goal of over 800,000 MWh of annual energy savings); ESP IV, Companies' Initial Post-Hearing Brief (Feb. 16, 2016) at 31 (arguing the Companies' 800,000 MWh goal is a qualitative benefit); *id.* at 94-95; ESP IV, ELPC/OEC/EDF Initial Brief (Feb. 16, 2016) at 49-51 (arguing the Companies' 800,000 MWh goal is a speculative benefit to which the Commission should not lend much weight); ESP IV, NOPEC Initial Post-Hearing Brief (Feb. 16, 2016) at 75 (arguing ESP IV is not in the public interest because "the Companies commit only to 'strive' to meet 800,000 MWh of energy savings, which potentially could be met through existing programs"); ESP IV, Sierra Club Initial Post-Hearing Brief (Feb. 16, 2016) at 118-120 (arguing the Companies' 800,000 MWh goal is unenforceable and "toothless"); ESP IV, OCC/NOAC Post-Hearing Reply Brief (Feb. 26, 2016) at 92-93 (same); ESP IV, Companies' Post-Hearing Reply Brief (Feb. 26, 2016) at 262-65 (responding to ELPC's and OCC/NOAC's arguments regarding the 800,000 MWh goal).

including their commitment to "undertake comprehensive energy efficiency offerings including . . . a goal to achieve over 800,000 MWh of energy efficiency savings annually."[14] The Commission, after a prolonged briefing and hearing process involving over 40 intervening parties, found that the Companies' goal to strive to achieve over 800,000 MWh of savings annually was a "qualitative benefit" included in ESP IV "which would not be provided for in an MRO."[15]

**2. All cost-effective programs are eligible for shared savings.**

The parties similarly litigated the Third Stipulation's provision that all cost-effective programs will be eligible for shared savings.[16] In considering this issue, the Commission noted in its ESP IV Order the testimony of the Companies' witness (Mikkelsen) and addressed the Companies' position that all "cost-effective EE programs will be eligible for shared savings," including programs such as "the proposed Customer Action Program" ("CAP").[17] The Commission also noted the opposing intervenors' arguments, who disagreed with the Companies and contended that counting the savings for some cost-effective programs, such as CAP, "goes against the inherent purpose of shared savings, which is to provide motivation to a utility to discover ways to encourage energy efficiency."[18] The Commission fully discussed and addressed

---

[14] ESP IV Order at 23, 87, 94.
[15] *Id.* at 119.
[16] *See, e.g.*, ESP IV, Direct Testimony of Karl R. Rábago (Dec. 30, 2015) at 16 (arguing the Third Stipulation "does not preclude the Companies from counting energy savings resulting from independent customer action rather than utility programs"); ESP IV, Hearing Tr. Vol. XXXVII (Jan. 15, 2016) at 7861:23-7873:10 (Mikkelsen Cross) (discussing the Companies' ability to count independent customer actions toward energy efficiency goal and shared savings); ESP IV, Companies' Initial Post-Hearing Brief (Feb. 16, 2016) at 94-95 (arguing that all cost-effective energy efficiency programs will be eligible for shared savings); ESP IV, ELPC/OEC/EDF Initial Brief (Feb. 16, 2016) at 49-51 (arguing against the Companies' ability to count independent customer actions towards shared savings); ESP IV, Companies' Post-Hearing Reply Brief (Feb. 26, 2016) at 262-265 (responding to intervenors' arguments regarding the ability to count savings achieved through independent customer actions toward annual energy savings).
[17] ESP IV Order at 68.
[18] *Id.* at 68-69.

the issue, rejected the opposing intervenors' positions and, citing Mikkelsen's testimony, held that the Companies proposal "[wa]s in the public interest because it encourages the Companies to seek to provide to their customers ***all available cost-effective energy efficiency opportunities***."[19] The Commission emphasized that "every kWh of energy that can be displaced through cost-effective energy efficiency programs is a savings, not a cost, to the Companies' customers."[20]

**3. The $25 million annual after-tax shared savings cap.**

The parties also litigated the provision of the Third Stipulation that increased the Companies' after-tax annual shared savings cap from $10 million to $25 million.[21] While the Companies and signatories to the Third Stipulation (including Staff) supported the shared savings cap increase, opposing intervenors argued that there was "absolutely no explanation in the record as to the basis for the increase" and that the "increase in the shared savings cap will likely cause unreasonable additional costs to customers."[22] As with the intervenors' arguments regarding the inclusion of all cost-effective programs in shared savings, the Commission

---

[19] *Id.* at 68-69, 94-95 (emphasis added).
[20] *Id.* at 95 (citing *In re Application of FirstEnergy*, Case No. 09-1947-EL-POR, *et al.*, Entry on Rehearing (Sep. 7, 2011) at 6.).
[21] *See, e.g.*, ESP IV, Second Supplemental Testimony of Matthew I. Kahal (Dec. 30, 2015) at 17 (arguing the Third Stipulation's provision of a "sharp increase in the energy efficiency shared savings" was "clearly intended to benefit shareholders rather than customers"); *id.* at 26 (same); ESP IV, Hearing Tr. Vol. XXXVI (Jan. 14, 2016) at 7638:19-7644:4 (Mikkelsen Cross) (addressing the increase in the annual shared savings cap to $25 million); ESP IV, Hearing Tr. Vol. XXXVIII (Jan. 19, 2016) at 8198:10-8199:4 (Rábago Redirect) (addressing when shared savings can be a useful utility incentive and discussing the Third Stipulation's increase in the shared savings cap); ESP IV, Hearing Tr. Vol. XXXVIII (Jan. 19, 2016) at 8234:16-20 (Kahal Cross) (addressing the intentions of the signatory parties as to the increase in the annual shared savings cap); *id.* at 8237:21-8239:15 (discussing the increase in the shared savings cap); ESP IV, Companies' Initial Post-Hearing Brief (Feb. 16, 2016) at 94-95 (addressing the annual shared savings cap increase to $25 million); ESP IV, ELPC/OEC/EDF Initial Brief (Feb. 16, 2016) at 49-51 (arguing that there was no evidentiary support justifying the increase in the shared savings cap from $10 to $25 million); ESP IV, OCC/NOAC Initial Post-Hearing Brief (Feb. 16, 2016) at 68 (arguing the increase in the shared savings cap will not benefit customers); *id.* at 158; ESP IV, OMAEG Initial Post-Hearing Brief (Feb. 16, 2016) at 87 (citing ELPC witness Rábago and arguing that the evidentiary record does not support increasing the shared savings cap); ESP IV, Companies' Post-Hearing Reply Brief (Feb. 26, 2016) at 262-265 (responding to intervenors' arguments regarding the shared savings cap increase); ESP IV, OCC/NOAC Post-Hearing Reply Brief (Feb. 26, 2016) at 93 (arguing the increase in the shared savings cap means "higher FirstEnergy profits to be paid by Ohioans").
[22] ESP IV Order at 68-69.

eschewed the intervenors' position, holding "that the increase in the shared savings cap is in the public interest . . . ."[23] The Commission also noted that "[t]he current cap of $10 million was set only for the purposes of the Companies' three-year program portfolio plan for 2014 through 2016," and that it had previously "noted that the cap could be increased . . . if the Companies implemented a decoupling mechanism."[24] Because the cap increase was "in the public interest," and because the Companies "committed to file an application to implement a decoupling mechanism," the Commission approved and adopted the increase in the shared savings cap.[25]

**E. Intervenors' Participation In The ESP IV Case.**

With the exception of NRDC, each Intervenor was a party to the ESP IV Case and thus had ample opportunity to raise their concerns with the Commission regarding the Stipulated ESP IV, including the terms and conditions of the Third Stipulation.[26] In fact, those Intervenors did avail themselves of the opportunity to be heard—including on the Litigated Issues—as each participated in the proceeding extensively by filing briefs and motions, submitting direct testimony, and/or advancing their respective positions during the lengthy ESP IV Case hearing process.[27] Moreover, each of those Intervenors was provided an opportunity to participate in

---

[23] *Id.* at 95.
[24] *Id.*
[25] *Id.*
[26] OCC moved to intervene as an affected party to the ESP IV Case on August 14, 2014; OMAEG moved to intervene on August 29, 2014; OEC/EDF moved to intervene on September 26, 2014; and ELPC moved to intervene on September 30, 2014. Each of those parties actively participated thereafter in the ESP IV Case.
[27] *See supra* at 4-7, fns. 13, 16 & 21. *See also* ESP IV Docket. OCC, by way of example, submitted written testimony in the proceeding no less than 15 times. *See* ESP IV, Direct Testimony of Kenneth Rose (Dec. 22, 2014), Direct Testimony of James F. Wilson (Dec. 22, 2014), Direct Testimony of James D. Williams (Dec. 22, 2014), Supplemental Testimony of James F. Wilson (May 11, 2015), Supplemental Testimony of Kenneth Rose (May 11, 2015), Supplemental Testimony of Ramteen Sioshansi (May 11, 2015), Direct Testimony of Scott J. Rubin (Aug. 10, 2015), Second Supplemental Direct Testimony of Matthew I. Kahal (Dec. 30, 2015), Supplemental Testimony of Scott J. Rubin (Dec. 30, 2015), Second Supplemental Direct Testimony of James F. Wilson (Dec. 30, 2015), Rehearing Direct Testimony of James F. Wilson (Jun. 22, 2016), Direct Testimony of Matthew I. Kahal (Jun. 22, 2016), Rehearing Direct Testimony of Daniel J. Duann (Jun. 22, 2016), Rehearing Direct Testimony of Kenneth Rose (Jun. 22, 2016), Rehearing Rebuttal Testimony of Matthew I. Kahal (Jul. 15, 2016).

discussions and the settlement process that lead to the stipulations and recommendations ultimately approved and adopted by the Commission in the ESP IV Case.[28]

Thus, those Intervenors actively participated in the ESP IV Case, where the Litigated Issues were stipulated, litigated, and decided.

## III. LAW AND ARGUMENT

### A. Testimony Addressing Or Pertaining To The Litigated Issues Is Barred By The Doctrine Of Collateral Estoppel And Must Be Stricken And Precluded.

Collateral estoppel precludes Intervenors from relitigating the issues addressed and decided by the Commission in the ESP IV Order, whether through the direct testimony filed in this proceeding or through future testimony and evidence during the upcoming administrative hearing. In Ohio, the doctrine of collateral estoppel "holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different."[29] The doctrine serves "the dual purpose of protecting litigants from the burden of re-litigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation."[30] The doctrine also eliminates "the possibility of inconsistent decisions."[31]

---

[28] ESP IV Order at 41-45.
[29] *Fort Frye Teachers Ass'n, OEA/NEA v. State Employment Relations Bd.*, 1998-Ohio-435, 81 Ohio St.3d 392, 395, 692 N.E.2d 140, 144; *see also Trautwein v. Sorgenfrei*, 58 Ohio St.2d 493, 495, 391 N.E.2d 326, 328 (1979).
[30] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S. Ct. 645, 649 (1979); *see also Kelly v. Georgia-Pac. Cor*p., 46 Ohio St.3d 134, 143, 545 N.E.2d 1244, 1253 (1989) ("[P]reserving the rights of defendants and promoting judicial economy are both major policy justifications for the use of collateral estoppel.").
[31] *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363 (attached as Exhibit B), ¶ 25; *see also U.S. S.E.C. v. Blackwell*, 477 F. Supp. 2d 891, 902 (S.D. Ohio 2007); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 553, 110 S. Ct. 1331, 1337, 108 L. Ed. 2d 504 (1990) ("Collateral estoppel protects parties from multiple lawsuits and the possibility of inconsistent decisions, and it conserves judicial resources.").

It is well-settled that collateral estoppel "applies equally to administrative proceedings."[32] Indeed, the Commission routinely invokes the doctrine to bar the admission of evidence related to issues that have been litigated and decided by the Commission in a prior proceeding—including prior ESP proceedings.[33]

Collateral estoppel applies when the following three elements are satisfied: (1) the issues were "actually and directly litigated in the prior action;" (2) the issues were "passed upon and determined by a court of competent jurisdiction;" and (3) "the party against whom collateral estoppel is asserted was a party [or] in privity with a party to the prior action."[34] Here, each of these three elements is satisfied, warranting the application of collateral estoppel and precluding Intervenors from contesting the Litigated Issues that the Commission has already decided.

---

[32] *State ex rel. Kincaid v. Allen Refractories Co.*, 2007-Ohio-3758, ¶ 8, 114 Ohio St.3d 129, 130, 870 N.E.2d 701, 703; *see also Set Prod., Inc. v. Bainbridge Twp. Bd. of Zoning Appeals*, 31 Ohio St.3d 260, 263, 510 N.E.2d 373, 376 (1987).

[33] *See In re the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Section 4909.18 Revised Code; In re the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods; In re the Application of Duke Energy Ohio, Inc., for the Approval of a Tariff for a New Service*, Pub. Util. Comm. No. 12-2400-EL-UNC, 12-2401-EL-AAM, 12-2402-EL-ETA, 2014 Ohio PUC LEXIS 23, at *90-94, Opinion & Order (Feb. 13, 2014) (holding that collateral estoppel precluded the relitigation of issues resolved in Duke Energy's prior ESP proceeding); *see also In re the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Columbia Gas of Ohio, Inc., and Other Related Matters*, Pub. Util. Comm. No. 90-17-GA-GCR, 1991 Ohio PUC LEXIS 56, Entry (Jan. 9, 1991) (granting motion to strike on collateral estoppel grounds); *In re the Regulation of the Electric Fuel Component Contained Within the Rate Schedules of The Toledo Edison Company and Related Matters*, Pub. Util. Comm. No. 86-05-EL-EFC, 1986 Ohio PUC LEXIS 853, Entry (Nov. 10, 1986) (holding "collateral estoppel may be used to bar litigation of issues in a second administrative proceeding" when "parties have had an adequate opportunity to litigate the issues involved in [a prior] proceeding"); *In re the Regulation of the Electric Fuel Component Contained Within the Rate Schedules of Ohio Edison Company and Related Matters*, Pub. Util. Comm. No. 83-34-EL-EFC, 1984 Ohio PUC LEXIS 60, at *9-11, Opinion & Order (Jan. 31, 1984) (applying "collateral estoppel to bar relitigation of certain issues"); *In re the Application of Ohio Suburban Water Company for an Increase in the Rates to be Charged and Collected for Water and Sewer Services and to Change Certain of its Regulations and Practices Affecting the Same*, Pub. Util. Comm. No. 81-657-WW-AIR, 1982 Ohio PUC LEXIS 15, Entry (Apr. 7, 1982) (granting motion to strike portions of pre-filed testimony because collateral estoppel precluded relitigation of issues).

[34] *Thompson v. Wing*, 70 Ohio St.3d 176, 183, 637 N.E.2d 917, 923 (1994); *Fort Frye*, 81 Ohio St.3d at 395.

### 1. The Litigated Issues were actually and directly litigated in the ESP IV Case.

The first element of collateral estoppel is satisfied because Intervenors, through the filing of direct testimony, attempt to call into question three specific issues that were "actually and directly litigated in the prior action," namely, the ESP IV Case: (1) the Companies' goal to achieve over 800,000 MWh of energy efficiency savings annually; (2) the eligibility of all cost-effective energy efficiency programs for shared savings; and (3) the increase of the after-tax annual shared savings cap to $25 million. There can be no question that the parties in the ESP IV Case, including Intervenors in this matter, had ample opportunity to present their respective positions on the Litigated Issues in that case, and all but NRDC did, in fact, extensively litigate those issues through the submission of briefs, motions, and testimony.[35] Intervenors cannot dispute this fact.

Nevertheless, OCC now seeks to contest the Commission's ESP IV Order by introducing direct testimony of Richard Spellman that relates to the Companies striving to achieve at least 800,000 MWh of energy efficiency savings each year.[36] OCC, along with OEC/EDF, ELPC, OMAEG, and NRDC, also seeks to relitigate the Commission's determination with respect to the second Litigated Issue. Indeed, the following portions of the Intervenor witnesses' filed testimony relate solely to the Commission's conclusion that all cost-effective programs, including CAP, are eligible for shared savings:

1. Spellman (OCC): page 7, line 3-7; page 41, line 1 through page 47, line 20;
2. Demeter (OEC/EDF): page 3, line 8-10; page 3, line 14 through page 5, line 19;
3. Jewell (ELPC): page 3, line 1-2; page 5, line 1-2; page 35, line 18-19;

---

[35] *See supra* at 4-7, fns. 13, 16 & 21.
[36] *See* Direct Testimony of Richard F. Spellman (Sep. 13, 2016) at 69-70.

4. Neme (NRDC): page 19, line 277 through page 23, line 349; page 41, line 638-640; and

5. Seryak (OMAEG): page 3, line 23 through page 4, line 3; page 10, lines 12-16.

In addition, Intervenors attempt to relitigate the third issue, through the submission of direct testimony challenging the Commission's decision to increase the shared savings cap from $10 million to $25 million:

1. Seryak (OMAEG): page 4, line 8-9; page 5, line 5-14; and

2. Spellman (OCC): page 8, line 3-7; page 18, line 8-9; page 48, line 4 through page 50, line 2.

These issues were resolved through the ESP IV Case, and thus the first element of collateral estoppel is satisfied.

**2. The Litigated Issues were determined by the Commission.**

The second element of collateral estoppel is also satisfied because the Litigated Issues were "passed upon and determined" by the Commission in its 122-page ESP IV Order.[37] Specifically, with respect to the first issue, the Commission determined that the Companies' agreement to strive to achieve over 800,000 MWh of savings annually was a "qualitative benefit" included in ESP IV "which would not be provided for in an MRO."[38]

The Commission also determined the second issue, holding that the eligibility and inclusion of all cost-effective programs for shared savings "[wa]s in the public interest because it encourages the Companies to seek to provide to their customers ***all available cost-effective energy efficiency opportunities***."[39] The Commission also emphasized that "every kWh of

[37] *See supra* at 3 to 7.
[38] ESP IV Order at 119.
[39] *Id.* at 68-69, 94-95 (emphasis added).

energy that can be displaced through cost-effective energy efficiency programs is a savings, not a cost, to the Companies' customers."[40]

The third Litigated Issue was also determined—the Commission rejected the intervenors' arguments and held "that the increase in the shared savings cap [to $25 million] is in the public interest . . . ."[41] The Commission also noted that "[t]he current cap of $10 million was set only for the purposes of the Companies' three-year program portfolio plan for 2014 through 2016," and that it had "previously noted that the cap could be increased . . . if the Companies implemented a decoupling mechanism."[42] Because the cap increase was "in the public interest," and because the Companies "committed to file an application to implement a decoupling mechanism," the Commission approved and adopted the shared savings cap increase.

Accordingly, the second element of collateral estoppel is satisfied.[43]

**3. Intervenors were parties to the ESP IV Case or were in privity with such parties.**

Because Intervenors were either parties to the ESP IV Case or, in the case of NRDC, in privity with parties to that case, the final element of collateral estoppel is satisfied. It is beyond dispute that OMAEG, OCC, OEC/EDF, and ELPC were parties in "the prior action"—*i.e.*, the ESP IV Case.[44] Each of those entities chose to avail themselves of the opportunity to be heard

---

[40] *Id.* at 95 (citing *In re Application of FirstEnergy*, Case No. 09-1947-EL-POR, *et al.*, Entry on Rehearing (Sep. 7, 2011) at 6.).
[41] *Id.* at 95.
[42] *Id.*
[43] There can be no question, of course, that the Commission is an administrative body of "competent jurisdiction." *Thompson*, 70 Ohio St.3d at 183. *See* R.C. 4928.143(C)(1) (authorizing the Commission to "approve or modify and approve" ESP applications).
[44] *Thompson*, 70 Ohio St.3d at 183.

by intervening in the ESP IV Case as affected parties.[45] As such, this element is easily satisfied with respect to those Intervenors.

The element is also met with respect to NRDC. The Ohio Supreme Court has made clear that collateral estoppel "does not apply merely to those who were parties to the [prior] proceeding," such as the other Intervenors, but also to "those in privity with the litigants ***and*** to those who could have entered the proceeding but did not avail themselves of the opportunity."[46] NRDC meets both conditions. To be sure, NRDC could have easily availed itself of the opportunity to intervene in the ESP IV Case pursuant to R.C. § 4903.221, which provides that any entity "who may be adversely affected" by a Commission proceeding may seek intervention in that proceeding.[47] NRDC chose not to intervene, waiving its opportunity to present its position on the Litigated Issues when the Commission determined those issues.[48]

Further, NRDC is in "privity" with the entities that intervened in the ESP IV Case, including the other Intervenors. Ohio courts recognize that "privity" exists for purposes of collateral estoppel when "a mutuality of interest" exists, meaning "an identity of interest in the desired result."[49] NRDC seeks to relitigate the Commission's determination that all cost-effective programs be eligible for shared savings.[50] The same exact argument NRDC seeks to make through the direct testimony of Chris Neme was presented to the Commission by multiple

---

[45] *See supra* at 7, fn. 26.
[46] *Howell v. Richardson*, 45 Ohio St.3d 365, 367, 544 N.E.2d 878, 881 (1989), *opinion corrected sub nom. Grange Mut. Cas. Co. v. Uhrin*, 49 Ohio St.3d 162, 550 N.E.2d 950 (1990) (emphasis added).
[47] R.C. § 4928.141; *see also* O.A.C. 4901-1-11 (permitting intervention in a Commission proceeding by a party that "has a real and substantial interest in the proceeding").
[48] *See Howell*, 45 Ohio St.3d at 367 (holding that insurance company was collaterally estopped from relitigating an issue decided in a prior case that it did not participate in because it "could have intervened in the prior proceeding" but chose not to).
[49] *Nye v. Ohio Bd. of Examiners of Architects*, 165 Ohio App.3d 502, 509, 2006 -Ohio- 948, 847 N.E.2d 46, 51 (10th Dist.); *Brown v. Dayton*, 89 Ohio St.3d 245, 248, 730 N.E.2d 958, 962 (2000) ("We find that a mutuality of interest, including an identity of desired result, creates privity . . . .").
[50] *See* Direct Testimony of Chris Neme (Sep. 13, 2016) at 19-23, 41.

intervenors in the ESP IV Case.[51] Moreover, several of the intervenors in the ESP IV Case, including OEC/EDF, ELPC, and Sierra Club, are environmental advocacy groups and/or organizations that represent interests similar to NRDC. Thus, NRDC's interests were fully protected and represented in the ESP IV Case, and NRDC is precluded from relitigating the Litigated Issues in this proceeding. "To find otherwise would be to allow the [Commission's Order] to come under constant attack simply by replenishing the ranks of [interested parties]."[52]

* * * * * *

In sum, the three elements of collateral estoppel are satisfied in this case, and Intervenors are "estoppe[d] from attempting to relitigate the issue[s] . . . previously determined" by the Commission.[53] Accordingly, the Commission should strike all portions of Intervenor Witnesses' filed testimony that address those Litigated Issues, as well as preclude Intervenors from attempting to introduce any future testimony or evidence on those issues in this proceeding.

### B. Any Further Consideration Of The Litigated Issues Is Reserved For The Commission In The ESP IV Case.

As set forth above, the Commission has already determined that the Companies' 800,000 MWh goal was reasonable, all cost-effective programs (including the proposed CAP) are eligible for shared savings, and the increase of the after-tax annual shared savings cap from $10 million to $25 million is appropriate. These matters cannot be relitigated in this proceeding.

Moreover, some of the very same Intervenors who are improperly attempting to contest the Litigated Issues in this matter are simultaneously seeking rehearing of the same exact issues in the ESP IV Case. Indeed, ELPC and OEC/EDF filed a joint-application for rehearing that

---

[51] ESP IV Order at 68-69.
[52] *Brown*, 89 Ohio St.3d at 248.
[53] *Office of Consumers' Counsel v. Pub. Utilities Comm'n of Ohio*, 16 Ohio St.3d 9, 10, 475 N.E.2d 782, 783 (1985) (barring OCC from relitigating an issue determined by the Commission in a prior proceeding).

devotes eight pages to challenging the Commission's decision to raise the annual shared savings cap to $25 million.[54] OCC, in a joint application for rehearing with the Northwest Ohio Aggregation Coalition ("NOAC"), also challenges the Commission's Order, vaguely arguing that the energy efficiency provisions are "contrary to the public interest and governing law."[55]

Intervenors thus implicitly acknowledge that the ESP IV Case is the appropriate proceeding in which to further challenge the Litigated Issues. Intervenors' attempts to take a simultaneous "second bite at the apple" in this case should be rejected out of hand, as it will waste valuable Commission and party resources and create the possibility of conflicting decisions and confusion.

Accordingly, the Commission should hold that Intervenors must rely on their arguments for rehearing in the ESP IV Case, where each of the Litigated Issues has already been addressed and determined by the Commission.[56]

---

[54] *See* ESP IV, Case No. 14-1297-EL-SSO, Application for Rehearing of the ELPC, OEC, and EDF (May 2, 2016) at 16-23.

[55] *See* ESP IV, Case No. 14-1297-EL-SSO, Application for Rehearing of the OCC and NOAC (May 2, 2016) at 47-48.

[56] The fact some intervenors in the ESP IV Case have filed applications for rehearing does not affect the "finality" of the Commission's ESP IV Order for collateral estoppel purposes. Indeed, it is well-settled that a judgment or order is final for purposes of collateral estoppel when it is not "tentative, provisional, or contingent," and until it is reversed on appeal or is otherwise modified or set aside. *See Augustine v. Adams*, 88 F. Supp. 2d 1166, 1171 (D. Kan. 2000) ("[A] judgment will ordinarily be considered final [for purposes of collateral estoppel] . . . if it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court . . . .") (quoting Restatement (Second) of Judgments § 13, cmt. b (1980)); *Illinois Bell Tel. Co. v. Haines & Co.*, 713 F. Supp. 1122, 1124 (N.D. Ill. 1989) (holding a court decision was "final" because it was not "avowedly tentative" and because "the parties were given an adequate opportunity to set forth their positions and the court supported its decision with a reasoned opinion"); *see also Brown v. Florida Coastal Partners*, No. 2:13-CV-1225, 2015 WL 4205157, at *9 (S.D. Ohio July 10, 2015) ("[T]he fact of a pending appeal does not impact the [collateral estoppel] effect of the judgment.") (attached as Exhibit C); *In re Bodrick*, 534 B.R. 738, 744 (Bankr. S.D. Ohio 2015) ("[A]n appeal of an otherwise final judgment will not preclude application of [collateral estoppel].");*Ohio Cellular Prod. Corp. v. Adams USA Inc.*, No. 3:94 CV 7251, 2000 WL 33743107, at *4 (N.D. Ohio Nov. 9, 2000) (recognizing that "finality" for collateral estoppel purposes requires a decision that "was not avowedly tentative") (quotation omitted) (attached as Exhibit D).

### C. Intervenors Should Not Be Permitted To Selectively Attack the ESP Parties' Comprehensive Settlement.

While collateral estoppel precludes Intervenors from relitigating the issues addressed and decided in the Commission's ESP IV Order, the Commission should also grant this Motion because Intervenors should not be permitted to selectively attack portions of the Stipulated ESP IV. The issues that Intervenors seek to challenge (again) were part of a comprehensive settlement in the ESP IV Case, where every component was a critical factor in the settling parties' decision to go forward with the settlement. It would be highly improper to permit Intervenors (most of whom were parties to the ESP IV Case) to "cherry pick" those portions of the settlement that, in hindsight, they dislike.

As set forth above, each of the Litigated Issues decided in the ESP IV Case was part of the Third Stipulation, which the Commission approved and adopted in its ESP IV Order.[57] The Commission acknowledged that the Third Stipulation was the result of a comprehensive negotiation and "the product of serious bargaining among capable, knowledgeable parties" that represent "diverse interests, including the Companies, a municipality, competitive suppliers, commercial customers, industrial consumers, labor unions, small businesses, advocates for low and moderate income residential customers, and Staff."[58] The Third Stipulation also "embodie[d] considerable time and effort by the signatory parties," including Staff.[59] Moreover, "all of the opposing intervenors were part of the settlement discussions [in the ESP IV Case] and

[57] ESP IV Order at 36.
[58] *Id.* at 43, 45.
[59] *Id.* at 39.

have had ample opportunity to challenge the various provisions in this case through the hearing process."[60]

Parties to a settlement, particularly one approved and adopted by the Commission, should not need to worry about future attacks on their approved agreements months or even years after-the-fact. Permitting Intervenors to attack the Stipulated ESP IV in this proceeding would discourage parties from participating in future meaningful settlement discussions and from spending the time and resources necessary to resolve complex matters, such as an ESP case, since they might have to devote similar time and resources to defend the ***same*** issues in a subsequent proceeding. As aptly stated by the Tenth District, "[i]t is uncontroverted that public policy favors settlements."[61] Indeed, "[w]hen parties agree to settle cases, litigation is avoided, costs of litigation are contained, and the legal system is relieved of the burden of resolving the dispute with the resulting effect of alleviating an already overcrowded docket."[62] This, however, is only true if such settlements are not subject to second guessing in subsequent proceedings.

Accordingly, the Commission should not permit Intervenors to call into question provisions of a settlement that the Commission has already accepted and adopted.

### D. The Companies Request An Expedited Ruling In Light Of The Fast-Approaching Administrative Hearing.

Pursuant to O.A.C. 4901-1-12(C), the Companies respectfully request an expedited ruling on this Motion in advance of the administrative hearing on the Companies' proposed Energy Efficiency and Peak Demand Reduction Plans, which is set to commence on Tuesday, October 11, 2016. The standard fifteen-day response period will not allow for a decision in a

---

[60] *Id.* at 40-41.
[61] *Triplett v. Rosen*, Nos. 92AP–816 & 92AP–817, 1992 WL 394867, at *7, 18–19 (10th Dist. 1992) (attached as Exhibit E).
[62] *Id.*

time frame that would permit the Companies and Intervenors sufficient time to prepare their cases prior to the commencement of the hearing. Because of this inherent unfairness, an expedited ruling under O.A.C. 4901-1-12(C) is warranted.

## IV. CONCLUSION

For the foregoing reasons, the Companies respectfully request that the Commission strike the Intervenor Witnesses' filed testimony related to the Litigated Issues, including the following:

1. Seryak: page 3, line 23 through page 4, line 3; page 4, lines 8-9; page 5, lines 5-14; page 10, lines 12-16;
2. Spellman: page 7, lines 3-7; page 8, lines 3-7; page 18, lines 8-9; page 41, line 1 through page 47, line 20; page 48, line 4 through page 50, line 2; page 69, line 9 through page 70, line 7;
3. Demeter: page 3, lines 8-10; page 3, line 14 through page 5, line 19;
4. Jewell: page 3, lines 1-2; page 5, lines 1-2; page 35, lines 18-19; and
5. Neme: page 19, line 277 through page 23, line 349; page 41, lines 638-640.[63]

Further, the Companies ask that the Intervenors be precluded from eliciting any subsequent testimony or evidence that addresses the Litigated Issues. Finally, the Companies request that the Commission issue an expedited ruling on this Motion due to the timing of the administrative proceeding.

[63] A more detailed illustration of the filed testimony that should be stricken is attached as Exhibit A.

September 23, 2016

Respectfully submitted,

/s/ *Erika Ostrowski*_____

Carrie M. Dunn (#0076952)
Counsel of Record
Erika Ostrowski (#0084579)
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
Telephone: 330-761-2352
Facsimile: 330-384-3875
cdunn@firstenergycorp.com
eostrowski@firstenergycorp.com

Kathy J. Kolich (#0038555)
Kolich & Associates, LLC
1521 Hightower Drive
Uniontown, Ohio 44685
Telephone: 330-316-2378
kjklaw@yahoo.com

Michael R. Gladman (#0059797)
JONES DAY
325 John H. Hall McConnell Blvd.,
Suite 600
Columbus, Ohio 43215
Telephone: 614-281-3865
Facsimile: 614-451-4196
mrgladman@jonesday.com

Attorneys for Ohio Edison Company,
The Cleveland Electric Illuminating
Company, and The Toledo Edison Company

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Expedited Motion To Strike Portions Of Intervenor Witnesses' Filed Testimony And To Preclude Future Testimony Related To Previously Litigated Issues* will be served on this 23rd day of September, 2016 by the Commission's e-filing system to the parties who have electronically subscribed to this case and via electronic mail upon the following counsel of record:

| | |
|---|---|
| Colleen L. Mooney<br>cmooney@ohiopartners.org<br><br>Ohio Partners for Affordable Energy | Robert Dove<br>rdove@attorneydove.com<br><br>Natural Resources Defense Council |
| Christopher Healey<br>Christopher.healy@occ.ohio.gov<br><br>Dane Stinson<br>DStinson@bricker.com<br><br>Deb J. Bingham<br>bingham@occ.state.oh.us<br><br>Ohio Consumers' Counsel | Kimberly W. Bojko<br>bojko@carpenterlipps.com<br><br>Danielle Ghiloni Walter<br>ghiloni@carperterlipps.com<br><br>Ohio Manufacturers Association Energy Group |
| Madeline P. Fleisher<br>mfleisher@elpc.org<br><br>Robert Kelter<br>rkelter@elpc.org<br><br>Environmental Law and Policy Center | Matthew R. Pritchard<br>mpritchard@mwncmh.com<br><br>Samuel Randazzo<br>sam@mwncmh.com<br><br>Industrial Energy Users of Ohio |
| Ryan P. O'Rourke<br>O'Rourke@carpenterlipps.com<br><br>Cheryl Smith<br>smith@carpenterlipps.com<br><br>Counsel for The Kroger Company | Richard L. Sites<br>ricks@ohanet.org<br><br>Matthew W. Warnock<br>mwarnock@bricker.com<br><br>Dylan F. Borchers<br>dborchers@bricker.com<br><br>Teresa Orahood<br>torahood@bricker.com |

| | |
|---|---|
| | The Ohio Hospital Association |
| Joseph E. Oliker<br>joliker@igsenergy.com<br><br>IGS Energy | Trent A. Dougherty<br>tdougherty@theoec.org<br><br>Miranda Leppla<br>mleppla@theoec.org<br><br>Ohio Environmental Council |
| John Finnigan<br>jfinnigan@edf.org<br><br>Environmental Defense Fund | Christopher J. Allwein<br>callwein@keglerbrown.com<br><br>Energy Management Solutions, Inc. |
| Joel E. Sechler<br>sechler@carpenterlipps.com<br><br>Gregory J. Poulos<br>Gpoulo@enernoc.com<br><br>EnerNOC, Inc. | Natalia Messenger<br>Natalia.Messenger@ohioattorneygeneral.gov<br><br>Tonnetta Scott<br>Tonnetta.scott@ohioattorneygeneral.gov<br><br>Ohio Attorney General for PUCO Staff |
| Debra Hight<br>Debra.Hight@puc.state.oh.us<br><br>Vesta Miller<br>Vesta.Miller@puc.state.oh.us<br><br>Sandra Coffey<br>Sandra.Coffey@puc.state.oh.us<br><br>Public Utilities Commission of Ohio | |

*/s/ Erika Ostrowski*
An Attorney for Applicant Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company

NAI-1502079001

# EXHIBIT A

**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

| | | |
|---|---|---|
| In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019 | ) ) ) ) ) ) ) | Case No. 16-0743-EL-POR |

---

# TESTIMONY OF JOHN SERYAK
# ON BEHALF OF THE
# OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

---

**September 13, 2016**

Peak Demand Reduction Program Portfolio Plans (Portfolio Plan). In summary, my testimony includes but is not limited to the following:

- The Customer Action Program (CAP) is not cost-effective and undermines consumer protections;
- The proposed shared-savings incentive mechanism has failed to incent good program management; and
- The proposed incentives and program for combined heat and power (CHP) is underwhelming.

Given the wide scope of the issues addressed in the Portfolio Plan, my recommendations are concentrated on a limited number of issues. Absence of comment on my part regarding a particular aspect of the Portfolio Plan does not signify support (or opposition) toward the Companies' filing with respect to said issue.

**Q. What are your primary conclusions and recommendations?**

A. I have several conclusions and subsequent recommended changes to the Portfolio Plan:

- CAP does not produce energy or cost savings above a business-as-usual case. Thus, it produces no cost benefits and fails both the Total Resource Cost (TRC) and Utility Cost Test (UCT). Moreover, the CAP undermines the successful mercantile self-direct program, creating costs for ratepayers. As a result, I recommend that the Commission reject approval of the CAP and disallow CAP from the Portfolio Plan. ~~At a minimum, the~~

~~Commission should clarify that the Companies cannot collect shared savings incentives on efficiency projects that they did not create or were were not involved with, which would include CAP projects.~~

- The proposed shared-savings mechanism likely amounts to $39 million per year that will be collected from customers and given to the Companies' shareholders, compared to a program budget of approximately $107 million per year on average across the program years. ~~The Companies have not demonstrated that that great of an incentive is necessary for the Companies to perform~~. Moreover, the Companies' program has been deficient in several respects. To better incent Company performance, I recommend that foregone price suppression from energy-efficiency capacity not bid into the PJM Base Residual Auction (BRA) be subtracted from the net-benefits pool, and that foregone PJM capacity payments be subtracted from the after-tax shared savings amount incentive paid to the Companies.
- A CHP incentive should be developed that is offered as a specific measure, instead of relying solely on the self-direct mechanism as a means of incenting CHP. I recommend considering either the custom measure rate, or the same incentive structure currently offered by Dayton Power & Light (DP&L), which is $0.08 /kWh $_{\text{saved-first-year}}$ and $100 /kW[1], or $0.007 /kWh as previously recommended by OMAEG in Case Nos. 14-2296-EL-EEC and 14-2304-EL-EEC.

[1] *In the Matter of the Dayton Power and Light Company's Portfolio Status Report*, Case No. 16-851-EL-POR, Report at 75 ( May 13, 2016).

**The Companies Propose to Collect an Overly High Amount of Shared Savings, and the Shared-Savings Mechanism Needs to be Modified to Incent Better Utility Performance.**

**Q. ~~How much profit could the Companies collect from customers for shareholders?~~**

A. ~~The Companies propose to collect up to $25 million per year, after tax, if they meet and exceed their statutory benchmark energy savings goal.[2] This means that customers are expected to pay for the Companies' taxes on this profit. According to the Companies' rate calculations in multiple DSE2 rider filings, the corporate tax rate that the Companies applied to shared savings for each operating company is 36%[3]. Thus, the true cost to customers of the shared savings mechanism as proposed would be about $39 million per year. This is excessive and the Companies' proposal to use a tax rate of 36% should be rejected.~~

**Q. How does the Companies' proposed profit mechanism compare to program costs and budgeted customer incentives?**

A. According to Appendices B-1, the Companies are proposing program costs on average of greater than $107 million per year for the three operating companies. Of this, only about $60 million is for customer incentives. Thus, combined with the $39 million/year in profit incentive, the Companies would return only $4

[2] Portfolio Plan at 99-100.

[3] *In the Matter of the Review of the Demand Side Management and Energy Efficiency Riders of the Companies*, Case No. 14-1947-EL-RDR, Report in Support of Staff's 2015 Annual Review at Ex. B, pgs. 22-24 (March 31, 2016).

own[6]. This is not unexpected, and is likely close to the business-as-usual efficiency gains that are regularly included in electrical load forecasts. Because this is business-as-usual efficiency, there is no additional financial benefit to customers.

**Q. If there are no net benefits, can the CAP be cost effective?**

A. No. Any regulatory cost test, such as TRC or UCT, if properly applied, should consider only new financial benefits. Meaning, the financial benefits that occur above and beyond the business-as-usual case. Because the CAP has zero benefits of this case, it cannot be cost-effective.

**Q. ~~Should the Companies be allowed to recover shared savings profit incentives on the CAP?~~**

A. ~~No. First, shared savings is meant to incent utility performance to improve delivery of energy efficiency. The utility does nothing to create energy efficiency with CAP. Thus, it is improper to allow shared savings on CAP. Second, CAP produces no financial benefits, so the utilities' share of $0 benefits is rightly $0.~~

**Q. Does the Companies' projection of savings from CAP in their Portfolio Program match the Companies' 2015 CAP savings?**

[6] *In the Matter of the Application for the Energy Efficiency and Peak Demand Reduction Portfolio Status Report*, Case Nos. 16-0941-EL-EEC, et al., Appendix I Customer Action Program 2015 – Section 5: Detailed Evaluation Findings, Page 11 (May 12, 2016).

*OCC EXHIBIT NO.* _____

**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

| | | |
|---|---|---|
| In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019. | ) ) ) ) ) ) ) | Case No. 16-0743-EL-POR |

# DIRECT TESTIMONY
# OF
# RICHARD F. SPELLMAN

**On Behalf of the**
**The Office of the Ohio Consumers' Counsel**
*10 West Broad Street, Suite 1800*
*Columbus, Ohio 43215-3485*

**SEPTEMBER 13, 2016**

customers pay out of pocket) and therefore measures the actual benefits that customers receive.

ix. ~~FirstEnergy should not be allowed to charge customers for profit (shared savings) on the Customer Action Program ("CAP"), Energy Special Improvement District ("ESID") program, and Mercantile Customer Program) because customers—not FirstEnergy—achieved the electricity savings in these programs.~~

x. The LED Street Lighting Tariff, Mercantile Customer Program, Transmission and Distribution ("T&D") Upgrades Program, and Smart Grid Modernization Initiative Program, should not be counted for purposes of shared savings (profit) that customers will pay to FirstEnergy because these programs are being addressed in other proceedings.

xi. Behavioral programs should not be counted for purposes of the shared savings (profit) that customers will pay to FirstEnergy because these programs do not result in persistent savings. The programs do not have lives of much more than one year and the electricity savings are more difficult to quantify.

xii. There should not be a single cap (limit) on the amount of shared savings for all three Companies because a single cap could result in customers of one Company paying higher profits based on the performance of one of the other Company's programs. Instead,

there should be a separate shared savings cap on what customers would pay for each customer class for each Company.

xiii. ~~The aggregate shared savings cap that limits how much profit customers would pay to FirstEnergy should be $10 million, not $25 million, because a $10 million cap lowers the cost to customers and at the same time provides sufficient incentive~~ for ~~FirstEnergy to achieve energy savings.~~

xiv. The PUCO should require transparency in FirstEnergy's energy efficiency programs. All shared savings (profit) amounts paid by customers should be specified in pre-tax dollars, not as after-tax values. FirstEnergy's Application states that customers will pay up to $25 million per year in shared savings. But this figure understates the profit that customers would pay to FirstEnergy. Customers will actually pay up to $39 million in profit to FirstEnergy because FirstEnergy proposes that customers pay FirstEnergy's taxes on the profit. The Application should state the cap in terms of the amount that customers actually pay.

xv. The costs to restart programs that FirstEnergy unilaterally cancelled for 2015 and 2016 should not be included in the budget that customers pay for FirstEnergy's EE/PDR programs. Customers should not be required to pay additional costs based on FirstEnergy's decision to cancel nearly all of its programs.

compounding the harm to consumers. The Companies should not be permitted to have it both ways. They should not be permitted to include non-cost effective programs in the energy savings calculation, and they should be removed from the Portfolio Plans. However, if they want credit for the reduced energy achieved through non-cost-effective programs, then the net cost of these programs must also be recognized when calculating the total net benefits of the Portfolio Plans.

~~Fourth, the Companies provided no reasonable justification to increase their shared savings cap to $25 million.~~ Moreover, a single cap for all three Companies may cause customers of one Company to pay higher profits based on the performance of one of the other Company's programs.

Each of these material defects in the Shared Savings Mechanism must be corrected to avoid customers paying excessive shared savings to the Companies, as I discuss in more detail below.

## D. ~~FIRSTENERGY SHOULD NOT BE ABLE TO COUNT THE CUSTOMER ACTION PROGRAM (CAP) AND OTHER PROGRAMS THAT ARE NOT ADMINISTERED BY FIRSTENERGY AS PART OF THE SHARED SAVINGS THAT CUSTOMERS ARE BEING ASKED TO FUND.~~

***Q41. ~~CAN YOU DESCRIBE THE CUSTOMER ACTION PROGRAM, ENERGY SPECIAL IMPROVEMENT DISTRICT, AND MERCANTILE CUSTOMER PROGRAMS?~~***

***A41.*** ~~The residential CAP "captures energy savings and peak demand reductions achieved through actions taken by customers outside of utility-administered programs."[41] FirstEnergy performs surveys and collects data on savings that customers are achieving on their own and counts those savings toward the net benefits that are used to determine its profits in the Shared Savings Mechanism.~~

~~The ESID program captures savings that townships and municipalities achieve by creating Energy Special Improvement Districts under Ohio Revised Code 1710.061.[42] FirstEnergy proposes to count the savings achieved by ESIDs toward its statutory benchmark and toward its shared savings profit calculations.~~

[41] *See* Portfolio Plan § 3.2 (page 40).

[42] *See* Portfolio Plan § 3.6 (page 77).

Like the CAP and ESID programs, the Mercantile Customer Program captures savings from projects that the mercantile customer (not the Companies) initiated and directed.

***Q42. DOES FIRSTENERGY CONTRIBUTE TO THE ACHIEVEMENT OF ENERGY SAVINGS FROM THE CAP, ESID, AND MERCANTILE SELF-DIRECT PROGRAMS?***

*A42.* No. FirstEnergy plays no role in customers achieving savings from the CAP and does not provide any incentives to customers to reduce usage or demand. FirstEnergy does not administer the ESID programs, does not encourage townships and municipalities to create ESIDs, and does not otherwise contribute to any of the savings achieved by these programs. FirstEnergy does not administer the Mercantile Customer Program and does not contribute to any of the savings. In each of these programs, the customer achieves savings outside of FirstEnergy's programs, and FirstEnergy merely counts those savings towards its benchmark and to increase its profits.

***Q43. ARE CUSTOMERS HARMED BY INCLUDING THESE THREE PROGRAMS IN THE SHARED SAVINGS MECHANISM?***

*A43.* Yes. Customers should not be forced to pay a shared savings incentive for EE/PDR activities where First Energy has had no effect on customers' decisions to adopt energy efficiency. This takes money from customers for nothing. Furthermore, the harm to customers is exacerbated by the use of the UCT to

calculate shared savings. The UCT includes only costs incurred by the utility (*i.e.*, the program costs) and not costs incurred directly by the consumer. In the case of the CAP, ESID, and Mercantile Customer Programs, customers bear all of the costs. Thus, when calculating the net benefits of these programs, FirstEnergy counts all of the savings achieved by the consumer but none of the costs. FirstEnergy's profits (funded by customers), therefore, are even higher than they would be if FirstEnergy had run programs to achieve those same savings. Customers should not pay profits to FirstEnergy for the CAP, ESID, and Mercantile Customer Programs, and customers especially should not pay more profit for these programs than they do for programs that FirstEnergy actually designs and administers.

***Q44. WHAT IS YOUR RECOMMENDATION WITH RESPECT TO THE CAP, ESID, AND MERCANTILE CUSTOMER PROGRAMS?***

***A44.*** These programs should not be included as part of the shared savings mechanism because FirstEnergy does not contribute in any way to the savings produced by these programs. As the PUCO Staff has previously concluded:

> [A] shared savings mechanism for the First Energy electric distribution utilities should only be for those activities for which First Energy has had a material effect in their customers' decisions in adopting energy efficiency. Only those programs that are under the direct or indirect supervision or management of the Company should be able to count toward those savings that exceed their annual benchmarks.[43]

[43] *See* Proposal for Incentivizing Utility Energy Efficiency Performance Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio, Case No. 09-1947-EL-POR (Oct. 24, 2011). *See also* Opinion

I agree that a utility should only receive shared savings profits for programs that it develops and administers for the benefit of customers. A properly designed shared savings mechanism encourages a utility to run efficient programs that reduce usage and peak demand and increase the overall benefits for consumers. FirstEnergy's Shared Savings Mechanism violates these core principles by including savings from the CAP, ESID program, and Mercantile Customer Program in its profit calculations. Savings from these programs should not count for purposes of determining which "incentive tier" is used in the Shared Savings Mechanism, and benefits from these programs should be excluded from the calculation of Total Discounted Net Lifetime Benefits for purposes of the Shared Savings Mechanism. To find otherwise is unfair to customers and represents a handout for FirstEnergy at customer expense.

**E. FIRSTENERGY SHOULD NOT BE ABLE TO COUNT BEHAVIORAL PROGRAMS AS PART OF SHARED SAVINGS THAT CUSTOMERS MUST FUND.**

***Q45. SHOULD BEHAVIORAL PROGRAMS BE EXCLUDED FROM THE SHARED SAVINGS THAT CUSTOMERS ARE BEING ASKED TO PAY?***

***A45.*** Yes. Behavioral programs should be excluded from the shared savings mechanism because they do not result in persistent savings (i.e., measure lives

and Order at 16, Case No. 12-2190-EL-POR (Mar. 23, 2013) (PUCO stating that FirstEnergy would exclude self-direct mercantile energy savings from the shared savings calculation).

from such programs cannot be counted on for more than one or a maximum of two years) and the measurement of savings from such programs is more difficult to quantify than other programs that include installation of specific energy efficient equipment. Behavior-based programs focus on energy savings resulting from changes in individual customers or organizational behavior and decision-making, compared to savings from deployment of hardware such as appliances, HVAC equipment and home insulation. By their nature, behavioral program savings are short-lived. FirstEnergy provides that the measure life for their residential behavior program is only one year.[44] In contrast, programs that involve hardware (like a high efficiency HVAC system) have a measure life of anywhere from three to 18 years, according to FirstEnergy.[45] These non-behavioral programs provide savings that benefit customers year after year. I agree with the PUCO staff's recommendation in FirstEnergy's earlier portfolio case that "[p]rograms that rely strictly on behavioral changes of customers must demonstrate the persistence of such savings each year."[46] FirstEnergy admits that its residential behavioral program has a measure life of just a single year and therefore does not demonstrate persistence of savings each year.

[44] *See* Application, Appendix C-1: Measure Assumptions.

[45] *See id.*

[46] *See* Proposal for Incentivizing Utility Energy Efficiency Performance Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio at 2, Case No. 09-1947-EL-POR (Oct. 24, 2011).

***Q46. ARE THERE OTHER REASONS WHY BEHAVIORAL PROGRAMS SHOULD BE EXCLUDED FROM THE SHARED SAVINGS THAT CUSTOMERS ARE BEING ASKED TO PAY?***

***A46.*** Yes. Behavioral programs do not rely on hardware or other similar measures, but instead rely on general customer decision-making. As a result, the actual savings from behavioral programs are harder to measure and harder to determine whether the utility, a government agency or other economic or social drives are responsible for the energy savings. Again, this presents the potential issue of customers paying the utility for efforts it had little or nothing to do with. It is relatively simple to calculate the energy savings that result from using an efficient appliance or lightbulb compared to an inefficient one. But there is no easy way to reliably determine that a customer made a behavioral change as a result of receiving a report from a utility about electricity usage. I agree with the PUCO staff's recommendation that "[e]nergy efficiency savings must be clearly and easily measurable,"[47] and FirstEnergy's behavioral programs do not meet this standard. I recommend that savings from behavioral programs be excluded from the shared savings mechanism.

[47] *See* Proposal for Incentivizing Utility Energy Efficiency Performance Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio at 2, Case No. 09-1947-EL-POR (Oct. 24, 2011) ("Energy efficiency savings must be clearly and easily measureable.").

**F. PROGRAMS ADDRESSED IN OTHER DOCKETS SHOULD BE EXCLUDED FROM CONSIDERATION IN THIS DOCKET.**

***Q47. ARE THERE OTHER FIRSTENERGY PROGRAMS THAT SHOULD BE EXCLUDED FROM THE SHARED SAVINGS THAT CUSTOMERS ARE BEING ASKED TO PAY?***

*A47.* Yes. Programs addressed in other dockets should not be counted for purposes of shared savings that customers pay. FirstEnergy identifies several programs that are addressed in other dockets, including the LED Street Lighting Tariff, Mercantile Customer Program, Transmission and Distribution ("T&D") Upgrades Program, and Smart Grid Modernization Initiative Program. As FirstEnergy contends, these programs are not being addressed in this case and "no further approval is necessary in this docket."[48] Accordingly, FirstEnergy should not be entitled to charge customers for these programs in its shared savings calculation.

Furthermore, to the extent that the T&D Upgrades Program, Smart Grid Modernization Initiative Project, or any other programs include capital investments, the Companies could receive a return on those investments, so allowing shared savings would result in customers paying for profits twice, through two different rate mechanisms. That is unreasonable.

[48] *See* Application ¶ 23.

## G. THERE SHOULD BE REASONABLE LIMITS ON THE AMOUNT OF PROFITS (SHARED SAVINGS) THAT CUSTOMERS FUND.

~~***Q48. DO YOU AGREE THAT FIRSTENERGY SHOULD BE ALLOWED TO INCREASE THE SHARED SAVINGS THAT CUSTOMERS PAY FROM $10 MILLION A YEAR (AFTER TAXES) TO $25 MILLION A YEAR (AFTER TAXES)?***~~

~~***A48.*** No. FirstEnergy requests a 150% increase in profits to be paid by customers from $10 million per year to $25 million[49] per year. In this case, FirstEnergy provides no information on how it arrived at this number, why it is appropriate, why customers should be asked to pay it, or why it is 150% higher than the previous cap. There is no justification for such a substantial increase in profits that customers would pay. The cap should remain at $10 million per year (at most), which represents nearly 10% of the total annual proposed program costs.~~

~~***Q49. DO YOU FIND THAT PRESENTATION OF SHARED SAVINGS VALUES THAT CUSTOMERS ARE BEING ASKED TO PAY IN "AFTER-TAX" DOLLARS IS APPROPRIATE?***~~

~~***A49.*** No. Presenting FirstEnergy's shared savings mechanism cap as "post-tax" values is deceptive because it does not represent the amount of money that customers actually will be asked to pay. There should be transparency about what customers~~

~~[49] As discussed above, I understand that because the $25 million cap is post-tax, customers could actually pay up to $39 million a year in profits.~~

~~will pay. Using and communicating a $10 million or $25 million value is deceptive because such values are not the amounts that customers will actually be paying. Instead, the Company should present its shared savings values as "pre-tax." Presentation of shared savings incentives in pre-tax dollars is quite common in other jurisdictions and should be the approach used for the Company going forward. Furthermore, if the PUCO does conclude that the cap should be $25 million, the $25 million number should be the before-tax number, and not the after-tax number.~~

~~***Q50. DO YOU FIND THAT THE PROPOSED $39 MILLION ANNUAL CAP FOR THE SHARED SAVINGS THAT CUSTOMERS ARE BEING ASKED TO PAY IS UNREASONABLE?***~~

~~***A50.*** Yes. The $25 million shared savings cap in FirstEnergy's application will actually cost customers around $39 million.[50] Charging customers for $39 million in profits is excessive because FirstEnergy bears almost no risk under the 2017-2019 Portfolio. The Companies' return (profit) from EE/PDR programs should be commensurate with the risk associated therewith. The 2017-2019 Portfolio costs FirstEnergy nothing: consumers pay 100% of program costs plus distribution revenues that are lost as a result of EE/PDR programs. Despite the lack of any risk on behalf of the Companies, FirstEnergy asks customers to pay up to an~~

[50] *See* Exhibit RFS-4.

~~additional $39 million a year to the Companies in profit if FirstEnergy achieves a certain amount of energy savings.~~

***Q51. DO YOU SEE ANY ISSUES WITH HAVING A SINGLE SHARED SAVINGS CAP SPREAD ACROSS ALL OF THE CUSTOMERS SERVED BY THE THREE COMPANIES?***

***A51.*** Yes. Having a single shared savings cap across all three Companies is unfair to customers and should not be approved. The Application states that the Shared Savings Mechanism will include a "cap of $25 million after-tax per year in total across the Companies."[51] The Application, however, does not provide any details on how the $25 million yearly shared savings cap will be spread across the three operating Companies. It does not provide any details on how much of the $25 million yearly cap will be paid by OE's customers, how much by CEI's customers, and how much by TE's customers.

If the PUCO approves a single cap spread across all three Companies, then the amount of profits paid by one Company's customers may be higher or lower depending not just on the success of those customers' own operating Company's programs, but on the success or failure of the other two operating Companies' programs. It seems unreasonable to have the different utilities' customers, all who

[51] *See* Portfolio Plan § 7.1.

***Q81. DID FIRSTENERGY MAKE MATERIAL DECISIONS REGARDING ITS 2017-2019 PORTFOLIO PLAN BEFORE THE MARKET POTENTIAL STUDY WAS PERFORMED?***

***A81.*** Yes. FirstEnergy agreed to increase its savings target to 800,000 MWh (more than 150% of the statutory benchmark) before the MPS was performed. FirstEnergy also agreed to restart all of its prior programs before the MPS was completed.

~~***Q82. WHAT IMPACT DID FIRSTENERGY'S DECISION TO INCREASE THE TARGET TO 800,000 MWH AND TO RESTART ALL PRIOR PROGRAMS BEFORE THE MARKET POTENTIAL STUDY WAS COMPLETE HAVE ON THE PORTFOLIO?***~~

~~***A82.*** One of the primary benefits of completing a market potential study prior to making material decisions on EE/PDR programs is that the MPS is designed to determine whether a particular energy savings target is feasible. The MPS also includes a cost-effectiveness analysis of all potential programs, which guides the utility in determining whether each program should be part of the portfolio. The MPS, therefore, should play an important role in determining the scope of programs and the targeted energy savings. FirstEnergy decided to substantially increase the scope of its programs to reach a very high savings target and to include a variety of programs without the benefits of a completed MPS. Had the MPS been completed for the 2017-2019 Portfolio Plans, inclusion of over $100 million in programs that are not cost-effective could have been prevented.~~

~~***Q83. WHAT IS YOUR RECOMMENDATION REGARDING THE MARKET POTENTIAL STUDY?***~~

~~***A83.*** I recommend that the PUCO order FirstEnergy to complete a Market Potential Study for the next program planning cycle in 2019 **before** making decisions on energy efficiency measures and programs to be included in the EE/PDR Plan for 2020 to 2022, and **before** making its projections of program participants, kWh and kW savings and program budgets for that time period.~~

## IX. FIRSTENERGY'S LOW INCOME PROGRAMS SHOULD BE REEVALUATED AND IMPROVED SO AS TO REACH MORE LOW INCOME CUSTOMERS

***Q84. ARE FIRSTENERGY'S PROPOSED LOW INCOME PROGRAMS PROJECTED TO REACH A ROBUST SHARE OF THE POPULATION OF LOW INCOME HOUSEHOLDS?***

***A84.*** No. The 2017-2019 Portfolio includes two low-income programs: Community Connections and Low-Income New Homes. Community Connections is not a standalone program that FirstEnergy administers. Rather, Community Connections is a program administered by the Ohio Partners for Affordable Energy ("OPAE"). OPAE "uses the funds from this program to leverage other state funded programs through various agencies within the State of Ohio." The Low-Income New Homes program "provides incentives for the construction of

**BEFORE THE**
**PUBLIC UTILITIES COMMISSION OF OHIO**

| | | |
|---|---|---|
| In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019 | ) ) ) ) ) ) ) | Case No. 16-0743-EL-POR |

---

# DIRECT TESTIMONY OF TRISH DEMETER ON BEHALF OF OHIO ENVIRONMENTAL COUNCIL AND ENVIRONMENTAL DEFENSE FUND

---


Trent Dougherty (0079817)
**Counsel of Record**
Miranda Leppla (0086351)
1145 Chesapeake Avenue, Suite I
Columbus, Ohio 43212
(614) 487-7506 - Telephone
(614) 487-7510 - Fax
tdougherty@theOEC.org
mleppla@theOEC.org

John Finnigan (0018689)
128 Winding Brook Lane
Terrace Park, Ohio 45174
(513) 226-9558 – Telephone
jfinnigan@edf.org

***Counsel for Ohio Environmental Council & Environmental Defense Fund***

**Q. ARE YOU FAMILIAR WITH THE COMPANIES' PROPOSED ENERGY EFFICIENCY AND PEAK DEMAND REDUCTION PORTFOLIO PROGRAM PLAN?**

A. Yes.

**Q. PLEASE EXPLAIN WHAT PARTS OF FIRST ENERGY'S PROGRAM PLAN NEED TO BE CHANGED AND/OR IMPROVED.**

A. There are several changes and improvements that can be made to the proposed program plan to benefit the citizens and businesses of Ohio. ~~First, the Commission should not permit FirstEnergy to financially benefit by including savings calculations from shared savings programs that FirstEnergy has no material role in producing.~~ Second, FirstEnergy should commit to combined heat and power/waste energy recovery systems by including a fully outlined program in which FirstEnergy can benefit from shared savings.

~~**III. THE COMMISSION SHOULD NOT PERMIT FIRST ENERGY TO INCLUDE SHARED SAVINGS CALCULATIONS IN ITS BENCHMARK CALCULATIONS WHICH THE COMPANIES HAVE NO MATERIAL ROLE IN PRODUCING**~~

~~**Q. PLEASE EXPLAIN HOW THE COMMISSION SHOULD CHANGE FIRST ENERGY'S PROPOSED PROGRAMS AS THEY RELATE TO SHARED SAVINGS.**~~

A. The Commission should reject any part of the Companies' plan which permits FirstEnergy to recoup shared savings from programs where they have no material role in producing the energy savings. The purpose of shared savings is to incentivize FirstEnergy to go above and beyond its benchmark energy savings requirements. Permitting FirstEnergy to include calculations from programs where it had no role in producing the energy savings is illogical to the goal that shared savings incentivizes the Companies to work harder to achieve energy efficiency over and above their benchmark goals. It rewards the Companies for doing nothing more than simply surveying their customers for recent actions taken by them to save energy.

**Q. WHICH PROGRAMS SHOULD NOT BE INCLUDED AS SHARED SAVINGS BENEFITS TO FIRST ENERGY?**

**A.** FirstEnergy should not be permitted to include savings from the Customer Action Programs, the Mercantile Customer Program, the Energy Special Improvement District ("ESID") program, or any other programs creating savings that FirstEnergy had no material role in producing.

- The Customer Action Program ("CAP") (for residential and small C/I) captures energy savings and peak demand reductions achieved by actions *taken by customers outside of utility-adminstered programs*.
- The Mercantile Customer Program also includes a Customer Action Program shared savings component which would inappropriately award savings to the Companies for energy efficiency actions taken by mercantile customers that the Companies have no role in creating.

- The ESID program captures savings from Ohio townships and municipalities that create energy special improvement districts to offer their constituents Property Assessed Clean Energy ("PACE") financing to install qualified energy improvements pursuant to R.C. 1710.061. FirstEnergy adds nothing to this already-existing PACE financing opportunity, and implementing the ESID program per FirstEnergy's proposal is merely allowing FirstEnergy to claim shared savings on programs that are wholly designed, and administered by a local governmental entity.

None of these programs were designed to incentivize FirstEnergy to achieve additional levels of efficiency. These programs, as well as any other program that FirstEnergy proposes in its plan that would permit it to share in savings that it has no material role in producing, should not be approved by the Commission.

**Q. WHY SHOULD THESE PROGRAMS BE EXCLUDED FROM SHARED SAVINGS?**

A. As I explained above, permitting FirstEnergy to essentially earn bonuses on efficiency programs that it did not help create flies in the face of the intent of shared savings, which is to encourage the utility to go above and beyond the minimal annual savings benchmark. FirstEnergy should not be financially rewarded for the efforts taken by others.

## IV. FIRST ENERGY SHOULD INCLUDE A FULL COMBINED HEAT AND POWER/WASTE ENERGY RECOVERY PROGRAM IN ITS PROPOSAL

ELPC Exhibit No. _____

**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

| | | |
|---|---|---|
| In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019 | ) ) ) ) ) ) ) | Case No. 16-0743-EL-POR |

---

# DIRECT TESTIMONY OF JOHN PAUL JEWELL ON BEHALF OF ENVIRONMENTAL LAW & POLICY CENTER

---

**September 13, 2016**

~~not a prudent use of ratepayer dollars and should not count toward shared savings incentives.~~

**Q. WHAT IS YOUR IMPRESSION OF THE PROPOSED EFFICIENCY PLAN?**

A. I am pleased that FirstEnergy has proposed a new energy efficiency plan. Utility-run efficiency plans provide customer and societal benefits and help reduce energy costs for customers. Many customers will not or cannot implement cost-effective energy saving measures without assistance from their utilities. FirstEnergy should spend ratepayer funds to encourage deployment of efficiency measures that are unlikely to occur absent utility programs. The approved plan must be cost effective, which means the benefits exceed the costs. Therefore, FirstEnergy customers will benefit from reduced electricity costs, lower system demand, and many additional non-energy benefits. While FirstEnergy's plan provides customer savings, it should be improved to provide customers with greater value. Much has changed in the world of energy efficiency in the five years since FirstEnergy filed its last plan, and best practices have evolved. In my ensuing testimony, I provide recommendations that will move FirstEnergy's plans toward best practices.

**Q. PLEASE SUMMARIZE YOUR RECOMMENDATIONS.**

A. In my testimony I note:

- FirstEnergy proposes to continue discounting compact fluorescent lightbulbs (CFLs) throughout its three-year portfolio, despite the advent of superior light emitting diodes (LEDs) with costs that are declining. As prices of LED lighting decrease and quality

nearly $5 million to, ~~and counting toward shared savings, a program that does not generate any new savings strikes me a waste of ratepayer funds.~~

- FirstEnergy should provide a more detailed plan for how it will implement weatherization measures such as air sealing, duct sealing, and insulation.
- FirstEnergy should increase the size of its Government Tariff Lighting Program to provide more incentives for LED traffic signals and streetlights for municipalities in its territory.
- FirstEnergy should coordinate delivery of audits, weatherization, and additional measures that may have both electricity and gas savings with gas utility efficiency programs operating in FirstEnergy territory.

## RESIDENTIAL LIGHTING

**Q. DESCRIBE THE RESIDENTIAL LIGHTING PROGRAM.**

A. FirstEnergy's proposed EE and PDR plan relies heavily on savings from residential programs that provide rebates and incentives for CFLs. FirstEnergy proposes to spend $1,748,346 on CFL lamp incentives in the lighting subprogram of the Energy Efficient Products Program and $7,083,279 on LED lamp incentives. While FirstEnergy's trend toward emphasizing LEDs is moving in the right direction, it does not go far enough. The $1.75 million proposed spending on CFL lamps is a significant missed opportunity to further promote LED lighting and may delay the transformation of the lighting market in FirstEnergy territory. CFL lightbulbs are inferior to LEDs in several ways, and CFL lamp and fixture rebates and incentives should not be included in the plan. FirstEnergy's

outside of utility-administered programs. Over the three-year plan, FirstEnergy proposes spending $4.9 million on the Customer Action Plan and claiming 192,997,956 kWh in savings. This spending will not be on any incentives, marketing, or program administration – it will strictly be used on evaluating the savings from measures customers will take on their own.

**Q. DO YOU THINK THE SIZE OF FIRSTENERGY'S PROPOSED SPENDING AND CLAIMED SAVINGS ON THE CAP ARE REASONABLE?**

A. No. The nearly $5 million that FirstEnergy allocates to the Customer Action Program is not a prudent use of ratepayer funds. The purpose of a utility energy efficiency portfolio is to implement programs that achieve energy savings. The Customer Action Program does not represent implementation of a program, nor does it cause any energy savings. Unlike other utility energy efficiency measures, it is not eligible to be bid into PJM's capacity markets. The Customer Action Program is simply an expensive counting exercise that will allow FirstEnergy to claim an additional 192,997,956 million kWh that customers will undertake without any incentive, rebate, or assistance from the utility. While the law does allow utilities to claim customer actions toward their efficiency goals, the Customer Action Program is far from a best practice idea, ~~and FirstEnergy should not receive shared savings for the actions its customers take outside of utility programs.~~ The funds allocated toward the Customer Action Program should be reduced as low as possible, because they do not produce real results, and those funds should be directed other programs that actually produce savings.

# Public Utilities Commission of Ohio
# Case No. 16-0743-EL-POR

# Direct Testimony of Chris Neme

# (Public Version)

Submitted on behalf of
the Natural Resources Defense Council

**September 13, 2016**

savings target that exceeds the statutory target in the Ohio Revised Code.[21] The Companies designed and budgeted for their programs to save more than 800,000 MWh annually (subject to adjustments for opt-outs), which exceeds the Ohio Revised Code statutory target by an average of more than [redacted] across the three subsidiary Companies.[22] In that context, if the Companies only just meet their statutory targets, this should be considered under-performance and should not merit any shareholder rewards.

It is worth noting that the Companies have proposed that their shared savings cap be dramatically increased, from the current $10 million to $25 million per year after-tax.[23] The Companies base this proposal on the Commission's March 31, 2016 Opinion and Order in the ESP IV case.[24] That same Order endorsed the savings target of 800,000 MWh that the Companies' 2017-2019 Proposed Plans have been designed to meet.[25] If both the Companies' savings target and shared savings cap are to be increased substantially, it is unreasonable to expect the "trigger point" for shared savings to remain unchanged.

### B. Inappropriate Inclusion of Savings the Companies Had No Material Role in Producing

**Q: What is the Companies' proposal with regards to the savings they can count towards their savings targets and include in their shared savings calculations?**

A: The Companies suggest that all savings from all of the programs in the Proposed Plans count toward both the annual savings targets and the calculation of shared savings, with the exclusion T&D projects and projects that receive funding from the Universal Service Fund which will not

[21] *See* Docket No. 14-1297-EL-SSO, ESP IV Stipulation at 11; *see also* Ohio Revised Code 4928.66 (A)(1)(a).
[22] *See* Exhibit CN-1.
[23] Proposed Plans, Attachment A at 100.
[24] Docket No. 14-1297-EL-SSO, Opinion and Order at 68-69, 94-95;
[25] *Id.* at 23 to 24, 94, 119

be included in the portfolio's adjusted net benefits.[26] The programs that the Companies intend to count toward shared savings include a variety of "programs" whose savings the Companies will have had no material role (or no active role) in producing, such as their various "Customer Action Programs" and their Mercantile Customer Program.

**Q: How large a role do these programs play in the Companies' Proposed Plans?**

A: Together, the three Customer Action Programs and the Mercantile Customer Program account for only about 2% of the total budget,[27] but about 17% of total annual MWh savings over the three-year plan period.[28] Their impact on shared savings is larger. Combined, they account for about 23% of the UCT net benefits that the Companies estimate the Proposed Plans will produce and which would be "shared" with customers under the Companies' proposed shared savings mechanism.[29] And these values may be conservative estimates. They do not include impacts from the Energy Special Improvement District ("ESID") initiative for which the Companies have not yet estimated any savings or UCT net benefits in their Proposed Plan, but whose impacts they appear to be reserving the right to include in future shared savings calculations,[30] even though they do not appear to have plans to play a material role in the production of savings from ESIDs.[31]

**Q: Aren't the Companies permitted, by law, to count savings from programs like their Customer Action and Mercantile Customer Programs?**

---

[26] *Id.*
[27] Proposed Plans, Attachment A, Appendix B-1.
[28] Proposed Plans, Attachment A, Appendix B-2.
[29] *See* Exhibit CN-6; *see* also Exhibit CN-2.
[30] *See* Exhibit CN-7.
[31] *See* Exhibit CN-8.

A: As I understand it, the Companies are permitted by law to count such savings towards their statutory savings targets. I am not contesting that point. However, I am unaware of any provision in law that specifies whether savings from such programs should be counted in shared savings calculations.

**Q: Are you suggesting that the savings and benefits from these programs should be excluded from shared savings calculations?**

A: Yes.

**Q: Why?**

A: Three related reasons:

1. It would be bad policy to reward utility shareholders for actions they did not influence;

2. It violates the concept, committed to in the Proposed Plans and negotiated by the Companies in their recent ESP IV Stipulation, of embracing "best practices" for efficiency programs;[32] and

3. It would provide a significant incentive for the Companies to increase focus on programs that merely document savings that the Companies did not have a material role in producing – and lessen focus on other programs that are actively designed to provide new, cost-effective benefits to customers.

**Q: Can you elaborate on why it would be bad policy?**

[32] *See* Docket No. 14-1297-EL-SSO, ESP IV Stipulation at 11; Opinion and Order at 68.

A: The Companies' shareholder incentive mechanism is called "shared savings." But if the utility has no role in producing savings, there is no grounds for "sharing." Put another way, utility shareholders should not be rewarded for actions that the Companies had no material role in producing. I cannot imagine what policy grounds there would be for thinking otherwise.

**Q: How would the Companies' proposed shared saving structure violate the principle of embracing "best practices" in efficiency programming?**

A: The Companies' Customer Action Programs, for example, are the antithesis of "best practice" because they do not produce any new savings. They merely document what customers have already produced on their own. No other jurisdiction with which I am familiar counts such savings towards utility savings targets, let alone rewards shareholders for the utility doing no more than documenting their existence. The ESID is problematic for similar reasons.

**Q: Why would including savings from such programs in shared savings calculations create incentives to increase focus on such "programs" and lessen focus on other programs that actually provide benefits to customers?**

A: The savings from the Companies' three Customer Action and Mercantile Customer "programs" collectively have a UCT benefit-cost ratio of 25 to 1.[33] In contrast, the UCT benefit-cost ratio of the other cost-effective programs in the Proposed Plans is 2.7 to 1.[34] In other words, the Customer Action and Mercantile Customer "programs" provide about *nine times* as much net benefits to "share" under the Companies' proposed "shared savings" mechanism as their other programs. That is not surprising since the Companies spend very little substantive program

[33] *See* Exhibits CN-2 and CN-6.
[34] *Id.*

dollars to produce them. All they have to do is conduct studies to estimate what their customers are doing on their own.[35]

Put simply, every kWh of savings documented through the Customer Action Programs allows each utility to expend less effort to capture savings from other programs. The only real, new savings that produce any benefits (relative the baseline of what would have happened anyway) will come from these other programs. As a result, any incentive to maximize documentation of Customer Action Program savings will have adverse economic, environmental and economic development impacts relative to a plan and policy that did not allow such savings to be included in the determination of shareholder incentives.

### C. Excluding Programs Failing UCT Screening from Shared Savings Calculation

**Q: What is your concern regarding the Companies' proposal to include only the impacts of cost-effective programs in their calculation of shared savings?**

A: I have a couple of concerns. First, as noted above, it is a form of "cherry-picking." In short, it means that the Companies' shareholders would receive a portion of the economic *benefits* of programs that are cost-effective, but shoulder none of the *burden* of programs whose costs are greater than the direct electric bill savings that they produce but which may be pursued for other important policy reasons (e.g. supporting low-income customers). That is inequitable. Second, it means that the Companies would have no incentive to improve or even to efficiently deliver programs that are expected to fail cost-effectiveness screening.

[35] The data collected from such an inquiry may be interesting to gauge customer uptake and trends, but does not rise to the level of being a "program," let alone one that represents "best practice" or is worthy of rewarding through a shareholder incentive mechanism.

## VI. RECOMMENDATIONS

**Q: Please summarize the recommendations you have for improving the Companies' Proposed Plans to address the concerns you have raised.**

A: I offer the following recommendations to the Commission:

### 1. Changes to the Companies' Proposed Shared Savings Mechanism

a. Make the annual savings level at which the Companies trigger earning of any shared savings equal to each Company's share of the 800,000 MWh goal (adjusted for opt-outs) that was established in the ESP IV Stipulation and to which they committed in their Proposed Plans. The shared savings "tiers," compliance percentages and incentive percentages would all be pegged to that goal, such that the maximum 13% shared savings for Tier 5 would be earned once a Company had achieved at least 115% of its portion of a 920,000 MWh (adjusted for opt outs) savings level.

b. ~~Exclude from any shared savings calculations the savings (and costs) associated with all Customer Action Programs, the Mercantile Customer Program, the ESID program and any other programs whose savings the Companies will have had no material role in producing.~~

c. Require that the impacts of all non-cost effective programs be included in the shared savings calculation.

### 2. Changes to Portfolio and Program Designs to Reflect Best Practices

a. Eliminate all standard CFLs from all efficiency programs; they should be replaced with standard LEDs.

# EXHIBIT B

2002 WL 1400583

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Eleventh District, Trumbull County.

John HAPGOOD, Appellant,
v.
James CONRAD, Administrator,
Bureau of Workers' Compensation, et al.

No. 2000-T-0058.
|
Decided June 28, 2002.

Claimant appealed decision denying his workers' compensation claim. The Court of Common Pleas, Trumbull County, granted summary judgment in favor of Administrator of the Bureau of Workers' Compensation and Industrial Commission. Claimant appealed. The Court of Appeals, William M. O'Neill, P.J., held that claimant was not precluded by doctrine of collateral estoppel from pursuing claim, even though arbitrator upheld his termination for filing a claim falsely asserting he was injured in the course of his employment.

Reversed and remanded.

Judith A. Christley, J., concurred in judgment only.

Diane V. Grendell, J., filed a dissenting opinion.

Administrative Appeal from the Court of Common Pleas, Case No. 97 CV 529.

**Attorneys and Law Firms**

Atty. C. Douglas Ames and Robert J. Foley, Youngstown, OH for appellant.

Betty D. Montgomery, Attorney General, and Steven K. Aronoff, Assistant Attorney General, Cleveland, OH, for appellees.

**Opinion**

WILLIAM M. O'NEILL, P.J.

***1** {¶ 1} Plaintiff-appellant John Hapgood ("appellant") appeals from the judgment of the Trumbull County Court of Common Pleas, granting summary judgment in favor of defendants-appellees the Administrator of the Bureau of Workers' Compensation and the Industrial Commission of Ohio following the denial of his workers' compensation claim.

{¶ 2} On January 24, 1997, appellant filed an appeal from the decision of the Bureau of Workers' Compensation, denying appellant the right to participate in the Workers' Compensation Fund. Appellant claimed he was injured while employed by Trumbull County.

{¶ 3} On October 7, 1999, the Administrator of the Bureau of Workers' Compensation and the Industrial Commission filed a motion for summary judgment. In the motion, the defendants stated that appellant's claim for "bulging disc S1, nerve compression left" was premised on a January 2, 1993 incident. Appellant was discharged from his employment as a firefighter for the city of Warren as a result of filing a claim falsely asserting he was injured in the course of his employment. Appellant filed a grievance with the union because of his dismissal. The arbitrator upheld appellant's dismissal, finding appellant lied about injuring himself at work. The defendants maintained appellant's workers' compensation appeal was precluded by collateral estoppel because of the arbitration. The defendants argued that the arbitrator's decision was final and binding on the parties.

{¶ 4} Earlier, appellant had filed a retaliatory discharge claim in the court of common pleas. This court upheld the grant of summary judgment in favor of the defendant in *Hapgood v. Warren* [1]. This court held the doctrine of collateral estoppel precluded appellant from bringing the cause of action, because the arbitration proceeding and the retaliatory discharge claim involved the same falsified workers' compensation application.

{¶ 5} Appellant countered the defendant's motion for summary judgment by contending that collateral estoppel was not applicable, because the appeal before the court of common pleas involved the merits of his workers' compensation claim and not any falsification of that claim. Appellant asserted that he needed to prove he was injured during the course and scope of his employment and not whether his termination was lawful. Appellant argued the issue before the court of common pleas was not

  

identical to the earlier arbitration proceedings. Appellant further argued that the parties were not identical because the Industrial Commission and the Bureau of Workers' Compensation were not parties to the arbitration or the retaliatory discharge action.

{¶ 6} The trial court granted the Industrial Commission's motion to dismiss. R.C. 4123.512 provides that the court shall make the Commission a party upon the application of the Commission. The Commission did not make an application to be a party in the action. The trial court also granted the defendants' motion for summary judgment. Appellant has appealed from this judgment.

***2** {¶ 7} On April 5, 2001, this court remanded the case to the trial court after determining the appeal was not based on a final appealable order. Defendant, the city of Warren, did not file a motion for summary judgment and remains a party below. On April 17, 2001, the trial court issued a nunc pro tunc judgment entry stating there was no just cause for delay. Pursuant to Civ.R. 54(B), the appeal is now properly before this court.

{¶ 8} Appellant assigns the following error for review:
{¶ 9} "Appellant is not precluded by the doctrine of collateral estoppel from pursuing a workers' compensation claim."

{¶ 10} In his sole assignment of error, appellant contends the trial court erred in determining collateral estoppel barred him from participating in the workers' compensation fund. Appellant asserts that the elements of collateral estoppel have not been met. First, appellant claims the parties are not identical because the Bureau of Workers' Compensation and the Industrial Commission were not parties to the earlier actions. Appellant further argues that the same facts needed to determine his right to participate in the workers' compensation fund are not the same as were necessary for the resolution of the retaliatory discharge cause of action or the wrongful termination pursuant to a collective bargaining agreement. Appellant maintains the issues are not identical.

{¶ 11} This case was decided by summary judgment. Summary judgment is a procedural device designed to terminate litigation and to avoid a formal trial where there is nothing to try. [2] Doubts must be resolved in favor of the nonmoving party. [3] Pursuant to Civ.R. 56(C), summary judgment is proper when (1) there is no genuine issue of material fact remaining to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. The nonmoving party is entitled to have the evidence construed most strongly in his or her favor. [4]

{¶ 12} A party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. [5] The moving party has the burden even with regard to issues for which the plaintiffs would have the burden of proof should the case go to trial. [6] Once a party has satisfied this initial burden, a reciprocal burden arises upon the nonmoving party to respond and set forth specific facts showing that there is a genuine issue of material fact to be resolved at trial. [7] A "material" fact is one affecting the outcome of the suit under the applicable substantive law. [8]

{¶ 13} When reviewing a summary judgment case, appellate courts apply a de novo standard of review. [9] A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law. [10]

***3** {¶ 14} Appellant has not appealed the dismissal of the Industrial Commission. Therefore, the dismissal of the Industrial Commission is a final judgment. The appeal will proceed with only the Bureau of Workers' Compensation as the appellee.

{¶ 15} Collateral estoppel bars a party from relitigating a fact or point that was actually and directly at issue in a previous action if that fact or issue was passed upon and determined by a court of competent jurisdiction. [11] The issue at hand is whether the earlier administrative hearing or the retaliatory discharge claim bars appellant from pursuing a workers' compensation claim. The earlier arbitration determined that appellant's dismissal from the fire department was lawful. The retaliatory discharge claim was barred by collateral estoppel. The instant case involves appellant's right to participate in the workers' compensation fund.

  

{¶ 16} An appeal to the court of common pleas pursuant to R .C. 4123.512 contemplates a full and complete de novo determination of facts and law. [12] The plaintiff is not limited to the record presented to the Industrial Commission but may offer evidence the same as in any civil action. [13] As the trier of fact, the judge or jury, upon the evidence adduced at the hearing, decides de novo the single issue of the plaintiff's right to participate in the fund without deference to the commission's decision. [14] The determination before the court of common pleas is based upon the evidence presented during the de novo trial, and not that given at the earlier proceeding. [15] Further, an allegedly injured worker may raise additional issues at the trial court, which were not raised before the Industrial Commission. [16] The only issue before the court of common pleas is the right of the claimant to participate or continue to participate in the workers' compensation fund. [17]

{¶ 17} The issue before the trial court was appellant's right to participate in the workers' compensation fund. Appellant has the right to present new evidence or issues to the trial court, which were not considered by the arbitrator. Further, the arbitrator's determination that appellant falsified his workers' compensation claim is given no deference by the trial court when considering whether appellant is entitled to receive workers' compensation. The issue before the arbitrator was the lawfulness of appellant's termination, not his right to participate in Ohio's workers' compensation fund. Collateral estoppel is not a bar to appellant's claim for workers' compensation. Appellant's assignment of error has merit. The judgment of the Trumbull County Court of Common Pleas is reversed and the matter is remanded for proceedings consistent with this opinion.

JUDITH A. CHRISTLEY, J., concurs in judgment only.

DIANE V. GRENDELL, J., dissents with Dissenting Opinion.

DIANE V. GRENDELL, J., dissenting.

***3** {¶ 18} This case is not about the sacredness of the jury process. This case concerns the integrity of the judicial process.

***4** {¶ 19} The majority essentially holds that a person-(1) who is properly discharged for filing a *fraudulent* workers' compensation claim; (2) who attempts to pursue a baseless retaliatory discharge claim, which claim was *denied* by two courts (including this court) because he was discharged for making a *fraudulent* workers' compensation claim; and (3) who has that *fraudulent* workers' compensation claim *denied* by the Bureau of Workers' Compensation because it was *fraudulent*-is somehow entitled to still pursue a de novo trial of such *fraudulent* workers' compensation claim. From that decision, I must respectfully dissent.

{¶ 20} The majority opines that "{t}he only issue before the court of common pleas is the right of the claimant to participate or continue to participate in the Workers' Compensation Fund." The majority further opines that "Appellant has the right to present new evidence or issues to the trial court, which were not considered by the arbitrator."

{¶ 21} The majority's analysis in this case is perplexing. Appellant John Hapgood claims that he was injured when he stepped off a fire truck on or about January 2, 1993. This factual predicate has been found to be *fraudulent* by an arbitrator and two courts, including this court. Simply stated, the underlying injury claim supporting appellant's discharge arbitration, retaliatory discharge claim and workers' compensation action is the *same fraudulent* injury claim, which under the circumstances, is *not* a bona fide injury claim.

{¶ 22} Appellant has no right to participate or continue to participate in the Workers' Compensation Fund for the purpose of pursuing an already adjudicated *fraudulent* claim. Presenting new evidence consistent with the previous fraud rulings simply perpetuates appellant's previous fraudulent misconduct. Presenting new evidence alleging a new, different cause for appellant's January 2, 1993 back injury, inconsistent with his previous claims, would constitute the perpetration of a new fraud on the court. No claimant has a right to pursue or commit fraud on a tribunal.

{¶ 23} The general principle of a separate statutory action is still subject to the summary judgment process when, as in this case, the fraudulent nature of the claimed January 2, 1993 back injury has been determined to be fraudulent, not only by an arbitrator, but by two courts, including this court. While appellant may have a back injury, his

  

claim that it was caused by stepping off a fire truck on January 2, 1993, has been adjudicated to be fraudulent in several previous proceedings. While summary judgment will prevent the trial de novo in this case as sought by the majority, that is the precise purpose of summary judgment. There is no reason to ask a jury to consider whether appellant's January, 1993 back injury claim is fraudulent, when that very issue has been decided multiple times.

{¶ 24} In this case, the fact that appellant is attempting to use his previously adjudicated fraudulent claim to seek workers' compensation benefits has legal significance-it is called collateral estoppel.

***5** {¶ 25} The majority's approach could lead to the incongruous result whereby appellant was properly fired for making a fraudulent work-related injury claim, yet still receives state workers' compensation benefits for that same fraudulent claim. Preventing such illogical and inconsistent rulings is the very function of the doctrine of collateral estoppel and the purpose for which we have summary judgment.

{¶ 26} In his sole assignment of error, appellant contends the trial court erred in determining collateral estoppel barred him from participating in the workers' compensation fund. Appellant asserts that the elements of collateral estoppel have not been met. First, appellant claims the parties are not identical because the Bureau of Workers' Compensation and the Industrial Commission were not parties to the earlier actions. Appellant further argues that the same facts needed to determine his right to participate in the workers' compensation fund are not the same as were necessary for the resolution of the retaliatory discharge cause of action or the wrongful termination pursuant to a collective bargaining agreement. Appellant maintains the issues are not identical.

{¶ 27} A valid final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226, 1995-Ohio-331, syllabus. Res judicata will bar all subsequent actions that arise out of the same common nucleus of operative facts that were the subject of the previous litigation, even if the subsequent action relies on different claims, grounds, or theories for relief. Id. at 382, 653 N.E.2d 226. The doctrine of res judicata applies to administrative proceedings that are judicial in nature, including workers' compensation hearings before the Industrial Commission. *State ex rel. Kroger Co. v. Indus. Comm. of Ohio,* 80 Ohio St.3d 649, 687 N.E.2d 768, 1998-Ohio-174.

{¶ 28} The collateral estoppel branch of res judicata dictates that material facts or questions at issue in an earlier suit, which were judicially determined by a court of competent jurisdiction, are conclusively settled by a judgment so far as the parties to that action are concerned. *Goodson v. McDonough Power Equip., Inc.* (1983), 2 Ohio St.3d 193, 195, 443 N.E.2d 978.

{¶ 29} For collateral estoppel to apply, the identical issue actually determined in the previous case must be present in the subsequent action. *Hapgood v. Warren* (Oct. 25, 1996), 11th Dist. No. 95-T-5355, 1996 Ohio App. Lexis 4684. Appellant's primary contention is that the issue before the court of common pleas was whether he had the right to participate in the workers' compensation fund and not whether he falsified that claim. Appellant argues the previous determination that his employment was not terminated in retaliation for filing a workers' compensation fund or that he was fired for just cause under the collective bargaining agreement differs from the issue presented here.

***6** {¶ 30} The scope of a retaliatory discharge cause of action is limited to the employee proving his or her termination was in direct response to the filing of a workers' compensation claim. See *Stevenson v. Pace Eng., Inc.* (Nov. 4, 1994), 11th Dist. No. 93-L-165, 1994 Ohio App. LEXIS 4980. In *Hapgood,* supra, this court determined appellant was estopped from bringing a retaliatory discharge claim because the arbitrator had determined appellant falsified his workers' compensation claim. The court stated that the issues and facts of both cases were sufficiently intertwined to require the application of the doctrine of collateral estoppel. The facts pertinent to appellant's retaliatory discharge claim were the same facts that the arbitrator considered. This court noted that the actions involved the same subject matter of the falsified workers' compensation claim.

{¶ 31} Appellant submits that whether he filed a false workers' compensation claim does not conclusively preclude his participation in the workers' compensation fund, but might be considered in assessing his credibility.

Appellant argues he has the right to present evidence regarding any injury he may have suffered as a result of his employment, perhaps even involving a different injury date or location. Appellant ignores the fact that his application for workers' compensation stated he was injured in January of 1993 when stepping off a fire truck. This is *exactly the same claim* upon which the other litigation was premised. Appellant's workers' compensation claim involved the *same* back injury appellant previously, and repeatedly, had stated was not work-related. There is no evidence of any additional injury.

{¶ 32} Whether an employee has filed a fraudulent claim or has been discharged for that misdeed may not be relevant to determining whether that employee has been injured. But those determinations are extremely relevant to the determination as to the cause of such injury. Where, as in this case, the cause of the injury has been determined *not* to be work related, summary judgment is warranted. In this case, the trial judge correctly made that call.

{¶ 33} Appellant has had more than one day in court in pursuit of his fraudulent claim. No one should be entitled to participate or continue to participate in the commission of fraud on the court.

{¶ 34} For these reasons, I would affirm the trial court's ruling.

**All Citations**

Not Reported in N.E.2d, 2002 WL 1400583, 2002 -Ohio- 3363

Footnotes

1 *Hapgood v. Warren* (Oct. 25, 1996), 11th Dist. No. 95-T-5355, 1996 Ohio App. LEXIS 4684.
2 *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 433 N.E.2d 615.
3 *Davis v. Loopco Industries, Inc.*, 66 Ohio St.3d 64, 66, 609 N.E.2d 144, 1993-Ohio-195.
4 *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 696 N.E.2d 201, 1998-Ohio-389.
5 *Dresher v. Burt*, 75 Ohio St.3d 280, 293-294, 1996-Ohio-107.
6 *Vahila v. Hall*, 77 Ohio St.3d 421, 674 N.E.2d 1164, 1997-Ohio-259.
7 *Dresher*, supra, at 293, 662 N.E.2d 264.
8 *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 733 N.E.2d 1186.
9 *Cole v. Am. Industries and Resources Corp.* (1998), 128 Ohio App.3d 546, 715 N.E.2d 1179.
10 *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829, 586 N.E.2d 1121.
11 *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 692 N.E.2d 140, 1998-Ohio-435.
12 *Robinson v. B.O.C. Group Gen. Motors Corp.*, 81 Ohio St.3d 361, 691 N.E.2d 667, 1998-Ohio-432.
13 *Grant v. Ohio Dept. of Liquor Control* (1993), 86 Ohio App.3d 76, 81, 619 N.E.2d 1165.
14 Id.
15 *Marcum v. Barry* (1991), 76 Ohio App.3d 536, 602 N.E.2d 419.
16 *Behrend v. Chi Chi's Inc., d.b.a. Chi Chi's Mexican Restaurants* (Nov. 27, 1998), 11th Dist. No. 97-L -259, 1998 Ohio App. LEXIS 5606.
17 *Afrates v. Lorain* (1992), 63 Ohio St.3d 22, 584 N.E.2d 1175, paragraph one of the syllabus.

# EXHIBIT C

2015 WL 4205157
Only the Westlaw citation is currently available.
United States District Court,
S.D. Ohio,
Eastern Division.

Ronald BROWN, et al., Plaintiffs,
v.
FLORIDA COASTAL PARTNERS, LLC, Defendants.

No. 2:13–cv–1225.
|
Filed July 10, 2015.

**Attorneys and Law Firms**

Ronald Brown, Westerville, OH, pro se.

Tonya Brown, Westerville, OH, pro se.

Charles Roland Griffith, Westerville, OH, Eric T. Deighton, Carlisle, McNellie, Rini, Kramer & Ulrich, Co, LPC, Beachwood, OH, for Defendants.

*OPINION AND ORDER*

TERENCE P. KEMP, United States Magistrate Judge.

***1** This case (in which the parties have consented to full disposition by the Magistrate Judge) is before the Court on a "notice of bankruptcy and suggestion stay [sic]" filed by defendant attorney Charles R. Griffith on his own behalf and on behalf of his client Florida Coastal Partners, LLC, relating to a bankruptcy filing made by plaintiff Tonya Brown. (Doc. 57). Also before the Court is a motion for summary judgment filed by defendant Carlisle, McNellie, Rini, Kramer & Ulrich, Co., LPA ("Carlisle") (Doc. 54), the plaintiffs' motion for leave to file an amended complaint and injunction or motion to stay (Doc. 60), and their amended motion for leave to file an amended complaint and injunction or motion to stay. (Doc. 61). For the reasons set forth below, the Court will find that Ms. Brown is no longer the real party in interest with respect to her claims in light of her pending bankruptcy. Thus, the Court will consider the pending motions only as they apply to Mr. Brown. The Court will grant Carlisle's summary judgment as to the claims brought by Mr. Brown only. Further, the Court will deny the motion for leave to file an amended complaint and injunction or motion to stay as moot. (Doc. 60). Finally, the Court also will deny Mr. Brown's amended motion for leave to file an amended complaint and injunction or motion to stay. (Doc. 61).

I. *Background*

The Browns are property owners who are parties to a foreclosure action filed in the Delaware County Court of Common Pleas as Case No. 08–CVE–12–1598. A discussion of the procedural history of that foreclosure action is necessary to address the notice of bankruptcy and suggestion of stay and the pending motions.

CitiGroup Global Markets Realty Corp. ("CitiGroup") filed the foreclosure case against the Browns in December, 2008. On September 8, 2010, CitiGroup filed a motion to substitute Kondaur Capital Corporation ("Kondaur") as the plaintiff. CitiGroup attached an assignment of mortgage to the motion reflecting that CitiGroup had assigned the mortgage and note to Kondaur. Before the Court of Common Pleas ruled on the motion to substitute, it became aware that Mr. Brown had filed a petition in United States Bankruptcy Court. Consequently, pursuant to 11 U.S.C. § 362, the Court of Common Pleas stayed the case on October 11, 2010. The Court of Common Pleas lifted the stay and returned the case to its active docket on July 5, 2011. Thereafter, on October 24, 2011, the Court of Common Pleas granted the motion to substitute. In doing so, the Court of Common Pleas noted that, after the action was filed, "Plaintiff CitiGroup ... assigned the subject mortgage together with the note to Kondaur...." Carlisle acted as counsel to both CitiGroup and Kondaur.

Kondaur and Florida Coastal Partners, LLC ("Florida Coastal") subsequently filed a joint motion to substitute party plaintiff and counsel. That motion, filed on August 20, 2013, reflected that the note and mortgage were transferred by Kondaur to Florida Coastal by assignment of mortgage dated December 11, 2011. The motion also sought to replace Carlisle and substitute Charles R. Griffith as the attorney for Florida Coastal. The Court of Common Pleas granted the joint motion to substitute party plaintiff and counsel on September 25, 2013.

***2** On December 13, 2013, while the foreclosure action was still pending in the Court of Common Pleas, the Browns brought this action pursuant to this Court's

federal question jurisdiction, alleging that Florida Coastal and John Doe, Individuals 1–50 violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692 *et seq.* The Browns also alleged fraud in connection with the mortgage on their property and sought to quiet the title to the property. On January 3, 2014, the Browns filed an amended complaint adding Mr. Griffith as a defendant and adding, among other allegations, a claim for slander of title. Finally, on May 23, 2014, with leave of Court, the Browns filed a "3rd amended complaint" against Florida Coastal, Mr. Griffith, Carlisle, and John Doe, Individuals 1–50.

Count one of the 3rd amended complaint alleges that the defendants violated the FDCPA. More specifically, the Browns allege that Carlisle falsely represented in the Common Pleas Court action that its clients were proper party plaintiffs (specifically, holders of the loan) when, in fact, they were debt collectors. The Browns allege that Carlisle's false and misleading representations resulted in judgments and sanctions against them in the foreclosure action. Similarly, the Browns allege that Mr. Griffith falsely represented that Florida Coastal was a proper party plaintiff in that case when, in fact, it was also a debt collector. The Browns further allege that Florida Coastal and Mr. Griffith misrepresented the character, amount, and legal status of the mortgage and note in violation of the FDCPA. The Browns also set forth state law claims for foreclosure fraud (count two), slander of title (count three), slander of credit (count four), emotional distress (count five), and quiet title (count six). On October 10, 2014, the Court granted in part a motion to dismiss by Carlisle, dismissing the Browns' claims against Carlisle for the intentional infliction of emotional distress and to quiet title. (Doc. 46).

One day after they filed the complaint in this case, the Browns removed the state court foreclosure action from the Delaware County Court of Common Pleas. It became Case No. 2:13–cv–1232. On September 24, 2014, Judge Economus of this Court issued an Opinion and Order adopting a Report and Recommendation which determined that the Court lacked subject matter jurisdiction over the dispute, and he remanded the case to the Delaware County Court of Common Pleas. The Delaware County Court of Common Pleas entered a judgment of foreclosure on November 12, 2014 and a judgment confirming the sale and distribution of sale proceeds on February 11, 2015. In the final entry of confirmation and order for distribution, the Court of Common Pleas indicated that property was sold at Sheriff's sale for $240,000 to Florida Coastal, which then assigned its bid to Triton Investments, LLC. On February 13, 2015, the Browns filed an appeal and an emergency motion seeking a stay of the foreclosure and a writ of possession.

***3** On February 20, 2015, Tonya Brown filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Southern District of Ohio, Case No. 2:15–bk–50925. On February 27, 2015, Florida Coastal filed a notice of bankruptcy and suggestion of stay. The Ohio Court of Appeals for the Fifth Appellate District issued a judgment entry on March 13, 2015, staying the appeal in light of the pending bankruptcy. The Court of Appeals closed the action and stated that the parties may take action to reinstate the appeal after settlement of the bankruptcy or in the event that the bankruptcy court lifts the automatic stay. On May 7, 2015, the bankruptcy court granted relief from the automatic stay with respect to Triton Investments, LLC, its successors, and assigns—the purchaser of the property—limiting the relief to the "in rem action against the real property located at 6374 Hermitage Dr., Westerville, Ohio 43082."

The Browns appealed the bankruptcy court's decision lifting the stay with respect to Triton Investments LLC, and they moved to stay the appeal of the Court of Common Pleas case pending decision on the appeal of the bankruptcy court's order lifting the stay. The Court of Common Pleas granted the motion for a stay of execution of judgment pending appeal, subject to the posting of a supersedeas bond. On June 9, 2015, the Browns filed a notice urging that they were not required to post bond due to the pending bankruptcy.

In this case, also on February 27, 2015, Mr. Griffith and Florida Coastal filed a notice of bankruptcy and suggestion of stay. (Doc. 57). In examining that bankruptcy, the Court notes that the Office of the United States Trustee ("UST") moved the bankruptcy court for an order dismissing the Chapter 11 case. In its motion, the UST stated:

> While this case is relatively new, the UST is concerned that the case was filed solely as a stop-gap maneuver, relative to a recent confirmed Sheriff's Sale of the Debtor's real

> property. Considering the history reflected in Debtor's Non–Filing Spouse's cases, the allegations in the Motion for Relief from Stay, and the Debtor's failure to appear for the Meeting of Creditors, the UST believes that the Debtor lacks a good faith intention of fulfilling the obligations commensurate with bankruptcy protection. The Debtor's behavior thus far, though admittedly limited to just over one month, demonstrates behavior that is prejudicial to her creditors. The Debtor cannot be permitted to enjoy the benefits of bankruptcy protection without complying with the requirements of the Bankruptcy laws or the UST Guidelines.

(Bankr.Doc. 47 at 5). Based on the contention that Ms. Brown refused to "play by the rules," the UST asked that the case be dismissed or, alternatively, converted to Chapter 7. *Id.* The bankruptcy court found the motion to be well taken and ruled that conversion to Chapter 7 was appropriate. Thus, Ms. Brown's bankruptcy is now a Chapter 7 bankruptcy.

***4** In this Opinion and Order, the Court will first examine the impact of Ms. Brown's bankruptcy on this litigation. After doing so, the Court will examine Mr. Brown's motions, namely the motion for leave to file an amended complaint and injunction or stay filed on May 14, 2015 (Doc. 60), and the amended motion for leave to file an amended complaint and injunction or motion to stay filed on May 15, 2015 (Doc. 61). Finally, the Court will consider the motion for summary judgment filed by Carlisle on January 1, 2015. (Doc. 54).

## II. *Impact of Pending Bankruptcy*

Once a debtor files a petition in bankruptcy, only the bankruptcy trustee has standing to pursue the debtor's pre-petition causes of action. *Tyler v. Capital Mgmt., Inc.,* 736 F.3d 455, 461 (6th Cir.2013), citing *Stevenson v. J.C. Bradford & Co. (In re Cannon),* 277 F.3d 838, 853 (6th Cir.2002). That is, the trustee, and not the debtor, has standing to pursue existing claims after the debtor files for bankruptcy protection because such claims are considered to be "property of the estate" under 11 U.S.C. § 541(a) (1). *See, e.g., In re Bernstein,* 525 B.R. 505, 508 (N.D.Ga.2015) ("a Chapter 7 debtor lacks standing to litigate pre-petition claims and is not the real party in interest in whose name such claims may be brought unless and until such claims are abandoned by the trustee back to the debtor"). As the Court of Appeals has observed, "[t]he Bankruptcy Code itself provides that the bankruptcy estate comprises 'all legal or equitable interests of the debtor in property as of the commencement of the case,' 11 U.S.C. § 541(a) (1), and it is well established that the 'interests of the debtor in property' include 'causes of action.' " *Bauer v. Commerce Union Bank, Clarksville, Tenn.,* 859 F.2d 438, 440–41 (6th Cir.1988). Further, this Court may raise the issue of standing *sua sponte. See Coston v. Petro,* 398 F.Supp.2d 878, 882 (S.D.Ohio 2005).

There is no question that Ms. Brown is a Chapter 7 debtor. In light of the pending bankruptcy, Ms. Brown lacks standing to pursue her pre-petition claims in this Court because those claims are now considered to be "property of the estate." Because the Chapter 7 trustee is the real party in interest to Ms. Brown's claims, the Court will analyze the pending motions only to the extent that they pertain to Mr. Brown.

## III. *Mr. Brown's Motions*

On May 14, 2015, Mr. Brown filed a motion for leave to file an amended complaint and injunction or stay. (Doc. 60). The following day, on May 15, 2015, Mr. Brown filed an amended motion for leave to file an amended complaint and injunction or motion to stay. (Doc. 61). The latter motion is identical to the one filed the previous day, except that the attached proposed fourth amended complaint differs in some respects. It is apparent that Mr. Brown intended for the amended motion (Doc. 61) to replace the original motion (Doc. 60). Consequently, the Court will deny the original motion as moot. (Doc. 60).

***5** The Court now turns to the amended motion for leave to file an amended complaint and injunction or motion to stay. (Doc. 61). In the amended motion, Mr. Brown seeks leave to file a fourth amended complaint "to add violations of Racketeer Influenced Corrupt Organizations Act, 18 U.S.C.1962 et seq., 1964 ('RICO') and new Defendants...." *Id.* at 2. Mr. Brown claims

that he has new evidence that the property which was subject to foreclosure has been used in a scheme of racketeering. More specifically, Mr. Brown states that he learned that Alexius Dorsey is to become recipient of the real property, and that Mr. Dorsey filed a false affidavit in state court concerning his interaction with and knowledge of the mortgage and note. In the proposed fourth amended complaint, Mr. Brown seeks to add the following defendants: The Windsor Companies, Triton Investments, LLC, Alex Dorsey, and Luke Farrell. In addition, Mr. Brown seeks to introduce new facts and to assert the following causes of action: FDCPA (count one), fraud (count two), a "violation of federal rule 62" rendering the "state court action void" (count three), "removal of state court action" rendering the state court "proceedings void" (count four), RICO violations (count five), slander of title (count six), and slander of credit (count seven).

Carlisle filed a response to the motion, arguing that Mr. Brown's motion should be denied. (Doc. 62). More specifically, Carlisle argues that it will suffer prejudice if the motion is granted "as it will unduly delay the already pending Motion for Summary Judgment...." *Id.* at 2. Carlisle also argues that the futility of "[the] proposed amendment is apparent on its face and the proposed amendment fails to cure the deficiencies contained in Browns' previous pleadings." *Id.* at 3.

Mr. Griffith and Florida Coastal also filed a memorandum in opposition to Mr. Brown's motion, together with The Windsor Companies, Triton Investments, LLC, Alex Dorsey, and Luke Farrell. (Doc. 64). In a typical case, non-parties such as The Windsor Companies, Triton Investments, LLC, Alex Dorsey, and Luke Farrell would not, without leave of Court, be permitted to appear and oppose a motion for leave to amend. *See, e.g., Custom Pak Brokerage., LLC v. Dandrea Produce, Inc.,* 2014 WL 988829, at *2 (D.N.J. Feb.27, 2014) ("Proposed defendants do not have standing to oppose a motion to amend because they are not yet named parties") (internal quotations and citation omitted). Thus, this Court will consider the memorandum in opposition only insofar as it was filed by defendants Mr. Griffith and Florida Coastal.

In their memorandum in opposition, Mr. Griffith and Florida Coastal argue that Mr. Brown's motion should be denied because it is "just another attempt to try and delay the foreclosure process that has been ongoing." *Id.* at 2. Mr. Griffith and Florida Coastal provide this Court with a history of the relevant cases in an effort to demonstrate that Mr. Brown has repeatedly tried to get the foreclosure action stayed or removed. Mr. Griffith and Florida Coastal further argue that Mr. Brown's motion should be denied because it seeks to re-litigate matters resolved against Mr. Brown in other courts and to add "new parties that have no relation to the original action." *Id.* at 4. To add the new defendants at this stage, Mr. Griffith and Florida Coastal argue, "would unduly prejudice and delay this proceeding." *Id.* at 5. Mr. Griffith and Florida Coastal further assert that there is no basis for the requested injunctive relief.

***6** As set forth previously by this Court, generally, motions to amend pleadings are governed by Rule 15(a) of the Federal Rules of Civil Procedure, which provides that after the time for amending as a matter of course has passed, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed.R.Civ.P. 15(a). The higher standard set forth in Rule 16(b) for modifying a scheduling order only applies when a court has issued a scheduling order setting a deadline for motions to amend the pleadings. Fed.R.Civ.P. 16(b). The Court has not entered a scheduling order in this case. Accordingly, the liberal standard set forth in Rule 15(a) applies here.

Under this standard, motions for leave to amend may be denied "where the court finds 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.' " *Marquette Gen. Hosp. v. Excalibur Med. Imaging, LLC,* 528 F. App'x 446, 448 (6th Cir.2013), quoting *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). In considering what constitutes "undue delay" and "undue prejudice," the Court of Appeals has considered factors including the length of the delay, whether dispositive motions have been granted, whether the new allegations would require the opponent to expend significant additional resources to conduct discovery and prepare for trial, and whether the new allegations would significantly delay resolution of the dispute. *See, e.g., Phelps v. McClellan,* 30 F.3d 658, 662–63 (6th Cir.1994) ("In determining what constitutes

  

prejudice, the court considers whether the assertion of the new claim or defense would: require the opponent to expend significant additional resources to conduct discovery and prepare for trial; significantly delay the resolution of the dispute; or prevent the plaintiff from bringing a timely action in another jurisdiction"). "The longer the delay, the less prejudice the opposing party will be required to show." *Dubuc v. Green Oak Tp.,* 312 F.3d 736, 752 (6th Cir.2002) (citation omitted). On the other hand, "[i]n the absence of reasons such as those listed above, leave should generally be granted." *Johnson v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.,* 502 F. App'x 523, 541 (6th Cir.2012), citing *Foman,* 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222.

In this case, the Court finds that granting Mr. Brown's motion for leave to file a fourth amended complaint would cause undue delay and prejudice. Mr. Brown is attempting to add new parties and bring entirely new claims in a case which has been pending since December 10, 2013. To allow Mr. Brown to begin this case once again at this stage of the proceedings would cause undue delay and unfair prejudice to the existing defendants in that the addition of the new claims and defendants would require the existing defendants to expend additional resources to conduct additional discovery and would significantly delay the resolution of this dispute. *See, e.g ., Cross v. MHM Corr. Servs., Inc.,* 2014 WL 346038, at *3 (E.D.Mo. Jan.30, 2014) (denying motion for leave to file fourth amended complaint because, *inter alia,* "[t]o essentially start the case over, which has been pending for over two years and already has been amended several times would cause further delay and burden Defendants with additional responsive pleading and discovery requirements"). Conversely, denying Mr. Brown's motion would not be unduly prejudicial to him, given that he is free to pursue any valid claims in a separate action. *See id.* Consequently, the Court, in its discretion, will deny the amended motion for leave to file an amended complaint. Further, Mr. Brown does not provide this Court with any basis upon which to grant an injunction or a stay. For these reasons, the Court will deny Mr. Brown's amended motion in its entirety. (Doc. 61).

IV. *Carlisle's Motion for Summary Judgment*

***7** The Court now turns to Carlisle's motion for summary judgment. Summary judgment is not a substitute for a trial when facts material to the Court's ultimate resolution of the case are in dispute. It may be rendered only when appropriate evidentiary materials, as described in Fed.R.Civ.P. 56(c), demonstrate the absence of a material factual dispute and the moving party is entitled to judgment as a matter of law. *Poller v. Columbia Broad. Sys., Inc.,* 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). The moving party bears the burden of demonstrating that no material facts are in dispute, and the evidence submitted must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). "[I]f the evidence is insufficient to reasonably support a jury verdict in favor of the nonmoving party, the motion for summary judgment will be granted." *Cox v. Kentucky Dep't of Transp.,* 53 F.3d 146, 150 (6th Cir.1995) (citation omitted). Additionally, the Court must draw all reasonable inferences from that evidence in favor of the nonmoving party. *United States v. Diebold, Inc.,* 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). The nonmoving party does have the burden, however, after completion of sufficient discovery, to submit evidence in support of any material element of a claim or defense on which that party would bear the burden of proof at trial, even if the moving party has not submitted evidence to negate the existence of that material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Of course, since "a party seeking summary judgment ... bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact," *Celotex,* 477 U.S. at 323, the responding party is only required to respond to those issues clearly identified by the moving party as being subject to the motion. It is with these standards in mind that the instant motion for summary judgment must be decided.

On January 8, 2015, Carlisle filed a motion for summary judgment, arguing that this action is merely an improper attempt by the Browns to re-litigate the foreclosure action filed and decided against them in state court. More specifically, Carlisle argues, *inter alia,* that the claims against it are barred by the doctrine of *res judicata* because "many of the issues crucial to Plaintiff's [sic] claims against Carlisle are *res judicata* as determined by the November 12, 2014 final judgment rendered in case number 08–CVE–12–1598 (The State Foreclosure Action)." (Doc. 54 at 4).

There is both a federal law standard and a state law standard for issue preclusion, also known as collateral estoppel, and these standards share several common elements. Under the federal standard, the party claiming preclusion must demonstrate:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

***8** *Kosinski v. Commissioner of Internal Revenue,* 541 F.3d 671, 675 (6th Cir.2008), quoting *United States v. Cinemark USA, Inc.,* 348 F.3d 569, 583 (6th Cir.2003). Similarly, issue preclusion under the Ohio standard applies if:

> 1) the fact or issue was actually litigated in the prior action; 2) the court actually determined the fact or issue in question; 3) the party against whom issue preclusion is asserted was a party, or in privity with a party, to the prior action.

*Osborn v. Knights of Columbus,* 401 F.Supp.2d 830, 832–33 (N.D.Ohio 2005). The third element of issue preclusion under Ohio law is required only if "a party seeks to use issue preclusion offensively" in the litigation. *Id.,* citing *Chambers v. Ohio Dep't of Human Services,* 145 F.3d 793, 801 n. 14 (6th Cir.1998).

Under both standards, Carlisle is able to establish that issue preclusion bars Mr. Brown's claims against it in this case. Mr. Brown's FDCPA claim (count one) raises issues as to whether Carlisle's clients were proper party plaintiffs, as opposed to debt collectors, and whether Carlisle made misleading representations with respect to the mortgage and note. In his fraud claim (count two), Mr. Brown alleges that Carlisle fraudulently back-dated an assignment of the mortgage and note, and that it fraudulently brought the foreclosure action on behalf of debt collectors. Mr. Brown's slander of title claim (count three) challenges the validity of the mortgage assignments. Finally, in his slander of credit claim (count four), Mr. Brown raises an issue concerning allegedly misleading and deceptive debt collection practices. As set forth by Carlisle, all of these issues were raised and resolved in the judgment decree and order of foreclosure issued by the Delaware County Court of Common Pleas on November 12, 2014.

In the judgment decree and order of foreclosure, the findings of the Court of Common Pleas included the following with respect to CitiGroup and Kondaur (collectively, "Carlisle's clients"):

- that Carlisle's clients provided clear and accurate disclosures and performed all of the conditions precedent required to be performed prior to the acceleration of the mortgage and initiation of foreclosure proceedings;
- that the accounting of the amount owed was accurate and the interest rate was proper;
- that the mortgage was assigned to CitiGroup on December 1, 2008 and officially recorded;
- that the mortgage was further assigned to Kondaur on November 9, 2009 and officially recorded;
- that a judgment of foreclosure against the Browns was warranted;
- that Carlisle's clients did not: breach the mortgage contract or any contract, commit fraud, violate federal laws or regulations with regard to the mortgage, engage in willful or wanton misconduct in their handling of the loan, misrepresent any material facts regarding the loan relationship, violate the Ohio Consumer Sales Practices Act, use inaccurate or misleading terms with regard to the loan, violate a fiduciary duty owed to the Browns, breach any contractual obligations of good faith, charge excessive forfeiture/penalty payments above market rates with respect to the loan, engage in unfair methods of commerce, or make any false representation orally or in writing to the Browns.

  

***9** *See* Joint Decree and Order of Foreclosure, Case No. 08 CV E 12 1598 (Nov. 12, 2014). The determination of those issues was necessary to resolve the judgment decree and order of foreclosure. If, for example, there been improper debt collection practices, fraud, or improper assignments, those issues necessarily would have impacted the state court's decision. Further, under Ohio law, the decree of foreclosure is a final judgment for *res judicata* purposes. *See In re Hoff,* 187 B.R. 190, 194 (S.D.Ohio 1995). Finally, Mr. Brown had a full and fair opportunity to litigate these issues in the Court of Common Pleas. Here, Carlisle does not need to demonstrate mutuality of parties in the prior litigation because it seeks to use issue preclusion defensively, rather than offensively. Based on the foregoing, the Court agrees that Mr. Brown's claims against Carlisle in the instant case are barred by *res judicata.*

In his memorandum in opposition to Carlisle's motion for summary judgment, Mr. Brown argues against this conclusion. (Doc. 58). First, Mr. Brown appears to argue that *res judicata* does not bar his claims because he filed a timely appeal of the Court of Common Pleas decision. *See* 15 CAE 02 0014. Mr. Brown attaches a February 17, 2015 notice of appeal as an exhibit to his memorandum in opposition, which reflects that the Browns are appealing the judgment confirming the sale and distribution of sale proceeds issued on February 11, 2015. *Id.,* Ex. A. Mr. Brown also states that *"Res Judicata* and Claim preclusion are not applicable to the FDCPA complaint because the Plaintiffs Brown have not previously litigated any federal law claims" against Carlisle. *Id.* at 4. Finally, Mr. Brown argues that "succeeding in or a final judgment of a foreclosure does not preclude Plaintiffs from pursuing FDCPA complaints against a law firm." *Id.*

In reply, Carlisle argues that "the Browns have waived the right (by failure to timely appeal) the validity and findings of the Judgment Entry of Foreclosure and are instead appealing the Confirmation of Sale order and questioning whether the execution of that Judgment Entry of Foreclosure...." (Doc. 59 at 4). Carlisle argues that the judgment entry of foreclosure and confirmation of sale order "are separate and distinct actions, both of which constitute final appealable orders once entered." *Id.* Finally, Carlisle argues that no evidence has been offered in opposition to its motion for summary judgment. Thus, Carlisle urges this Court to grant judgment in its favor.

Irrespective of whether Mr. Brown waived his appeal of the judgment entry of foreclosure, "the fact of a pending appeal does not impact the *res judicata* effect of the judgment." *Chandler v. Carroll,* 2012 WL 252014, at *3 (D.Vt. Jan.26, 2012), citing *Chariot Plastics, Inc. v. United States,* 28 F.Supp.2d 874, 881 (S.D.N.Y.1998) (noting that *"res judicata* and collateral estoppel apply once final judgment is entered in a case, even while an appeal from that judgment is pending") (citation omitted). As to Mr. Brown's claim that *res judicata* should not apply because Carlisle was counsel in the state court litigation, as opposed to a party, the Court finds that, as set forth above, mutuality of parties is required only if issue preclusion is being used offensively. Moreover, even if mutuality of parties were required, that element would be satisfied in this case. As the Court of Appeals has noted, "it is well settled that a principal-agent relationship satisfies the privity requirement of *res judicata* where the claims alleged are within the scope of the agency relationship." *ABS Indus., Inc. v. Fifth Third Bank,* 2009 WL 1811915, at *5 (6th Cir. June 25, 2009); *but see Charvat v. GVN Michigan, Inc.,* 2010 WL 2706163, at *5 (Ohio Ct.App. 10th Dist. July 8, 2010) (stating that the cases cited in *ABS Industries* "suggest the rule that a principal-agent relationship satisfies privity for purposes of *res judicata* is fact-based and case-specific"). Because "the relationship between client and attorney ... is a quintessential principal-agent relationship," *CIR v. Banks,* 543 U.S. 426, 436, 125 S.Ct. 826, 160 L.Ed.2d 859 (2005) (citations omitted), privity in the context of *res judicata* is satisfied in these circumstances. Further, although Carlisle was not a party to the state court litigation, the Court of Common Pleas made various rulings which determined that the actions taken by Carlisle on behalf of its clients were proper. In addition to the rulings set forth above, the Delaware Court of Common Pleas also found that Carlisle did not violate Rule 11 in that action. (Doc. 54, Ex. B). Because issue preclusion bars Mr. Brown's claims in this case, Carlisle is entitled to summary judgment. *See, e.g., Byrd v. Homecomings Finan. Network,* 407 F.Supp.2d 937, 944–45 (N.D.Ill.2005) (finding FDCPA claim barred by *res judicata* where the allegations stem from the same group of facts determined by the state court foreclosure). In light of this Court's determination that Mr. Brown's claims against Carlisle in the instant case are barred by *res judicata,* the Court need not consider the additional arguments raised in Carlisle's motion for summary judgment. Carlisle's motion for

  

summary judgment will be granted as to Mr. Brown's claims. (Doc. 54).

## V. *Conclusion*

***10** For the reasons set forth above, Carlisle's summary judgment is granted as to the claims brought by Mr. Brown only. (Doc. 54). Further, the motion for leave to file an amended complaint and injunction or motion to stay is denied as moot. (Doc. 60). Finally, to the extent that it is brought by Mr. Brown only, the amended motion for leave to file an amended complaint and injunction or motion to stay is denied. (Doc. 61).

**All Citations**

Not Reported in F.Supp.3d, 2015 WL 4205157

**End of Document**

# EXHIBIT D

2000 WL 33743107
United States District Court,
N.D. Ohio,
Western Division.

OHIO CELLULAR PRODUCTS CORPORATION, Plaintiff,
v.
ADAMS USA, INC., et al., Defendant.

No. 3:94 CV 7251.
|
Nov. 9, 2000.

*MEMORANDUM OPINION*

KATZ, District Judge.

***1** This matter is before the Court on cross-motions for summary judgment on third-party plaintiffs' third-party complaint and on third-party plaintiffs' motion to dismiss third-party defendant's counterclaim. For the following reasons, third-party plaintiffs' motion for partial summary judgment on the third-party complaint will be granted, third-party defendant's motion for summary judgment will be denied, and third-party plaintiffs' motion to dismiss third-party defendant's counterclaim will be granted in part and denied in part.

## *BACKGROUND*

On May 19, 1994, Plaintiff Ohio Cellular Products (OCP) brought a patent infringement action against Defendants Adams USA, Inc., and Apehead Manufacturing Inc. (hereinafter collectively referred to as "Adams"). In a judgment rendered on October 11, 1995, this Court found that the patents OCP sought to enforce against Adams were invalid and granted Adams' motion for summary judgment. That finding was subsequently affirmed by the Court of Appeals for the Federal Circuit.

Adams then moved for attorney fees under 35 U.S.C. § 285 on the dual grounds that OCP engaged in inequitable conduct before the Patent and Trademark Office (PTO), and that OCP engaged in unjustified and/or vexatious litigation. In a judgment rendered on February 12, 1997, and reaffirmed on September 25, 1997, this Court granted the motion for attorney fees on the sole ground that OCP had engaged in inequitable conduct before the PTO. That finding was grounded in a factual determination that OCP's president and sole shareholder, Donald Nelson, had intentionally failed to disclose to the PTO the existence of a material piece of prior art, Patent No. 4,524,037, held by Michel Mark.

After entry of that judgment, parties tried to negotiate the amount of attorney fees. The negotiations were not successful, and on January 20, 1998, this Court granted Adams' fee petition in the total amount of $178,888, exclusive of interest. On February 3, 1998, Adams filed a motion claiming that it would be unable to collect the judgment unless Nelson was added as a third-party defendant and the judgment was amended to include Nelson as an additional party against whom judgment was entered. On March 25, 1998, this motion was granted, and on May 18, 1998, Nelson's motion to alter or amend the judgment was denied. The judgment against Nelson was affirmed by the Court of Appeals for the Federal Circuit. *Ohio Cellular Prods., Inc. v. Adams USA, Inc.,* 175 F.3d 1343 (1999).

The Supreme Court granted certiorari, and found that Nelson's right to due process had been violated by entrance of the judgment against him at the same time that he was added as a party. *Nelson v. Adams USA, Inc.,* 529 U.S. 460, 120 S. Ct 1579, 146 L.Ed.2d 530 (2000). The Court reversed and remanded the decision of the Federal Circuit with instructions that Nelson be given a full and fair opportunity to defend himself on the merits of the case. *Id.* at ——, 120 S.Ct. at 1587. Significantly, the Court also noted that its decision did not insulate Nelson from liability, *id .,* and that Adams would be free to advance its argument that the principles of collateral estoppel would prevent Nelson from contesting findings made during the litigation of the fee award against OCP. *Id.* at ——, 120 S.Ct. at 1587, n. 5.

***2** Adams has filed a motion for partial summary judgment requesting that this Court find that Nelson is collaterally estopped from relitigating the finding that Nelson committed inequitable conduct warranting a fee award to Adams. Nelson has filed a cross-motion for summary judgment on Adams' third-party complaint, claiming that Adams was not a "prevailing party" for the purpose of a fee award against Nelson, that any award

based on "inequitable conduct" is barred by the statute of limitations, and that Nelson acted on behalf of OCP at the time of any "inequitable conduct" and should therefore not be held individually liable.

Nelson has also filed a counterclaim against Adams, requesting compensatory and punitive damages for intentional and negligent infliction of emotional distress and for tortious interference with business and contractual relationships. Adams has moved that the counterclaim be dismissed for failure to state a claim upon which relief may be granted.

All of the issues have been fully briefed and are ripe for review. The parties' contentions are discussed below.

## *DISCUSSION*

### *I. The Third–Party Complaint*

#### *A. Summary Judgment Standard*

As an initial matter, the Court sets forth the relative burdens of the parties once a motion for summary judgment is made. Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U .S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Of course, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Id.* at 323, 106 S.Ct. at 2553. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 2541, 91 L.Ed.2d 202 (1986) (*quoting* Fed.R.Civ.P. 56(e)).

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex,* 477 U.S. at 324, 106 S.Ct. at 2553. Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

#### *B. Collateral Estoppel*

***3** The doctrine of collateral estoppel, or issue preclusion, provides that "the relitigation of issues previously decided is barred on principles of finality and repose." *Del Mar Avionics, Inc. v. Quinton Instrument Co.,* 836 F.2d 1320, 1324 (Fed.Cir.1987); *see generally* 18 James W. Moore, Moore's Federal Practice § 132.01 (3d ed.1999). Adams claims that Nelson should be bound by this Court's prior determination that Nelson's actions constituted "inequitable conduct" before the PTO sufficient to justify an award of fees to Adams. Adams' argument is based •primarily on Section 39 of the Restatement (Second) of Judgments, which provides, "A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by a determination of issues decided as though he were a party." RESTATEMENT (SECOND) OF JUDGMENTS § 39 (1980).

Precedent and the underlying rationale for collateral estoppel both support the application of issue preclusion against Nelson in this case. The Court of Appeals for the Federal Circuit has approved the use of collateral estoppel to bind a non-party when the non-party controlled the earlier litigation. In *Mother's Restaurant Inc. v. Mama's Pizza, Inc.,* 723 F.2d 1566 (Fed.Cir.1983), the Federal Circuit noted, "Federal courts have repeatedly held a non-party may be bound by a judgment if one of the parties to the earlier suit is so closely aligned with the non-party's interests as to be its virtual representative." *Id.* at 1572 (citations omitted). The Supreme Court has also approved the use of collateral estoppel against a non-party. "[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own ... is as much bound ... as he would be if he had been a party to the record." *Montana v. United States,* 440 U.S. 147, 154, 99 S.Ct. 970, 974, 59

L.Ed.2d 210 (1979) (ellipses in original) (quoting *Schnell v. Peter Eckrick & Sons, Inc.,* 365 U.S. 260, 262, n. 4, 81 S.Ct. 557, 559, 5 L.Ed.2d 540 (1961)): The aim of collateral estoppel is to allow "the conclusive resolution of disputes." *Montana,* 440 U.S. at 153, 99 S.Ct. at 973. "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.,* 99 S.Ct. at 973.

There can be little doubt that application of collateral estoppel in the instant case would prevent expensive and vexatious litigation and conserve judicial resources; the only question that remains, then, is whether the interests of OCP were "virtually representative" of the interests of Nelson in the original action. *Mother's Restaurant,* 723 F.2d at 1572. This Court believes that they were. As undisputed evidence indicates, Nelson was the president and sole shareholder of OCP during the litigation with Adams. Furthermore, Nelson has indicated that he approved the refusal of Adams' settlement offer. Finally, this Court must note that Nelson was a witness at the hearing at which it was determined that Nelson's conduct toward the PTO was inequitable. Nelson has had his day in court, and there is no reason to allow him to have another with respect to the issues already determined. *See also Benson & Ford, Inc. v. Wanda Petroleum Co.,* 833 F.2d 1172, 1174 (5th Cir.1987) (president and sole shareholder control litigation).

***4** Nelson has raised a number of arguments in opposition to collateral estoppel, but all of them are unpersuasive. Nelson first argues that there is a sufficient dispute concerning material facts to prevent summary judgment, and has presented a list of the facts that are supposedly in dispute. This argument is unavailing for two reasons. First, many of the facts "in dispute" are not material to this Court's decision. Second, much of the information in Nelson's affidavit attached to his opposition to the motion for partial summary judgment contradicts information obtained from Nelson in prior discovery. "A party cannot create a factual dispute by filing an affidavit, after a motion for summary judgment has been made, which contradicts earlier testimony." *Dotson v. United States Postal Service,* 977 F.2d 976, 978 (6th Cir.1992) (citing *Gagne v. Northwestern Nat'l Ins. Co.,* 881 F.2d 309, 315 (6th Cir.1989)); *accord Sinskey v. Pharmacia Ophthalmics, Inc.,* 982 F.2d 494, 498 (Fed.Cir.1992).

Nelson also argues that there was no "final judgment" on the proceeding against OCP, and therefore no "second proceeding" against him; he contends that both are necessary to allow application of collateral estoppel. Even if this Court's judgment with respect to OCP's fee liability were not final due to OCP's failure to file a timely appeal, collateral estoppel might still apply. A judgment need not be final for the purposes of appeal in order to be final for the purposes of collateral estoppel:

> Whether a judgment, not 'final' in the sense of 28 U.S.C. § 1291, ought nevertheless be considered 'final' in the sense of precluding further litigation of the same issue, turns upon such factors as the nature of the decision (i.e., that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review. 'Finality' in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.

*Lummus Co. v. Commonwealth Oil Refining Co., Inc.,* 297 F.2d 80, 89 (5th Cir.1981). This Court does not see "any good reason" for relitigating an issue that was never tentative and upon which there was an adequate hearing and opportunity for review.

Nelson also argues that collateral estoppel is prevented through application of Paragraph (5) of Section 59 of the Restatement (Second) of Judgments. Paragraph (5) provides:

> A judgment against the corporation *that is found to be the alter ego of a stockholder or member of the corporation* establishes personal liability of the latter only if he is given notice that such liability is sought to be imposed and fair opportunity to defend the action resulting in the judgment.

  

RESTATEMENT (SECOND) OF JUDGMENTS § 59 (1980) (emphasis added). OCP has not been found to be Nelson's alter ego, and Adams has repeatedly disavowed any effort to convince the Court otherwise. Paragraph (5) is clearly inapplicable to the case at bar.

***5** In his final argument, Nelson asserts that summary judgment is not proper because Adams must establish an independent basis to hold Nelson liable for attorney fees. This argument is not germane to the issue of collateral estoppel and is more properly considered below during the discussion of Nelson's ultimate liability.

Adams' motion for partial summary judgment with respect to the application of collateral estoppel to this Court's earlier findings that Nelson committed inequitable conduct toward the PTO is well-taken and will be granted.

*C. Nelson's Motion for Summary Judgment*

Nelson has moved that Adams' third-party complaint be dismissed for three reasons. First, Nelson claims that Adams was not a "prevailing party" within the meaning of 35 U.S.C. § 285, the fee statute, with respect to Nelson, since Nelson was not the party responsible for relief on the merits in the underlying action. Second, Nelson asserts that the claim for fees is barred by Ohio's four-year statute of limitations on fraud. Finally, Nelson claims that, since he was an officer acting within the course and scope of his employment with OCP, there is no basis upon which this Court can hold him individually liable for his own inequitable conduct.

Nelson's argument that Adams was not the prevailing party is an attempt to re-frame the issue in this case and is without merit. The fee-shifting statute states, "The court in exceptional cases may award reasonable attorney fees to the prevailing party." 35 U.S.C. § 285. There can be no dispute that Adams was the prevailing party in its litigation with OCP. The issue that remains in this case is not whether Adams can recover against Nelson for some hypothetical wrong over which Nelson and Adams must litigate; the issue is whether Nelson may be held liable as the director or shareholder of the losing party. An objection to Adams' characterization as a prevailing party would have had to have been made by OCP when the initial fees were awarded, and the time for appealing any such designation is long past.

Nelson's reliance on Ohio's four year statute of limitations for fraud actions fails as well. Nelson claims that Adams' cause of action under 35 U.S.C. § 285 accrued no later than 1992, when Adams learned that Nelson had failed to disclose prior art to the PTO. Nowhere does Nelson explain exactly why Adams should have been required to bring an action for the payment of fees to a prevailing defendant in a patent action two years *before* the ultimately unsuccessful plaintiff even brought its case. The Supreme Court has noted that "a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area Laundry v. Ferbar Corp. of California, Inc.,* 522 U.S. 192, 201, 118 S.Ct. 542, 549, 139 L.Ed.2d 553 (1997). Adams did not become a "prevailing party" until this Court granted its initial motion for summary judgment on October 11, 1995; Adams filed its motion to add Nelson on February 3, 1998, well within any potentially applicable statute of limitations.

***6** Nelson's final argument involves the threshold issue upon which this litigation depends: may Nelson, as an officer acting in that capacity on behalf of a corporation, be held liable for inequitable activities that led to the award of attorney fees against that corporation under 35 U.S.C. § 285? Precedent in the Federal Circuit indicates that he may.

In *Hoover Group, Inc. v. Custom Metalcraft, Inc.,* 84 F.3d 1408 (Fed.Cir.1996), the Federal Circuit held that, unless the corporate veil were pierced, an officer would only be subject to liability for infringement when the officer evidenced bad faith, fraud, or culpable intent. In *Hoover,* the Court reviewed the nature of individual liability for acts performed on behalf of the corporation:

> [W]hen a person in a control position causes the corporation to commit a civil wrong, imposition of personal liability requires consideration of the nature of the wrong, the culpability of the act, and Whether the person acted in his/her personal interest or that of the corporation. The decisions have not always distinguished among the various legal premises, i.e. (1) justification for piercing the corporate veil based on such criteria as absence of corporate assets

  

> or use of the corporate form for illegal purposes; (2) corporate commitment of a commercial tort (such as interference with contract or business advantage, or patent infringement) caused by the officer acting as agent of the corporation; (3) actions similar to (2) but exacerbated by culpable intent or bad faith on the part of the officer; or (4) personal commitment of a fraudulent or grossly negligent act. For example, corporate officers have been held personally liable when they participated in conversion, breach of fiduciary duty, fraud, and malicious prosecution; and have been held not to be personally liable for commercial torts such as interference with contractual relations if they were acting in the corporation's interest. [1]

1 The latter part of this quotation appears in Nelson's memorandum in support of his motion for summary judgment in the following form: "For example, corporate officers ... have been held not to be personally liable for commercial torts ... if they were acting in the corporation's interest." (Mem. in Supp. at 19) Counsel for Nelson would be well-served to review their duty of candor to the Court as imposed by Ohio's Code of Professional Responsibility EC 7–23.

*Hoover,* 84 F.3d at 1411 (citations omitted).

In an opinion issued on September 25, 1997, this Court held that "Nelson's conduct manifests a sufficiently culpable state of mind to warrant a determination that it resulted from an intent to mislead the PTO." As discussed in Section I(B), *supra,* Nelson is collaterally estopped from relitigating any issue related to his culpable state of mind and intention. Even if, as Nelson asserts, he did not commit his inequitable acts for his own benefit, Nelson's acts certainly exhibit the requisite level of fraud, bad faith, and culpable intent to prevent an award of summary judgment in Nelson's favor. Nelson's motion for summary judgment on Adams' third-party complaint will be denied.

*II. Nelson's Counterclaim*

Nelson has filed a five-count counterclaim against Adams. Counts I and II allege intentional and negligent infliction of emotional distress, Count III alleges intentional interference with a contractual and business relationship, Count IV requests punitive damages, and Count V requests attorney fees pursuant to 35 U.S.C. § 285 for Nelson's successful appeal.

*A. Motion to Dismiss*

***7** In deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b), the function of the Court is to test the legal sufficiency of the complaint. In scrutinizing the complaint, the Court is required to accept the allegations stated in the complaint as true, *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984), while viewing the complaint in a light most favorable to the plaintiffs, *Scheuer v. Rhodes,* 416 U .S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); *Westlake v. Lucas,* 537 F.2d 857, 858 (6th Cir.1976). The Court is without authority to dismiss the claims unless it can be demonstrated beyond a doubt that the plaintiff can prove no set of facts that would entitle it to relief. *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 101–02, 2 L.Ed.2d 80 (1957); Westlake, supra, at 858. *See generally* 2A James W. Moore, Moore's Federal Practice, ¶ 12.07[2.–5] (2d ed.1994).

*B. Intentional and Negligent Infliction of Emotional Distress*

Ohio permits a cause of action for intentional infliction of emotional distress, and a cause of action for business-related emotional distress has been recognized. *See Yeager v. Local Union 20,* 6 Ohio St.3d 369 (1983). Nelson claims that he has suffered and continues to suffer severe emotional distress due to false allegations by Adams that Nelson committed fraud before the PTO while obtaining the #702 patent by intentionally failing to inform the PTO of the #037 patent issued to Michael Marc. As determined above, Nelson is estopped from relitigating the issue of his failure to inform the PTO of the #072 patent. Since Nelson's success on both counts of emotional distress requires that he be able to show that, contrary to any representations of Adams, he did not commit misrepresentation to the PTO, he will be unable to succeed on either Count I or Count II of his counterclaim. Adams'

motion to dismiss will be granted with respect to Count I and Count II of Nelson's counterclaim.

*C. Interference with Business and Contractual Relations*

In Count III of his counterclaim, Nelson alleges that Adams engaged in improper discussions with James Lammy, Sr., a former shareholder of OCP, causing Lammy to breach both contractual and fiduciary duties to Nelson. In Ohio, one who claims intentional interference with a contract "must prove (1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages." *Kenty v. Transamerica Premium Ins. Co.,* 650 N.E.2d 863, 864 (Ohio 1995). Adams claims that it was unaware of the existence of any contract between Lammy and Nelson, that Nelson failed to allege that there was no justification for the breach, and that, furthermore, any contract between Lammy and Nelson was for the illegal purpose of concealing Nelson's misrepresentations to the PTO and should therefore be unenforceable as a matter of law.

***8** All of Adams' arguments for the dismissal of Count III involve factual allegations that this Court may not consider when deciding a motion to dismiss. When the facts as stated in Nelson's pleading are taken as true and the allegations are viewed in their best light, they state a claim upon which relief may be granted. Count III of Nelson's complaint will not be dismissed. [2]

2 Adams also argues that Nelson's interference claim is only a permissive counterclaim, and therefore subject to dismissal due to lack of subject matter jurisdiction in this Court. Although Nelson made no jurisdictional allegations, at this point in the litigation an analysis of Nelson's pleadings indicates that this claim is closely enough related to the transactions and occurrences giving rise to Adams' complaint as to fall under the ambit of supplemental jurisdiction, 28 U.S.C. § 1367. Given the length of time the parties have been before this Court and the amount of resources already expended in discovery, jurisdiction will be retained. Of course, this Court is free to reconsider this determination *sua sponte* at any time in the litigation, should new facts be brought to its attention.

*D. Punitive Damages*

Ohio permits recovery for punitive damages based on intentional interference with a business relationship. *Akron–Canton Waste Oil, Inc. v. Safety–Kleen Oil Services, Inc.,* 611 N.E.2d 955, 966, 81 Ohio App.3d 591, 606 (Summit Co.1992). Since Count III of Nelson's counterclaim did not fail to state a claim upon which relief may be granted, his claim for punitive damages based on that count also must survive dismissal.

*E. Fees under 35 U.S.C. § 285*

Nelson claims that 35 U.S.C. § 285 entitles him to attorney fees for his successful appeal of this Court's original ruling, since this Court has already determined that this case is "exceptional" under the statute. This claim is utterly without merit.

An award of fees under 35 U.S.C. § 285 requires a two-step analysis. First, the district court must determine whether there are exceptional circumstances, such as inequitable conduct during the prosecution of a patent, misconduct during litigation, vexatious or unjustified litigation, or a frivolous suit. *Bayer Aktiengesellschaft v. Duphar Int'l Research B.V.,* 738 F.2d 1237, 1242 (Fed.Cir.1984). Nelson is correct in asserting that this case did involve exceptional circumstances; of course, what Nelson fails to mention in his complaint is that the exceptional circumstances were *of his own making.* The second prong of the analysis requires the district court to determine if the exceptional circumstances justify an award of attorney fees. *Rohm & Haas Co. v.. Crystal Chem. Co.,* 736 F.2d 688, 691 (Fed.Cir.1984).

Clearly, Nelson should not be rewarded for his own inequitable conduct during the prosecution of his patent. Further, none of Adams' actions during this appeal, which resulted in affirmance by the Federal Circuit, rise to the level necessary to permit a fee award. Adams' motion to dismiss Count V of Nelson's counterclaim will be granted.

***CONCLUSION***

For the foregoing reasons, third-party plaintiff Adams U.S.A. Inc .'s motion for partial summary judgment on the issue of collateral estoppel in their third-party complaint is granted, and Nelson is estopped from relitigating this Court's earlier determination that he committed inequitable conduct before the Patent and Trademark

Office. Nelson's motion for summary judgment on the third-party complaint is denied. Adams' motion to dismiss Nelson's third-party counterclaim is granted with respect to Nelson's intentional infliction of emotional distress, negligent infliction of emotional distress, and 35 U.S.C. § 285 claims and denied with respect to Nelson's interference with business and contractual relations claim and his punitive damages claim.

***9** IT IS SO ORDERED.

**All Citations**

Not Reported in F.Supp.2d, 2000 WL 33743107, 62 U.S.P.Q.2d 1522

# EXHIBIT E

1992 WL 394867
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES
FOR REPORTING OF OPINIONS AND
WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth
District, Franklin County.

Zack TRIPLETT, Administrator of the Estate of
Kevin Triplett, Deceased et al., Plaintiffs-Appellees,
v.
Jack B. ROSEN, Defendant-Appellee,
(Cincinnati Insurance Company), (Appellant).

Nos. 92AP-816, 92AP-817.
|
Dec. 29, 1992.

Appeals from the Franklin County Court of Common Pleas.

**Attorneys and Law Firms**

Lamkin, Van Eman, Trimble, Beales & Rourke, and Timothy L. Van Eman, for plaintiff-appellees.

Hammond & Willard, and Robert H. Willard, for defendant-appellee Jack B. Rosen.

Lane, Alton & Horst, Gregory D. Rankin and Timothy P. Spears, for appellant Cincinnati Ins. Co.

Crabbe, Brown, Jones, Potts & Schmidt, and Jeffrey M. Lewis, for plaintiff-appellee Prudential-LMI Commercial Ins. Co.

OPINION

YOUNG, Presiding Judge.

***1** This matter is before this court upon the appeal of Cincinnati Insurance Company ("CIC") from a declaratory judgment of the Franklin County Court of Common Pleas which found that the $300,000 insurance policy limits of Jack Rosen's ("Rosen") primary insurance carrier, Prudential-LMI Commercial Insurance ("LMI") had been exhausted through settlement by the payment of $200,000 to plaintiffs, Zack Triplett et al., and its order that CIC defend Jack Rosen against the claims of the plaintiffs, and indemnify Rosen for any verdict that may be rendered in excess of the primary policy limits of $300,000, up to its policy limits, as the excess liability insurer.

The incident giving rise to this litigation was a fire which occurred January 6, 1984 in an apartment building owned by Rosen which caused the deaths of all four of plaintiffs' decedents. A lawsuit was filed in January 1984, and it is undisputed that LMI was the primary insurance carrier, responsible for the initial liability of $300,000 and CIC was the excess insurance carrier, responsible for liability over and above the primary carrier's liability limits up to $1,000,000.

For reasons unrelated to this appeal, this case was before this court and remanded to the trial court. See *Triplett v. Rosen* (Apr. 5, 1988), Franklin App. No. 87AP-72, unreported (1988 Opinions 1246); (May 16, 1989), Franklin App. No. 88AP-776, unreported (1989 Opinions 1660); (1989), 45 Ohio St.3d 715 (jurisdictional motion overruled); (1989), 46 Ohio St.3d 715, 717, 545 N.E.2d 907 (denial of rehearing). Eventually, this case was set for trial March 5, 1991.

On the day of trial, the plaintiffs, Rosen, and LMI, entered into two separate settlement agreements. LMI agreed to pay plaintiffs $200,000 of the $300,000 policy limits in settlement on the condition that Rosen file a declaratory judgment to determine that such an agreement constitutes exhaustion thus triggering the obligation of the excess insurance carrier. Furthermore, plaintiffs agreed not to pursue any liability claims which they may incur against Rosen, personally.

Rosen filed his declaratory judgment action against the plaintiffs and in May 1991, Rosen filed a third-party complaint against CIC, joining it in this lawsuit. CIC filed an answer and moved to interplead LMI as a fourth-party defendant. All interested parties to this appeal agreed to brief the issues to the trial court as on motions for summary judgment. On April 8, 1992, the trial court granted summary judgments for Rosen and LMI. The entry reflecting these decisions was journalized May 14, 1992. Pursuant to a motion filed by CIC, the summary judgments have been consolidated for purposes of this appeal. Plaintiffs, Zack Triplett et al., representing the

  

four decedents, are not parties to this appeal. CIC sets forth the following two assignments of error:
"*ASSIGNMENT OF ERROR NO. I.*

"THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN GRANTING SUMMARY JUDGMENT TO JACK ROSEN AND PRUDENTIAL-LMI COMMERCIAL INSURANCE COMPANY ON THEIR CLAIMS THAT THE PAYMENT OF $200,000 TO PLAINTIFFS BY PRUDENTIAL-LMI EXHAUSTED THE $300,000 LIMITS OF THE PRIMARY POLICY, AND TRIGGERED THE OBLIGATIONS OF CINCINNATI INSURANCE COMPANY AS THE EXCESS INSURANCE CARRIER.

***2** "*ASSIGNMENT OF ERROR NO. II.*

"THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN GRANTING SUMMARY JUDGMENT TO PRUDENTIAL-LMI INSURANCE COMPANY, THE PRIMARY INSURER, ON THEIR CLAIM THAT CINCINNATI INSURANCE COMPANY, THE EXCESS INSURER, LACKED STANDING TO SUE."

In the first assignment of error, appellant asserts that the trial court erred in concluding, as a matter of law, that LMI's settlement with Rosen exhausted the $300,000 limits of the primary policy thus triggering the obligations of CIC as the excess insurance carrier. Since the resolution of this matter necessarily involves the interpretation of the contracts of insurance between Rosen and the primary insurer LMI, and Rosen and the excess insurer CIC, this court initially will analyze the pertinent provisions of each contract of insurance.

The relevant provisions of the contract of insurance of the primary insurer, LMI [1], provide:

"Whenever the conditions of the printed form which are shown below can be construed to perform a liberalization of the conditions found elsewhere in this policy, such conditions shall become paramount.
" * * *

"B Conditions

" * * *

"2. OTHER INSURANCE

"The insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other insurance. When this insurance is primary and the Insured has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of LMI's liability under this policy shall not be reduced by the existence of such other insurance.

"When both this insurance and other insurance apply to the loss on the same basis, whether primary, excess or contingent, LMI shall not be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision below:

"a. CONTRIBUTION BY EQUAL SHARES-If all of such other valid and collectible insurance provides for contribution by equal shares, LMI shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so paid, the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each such insurer has paid its limit in full or the full amount of the loss is paid.

"b. CONTRIBUTION BY LIMITS-If any of such other insurance does not provide for contribution by equal shares, LMI shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

" * * *

"H. LIBERALIZATION CLAUSE

"If during the period that insurance is in force under this policy or within 60 days prior to the inception date thereof, on behalf of LMI there be filed with and approved or accepted by the insurance supervisory authorities, in conformity with law, any forms, endorsements,

  

rules or regulations by which the insurance provided under this policy could be extended or broadened, without additional premium charge, by endorsement or substitution of form, then such extended or broadened insurance shall inure to the benefit of the Insured as though such endorsements or substitution of form had been made.

***3** " * * *

"LMI will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence and LMI shall have the right and duty to defend any suit against the Insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but LMI shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of LMI's liability has been exhausted by payment of judgments or settlements.

" * * *

"COVERAGE A-LIABILITY

"The limit of liability stated on the declarations page(s) as applicable to 'each occurrence' is the total limit of LMI's liability for all damages, including damages for care and loss of services, as a result of any one occurrence provided that with respect to any occurrence for which notice of this policy is given in lieu of security or when this policy is certified as proof of financial responsibility under the provisions of the Motor Vehicle Financial Responsibility Law of any state or province such limit of liability shall be applied to provide the separate limits required by such law for bodily injury liability and property damage liability to the extent of the coverage required by such law, but the separate application of such limit shall not increase the total limit of LMI's liability.

"Subject to the above provision respecting 'each occurrence', the total liability of LMI for all damages because of all bodily injury and property damage which occurs during each annual period while this policy is in force commencing from its effective date and is described in any of the numbered subparagraphs below shall not exceed the limit of liability stated on the declarations page(s) as 'aggregate' with respect to:

"1. all property damage arising out of premises or operations rated on a remuneration basis or contractor's equipment rated on a receipts basis, but excluding property damage included in Subparagraph 2. below;

"2. all property damage arising out of and occurring in the course of operations performed for the Named Insured by independent contractors and general supervision thereof by Named Insured, but this Subparagraph 2. does not include property damage arising out of maintenance or repairs at premises owned by or rented to the Named Insured or structural alterations at such premises which do not involve changing the size of or moving buildings or other structures;

"3. all bodily injury and property damage included within the completed operations hazard and all bodily injury and property damage included within the products hazard.

"Such aggregate limit shall apply separately to the property damage described in Subparagraphs 1. and 2. and separately with respect to each project away from the insured premises. Such aggregate limit shall apply separately to the bodily injury and property damage described in Subparagraph 3.

***4** " * * *

"With respect to Coverages A and C, LMI will pay, in addition to the applicable limit of liability:

"A. all expenses incurred by LMI, all costs taxed against the Insured in any suit defended by LMI and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before LMI has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of LMI's liability thereon;

"B. premiums on appeal bonds required in any such suit, premiums on bonds to release attachments in any such suit for an amount not in excess of the applicable limit of liability of this policy, and the costs of bail bonds required of the Insured because of accident or traffic law violation arising out of the use of any vehicle to which this policy applies, but LMI shall have no obligation to apply for or furnish any such bonds;

  

"C. expenses incurred by the Insured for first aid to others at the time of an occurrence for bodily injury to which this policy applies;

"D. reasonable expenses incurred by the Insured at LMI's request in assisting LMI in the investigation or defense of any claim or suit."

Upon an examination of the contractual terms of the LMI policy, LMI was the primary insurer and was under a duty to indemnify Rosen under the facts of the case for liability up to the policy limits of $300,000. Furthermore, LMI had the right and duty to defend any suit filed against Rosen which sought damages for bodily injury or property damage, even if the allegations were groundless. Moreover, Section B, I Coverage A states that LMI " * * * may make such investigation and settlement of any claim or suit as it deems expedient, but LMI shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of LMI's liability has been exhausted by payment of judgments or settlements."

The relevant provisions of the CIC insurance policy are as follows:
"1. Coverage

"The Company Agrees

"To indemnify the Insured for all sums which the Insured shall become legally obligated to pay as damages because of:

"(a) Personal Injury

"(b) Property Damage

"(c) Advertising Liability

"to which this insurance applies, caused by an occurrence, anywhere during the policy period.

"2. Defense, Supplementary Payments

"With respect to any occurrence not covered by underlying insurance specified in Schedule A hereof or any other underlying insurance collectible by the Insured, but covered by the terms and conditions of this policy, without regard to the retained limit contained herein, the Company shall

"(a) have the right and duty to defend any suit against the Insured seeking damages on account thereof, even if such suit is groundless, false or fraudulent, but the Company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;

"(b) pay premiums on appeal bonds required in any such suit, and premiums on bonds to release attachments in any such suit for an amount not in excess of the applicable limit of liability of this policy, but the Company shall have no obligation to apply for or furnish any such bonds;

***5** "(c) pay all expenses incurred by the Company, all costs taxed against the Insured in any such suit and all interests on the entire amount of any judgment therein which accrues after entry of the judgment and before the Company has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the Company's liability thereon;

"(d) reimburse the Insured for all reasonable expenses, other than loss of earnings incurred at the Company's request;

"and the amounts so incurred, except settlements of claims and suits are payable to the Company in addition to the applicable limit of liability of this policy.

"In jurisdictions where the Company may be prevented by law or otherwise from carrying out this agreement the Company shall pay any expense incurred with its written consent in accordance with this agreement. The Insured shall promptly reimburse the Company for all sums paid on behalf of the Insured within the retained limit specified in the Declarations.

" * * *

"3. Underlying Insurance If underlying insurance is exhausted by any occurrence, the Company shall be obligated to assume charge of the settlement or defense of any claims or proceedings against the Insured resulting from the same occurrence, but only where this policy applies immediately in excess of such underlying insurance without the intervention of excess insurance of another carrier."

  

In analyzing the legal effects of these selected provisions, it is apparent that CIC was the excess insurance carrier and was only obligated to Rosen when the underlying insurance was exhausted by the primary insurance carrier. CIC was obligated "to assume charge of the settlement or defense of any claims or proceedings against the Insured * * * but only where this policy applies immediately in excess of such underlying insurance without the intervention of excess insurance of another carrier." (CIC policy Section V-Conditions, Paragraph 3.)

Accordingly, the issue before this court is whether the legal effect of the settlement agreement between Rosen, the insured, and the primary insurance company, LMI, exhausts the limits of liability of the primary insurer thus, triggering the duties and obligations of the excess insurance carrier, CIC, to assume the defense of any claims still pending against the insured.

The "SETTLEMENT AGREEMENT AND COVENANT NOT TO EXECUTE ON PERSONAL ASSETS OF DEFENDANT JACK ROSEN," in relevant part, provides as follows:
"WHEREAS, Plaintiffs and Defendants have reached a settlement pursuant to the following terms:

"1. Jack Rosen, by and through his primary insurance carrier, Lumberman's Mutual, agrees to pay immediately to Plaintiffs the sum of Two Hundred Thousand Dollars ($200,000).

"2. Plaintiffs agree to credit Defendant Jack Rosen's excess insurance carrier, The Cincinnati Insurance Company, with the amount Three Hundred Thousand Dollars ($300,000) to be applied against any judgment. By this agreement, Plaintiffs have accorded to the excess carrier the same benefit as if the full amount of the Lumberman's primary policy of $300,000 had been paid in full and exhausted.

***6** "3. Plaintiffs agree not to enforce any judgment against Jack Rosen personally or to execute against any personal assets of Jack Rosen for any claim, judgment, or settlement in this case, except that Plaintiffs hereby reserve their right to enforce any judgment or settlement against the $1,000,000 excess policy issued by The Cincinnati Insurance Company to Jack Rosen. Plaintiffs further agree that, upon payment of the $200,000 on behalf of Jack Rosen by Lumberman's Mutual, they waive and forfeit all rights to execute against Defendant Jack Rosen's assets; and that this covenant not to execute shall not be conditioned upon the success of any further action to recover anything from Jack Rosen's excess carrier, The Cincinnati Insurance Company.

"4. Jack Rosen will file a declaratory action against The Cincinnati Insurance Company to decide the issue of whether Lumberman's Mutual must pay the full amount of its $300,000 primary policy to exhaust its obligation under the primary policy before Cincinnati Insurance has an obligation to pay any judgment or settlement in excess of that amount.

" * * *

"IN CONSIDERATION OF THESE COVENANTS AND AGREEMENTS and in consideration of the sum of $200,000 being paid to the undersigned plaintiffs * * * hereby covenant and agree to waive and forfeit any and all rights which they may have to enforce against Jack Rosen personally any judgment rendered in these above-captioned cases or any other actions or claims arising from the same facts or to execute upon any such judgment against Jack Rosen's real property, personal property, monies, interests, holdings, securities, or assets of any kind and nature, with the exception of the insurance policy of The Cincinnati Insurance Company in which Jack B. Rosen is the named insured or an insured by definition of said policy. Plaintiffs' aforesaid covenants and agreements are not conditioned on the success of any subsequent action against the excess carrier, The Cincinnati Insurance Company, or the recovery of anything from The Cincinnati Insurance Company.

" * * * It is further understood that, as part of the agreement reached among the parties, plaintiffs will extinguish the first Three Hundred Thousand Dollars ($300,000) of liability against Jack B. Rosen, thus providing to the excess insurance carrier, Cincinnati Insurance Company, the full benefit of the primary policy. Under the terms of the agreement plaintiffs can proceed to trial against Jack Rosen in order to attempt to prove liability and to prove damages in excess of $300,000; provided, however, that in the event of a judgment in excess of any and all available insurance policies, Jack Rosen will not have any obligation to satisfy the judgment

  

personally or pay anything out of his own monies, real property, personal property, or assets of any kind and nature. * * * Any judgment in excess of $300,000, however, shall not be paid by Jack Rosen personally but only from Jack Rosen's excess insurance policy with The Cincinnati Insurance Company, as aforementioned.

***7** " * * * *

"This covenant is made without any admissions on the part of any parties hereto with respect to either liability or damage issues. * * * "

The settlement agreement was signed by representatives for each of the plaintiffs, Jack Rosen, the defendant, and a representative from LMI.

The resolution of this case does not depend so much upon a legal interpretation of the issues or the contracts of insurance as it does on public policy considerations. It is uncontroverted that public policy favors settlements. When parties agree to settle cases, litigation is avoided, costs of litigation are contained, and the legal system is relieved of the burden of resolving the dispute with the resulting effect of alleviating an already overcrowded docket. When the amount of settlement is less than the policy limits, the unpaid amount may represent a significant savings cost since litigation was avoided or curtailed. Moreover, settlements favor victims who need their compensation money for living expenses and spares them the anxieties associated with protracted litigation. Thus, separate from the contract of insurance, considerations of public policy generally favor settlements. See *Bogan v. Progressive Cas. Ins. Co.* (1988), 36 Ohio St.3d 22 (dictum at 26.)

In applying that rationale to the facts at bar, it is evident that the settlement agreement between the plaintiffs, Rosen, and LMI, does not violate any provision within the contract of insurance issued to Rosen by CIC. Moreover, CIC is in no worse position because of the settlement agreement. Under the facts of this case, the only question which remains is whether LMI or CIC will be responsible to the plaintiffs for the $100,000 which is represented as the amount between the agreed upon settlement amount with LMI, $200,000, and the $300,000 LMI policy limits. Since CIC contractually agreed to be liable only for amounts in excess of the underlying insurance company's policy limits, CIC's position is not affected by any settlement agreement between the plaintiffs and the primary insurance carrier particularly in light of the facts that litigation is being avoided or curtailed, plaintiff is receiving money for compensable injuries pursuant to the contractual terms of its primary and excess insurance carriers, and the evidence supports the fact that the injuries suffered by plaintiffs' decedents were compensable in an amount in excess of the primary insurer's policy limits.

CIC argues that the settlement agreement between plaintiffs, Rosen and Prudential, whereby plaintiffs settled for an amount less than the primary insurer's policy limits, is against public policy since it forces the excess insurer to try the case in order to determine whether a jury would find the plaintiffs' decedents compensable injuries to be in an amount more than the primary insurer's policy limits. Although this court acknowledges that this is a concern, this issue is better suited as a change in the contractual terms of an insurance contract. In light of the public policy considerations previously discussed, this court is inclined to promote settlement agreements in such cases with a special focus upon settlement agreements between an injured party and the primary insurer of the tortfeasor. Accordingly, appellant's first assignment of error is not well-taken and is overruled.

***8** In the second assignment of error, appellant asserts that the trial court erred in finding that appellee CIC, the excess insurer, lacked the necessary standing to sue in this matter. Upon review, there is no such finding in the trial court's April 8, 1992 decision or the May 19, 1992 judgment entry. Appellees concede as much in the argument in its brief. Accordingly, appellant's second assignment of error is not well-taken and is overruled.

Based upon the foregoing, the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

*Judgment affirmed.*

WHITESIDE, J., concurs.

PETREE, J., dissents.

PETREE, Judge., dissenting.

  

***8** I respectfully dissent. I do so because the majority has chosen to amend to the meaning of "legally obligated to pay" contained in the LMI primary insurance policy. The provision to be interpreted reads:

> "LMI will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence and LMI shall have the right and duty to defend any suit against the Insured seeking damages on account of such bodily injury or property damages, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but LMI shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of LMI's liability has been exhausted by payment of judgments or settlements."

The excess insurer had the right to rely upon the LMI policy provision to the extent that LMI's obligation to "pay" the first $300,000 is not met by a "credit." Since CIC issued its policy of excess insurance to be only excess of LMI's payment of $300,000, shifting the cost of the "duty to defend any suit" to CIC from LMI by means of a contrived "credit" contravenes the contracts in place between the parties to the detriment of CIC. It is of no assistance or advancement of public policy to pronounce that litigation will in any way be diminished between the insured and the injured parties. The lawsuit will go on. Certainly the insured will gain additional protection from the liability of a possible judgment in excess of $1,000,000, but he will do so at the expense of CIC being required solely to pay litigation expenses or be blackmailed into settlement. This amounts to a declaration by the majority of an unconscionable "public policy" abridging the clear language of the contracts of insurance involved. Isn't the clearly contracted-for exposure of CIC enough without adding a new obligation?

**All Citations**

Not Reported in N.E.2d, 1992 WL 394867

Footnotes

1 Lumberman's Mutual Insurance Company, LMI, subsequently was taken over by the Prudential Insurance Company.

Summary: Motion Expedited Motion To Strike Portions of Intervenor Witnesses' Filed Testimony And To Preclude Future Testimony Related To Previously Litigated Issues electronically filed by Michael R. Gladman on behalf of The Ohio Edison Company and The Toledo Edison Company and The Cleveland Electric Illuminating Company