



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

NO. 12-0968

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

Petitioner,

v.

OHIO POWER COMPANY AND AMERICAN ELECTRIC POWER COMPANY,

Respondents.

BRIEF OF THE PETITIONER

Christopher J. Regan (WV Bar #8593) Counsel of Record
CRegan@bordaslaw.com
Geoffrey C. Brown (WV Bar #9045)
GBrown@bordaslaw.com
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
(304) 242-8410 phone
(304) 242-3936 fax

and

Rodney C. Windom (WV Bar #4091)
rwindom@zoominternet.net
Scott A. Windom (WV Bar #7812)
scottwindom@aol.com
Paul V. Morrison (WV Bar #7753)
pvmilandman@aol.com
Law Offices of Rodney C. Windom
202 East Main Street
Harrisville, WV 26362
(304) 643-4440
Counsel for Petitioner

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III. ASSIGNMENTS OF ERROR

1. Since the jury found that Appellees killed a West Virginian with conscious disregard for his life, the Circuit Court erred by reducing the \$5,000,000.00 in punitive damages to only \$550.00, on the basis of an Ohio tort reform statute, for the following reasons:
 - A. Under *Paul v. National Life* and *Mills v. Quality Trucking*, West Virginia courts do not apply out-of-state law when such law conflicts with a substantial public policy of our state, such as the policies regarding punitive damages set forth in *Bond v. City of Huntington*, *Mayer v. Frobe*, *Peters v. Rivers Edge Mining*, and *Boyd v. Goffoli*, among others.
 - B. The Circuit Court's draconian result would not be correct even if this case were heard in Ohio. See *Wightman v. Consol. Rail Corp.*

IV. STATEMENT OF THE CASE

Ohio Power Company and American Electric Power Service Corporation (“hereinafter AEP”), both subsidiaries of American Electric Power, Inc., killed Lewis Timmons through conscious indifference to his life. AEP’s actions and inactions were so aggravated as to constitute actual malice. Record at 1397, 1399-1407. Despite numerous prior explosions in Appellees’ hydrogen storage systems in general, and detailed, explicit warnings about the menace to human life represented by Appellees’ Muskingum River hydrogen system in particular, the Appellees decided not to fix the system until it exploded, killing Lewis Timmons in January of 2007. R. at 2253-54, 2309-10, 3848, 2047, 1906.

A wrongful death case ensued in Marshall County, West Virginia, and this appeal follows the jury verdict in favor of Brian Timmons (the administrator of Lewis Timmons’ estate) and the Circuit Court’s drastic reduction of the jury’s verdict. The jury awarded \$1,998,940.00 in compensatory damages to the ten survivors of Lewis Timmons, and \$5,000,000.00 in punitive damages to punish AEP’s conscious indifference. But the Circuit Court then reduced the punitive damage award to just \$550.00, and Brian Timmons appeals that decision.

AEP is one of the largest entities operating in West Virginia. An electric utility, it does so principally through its subsidiaries Appalachian Power and Ohio Power, but also directly, through the American Electric Power Service Corporation, another subsidiary that employs the leadership of AEP and provides safety consulting throughout the company. R. at 2782. AEP has numerous power plants throughout the state, thousands of miles of power transmission lines, and extensive business relationships with hundreds of thousands of West Virginia customers, employees, and subcontractors. R. at 3300-03. The company also operates in several other states, including Ohio, and owns a power plant called the “Muskingum River Plant” in Beverly, Ohio,

where the subject explosion occurred.

A. FACTUAL HISTORY

On January 8th, 2007, a cloud of hydrogen gas detonated at Appellees' Muskingum River Power Plant, injuring ten workers, killing Lewis Timmons, and heavily damaging the power plant itself. Timmons had been filling the hydrogen tanks as an employee of a company called CGI. The explosion was the result of near-criminal disregard of engineering requirements and industry regulations surrounding the handling of compressed hydrogen gas. R. at 2253-54, 2309-10, 2676-77, 3848, 1399; 1406, 863-876. AEP could not have failed to anticipate this disaster, but did nothing to prevent it. R. at 2309-10, 1946-47, 1949-50, 2010-13.

Power plants use large amounts of hydrogen as a coolant for the enormous electric generators. Because hydrogen gas is *highly* explosive and much lighter than air, hydrogen must be stored in open areas and away from buildings and personnel. R. at 3848-50. Also hydrogen tanks must be in well-ventilated areas so that the hydrogen, if it should escape, can rise quickly and harmlessly into the atmosphere. R. at 2226-27, 2283, 2290-91. If the hydrogen is not safely vented to open air, it collects and then explodes with astonishing and deadly force. R. at 2263-66, 2301, 2297-98, 3856.

Hydrogen systems should therefore have short, straight, stainless steel vent pipes to let the hydrogen get away safely when it vents. *Id.* Appellees disregarded this safety rule despite repeated warnings of its importance and the danger of ignoring the situation. R. at 2260-62, 2264-65, 2270-2274, 1946-52, 2007, 2028. Appellees kept the Muskingum River hydrogen system pinned against the plant walls and under a roof – a highly dangerous condition. R. at 2269, 2297-98, 1897. Even worse, Appellees utilized circuitous, soft, thin-walled copper vent stacks that were utterly insufficient for the task, likewise creating a highly dangerous condition. R. at 1944, 1949-50, 2270-76.

The resulting explosion would have been predictable in the abstract, but AEP had *already caused a major hydrogen explosion*, well before the Muskingum River blast. Sixteen months before the Muskingum River explosion, the hydrogen system at AEP's Kammer Plant (in Marshall County) exploded. The "Safety Incident Brief" arising from that explosion describes in detail how defects, nearly identical to those at Muskingum River, caused a nearly identical hydrogen explosion. The similarities included soft copper vents instead of stainless steel and roofs that were improper. R. at 3841, 3847, 2267-2271. The Kammer explosion Safety Incident Brief credited sheer luck that no employees were in the area to be harmed. *Id.* R. at 3841, 3379. A memo by AEP safety engineer Jim Beller later compiled this experience for management in the safety department. R. at 3348. Beller specifically mentioned that "most of our hydrogen tube racks are much closer to plant buildings than Kammer's" – highlighting the danger for management. *Id.* AEP disregarded the Kammer explosion and made no meaningful changes at Muskingum River in response. R. at 2030-32.

In fact, *several* prior explosions and fires in AEP hydrogen systems, as well as reports on the Muskingum River system itself, forearmed Appellees with detailed knowledge of how the explosion would happen, but Appellees *still* refused to do anything to prevent it. *See, e.g.*, R. at 3866, 2006-08, 2012-13, 2017-18, 3848. Copper vent pipes had already failed on a similar hydrogen system at another AEP plant (Kyger Creek) in Ohio and several other hydrogen fires were reported including another at the Sporn Plant (New Haven). R. at 3848-52. Long before Lewis Timmons was killed, AEP's safety department *contemplated* the potentially fatal consequences of failing to fix these situations: "the prospect of a very large hydrogen cloud igniting off an adjacent flame jet is disturbing." R. at 3848.

Even worse, company managers eventually admitted that AEP intentionally compromised

maintenance and safety in order to keep plants “running lean.” R. at 3374. Appellees were forced to admit they did not accept a third-party proposal to fix the hydrogen systems and make them safe. R. at 2788, 2792, 3372, 2032-36, 2788-92, 3954. A purchasing employee specifically cautioned AEP against “patch repair jobs as a band-aid to what really needs to be addressed when there is more time and/or more money to fix it right,” referring specifically to the need to systematize maintenance of the hydrogen systems. R. at 3372.

In the aftermath of the explosion that killed Mr. Timmons, the Occupational Safety and Health Administration (R. at 863-876) cited AEP for nine separate violations of federal law, 8 of them serious and 1 of them willful. *Id.*¹ See also, R. at 2674-78. After the explosion, AEP rebuilt the Muskingum River system according to the regulations – placing it hundreds of feet from buildings and personnel, with stainless-steel vent lines and no roof.

Facing a multi-million dollar loss to its facility, AEP began attempting to pin the explosion on its hydrogen supplier, CGI. Safety officials from the company released public statements and even gave so-called industry safety briefings around the country relating a deliberately misleading story about the explosion that tended to exonerate AEP and indict CGI.² AEP’s investigation did not identify any of AEP’s failures as relevant. At all points, both before and after the explosion, AEP’s safety department acted as a risk-management/insurance defense apparatus – more concerned with evading responsibility for the incidents than preventing them

¹ The Circuit Court would later *exclude* the evidence of the OSHA citations on the grounds that OSHA citations are “irrelevant and inadmissible” in contravention of *Coleman Estate v. RM Logging*, 222 W.Va. 357, 360, 664 S.E.2d 698, 701 (2008) and *Coleman Estate ex rel. Coleman v. R.M. Logging, Inc.*, 226 W. Va. 199, 204, 700 S.E.2d 168, 173 (2010) as well as *Ryan v. Clonch Indus., Inc.*, 219 W. Va. 664, 674, 639 S.E.2d 756, 766 (2006); *cf.* Record at 14. (Order holding in advance of trial that OSHA citations are “not relevant and not admissible”).

² See e.g. Power, “Lessons Learned from a Hydrogen Explosion,” in which an AEP safety manager ignores AEP’s violations in an effort to case blame on CGI. http://www.powermag.com/o_and_m/Lessons-Learned-from-a-Hydrogen-Explosion_1857.html

from occurring in the first place. R. at 2769-71, 2804-06 (AEP attempted to have its corporate representative testify that CGI had been “found” to be at fault *by AEP* during AEP’s own sham investigation. The testimony was excluded as rank hearsay).

As a result of AEP’s conscious disregard for his life, Lewis Timmons, who lived with his son Brian and grandson Austin, lost that life, his retirement years, and everything else he had on January 8th, 2007. His brothers and sister, his three sons, and several grandchildren lost a devoted father, brother, and grandfather who played an important role in the life of his family in Tyler County, West Virginia. R. at 2648-94, 3860-61, 3873-3943. His unnecessary and foreseeable death left a hole in the lives of these West Virginians that cried out for justice in the only forms our system allows – compensatory damages to the wrongful death beneficiaries and a just award of punitive damages to punish the Appellees for their extraordinary malice, misconduct, and neglect.

B. PROCEDURAL HISTORY

1. Pre-trial proceedings

Brian Timmons filed suit in May, 2008, against the parties who, at the time, appeared to bear responsibility for his father’s death. Investigation had revealed many of the deficiencies in the Muskingum River system, but crucial pieces of extremely damning evidence, including the Kammer Safety Incident Brief, the Beller Memo, and the Caten Memo had not yet emerged. R. at 3841, 3848 and 3944. AEP made these shocking documents no part of its own internal investigation, or its safety briefings.

Notwithstanding AEP’s confession to the applicable OSHA violations and promises to bring the system into compliance that AEP made to the government, Appellees denied any

responsibility whatsoever for what occurred. R. at *e.g.* 42-120; 145-185. Because there had been nearly eighty million dollars in damage to its plant, AEP was much more interested in extracting payments from CGI and other companies for damage to its plant than addressing the injury and wrongful death claims. Moreover, only AEP, in sole possession of the key evidence and testimony that would later condemn it at trial, knew the full extent of its responsibility for what had occurred. Plaintiff, CGI and two other Defendants, Western Supply and Matrix Metals (a manufacturer and distributor of components of the hydrogen system), were comparatively left in the dark.

After litigation had pended over fifteen months in Marshall County, Appellees sought a dismissal on *forum non conveniens* grounds. The motion was denied. Of particular significance in denying the motion was Plaintiff's status as a West Virginia resident (R. at 123; 125 (Order of 3/1/10 at ¶ 11, p. 4, ¶ 18, p. 6)), the allegation of similar incidents in West Virginia (*Id.* at ¶ 21, p.7, R. at 126), and the existence of a controversy "more localized to West Virginia" than that of Ohio citizens hurt in the blast (*Id.* at ¶ 24, R. at 126). The case stayed in West Virginia. Plaintiff had specifically alleged that the Appellees did business in West Virginia (*see e.g.* R. at 24-25, Complaint at ¶ 4-10, p. 2-3, R. at 24), contracted for the subject hydrogen from a West Virginia company (Complaint at ¶ 18-19, p. 4, R. at 26), experienced a prior explosion in West Virginia, giving Appellees actual notice of the danger at Muskingum River (Complaint at ¶ 23, p.5, R. at 27), and refused the offer of West Virginia's CGI to repair the system (Complaint at ¶ 27, p.6. R. at 28).

Extensive discovery and motion practice took place pre-trial. Also prior to trial, the Estate of Lewis Timmons resolved its claims against Mr. Timmons' employer, CGI, in a good faith settlement. AEP had cross-claims against CGI, as well as independent lawsuits against it in

other state and federal courts and cross claims against a manufacturer and a distributor of various components of its hydrogen system.

As mentioned above, the trial judge ultimately excluded the comprehensive OSHA citations and AEP's confessions from evidence at trial. Essentially, the trial judge allowed Appellees to attempt to have it both ways, agreeing to one set of facts with OSHA, while pushing another angle in the Circuit Court. R. at 2676. The Court also denied *res judicata* effect to a verdict in Ohio finding that Ohio Power Company had intentionally caused the explosion. R. at 773-907, 1387-88 (Plaintiff's denied motion for collateral estoppel and Order). The Appellees' stratagem to deny what it knew to be true put the Plaintiff to hideous and unnecessary expense in litigating the case (R. at 22.1-22.4), since the facts themselves, the OSHA citations, and the prior trial all established AEP's liability beyond a shadow of a doubt. R. at 773-907.

2. Trial Proceedings

At trial, the Circuit Court further handicapped the Plaintiff's case in several respects. The Circuit Court excluded crucial evidence, such as the OSHA citations, that demonstrated not only the Appellees' culpability, but also their mendacity in denying liability. R. at 863-876. The Circuit Court also applied Ohio's burden of proof in respect to punitive damages – a burden of clear and convincing evidence as to both the fact and the amount of damages. R. at 1397. The Plaintiff's strong case nonetheless survived the enhanced burden. Finally, the Circuit Court allowed nakedly political speculation, demagoguery, and economic terrorism to serve as Appellee's only arguments in the punitive phase, as quoted below.

The profound weakness of AEP's case relates to the ultimate legal issue and is illustrated not only by the jury's categorical rejection of AEP's case, but by other unusual events. For example, AEP's attorney failed to deny liability as to Ohio Power Company in his opening

statement, leading to a hotly-contested motion for directed verdict at that stage. R. at 1934-35.³ Moreover, AEP, despite a massive expenditure of time and money in expert discovery, failed to call an expert on the liability issues surrounding the hydrogen system, despite having prepared and identified an expert.⁴ Finally, in closing, AEP could not even bear to ask the jury to find in favor of Ohio Power Company, so comprehensive was the case against it. R. at 3164. Finally, during AEP's own case, Kenneth McCollough, an AEP safety manager, testified frankly that safety recommendations from his department were *not followed for financial reasons*. R. at 3415.⁵

The jury accordingly found the Appellees 100% negligent in causing the death of Lewis Timmons. The jury further determined that the negligence of the Appellees was so aggravated and egregious that punitive damages were appropriate. R. at 1399-1408. AEP's effort to blame CGI was categorically rejected as CGI was found 0% negligent. *Id.* The survivors of Lewis Timmons were awarded a total of \$1,975,000.00 in wrongful death damages. The jury also specifically found that the Plaintiff should recover his attorney's fees. *Id.*

³ THE COURT: Is that something you really want me to do?
MR. REGAN: I think it's legally proper at this time, Judge. So we're going to make that motion.
THE COURT: what do you think Menis and the crew will do upstairs?
....
THE COURT: That's fine. That's fine. Words I don't like to speak, I'm going to take it under advisement, to get back to you promptly.

R. at 1934.

⁴ Instead, American Electric Power hired only a metallurgist to testify to a bizarre and unsupportable theory of causation that went nowhere.

⁵ For reasons of space and because the point is made, further record citations regarding the clear guilt of Appellees are omitted. However, if any doubt remains, Mr. Timmons refers the Court to the testimony of Dennis Kovach, a one-time 30(b) representative of Service Corporation who capitulated virtually without equivocation on all liability issues in the case. Kovach at 3416-3441 (testimony substantially conceding all liability issues).

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

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

A. That was in the 10-Q.

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

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

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

A. *Yes, they do.*

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

A. *Yes.*

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

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

....

Q. Based upon your understanding of the financial condition of Ohio Power Company through the compilation of materials and preparation of the 10-K, *what is your understanding of what's being evaluated with regards to the Kammer Plant?*

A. *They are evaluating that [sic] it would cost to retrofit that plant; whether that's a cost-effective investment. That's going on for all facilities.*

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

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

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

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

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

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

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

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

R. at 3300-03 (emphasis supplied). This testimony specifically emphasized AEP's extensive contacts with West Virginia, albeit for the nefarious purpose of terrorizing the jury about plant closures.

The Circuit Court permitted AEP's appeal to local fear and prejudice over potential job losses in West Virginia over Plaintiff's objection. This doubtless suppressed the magnitude of the verdict, as few issues are more sensitive than jobs in this economy. Indeed, the Circuit Court itself cited the "public policy of employment" at a hearing on legal issues, before withdrawing the comments as "dicta" and "out of left field" R. at 3510; 3515 ("[the Court]: I didn't say the policy of employment governs this decision. That was *dicta*"). But Brian Timmons prevailed.

3. Post-trial Proceedings

Notwithstanding the jury's findings, the overwhelming evidence, and the lack of any remotely meritorious defense in the case, after trial, the Circuit Court entered an order on October 17, 2011, slashing the jury's award of punitive damages from \$5,000,000.00 to just \$550.00. R. at 16. The State of Ohio limits punitive damages, by statute, to two times the compensatory damages. Ohio Revised Code § 2315.21. The Circuit Court allowed only the survivorship damages for the loss of Mr. Timmons' personal property, to be counted for purposes of this statute, and reduced the jury's punishment to the trivial sum of \$550.00. Mr. Timmons argued that the case should be governed by West Virginia law, citing *Paul v. National Life and Mills v. Quality Trucking, post*.

The Circuit Court based its ruling on a conclusion that "existing case law" (R. at 16) did

not state that Ohio's tort reform statute violated West Virginia public policy within the meaning of *Mills, post*, while simultaneously finding that the jury's awarded amount was entirely appropriate if *not too low*:

[the Court] By no stretch of the imagination can anyone argue that -- and it hasn't been -- that this [punitive award] was excessive given the facts and circumstances. I don't think that five million dollars is in any way a penny over, perhaps even shy, of what punitives would have been or could have been assessed in this case.

R. at 3510. Reflecting the trial judge's direct experience of the overwhelming case against Appellees, the trial judge further commented: "I certainly wouldn't begrudge the [Supreme] Court [of Appeals] -- in all caps -- from expanding on *Mills* somewhat. I believe *Mills* is about compensatory damages due to negligence. This is punitive damages due to willful, wanton disregard for Mr. Timmons' life." *Id.* The Circuit Court ultimately concluded that a decision on whether or not the Ohio tort reform statute should apply in this case was "*above my pay grade*" (*Id.* at 73, emphasis supplied) and with that, the issue was destined for this Court.⁶

The judgment, after the reduction of the punitive damages, was supplemented with interest and an award of attorney's fees, after full litigation of those issues. R. at 22.1-22.4. AEP moved to offset the compensatory award by the pre-trial settlement obtained by Plaintiff (in the hopes of paying *nothing* for what it had done), a motion the Circuit Court denied on Ohio law grounds, while the Plaintiff contended the offset should be denied under West Virginia law or Ohio law.

Following the entry of a final order in Circuit Court, this appeal was filed by Brian

⁶ The trial judge, quite expressly, anticipated this Court review of the issue:

THE COURT: Okay. Just for the record, so when Menace [sic] reads this, they can make it into three discreet [sic] areas. This is Defendant Ohio Power Company and American Electric Power Service Corporation's Motion to Mold the Verdict to Comply with Ohio Revised Code. That's right, Menace [sic]. I said Ohio. 2315.21, capital 0-2, capital A.

T. at 3483-84.

Timmons. In this Court, Timmons seeks REVERSAL of the Circuit Court's order slashing the punitive damage award and the RESTORATION of the jury's just punishment of AEP for its egregious misconduct in killing Lewis Timmons.

V. SUMMARY OF THE ARGUMENT

1. **The Circuit Court failed to apply *Paul v. National Life* and *Mills v. Quality Trucking* and to consider West Virginia's applicable public policies, leading the Circuit Court to its error in slashing the punitive damages to \$550.00.**

The Circuit Court failed to recognize West Virginia's substantial public policies underlying wrongful death damages, including punitive damages. It therefore failed to apply *Paul v. National Life* and *Mills v. Quality Trucking* properly. This error led to the unprecedented decision to reduce a fair and necessary punishment of \$5,000,000.00 to a paltry award of \$550.00 for killing a human being through conscious indifference to his life. Brian Timmons therefore asks this Court to examine the relevant public policies and apply the correct law to this case. The question of what law applies is of course a question of law in itself, subject to *de novo* review. *Mills, post* at 281, 622.

The public policy of our State must be determined in light of its history and experience and this is set forth here, as part of this Summary of Argument, as crucial background for the key legal issue addressed in the Argument, *post*, at Part VII. West Virginia's long history of on-the-job injuries and deaths speaks at once to the strength of its hard-working laborers and the weakness of some of its corporate leadership that has failed those workers time and time again. Monuments to West Virginians killed in utility, construction, timbering, railroad, and mining disasters mark the history of West Virginia back to its founding. Names such as Monongah,⁷

⁷ This month was the 105th Anniversary of the Monongah mine explosion that killed at least 362

Everettville,⁸ Farmington,⁹ Buffalo Creek,¹⁰ Willow Island,¹¹ Sago, and Upper Big Branch no longer stand only for places, but also for the many people whose lives were lost as a result of corporate inattention to safety rules and practices.¹²

Throughout the latter half of the 20th and early part of the 21st century, the death toll has lessened somewhat, thanks to painfully slow and extremely hard-won improvements in our regulations, our statutes, and our common law, all designed to push corporations operating industrial sites to do so more patiently, more responsibly, and above all, more safely. Often inspired by a disaster, our legislature has repeatedly sought to improve the circumstances of West Virginia's workers by promoting and improving regulations and laws directed at industrial safety. *See e.g.* W.Va. Code § 23-4-2; W.Va. Code § 21-3-1, *et seq.*; W.Va. Code § 22A-6-1.

miners in Marion County. It is the largest workplace catastrophe in American history. The true total death toll remains unknown. Norberto Lombardi, *Monongah 1907. Una tragedia dimenticata*, Italian Ministry of Foreign Affairs (2007).

⁸ Lee, Howard, *Bloodletting in Appalachia*, McClain Printing Company, (1969) at 154. 111 workers were killed in a natural gas explosion in Everettville in 1927. *Id.* at 155.

⁹ The explosion at Farmington in 1968 killed 78 miners, including the father of Circuit Judge James Matish.

¹⁰ The Buffalo Creek dam collapse claimed 125 lives in 1972. Stern, Gerald, *The Buffalo Creek Disaster*, Random House (1976). Of course, most of the victims were not workers, but innocent West Virginia citizens living downstream of the dam.

¹¹ The Willow Island Power Plant disaster took 51 lives in 1978. It remains the largest power plant disaster in American history.

¹² “[The] corporation through its officials, has shown flagrant disregard for the safety of residents of Buffalo Creek and other persons who live near coal refuse impoundments. This attitude appears to be prevalent throughout much of the coal industry.” Stern, *supra*, note 10 at page 64; Stewart, Bonnie, *No. 9: 1968 Farmington Mine Disaster*, West Virginia University Press (2011) at 58 (“No. 9 miners were working in extremely dangerous conditions in the weeks and days before the mine exploded. Many of them knew it; some sought help from their managers, from the union and even from state mining officials. Nonetheless, safety issues were not resolved.”); the Everettville Disaster “was caused by the refusal of the mine owners to rock dust their mine”; the Willow Island disaster resulted in a recommendation to the Governor of West Virginia that *criminal sanctions* be permitted under OSHA, as civil penalties were inadequate for the magnitude of industry’s negligence. *Governor’s Commission on Willow Island Report*, p. 49 <http://wvgazette.com/static/willowdocs/GovTaskForce.pdf>; the corporate misconduct at Sago and UBB is common knowledge in West Virginia today.

Moreover, West Virginia has repeatedly *expanded* remedies for wrongful death victims over the years – reforms that have particular application to workplace fatalities like that of Mr. Timmons, which continue to be far too numerous. In 1968, when the Farmington No. 9 disaster occurred, the families of the deceased miners, including the father of Harrison County Circuit Judge James Matish, were limited to a mere \$10,000.00 recovery, despite the frankly sickening level of corporate neglect that cost 78 miners their lives at No. 9.¹³ Thereafter, wrongful death liability was expanded, first to \$110,000.00 and then uncapped. *See* 1976 Acts of the Legislature, ch. 2; *see also* *McDavid v. United States*, 213 W. Va. 592, 600, 584 S.E.2d 226, 234 (2003).

Court decisions and later legislative changes allowed recovery against wrongdoers whether they were third-party contractors or direct employers. *Mandolidis v. Elkins Indus., Inc.*, 161 W. Va. 695, 246 S.E.2d 907 (1978); W.Va.Code, 23-1-1 *et seq.* Since criminal liability for causing on-the-job deaths has always been just over the horizon, West Virginia’s scheme of civil liability and comprehensive remedies, overseen by the Circuit Courts, has been a primary bulwark of this State’s public-policy drive to keep our workers safe. Government regulators have consistently lacked the strength to do the job, as the paltry \$90,000.00 fine OSHA settled for in this case showed.¹⁴

¹³ Faced with well-documented wrongful death case, the company was insistent that the widows take only \$10,000.00 each and also permit the company to mine again before even recovering all of the bodies. Stewart, *supra* note 12 at 187. Eventually, the widows’ own attorneys were forced by the legal environment to press the widows to accept these miniscule settlements as justice for the loss of their husbands. Stewart at 195-196. “But they knew they had not received justice.” Stewart, *supra* note 12 at 208.

¹⁴ AEP was worth \$8,500,000,000.00 billion at the time of trial (R. at 3283), or, if you prefer, its net worth was \$3,100,000.00 by another accounting standard. R. at 3289. Even at the lower figure, willfully, recklessly causing a death and ten injuries yielded a regulatory fine of *twenty-nine ten thousandths of one percent* of net worth, a figure so tiny that a standard calculator returns the result in scientific notation. That figure is actually less than what the Farmington

Space would not allow a full description of the sorrow West Virginians have come through in a century and a half to the reasonably enlightened time we live in and, in fairness, ours is not the only state touched by such bloody and grief-stricken history.¹⁵ Suffice it to say that researchers have catalogued how, for the better part of this region's history, "everywhere, men were mangled and killed in large numbers" while "operators clamored for ever higher production" and a "shockingly high number of industrial accidents killed or maimed men."¹⁶ The law failed these workers for many years.

But times have changed. This Court stated in 1981 that "[n]ot only has the Legislature liberalized the wrongful death recovery statute through the years, but this Court has adopted a liberal construction of the statute from our earliest cases." Syllabus point 1, *Bond v. City of Huntington*, 166 W.Va. 581, 276 S.E.2d 539 (1981), and indeed, punitive damages have been allowed for egregious negligence since 1895. *Turner v. Norfolk & W.R. Co.*, 40 W. Va. 675, 22 S.E. 83 (1895). The allowance of such damages however, became far more meaningful in 1976 when the cap on damages was lifted in favor of a direction from the legislature that the jury award such amounts as are "fair and just." *Cf. Bond* at 593, 546 (officially allowing punitive damages for wrongful death, but applying the pre-1976 cap of \$100,000.00, into which all compensatory and punitive damages had to fit).

The expansion of civil liability and remedies for workers injured or killed is an essential public policy of the state of West Virginia. The policy has loosened the historically iron grip on

widows were forced to take.

¹⁵ "It is difficult to estimate with any accuracy the number of men killed or seriously injured in the eastern Kentucky coalfields in these neophyte years, but thousands of widows and orphans were left in the camps, and multitudes of ruined, broken miners were cast out to loaf before their dreary hearths and on the porches of commissaries." Caudill, Harry, *Night Comes to the Cumberlands: A Biography of a Depressed Area*, Jesse Stuart Foundation (2001) at 121.

¹⁶ *Id.* at 118.

workers enjoyed by industry during the first half of West Virginia's history. As West Virginia lawyer Howard Lee described it in *Bloodletting in Appalachia*, industrial interests once held such power that:

Fifty thousand men, women and children were evicted from their homes in southern West Virginia. They found shelter under cliffs, in tents, and in improvised shacks built by the Union . . . in the end hunger won and the workers slunk back to the mines with hearts filled with hate and minds embittered by the memory of wrongs they had suffered.

Lee, *supra* note 8 at 83. In a way, what Appellees seek in this case – to walk away from what they did to Lewis Timmons and *give his family nothing* – represents the wish of industry to go back to the days when it could dispose of a man in any way it pleased with no consequences at all.¹⁷ *Id.*

But times *have* changed. In West Virginia, the most egregious cases of reckless, malicious, or willful misconduct call for punitive damages as determined by a jury. As this Court held in *Bond v. City of Huntington*, 166 W. Va. 581, 593, 276 S.E.2d 539, 545 (1981):

the best position consistent with public policy is to permit recovery of punitive damages where the facts warrant. . . . The rationale for this policy is that, if the defendant, acting recklessly, maliciously or wilfully, can be held liable for punitive damages if he injures the person, he ought to equally be held liable for punitive damages where the same quality of act kills the individual. . . . We, therefore, conclude that in an appropriate case punitive damages may be recovered in an action for wrongful death.

Id. (internal citations omitted). The spirit of justice written into law in *Bond* traces its lineage to the nineteenth century and *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58, 63 (1895), in which this Court declared:

a reconciliation of these differences of opinion establishes the just rule of exemplary damages to be as follows: If, after the jury has assessed damages to fully compensate the plaintiff for the injury, such damages are still not sufficient

¹⁷ Put another way, Appellees would go back to the time when “the habitual slaying and crushing of men was an accepted common-place in the coalfield, as it had been earlier in the logging community and in the hideous feuds.” Caudill, *supra* note 15 at 122.

in amount to punish the defendant for the maliciousness of the private wrong of which he is found guilty, and to hold him up as a public example and warning, to prevent the repetition of the same or the commission of similar wrongs, they may add such further sum, in their judgment, as may be necessary for this purpose.

Id. Mayer remains good law.

The public policy in favor of punitive damages for wrongful death underlies the most important endeavors of our State – to protect our people from danger to their very lives.¹⁸ Moreover, this policy is *not* strictly limited to the physical territory of West Virginia – this court has stated that “[c]ertainly, a West Virginia court *has an interest in protecting its citizens from tortious conduct* and is not precluded from doing so simply because some of the tortious conduct occurred in another state” *Boyd v. Goffoli*, 216 W. Va. 552, 562, 608 S.E.2d 169, 179 (2004) (emphasis supplied). Here, the Circuit Court decision would utterly strip its citizens, Brian and Lewis Timmons, of the protections of West Virginia law, simply because Mr. Timmons happened to be killed in Ohio.

The Circuit Court should have concluded that West Virginia’s public policy favoring liberal construction of the Wrongful Death Act and the availability of punitive damages for wrongful death were substantial public policies of the state of West Virginia. Having reached that conclusion, the Circuit Court would then have then applied the rule of *Paul v. Nat’l Life*, 177 W. Va. 427, 433, 352 S.E.2d 550, 556 (1986) and *Mills v. Quality Supplier Trucking, Inc.*, 203 W. Va. 621, 623, 510 S.E.2d 280, 282 (1998) that “we have long recognized that comity *does not require the application of the substantive law of a foreign state when that law contravenes the public policy of this State.*” *Id.* (emphasis supplied). The correct result would have followed; the jury’s just award would not have been slashed from \$5,000,000.00 to \$550.00; and justice would

¹⁸ [W]e, the people of West Virginia, in and through the provisions of this Constitution, reaffirm our faith in and constant reliance upon God and seek diligently to promote, preserve and perpetuate good government in the state of West Virginia for the common welfare, freedom and security of ourselves and our posterity. W.Va. Const. Preamble.

have been done by the State of West Virginia for its citizen who lost his life so needlessly at Appellee's hands.

For these reasons, the decision altering the jury's verdict should be REVERSED and the full punitive damage award RESTORED.

2. The Circuit Court did not apply Ohio law correctly in any case.

Ohio law on punitive damages in wrongful death cases conflicts squarely with West Virginia law: the Supreme Court of Ohio has found that the Ohio wrongful death statute does not allow punitive damages to be recovered. *See Rubeck v. Huffman*, 8 Ohio 3d 11, 374 N.E.2d 411, 413 (1978); *cf. Bond, supra*. However, for a generation at least, Ohio courts have sidestepped that harsh result by permitting punitive damages to be recovered wherever there is a survivorship claim and weighing those awards, for *State Farm v. Campbell*-ratio purposes, against the *entirety* of the wrongful death damages. *See Wightman v. Consolidated Rail*, 86 Ohio St.3d (1999).

No court in Ohio has done what the Marshall County Circuit Court did in this case – that is, no Ohio court has held that the Ohio tort reform statute requires that punitive damages be limited to two times the survivorship award. Under the *Wightman* concept, the statute would be interpreted to allow up to two times the *entire* compensatory damages from the case as punitive damages. Moreover, the tort reform statute, for the first time in Ohio statutory law, speaks of punitive damages in wrongful death cases (*see* Ohio Revised Code § 2315.21(D)(2) – casting doubt on the vitality of *Rubeck, supra*, and therefore further doubt on the Circuit Court's decision.

In short, rather than decide the case on the clear grounds of West Virginia law, the Circuit Court went out on a slender limb of recent Ohio tort reform law and reached a conclusion that

even the Circuit Court seemed to think was contrary to the interests of justice (“I welcome being wrong” R. at 3511), all because the Circuit Court didn’t think it had the authority to apply the general rule of *Paul* and *Mills* (“it’s above my pay grade” R. at 3516). This error provides alternate grounds for this Court to reverse and reinstate the jury’s award.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.

Appellant, Brian Timmons, submits that this case is appropriate for Rule 20 argument in light of the importance of the choice-of-law issue presented, the magnitude of this wrongful death case and the specific invitation from the trial judge to this Court to pass on what the Circuit Court considered to be a novel application of this Court’s precedents, specifically *Paul v. National Life* and *Mills v. Quality Trucking*.

VII. ARGUMENT

1. **The original punitive award of \$5,000,000.00 was reasonable, just, and in all respects legally proper and should not have been disturbed in favor of Ohio law in light of West Virginia’s substantial public policies underlying punitive damages for wrongful death and West Virginia’s connection to this case.**

West Virginia’s choice-of-law doctrine follows the general rule of *lex loci delicti*, but subject to exception where the application of foreign law is contrary to the public policy of the state of West Virginia. *Paul v. Nat’l Life*, 177 W. Va. 427, 428, 352 S.E.2d 550 (1986); *Mills v. Quality Supplier Trucking, Inc.*, 203 W. Va. 621, 510 S.E.2d 280 (1998). *Paul* relied on a 1936 case, and listed numerous circumstances in which, over the years, this Court has declined to enforce foreign law to a case arising out-of-state on public policy grounds. *Id.* at 433, 556.

Under the public-policy exception adopted formally in *Paul*, various regressive legal rules, including contributory negligence, eleemosynary immunity, assumption of the risk, and automobile guest-passenger statutes have all been deemed unenforceable in West Virginia

courts, no matter where the case arose. *Id.* at 433-34, 556. In *Mills*, this Court specifically held that in respect to a wrongful death, West Virginia law would control over various Maryland doctrines that could have potentially hampered Mrs. Mills' case for the wrongful death of her husband, killed in Maryland. *Id.* at 282, 623. As Justice Workman put it in *Mills*:

We therefore adhere to the rule that the doctrine of *lex loci delicti* will not be invoked where "the application of the substantive law of a foreign state ... contravenes the public policy of this State." *Paul*, 177 W.Va. at 433, 352 S.E.2d at 556.

Id.

The question for the Circuit Court under *Paul/Mills* was whether or not the application of Ohio law to reduce a reasonable and just award of punitive damages to a mere pittance "contravenes the public policy of this State." But the Circuit Court never answered that question. Instead, it stated that "I believe *Mills* is about compensatory damages due to negligence. This is punitive damages due to willful, wanton disregard for Mr. Timmons' life." T. at 3510. But this fact-bound effort to distinguish *Mills* sidesteps the key question under the *Paul/Mills* doctrine: does the Ohio law on punitive damages contravene a public policy of West Virginia or not?

Indeed, *Mills* made it clear that in respect to the wrongful death of a West Virginian, even though the death occurred in Maryland, the wrongful death law of our state would control over the more restrictive law of a foreign jurisdiction. *Mills held*:

2. In a wrongful death action pending in WV against a trucking company principally located in Ohio, which is based upon a claim that the trucking company negligently hired a driver who shot and killed a driver from West Virginia while in Maryland, does the substantive law of Maryland apply to the wrongful death cause of action, including the defenses of contributory negligence and assumption of the risk?

Answer: West Virginia.

Id. at 283, 624. It appears that, had the Circuit Court considered *Paul/Mills* correctly, it would have reached the right result, since the trial judge made clear his view that:

[the Court] By no stretch of the imagination can anyone argue that -- and it hasn't been -- that this [punitive award] was excessive given the facts and circumstances. I don't think that five million dollars is in any way a penny over, perhaps even shy, of what punitives would have been or could have been assessed in this case.

R. at 3510. Considering that conclusion – unchallenged by AEP in any way – in light of *Mayer*, *Bond*, and *Boyd*, *supra*, the Circuit Court should have ruled that West Virginia allows punitive damages in wrongful death cases for substantial and important reasons of public policy. *Id.* Ohio's contrary rule (as the Circuit Court interpreted Ohio law) – that the punishment for a death caused by actual malice should be obliterated and trivialized – could hardly conflict more starkly with West Virginia's stance on the matter.

The rule of *Paull/Mills* applies with particular force in this case, not only because of West Virginia's long history of workplace injuries and deaths described above, but because of the extensive contact West Virginia has with this case. Lewis Timmons was a citizen of West Virginia, employed by a West Virginia company retained by AEP to fill its hydrogen tanks at the time he was killed. Moreover, Appellees operate throughout West Virginia and have massive contacts with our state as well. Appellees assiduously pointed this out to the jury during the punitive phase when they thought threatening plant closures might hold the verdict down. R. at 3300-03 (emphasis supplied). Three of the five prior hydrogen explosions and fires AEP experienced occurred in West Virginia – at New Haven (Sporn), Winfield (Amos) and Moundsville (Kammer) before AEP finally killed someone in one at Muskingum River. R. at 3848.

The importance of applying West Virginia law to protect West Virginia and West Virginians should not have to be debated or even described, but if it did, this case would do it. This Court has held in syllabus point law that:

A State has a legitimate interest in imposing damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction where the State has a significant contact or significant aggregation of contacts to the plaintiffs' claims which arise from the unlawful out-of-state conduct.

Boyd v. Goffoli, 216 W. Va. 552, 556, 608 S.E.2d 169, 173 (2004). This case has extensive and far-reaching contacts with all of the litigants and all the claims as well, as set forth above. The rule in *Boyd* further cements the public-policy case for allowing the jury's reasonable award of punitive damages to stand. The law is clear that West Virginia will not allow wrongdoers who have major contacts with our state to escape punishment merely because some portion of their misconduct occurs out-of-state. *See Boyd, supra*.

In view of these authorities, and the facts and circumstances of this case, as well as the historical background and development of West Virginia law over time to enhance and broaden protections for victims of wrongful death, Appellant Brian Timmons submits that the Circuit Court's decision reducing the punitive award to \$550.00 is erroneous and should be REVERSED; the \$5,000,000.00 award should be RESTORED.

2. It is far from clear that the Circuit Court applied Ohio law correctly in any event, providing a further reason to reverse the Circuit Court's decision in light of the Ohio Supreme Court's decision in *Wightman*.

As explained above, Ohio law does not allow punitive damages in a pure wrongful death case. *Rubeck, supra*. Ohio law mitigates that harsh rule however, by holding that where a wrongful death is *joined with a survivorship claim*, punitive damages are allowed. *Wightman v. Consolidated Rail*, 86 Ohio St.3d (1999). Furthermore, as "ratio analysis" under *State Farm v. Campbell* has become popular, Ohio has allowed the compensatory damage award to which a punitive award must be "rationally related" to be the *entire compensatory award*, and not only the survivorship award. This view was made clear in *Wightman*, where a wrongful death litigant was held liable for compensatory damages of \$2,400.00 (in survivorship), \$1,000,000.00 (in

wrongful death) and \$15,000,000.00 in punitive damages were assessed *and upheld. Id.*

In *Wightman*, Conrail, the defendant, argued as follows:

Conrail argues that the punitive damages award of \$15,000,000 was grossly excessive and violated both Ohio law and the Due Process Clause of the United States Constitution. Conrail bases much of its argument regarding Ohio law on the ratio between the compensatory damage award and the punitive damages award. Mrs. Wightman's property loss was \$2,400, and upon that loss was based the \$15,000,000 punitive damages award, an amount 6,250 times greater than the compensatory award.

Wightman v. Consol. Rail Corp., 1999-Ohio-119, 86 Ohio St. 3d 431, 438, 715 N.E.2d 546, 552 (1999). The Ohio Court rejected this argument and upheld the entire punitive award. As a dissenting justice pointed out, in effect, the Ohio Supreme Court “the majority *implicitly sanctions the punitive damages award for the wrongful death*, not the comparatively minor property loss.” *Wightman v. Consol. Rail Corp.*, 1999-Ohio-119, 86 Ohio St. 3d 431, 448, 715 N.E.2d 546, 559 (Lundberg-Stratton, J., dissenting). Consistently with *Wightman*, Ohio courts have allowed punitive damages based on the entire verdict in cases so long a survivorship action was joined in the case (and the plaintiff prevailed on it).¹⁹

Under the logic of *Wightman*, the proper punitive damage award under Ohio law would be twice the entire compensatory verdict, not merely the survivorship award, but the Circuit Court did not consider this, despite the urging of Mr. Timmons. R. at 1268-1318 (esp. 1284 at fn. 13). Since the compensatory award consists of just less than two million dollars in wrongful-death damages and over a million dollars in attorney's fees and expenses, a *Wightman* approach to the statute would mandate restoration of the entire five million dollar punitive award.

¹⁹ See *Beavers v. Knapp*, 889 N.E.2d 181, 189-90 (Ohio App. 10th Dist. 2008) (punitive damages appropriate in mixed wrongful death/survivorship case given damage to decedent's motorcycle and clothing); *Gollihue v. Consolidated Rail Corp.*, 697 N.E.2d 1109, 1127-28 (Ohio App. 3rd Dist. 1997) (punitive damages appropriate where decedent's clothes were also damaged) (attached to Plaintiff's response to Defendant's Motion for Summary Judgment on punitive damages). Appellant prevailed on his survivorship claim in this case. R. at 1399.

No Ohio court has yet spoken to the issue of how the statute and *Wightman* interact, and still less has the Ohio Supreme Court spoken definitively on the matter; nor have the new Ohio punitive damage tort reforms been upheld against constitutional challenges. Mr. Timmons submits that it was a clear mistake, on such uncertain grounds, for the Circuit Court to reach such a dramatic and unjust result. There is extremely little law developed to date on the application of § 2315.21(D)(2)(a) and what exists is confusing. An appellate court has found it applies only to court proceedings and not arbitration. *Samber v. Mullinax Ford E.*, 2007-Ohio-5778, 173 Ohio App. 3d 585, 593, 879 N.E.2d 814, 819 (2007). One appellate court has applied it, discussing whether it applied in discrimination cases and the circumstances under which it can be waived. *Luri v. Republic Servs., Inc.*, 2011-Ohio-2389. No case law exists on the applicability of various statutory exceptions built into the law.

Moreover, even if Ohio's statute were found to apply, the latest iteration of O.R.C. § 2315.21 may have actually altered Ohio's common law with respect to the relationship between wrongful death claims and punitive damages. *Rubeck, supra*, premised the unavailability of punitive damages in wrongful death on their going unmentioned in the Ohio Revised Code. But the new tort reform statute *does mention punitive damages for wrongful death for the first time in Ohio law*. Certain categories of punitive damages are exempt from the Ohio "caps." As the code reads, "**Division (D)(2) of this section does not apply to a tort action where the alleged injury, death, or loss to person or property resulted from the defendant acting with one or more of the culpable mental states of purposely and knowingly . . .**" O.R.C. § 2315.21(D)(6) (emphasis supplied). But if punitive damages remain unavailable in cases of "death," the statutory language would make no sense. Accordingly, it is far from clear that even the restrictive Ohio statute was intended to bring about the draconian and harsh result the Circuit Court imposed on the

Appellant in this case. Ohio will certainly take years to determine the functional contours of this complex and unusual statute.

But most importantly, the staggering injustice the Defendants seek to accomplish – effectively limiting their punishment for *killing Lewis Timmons with conscious disregard for his life* to the cost of a big dinner out in Columbus, where AEP is headquartered, counsels against the application of any law in the manner sought by AEP. The fundamental rule that a jury verdict should never be disturbed where it represents substantial justice, among the other legal doctrines described herein, should have led the Circuit Court to honor the jury’s reasonable and measured decision herein and to impose judgment on the reasonable verdict.

VIII. CONCLUSION

WHEREFORE, Appellants respectfully request that the Circuit Court’s Order of October 17th, 2011 be REVERSED and the case REMANDED with directions for the Circuit Court to RESTORE the original punitive damage award imposed by the jury to the judgment against Appellees.

BRIAN TIMMONS, administrator
of the estate of LEWIS C. TIMMONS, Petitioner,



Christopher J. Regan (WV Bar #8593) Counsel of Record
cregan@bordaslaw.com
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
Telephone: (304) 242-8410
Facsimile (304) 242-3936

IX. CERTIFICATE OF SERVICE

Service of the foregoing ***BRIEF OF THE PETITIONER and APPENDIX*** was had upon the Respondents herein by mailing a true and correct copy thereof, by regular United States Mail, postage prepaid, this 18th day of December, 2012, to the following:

Michael P. Leahey, Esquire
Brian R. Swiger, Esquire
JACKSON & KELLY
50 Lee Street East, Suite 1600
P.O. Box 553
Charleston, WV 25322

By:



CHRISTOPHER J. REGAN #8593

Cregan@bordaslaw.com

GEOFFREY C. BROWN #9045

Gbrown@bordaslaw.com

BORDAS & BORDAS, PLLC

1358 National Road

Wheeling, WV 26003

(304) 242-8410

and

Rodney C. Windom (WV Bar #4091)

rwindom@zoominternet.net

Scott A. Windom (WV Bar #7812)

scottwindom@aol.com

Paul V. Morrison (WV Bar #7753)

pvmldman@aol.com

Law Offices of Rodney C. Windom

202 East Main Street

Harrisville, WV 26362

(304) 643-4440

Counsel for Petitioner