

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.

REPLY BRIEF OF THE PETITIONER

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TABLE OF AUTHORITIES

West Virginia Cases

Bond v. City of Huntington, 166 W.Va. 581, 276 S.E.2d 539 (1981)..... 1-2, 4

Boyd v. Goffoli, 216 W. Va. 552, 608 S.E.2d 169 (2004) 1-2, 4

Mayer v. Frobe, 40 W. Va. 246, 22 S.E. 58 (1895).....1

McDavid v. United States, 213 W. Va. 592, 584 S.E.2d 226 (2003).....1

Mills v. Quality Supplier Trucking, Inc., 203 W. Va. 621,
510 S.E.2d 280 (1998)2, 4

Nadler v. Liberty Mut. Fire Ins. Co., 188 W.Va. 329, 424 S.E.2d 256 (1992) 4-5

Paul v. Nat'l Life, 177 W. Va. 427, 352 S.E.2d 550 (1986)2, 4

Other Cases

Rubeck v. Huffman, 8 Ohio 3d 11, 374 N.E.2d 411 (1978).....1, 4

Wightman v. Consol. Rail Corp., 86 Ohio St. 3d 431,
715 N.E.2d 546 (1999).....5

Statutes and Regulations

W.Va. R. App. Pro. 10(d)4

The Petitioner's Brief explained how American Electric Power's willful blindness cost Lewis Timmons his life. In its Response, AEP buries its head in the sand. This Reply will be short, because AEP's Response simply asserts that there are "no cases" or "there is no evidence," without citation or support – illustrating the same weakness its legal defense exhibited at trial and the same willful blindness its corporate leadership showed in 2007. *See* Respondent's Brief at, e.g., 7, 16 ("no cases," ignoring *Boyd v. Goffoli*, *Bond v. City of Huntington*, *McDavid v. United States and Mayer v. Frobe*; "no evidence" of any public policy, ignoring the same); *R.* at 2006-35 (AEP's representative comprehensively admits AEP's foreknowledge of the danger at Muskingum River). *Boyd* specifically addressed West Virginia's interest in deterring out-of-state misconduct with punitive damages – the central issue in this appeal – and *AEP never even mentions Boyd in its Brief*. Quoting *Boyd*: "[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). AEP just pretends the case is not real, as though this Court's decision in *Boyd* is no more important than a memo from AEP's safety department warning that "the prospect of a very large hydrogen cloud igniting of an adjacent flame jet is disturbing," thirteen months before Lewis Timmons was killed. *R.* at 3848.

AEP states that *Bond* allowed punitive damages in wrongful death cases, "but did not indicate that the imposition of punitive damages were to further any public policy." Respondent's Brief at 12. To quote *Bond*:

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 willfully, 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.

Id. at 166 W.Va. 581, 593, 276 S.E.2d 539, 545 (emphasis supplied). AEP's Response declares that cases like *Bond* and *Boyd* do not exist, or do not say what they say, in precisely the way it ignored or manipulated explicit warnings from inside and outside the company that it was certain to get someone killed with its inattention to its dangerous hydrogen systems. R. at 3841-46, 3848-50, 3854-55.

Respondents simply failed to grapple with the argument in Petitioner's Brief. West Virginia's public policy of protecting its citizens from being killed by misconduct so extreme as to constitute actual malice through appropriately-calibrated awards of punitive damages exists – AEP cannot make it disappear by covering its eyes and hiding from it. Pursuant to the rule of *Paul v. National Life* and *Mills v. Quality Trucking*, the courts of West Virginia will not apply foreign law conflicting with substantial public policies of our State. Letting a company that maliciously killed a West Virginian off with a \$550.00 kiss on the wrist could not conflict with public policy any more clearly. By ignoring *Boyd* and *Bond*, as set forth above, AEP concedes the point, despite its unsupported assertions to the contrary.

But AEP reveals more, and perhaps worse, about itself in the Response that this Court should consider. For example, AEP states in its Brief that “the Circuit Court . . . *correctly ordered that Ohio law was to apply to all issues of substantive law.*” Respondent's Brief at 6 (emphasis supplied). *But see* Petitioner's Brief in Case No. 12-1072 at 26-29, wherein AEP demands that this Court apply West Virginia substantive law to the issue of contribution in this case. Doesn't AEP know the same Court is receiving both briefs?¹

Not content with that transparent hypocrisy, AEP goes on to say: “it is undisputed that Petitioner was able to recover in tort from OPCo and AEPSC. To be precise, Petitioner was

¹ It may know and not care.

awarded \$1,9998,940.00 in compensatory damages.” Respondent’s Brief at 11. AEP says this despite demanding in Case No. 12-1072 that Petitioner “recover” *no compensatory damages at all* from AEP in AEP’s appeal. Petitioner’s Brief in Case No. 12-1072 at 26-29.

This is of a piece with AEP claiming that Mr. Timmons was killed instantly by the explosion, such that no pain and suffering claim exists (R. in Case No. 12-1072 at 698) before claiming he wasn’t killed at all in the explosion, such that no wrongful death occurred. Petitioner’s Brief in Case No. 12-1072 at 21-25. The strategy is not different than AEP admitting to violating the law knowingly, before OSHA, and then denying it in court on the off chance it could prejudice the jury and steal a verdict. R. in Case No. 12-1072 at 863-876. Petitioner’s Brief in Case No. 12-1072 at *e.g.* 15-18.

In short, AEP’s litigation conduct is as rogue as its behavior in the real world, totally untethered to the safety rules, the trial evidence, the case law, or even its own prior positions. To give another specific example, AEP casually accuses the Petitioner of attempting to “mislead” the Court by trying to show that this case has “more of a connection to West Virginia that actually exists.” Respondent’s Brief at 1. This case involved the wrongful death of a West Virginian, working for a West Virginia company, at the hands of two companies doing extensive business in West Virginia (in fact regulated public utilities in West Virginia) with a punitive damage award at issue that is predicated on some acts that took place in West Virginia (the Kammer explosion, the Amos fire), and wherein American Electric Power appealed to the jury to hold down that punitive award because of the company’s extensive contacts to . . . West Virginia. If that is not sufficient connection to West Virginia, the case is, incidentally, being heard by the *courts of the State of West Virginia*. AEP grapples with precisely none of these facts in the Respondents’ Brief and makes no argument at all about why this Court should ignore the

connections to West Virginia – again, *a central point of the appeal*. The failure to respond “specifically” and to the “fullest extent possible” is tantamount to a concession. W.Va.R.App.Pro. 10(d).²

Perhaps the most significant concession of the Respondent’s Brief is AEP’s total failure to dispute in any way that it killed Lewis Timmons under circumstances so aggravated and extreme as to constitute actual malice. This crystalizes the issue for the Court perfectly in analyzing the public policy issues under *Paul/Mills*. According to AEP, it can *admit maliciously killing a West Virginian* and pay a mere \$550.00 as a penalty, since this Court will conclude that no public policy of our state demands more than that for our citizens. Mr. Timmons submits that West Virginia can, must and will do better than that for her people and that *Bond, Boyd and Mills* provide the clear roadmap for doing so in this case.

AEP preferentially cites the “contrary to pure morals or abstract justice” language from *Nadler v. Liberty Mut. Fire Ins. Co.*, 188 W.Va. 329, 424 S.E.2d 256 (1992), even though that language is not syllabus-point law. Nonetheless, in a case where AEP seeks to come as close as possible to getting away with murder, Mr. Timmons submits he can meet *Nadler’s* high bar. If

² There are other examples. Mr. Timmons certainly and repeatedly objected to the application of Ohio law – he did not “acknowledge” anything other than the Circuit Court’s *order requiring the parties to cite only Ohio law*. R. at 0453; *See also* R. at 1442-43 (transcript of pretrial hearing wherein Plaintiff again objected to application of Ohio law on punitive damages, citing *Mills*). *Cf.* Respondent’s Brief at 3 (suggesting Mr. Timmons somehow agreed to Ohio law). AEP’s suggestion that the Ohio tort reform statute quotation was unfairly truncated (Respondent’s Brief at 15), ignores the fact that Mr. Timmons was not relying on the criminal conviction exception, but *rather pointing out that the statute expressly contemplates punitive damages in wrongful death claims*, in conflict with *Rubeck v. Huffman*, 54 Ohio St. 2d 20, 374 N.E.2d 411 (1978), a point AEP *does not respond to at all*. *See* Petitioner’s Brief at 25-26 (making the point that a statute referring to caps on punitive damages for wrongful death assumes a world in which punitive damages can be recovered for wrongful death, calling *Rubeck* into question). Finally, AEP’s contentions about the unavailability of punitive damages in deliberate intent cases – this is not one – or compensatory caps in medical cases – this is not one of those either – are a stretch. *Boyd* and *Bond* are the cases on point.

AEP could get this Court to hop from West Virginia to Ohio law and back, so AEP can avoid any meaningful punishment and any duty to pay compensation for killing Brian Timmons' father so needlessly and wantonly, it would indeed be an "evil example," contrary to "abstract justice" and "pure morals." In support of this point, Mr. Timmons submits that the second moral lesson in the entire Judeo-Christian tradition teaches that punishment for wrongful killing shall be swift and severe:

And the LORD said unto Cain, Where *is* Abel thy brother? And he said, I know not: Am I my brother's keeper? ¹⁰ And He said, what hast thou done? The voice of thy brother's blood crieth unto me from the ground.¹¹ And now art thou cursed from the earth, which hath opened her mouth to receive thy brother's blood from thy hand;¹² *When thou tillest the ground, it shall not henceforth yield unto thee her strength; a fugitive and a vagabond shalt thou be in the earth.*

The King James Bible, Genesis, Chapter 4, Verses 9-12 (emphasis supplied). Was Cain heard to say, "but Ohio has a cap on how long thou canst make me wander in the land of Nod?" No. AEP's position is indeed contrary to "pure morals or abstract justice" within the meaning of *Nadler, supra*, and on the most ancient of authorities.

Transitioning from the sublime to the comparatively absurd, AEP willfully misses the point regarding Ohio law and *Wightman*. Since it is common knowledge that 6,250-1 ratios of compensatory to punitive damages are not allowed under federal law, *Wightman* obviously considered the entire wrongful death award in that case as a predicate for the punitive award. As the *Wightman* dissent made explicit, even the Ohio Supreme Court works hard to avoid the manifest injustice that results from the denial of punitive damages for wrongful death. Justice Lundberg-Stratton: "I believe that the damages award in this case is, in essence, an award based on a wrongful death — the fact that Michelle Wightman was killed in this accident." *Wightman v. Consol. Rail Corp.*, 86 Ohio St. 3d 431, 448, 715 N.E.2d 546, 559 (1999). Who will this Court believe on this point, AEP or Justice Lundberg-Stratton? AEP's statement that it is "clear" that

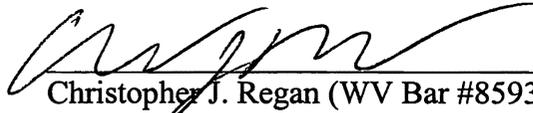
the Ohio Supreme Court ignored the wrongful death damages and approved a 6,250-1 ratio when there is no plausible way to approve a \$15,000,000.00 punitive award on \$2,400.00 in compensatories again shows AEP telling us that what it does not see cannot be real. The punitive award should have been sustained.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that the judgment of the Circuit Court reducing the punitive damage award in this case from \$5,000,000.00 to \$550.00 be REVERSED and that his Court remand the case for the entry of a judgment consistent with the jury's full verdict, together with all interests and costs to which the Petitioner is entitled under the law.

Very Respectfully submitted,

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CERTIFICATE OF SERVICE

Service of the foregoing ***REPLY BRIEF OF THE PETITIONER*** was had upon the Respondents herein by mailing a true and correct copy thereof, by regular United States Mail, postage prepaid, this 20th day of February, 2013, to the following:

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