

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0968

**ON APPEAL FROM THE CIRCUIT COURT OF
MARSHALL COUNTY (Civil Action No. 08-C-102M)**

**BRIAN TIMMONS, Administrator
of the ESTATE OF LEWIS C.
TIMMONS, Deceased,**

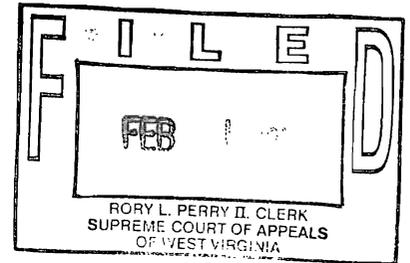
Petitioners,

v.

DOCKET NUMBER: 12-0968

**OHIO POWER COMPANY and
AMERICAN ELECTRIC POWER
SERVICE CORPORATION,**

Respondents.



RESPONDENTS' BRIEF

Counsel for Respondents

**Brian R. Swiger (WVSB #5872)
Michael P. Leahey (WVSB #9934)
JACKSON KELLY PLLC
Post Office Box 553
Charleston, West Virginia 25322
(304) 340-1000 (Phone)
(304) 340-1051 (Fax)**

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT	6
STATEMENT REGARDING ORAL ARGUMENT AND DECISION	8
ARGUMENT	9
1. The Circuit Court correctly held that the application of Ohio law to the punitive damages award was proper under <i>Paul v. National Life and Mills v. Quality Trucking</i> as the application of this law did not violate a strongly held West Virginia public policy	9
2. The Circuit Court properly computed the reduction to the punitive damages award based on <i>Ohio Revised Code</i> § 2315.21 and <i>Wightman v. Consolidated Rail Corp.</i>	13
CONCLUSION.....	16
CERTIFICATE OF SERVICE	17

TABLE OF AUTHORITIES

CASES	PAGE
<i>Bond v. City of Huntington</i> , 166 W. Va. 581, 276 S.E.2d 539 (1981).....	12
<i>Chrystal R.M. v. Charlie A.L.</i> , 194 W. Va. 138, 459 S.E.2d 415, Syl. Pt. 1 (1995).....	9, 13
<i>MacDonald v. City Hospital, Inc.</i> , 227 W. Va. 707, 715 S.E.2d 405 (2011)	13
<i>McDavid v. United States</i> , 213 W. Ca. 592,599, 584 S.E.2d 226 (2003).....	11
<i>Mills v. Quality Supplier Trucking, Inc.</i> , 203 W. Va. 621, 510 S.E.2d 280 (1998).....	9, 10, 11
<i>Nadler v. Liberty Mutual Fire Ins. Co.</i> , 188 W. Va. 329, 424 S.E.2d 111 (1992)	10
<i>Paul v. National Life</i> , 177 W. Va. 427, 352 S.E.2d 550 (1986)	9, 10, 11
<i>Ranells v. Cleveland</i> , 41 Ohio St. 2d 1, 321 N.E.2d 885, 889 (1975)	9
<i>Rubeck v. Huffman</i> 54 Ohio St. 2d 20, 374 N.E.2d 411, 413 (1978).....	9, 14
<i>Wightman v. Consolidated Rail Corp.</i> , 86 Ohio St. 3d 431, 715 N.E.2d 549 (1999).....	13, 14
<i>Yost v. Travelers Ins. Co.</i> , 1999 WL 409670, 6 (4 th Cir. 1999).....	10
STATUTES	
<i>Ohio Revised Code</i> § 2125.02.....	9
<i>Ohio Revised Code</i> § 2315.21.....	4, 9, 13, 14, 15
<i>W.Va. Code</i> 55-7-6.....	11
<i>W. Va. Code</i> 23-4-2.....	12
<i>W. Va. Code</i> 29-12A-7.....	13
<i>W. Va. Code</i> 55-7B-8.....	13
OTHER	
<i>1868 Acts of the Legislature</i> , c. 105.....	11

STATEMENT OF THE CASE

The two narrow assignments of error presented in Petitioner's brief are, 1) whether the application of Ohio law to the punitive damage award violated a substantial public policy of West Virginia, such that the Circuit Court should disregard the application of *lex loci delicti*, and 2) whether the Circuit Court improperly applied the law of Ohio to the punitive damages award.

Petitioner's Statement of the Case is nothing more than an inflammatory narrative intended to distract this Court from the two discrete legal issues that Petitioner has requested the Court to review. Although it is concerning that Petitioner included numerous facts that are irrelevant to the adjudication of the two specific Assignments of Error presented to this Court for review, it is more concerning that he has failed to discuss facts that are absolutely critical for this Court to properly evaluate these issues. Finally, Petitioner has misstated several key facts that, if left uncorrected, could materially mislead this Court. Respondents will attempt to cure these issues in their Statement of the Case.

First, throughout Petitioner's brief he refers to Ohio Power Company ("OPCo"), and American Electric Power Service Corporation ("AEPSC") generically as AEP. **Pet. Brief at 2.** Petitioner also discusses American Electric Power Company, Inc. ("AEP, Inc.") and Appalachian Power Company in an attempt to create confusion and more of a connection to West Virginia than actually exists. **Id.** At the time this case went to trial neither AEP, Inc. nor Appalachian Power Company was a party to this action. **Verdict Form, A001399-A001405.** To be clear, OPCo and AEPSC were the only defendants when the trial of this action commenced. **Id.**

Petitioner also attempts to inflame the issues presented herein by littering his Statement of the Case with irrelevant and untrue "facts" and issues. By way of example, Petitioner states that, "Because there had been nearly eighty million dollars in damage to its plant, AEP was much

more interested in extracting payments from CGI...” **Pet. Brief at 7.** Obviously, the value of the damage to OPCo’s plant is irrelevant to these issues. Moreover, it is noteworthy that Petitioner is unable to justify this “fact” with a record citation. The reason he is unable to do so is because no such citation could exist because the number is absolutely incorrect. In fact, the damage to OPCo’s plant was less than 15% of that number. Petitioner also included veiled references to alleged errors committed by the Circuit Court including the preclusion of the OSHA citations, the denial of his *res judicata* motion, the denial of his directed verdict motion at the conclusion of opening statements, etc. Petitioner does not, however, appeal any of these issues and, as such, they are irrelevant to the issues presented in his Brief.

Respondent, OPCo, an Ohio corporation, owns and operates the Muskingum River power station in Waterford, Ohio. Respondent, AEPSC, a New York Corporation, with its principal place of business in Ohio, is a shared service company set up pursuant to the requirements of the Public Utilities Holding Company Act of 1935 and, at all times relevant hereto, provided various shared services to OPCo.

The Muskingum River power station is an electricity generation facility that uses hydrogen as a coolant for its generators. The hydrogen is stored in a high pressure storage system. OPCo hired an independent contractor, General Hydrogen Corporation (“General Hydrogen”), to maintain the hydrogen storage system at the Muskingum River plant and deliver hydrogen gas to that system.

Petitioner’s decedent, Lewis C. Timmons (“Mr. Timmons”), was a West Virginia resident and an employee of General Hydrogen. **Complaint, R000023.** On January 8, 2007, Mr. Timmons was delivering compressed hydrogen to the plant’s unit 5 hydrogen storage system, located in Ohio, from the General Hydrogen tube trailer when a rupture disc in the hydrogen

storage system burst. This rupture caused a release of hydrogen that ultimately ignited. Mr. Timmons died during the explosion. On May 1, 2008, Respondent filed suit against OPCo, AEP, Inc., and “AEP Ohio” in the Circuit Court of Marshall County, West Virginia asserting premises liability claims and seeking both compensatory and punitive damages. **Complaint, R000023.**¹

On September 22, 2010, OPCo along with AEP, Inc. and AEP Ohio filed their motion for summary judgment. Therein, OPCo argued, *inter alia*, that Petitioner’s request for punitive damages was barred by Ohio’s wrongful death statute, which precludes the award of punitive damages. **Defs.’ MSJ, A000186-000192.** While Respondents’ motion for summary judgment was pending, the Circuit Court ruled that Ohio law was to apply to all substantive matters in the case. **10/20/2010 Order, A000001-000002.** Through his Opposition to the motion for summary judgment, Petitioner acknowledged that Ohio law was to apply to the legal issues contained in Respondents’ motion; however, he argued that the Circuit Court must allow the claim for punitive damages to survive summary judgment because Petitioner’s decedent had experienced a loss to his personal property. **Pl.’s Opp. to Def.’s MSJ A000453.** It should be noted that this is the very first time that Petitioner ever argued that facts existed that would support a claim under Ohio’s survival action statute.²

Ultimately the Circuit Court granted Respondents’ motion for summary judgment and ordered that Petitioners’ claims for punitive damages arising from the wrongful death action be dismissed. **8/2/2011 Order, A000004.** The Circuit Court did indicate that an award of punitive

¹ Petitioner originally named OPCo, AEP, Inc. and AEP Ohio in his Complaint. Petitioner subsequently admitted that AEPSC was actually the proper party in interest and petitioned the Circuit Court to allow him to substitute AEPSC for AEP, Inc. and AEP Ohio. **Pl.’s Opp. To Defs.’ MSJ, A000451.**

² Petitioner’s Complaint and Amended Complaint both allege that Mr. Timmons suffered physical pain, mental and emotional anguish and psychological damage. **Complaint, A000038; Amended Complaint, A000139.** While these damages would be components of a survival action, Petitioner was unable to present any evidentiary support for these alleged damages during discovery or at trial.

damages relative to the survival action would not be barred as a matter of law, but recognized that it may be required to mould any award of punitive damages to conform to Ohio law. **Id.**

Thereafter, on August, 11, 2011 – four days before trial was to begin – Petitioner filed a motion entitled, “Motion for a Declaration that Ohio’s Tort Reform “Caps” on Punitive Damages Contravene the Public Policy of West Virginia and for Reconsideration of This Court’s Order Applying Ohio’s Law Prohibiting Punitive Damages for Wrongful Death, in Contravention of the Strong Public Policy of West Virginia That Such Damages Be Allowed.” **R001088**. After reviewing Petitioner’s motion the Circuit Court ordered that “its ruling at the Final Pre-Trial Conference relative to Plaintiff’s claims for punitive damages arising from the wrongful death cause of action, as set forth full above is **AFFIRMED, in toto.**” **8/13/2011 Order, A000009**.

The case proceeded to trial against OPCo and AEPSC on August 15, 2011. During the charge conference, after all of the evidence had been presented to the jury, Petitioner again objected to the application of Ohio’s law relative to punitive damages. **8/23/2011, Trial Transcript, A003018**. Petitioner continued to argue that the application of Ohio law violated a strong public policy of West Virginia, but the Circuit Court declined to address that argument unless or until punitive damages were awarded. **Id. at A003026**. Thereafter, the jury returned a verdict against OPCo and AEPSC on August 24, 2011. **Verdict Form, A001399**. Because the jury found that punitive damages were warranted, the case resumed to determine the amount of the punitive award. On August, 26, 2011, the jury awarded Petitioner \$2,000,000 in punitive damages against OPCo and \$3,000,000 in punitive damages against AEPSC. **Verdict Form, A001406**.

Immediately following the Jury’s award of punitive damages, OPCo and AEPSC moved to mould the verdict to comply with Ohio Revised Code § 2315.21(D)(2)(a). **8/26/2012 Trial**

Transcript, A003348. OPCo and AEPSC then filed a brief in support of their motion to mould the verdict. **Brief in Support of Application of Ohio's Punitive Damages Law, A001259.** On October 6, 2011, the Circuit Court heard argument on this issue from all counsel. **10/6/2011 Argument Transcript, A003483.** At the conclusion of oral argument, the Circuit Court announced its decision that it would eliminate any punitive award attributable to the wrongful death count and reduce the punitive award relative to the survival action to \$550.00 to comply with Ohio law. **10/6/2011 Argument Transcript, A003511.** This decision was memorialized in an Order dated October 17, 2011. **10/17/2011 Order, A00016.**

Petitioner's appeal followed thereafter.

SUMMARY OF ARGUMENT

Petitioner's sole assignment of error is that the Circuit Court erred by reducing the \$5,000,000 punitive damages award to \$550.00 pursuant to the well-established statutory and common law of Ohio. Specifically, Petitioner argues 1) that the Circuit Court should have applied the public policy exception to West Virginia's conflict of laws analysis, and 2) that even if the application of Ohio law were proper, the Circuit Court misapplied Ohio law. For the reasons set forth herein, the Circuit Court's rulings on these issues were proper and supported by the law.

Petitioner's decedent, Lewis Timmons, was a resident of West Virginia. Respondent, OPCo is an Ohio corporation with its principal place of business located in Columbus, Ohio. Respondent AEPSC is a New York Corporation with its principal place of business located in Columbus, Ohio. This case arises out of injuries sustained by Petitioner's decedent at the OPCo's Muskingum River power station located in Beverly, Ohio.

Because this case involves a West Virginia resident who brought suit in West Virginia for an injury sustained in Ohio, it presents a potential conflict of laws. As such, whenever the laws of West Virginia and Ohio differ on a substantive issue of law a conflict of laws analysis must be performed to determine which state's law should apply. West Virginia has routinely reaffirmed its adherence to the conflict of *lex loci delicti* – the law of the place of the injury should apply.

As to the issues raised in Petitioner's appeal, there can be no doubt that the laws of West Virginia and the laws of Ohio conflict. In the early stages of motions practice in this case the Circuit Court recognized the potential for conflict and correctly ordered that Ohio law was to apply to all issues of substantive law. Adhering to its order, the Circuit Court applied Ohio law to the punitive damages issues appealed herein. Petitioner did not dispute that the proper

application of *lex loci delicti* required the application of Ohio law to these issues in the Circuit Court and he does not argue that point now.

In fact, Petitioner's first argument is that, despite the fact that Ohio law must apply under the doctrine of *lex loci delicti*, the Circuit Court should have applied West Virginia law based on the public policy exception. Petitioner's entire argument on this issue is based upon the evolution of compensatory damages in wrongful death suits in West Virginia. Petitioner cites to no cases or other sources to establish that West Virginia has a strong public policy of punishing out of state defendants for harm committed out of state. Specifically, Petitioner cites to no authority that would establish that a limitation or "cap" on punitive damages or the preclusion of punitive damages in certain types of actions is against West Virginia's strong public policy.

To the contrary, the law of West Virginia actually embraces both of these principals. First, West Virginia has precluded the award of punitive damages in deliberate intention workplace cases and has precluded these damages in cases involving municipalities and/or their employees. Furthermore, West Virginia caps non-economic compensatory damages in medical professional negligence cases.

As to Petitioner's second argument, the Circuit Court properly applied Ohio's law to reduce the punitive damages award. By statute, Ohio does not permit recovery of punitive damages in wrongful death actions. Although punitive damages are recoverable in survival actions they are not to exceed two times the value of the award of compensatory damages. The jury awarded Petitioner \$275.00 in compensatory damages at the trial. The Circuit Court then properly reduced the ultimate award of punitive damages to \$550.00, or two times the value of the compensatory award as it was statutorily required to do.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners respectfully submit that oral argument is necessary under Rule 18(a) of the Rules of Appellate Procedure because the decisional process would be significantly aided by oral argument.

Petitioners further submit that this appeal be set aside for oral argument pursuant to Rules 19(a)(1) of the Rules of Appellate Procedure. Rule 19(a)(1) applies to appeals contending that the Circuit Court failed to apply settled law.

- 1. THE CIRCUIT COURT CORRECTLY HELD THAT THE APPLICATION OF OHIO LAW TO THE PUNITIVE DAMAGES AWARD WAS PROPER UNDER *PAUL V. NATIONAL LIFE AND MILLS V. QUALITY TRUCKING* AS THE APPLICATION OF THIS LAW DID NOT VIOLATE A STRONGLY HELD WEST VIRGINIA PUBLIC POLICY.**

STANDARD OF REVIEW

“Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review. *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415, Syl. Pt. 1 (1995).

ARGUMENT

Prior to ever ruling on Respondents’ motion for summary judgment the Circuit Court, *sua sponte*, ordered that based upon the application of the doctrine of *lex loci delicti*, Ohio law would apply to all substantive issues in the case. **10/20/2012 Order, 000001**. Although filed prior to the Circuit Court’s Order, the conflict analysis set forth in Respondent’s Memorandum of Law in Support of its Motion for Summary Judgment came to the same conclusion that Ohio law must apply. **Def.’s MSJ, A000187**.

It is undisputed that under Ohio law a person may not recover punitive damages relative to a wrongful death claim. *Ohio Revised Code* § 2125.02; *see also Rubeck v. Huffman*, 54 Ohio St. 2d 20, 374 N.E.2d 411, 413 (1978) (“The language of R. C. 2125.02 is clear. Damages in wrongful-death actions are limited to those for ‘the pecuniary injury resulting from such death.’ . . . Since punitive damages are ‘assessed and above the amount adequate to compensate an injured party’ they are, by definition, not available in a wrongful-death action.” *Id. quoting Ranells v. Cleveland*, 41 Ohio St. 2d 1, 321 N.E.2d 885, 889 (1975)). It is likewise undisputed that pursuant to *Ohio Revised Code* § 2315.21(D)(2)(a), “The court shall not enter judgment for

punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant...”

At no time during the extensive briefing of this issue before the Circuit Court did Petitioner ever challenge the Circuit Court’s finding that the application of *lex loci delicti* required the application of Ohio’s law to the punitive damages issue. More importantly, Petitioner does not challenge this finding in this appeal. As such, the starting point of this Court’s analysis is that the Ohio statutes cited above apply to the award of punitive damages in this case.

In an attempt to avoid this proper result, Petitioner asks this Court to apply the public policy exception to the general rule of *lex loci delicti* set forth in *Paul v. National Life*, 177 W. Va. 427, 352 S.E.2d 550 (1986), and *Mills v. Quality Supplier Trucking, Inc.*, 203 W. Va. 621, 510 S.E.2d 280 (1998). It is clear from Petitioner’s argument in the Circuit Court and in his Brief that he misunderstands this exception.

When the public policy exception was first raised to the Circuit Court relative to a separate legal issue, Petitioner argued that “to the extent Ohio law could be read to deny the plaintiff a remedy, Ohio law must yield to West Virginia law under Mills.” **Pl.’s Opp, to Def.’s MSJ, A000461**. The exception created by these cases, however, is not nearly as broad as Petitioner attempts to make it appear to be. West Virginia adheres to the general view that, notwithstanding the applicability of another state’s law, the forum state may decline to enforce laws it deems repugnant to its own strong public policy. *Nadler v. Liberty Mutual Fire Ins. Co.*, 188 W. Va. 329, 424 S.E.2d 111 (1992). This exception is necessarily a narrow one, to be invoked only in extraordinary circumstances. *Yost v. Travelers Ins. Co.*, 1999 WL 409670, 6 (4th Cir. 1999).

Significantly, “the mere fact that the substantive law of another jurisdiction differs from or is less favorable than the law of the forum state does not, by itself, demonstrate that application of the foreign law under recognized conflict of laws principles is contrary to the public policy of the forum state.” *Nadler*, 188 W. Va. At 336. Rather, it is only where the foreign law “is contrary to pure morals or abstract justice, or unless enforcement would be of evil example and harmful to its own people” that is voidable on public policy grounds. *Id.* at 338.

A close reading of the *Paul* and *Mills* cases clearly points out the distinctions between those cases and the argument made herein by Petitioner. In *Paul* this Court held, “It is the strong public policy of this State that persons injured by the negligence of another should be able to recover in tort.” *Paul*, 177 W. Va. At 433. Similarly, in *Mills* this Court held, “Application of the doctrine of contributory negligence, barring a plaintiff’s recovery if that plaintiff is guilty of any negligence, violates the public policy of this State...” *Mills*, 203 W. Va. 624.

In the present case it is undisputed that Petitioner was able to recover in tort from OPCo and AEPSC. To be precise, Petitioner was awarded \$1,998,940.00 in compensatory damages. **11/23/2011 Order, A000019**. It should also be noted that because the Circuit Court did apply Ohio law to the punitive damages claim Petitioner was awarded an additional \$1,698,993.96 in attorney fees and expenses. **7/12/2012 Order, A000021**. Clearly, the application of Ohio law to this case did not prevent the Petitioner from recovering in tort.

Moreover, the recitation of tragic workplace accidents in West Virginia contained in Petitioner’s Summary of the Argument is equally unpersuasive. It is clear that during the 19th and 20th centuries West Virginia expanded the compensatory damages recoverable under a claim for wrongful death. In 1868 a jury was permitted to award damages in a wrongful death claim that it believed to be fair and just, but not to exceed \$5,000. *1868 Acts of the Legislature*, c. 105.

By 1955 the Legislature amended *W.Va. Code 55-7-6* to permit recovery of fair and just damages not to exceed \$10,000 and allowed recovery for pecuniary loss by the beneficiaries not to exceed \$20,000. *McDavid v. United States*, 213 W. Va. 592, 599, 584 S.E.2d 226 (2003). Again, all of these cases and statutes reflect West Virginia's public policy to **compensate** plaintiffs injured by the negligence of others.

In another case cited by Petitioner, *Bond v. City of Huntington*, 166 W. Va. 581, 276 S.E.2d 539 (1981), this Court concluded "that in an appropriate case punitive damages **may** be recovered in an action for wrongful death." *Bond*, 166 W. Va. At 593 (emphasis added). While this Court permitted the award of punitive damages it did not indicate that the imposition of punitive damages were to further any public policy. Importantly, this Court recognized the cap on the recovery of punitive damages placed by the legislature, the very thing that Petitioner herein argues violates public policy. *Id.* ("[I]t is clear that the maximum recovery for all damages was limited to \$110,000 plus the reasonable funeral, hospital, medical and other expenses. Thus while punitive damages may be recovered, they must be added with the other damages and be within the statutory limit of \$110,000.")

As such, while West Virginia courts allow the award of punitive damages in wrongful death claims, Petitioner has failed to put forward any compelling arguments that the prohibition of punitive damages in wrongful death claims or the limitation of those damages relative to other claims would be contrary to pure morals or abstract justice, or the enforcement would be of evil example and harmful to its own people. Respondents submit that based on the established law of West Virginia Petitioner is unable to do so.

As stated above, Petitioner argues that both the prohibition of punitive damages in wrongful death claims and the limitation of punitive damages in the survival action contravene

the public policy of West Virginia. As to the first issue, West Virginia’s legislature has enacted statutes that prohibit the award of punitive damages in certain types of actions. *See W. Va. Code 23-4-2* (Under West Virginia’s deliberate intention statute “no punitive or exemplary damages shall be awarded to the employee or other plaintiff.” *Id.*); *see also W. Va. Code 29-12A-7* (“In any civil action involving a political subdivision or any of its employees as a party defendant, an award of punitive or exemplary damages against such political subdivision is prohibited.” *Id.*)

As to Petitioner’s second issue, West Virginia’s Legislature has enacted – and this Court has upheld – “caps” on damages. *See W. Va. Code 55-7B-8* (“In any professional liability action brought against a health care provider pursuant to this article, the maximum amount recoverable as compensatory damages for noneconomic loss shall not exceed two hundred fifty thousand dollars per occurrence...” *Id.*) This Court was asked to review the constitutionality of that statute, which it affirmed. *MacDonald v. City Hospital, Inc.*, 227 W. Va. 707, 715 S.E.2d 405 (2011). It is also worth noting that this statute limited, and placed a cap on, a plaintiff’s right to recover compensatory damages whereas the Ohio statute does not impact a plaintiff’s right to be fully compensated for his/her damages.

2. THE CIRCUIT COURT PROPERLY COMPUTED THE REDUCTION TO THE PUNITIVE DAMAGES AWARD BASED ON OHIO REVISED CODE § 2315.21 AND WIGHTMAN V. CONSOLIDATED RAIL CORP.

STANDARD OF REVIEW

“Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review. *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415, Syl. Pt. 1 (1995).

ARGUMENT

Ohio Revised Code § 2315.21(D)(2)(a) states, “The court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section.” Although, as stated above, Ohio law clearly does not permit the award of punitive damages relative to a wrongful death claim, Petitioner argues that the wrongful death compensatory damages should be used to determine the amount of punitive damages. Such a result defies common logic.

Petitioner further argues that his rationale is supported by the Ohio Supreme Court’s decision in *Wightman, supra*. This is patently false. As a preliminary matter, the *Wightman* case was decided before the statutory cap on punitive damages provided by *Ohio Revised Code* § 2315.21 took effect; however, at the time the prohibition against the award of punitive damages in wrongful death actions was clearly established by *Rubeck v. Huffman*, 54 Ohio St. 2d 20, 374 N.E.2d 411 (1978). The Court’s rationale in this case is completely supportive of Respondents’ position nonetheless.

In the *Wightman* case a jury awarded \$1,000,000 to plaintiff in compensatory damages relative to the wrongful death claim and \$2,400 in property loss in the survival action. *Wightman*, 54 Ohio St.2d, 434, 438. The jury also awarded plaintiff \$25,000,000 in punitive damages which was reduced by the trial court to \$15,000,000. *Id.* at 434. On appeal the Ohio Supreme Court was asked whether the punitive award was grossly excessive. In undertaking its analysis the Ohio Supreme Court stated, “Mrs. Wightman’s property loss was \$2,400, **and upon that loss was based the \$15,000,000 punitive damages award.**” *Id.* at 438. (emphasis added). It is clear that to perform its analysis of the reasonableness of the punitive damages award in this

pre-cap statute case the Ohio Supreme Court ignored the \$1,000,000 compensatory award in the wrongful death action because punitive damages could not be awarded on that claim and it would, therefore, be improper to consider them for purposes of the punitive award in the survival action.

Furthermore, Petitioner's argument that *Ohio Revised Code* § 2315.21(D)(6) may exempt punitive damages from the Ohio cap statute is wholly without merit. Petitioner's argument is disingenuous and misleading relative to this issue. On page 25 of Petitioner's Brief he supplies this Court with a partial statutory quote to support his argument that if a defendant acts with one or more culpable mental states the caps on punitive damages may not apply. When the section of the statute is read as a whole, however, it is clear that the argument does not hold up. *Ohio Revised Code* § 2315.21(D)(6) states,

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 as described in section 2901.22 of the Revised Code and when the defendant has been convicted of or pleaded guilty to a criminal offense that is a felony, that had as an element of the offense one or more of the culpable mental state of purposely and knowingly as described in this section, that that is the basis of the tort action.

The bolded section of the statute quoted above was not contained in Petitioner's Brief. When this statutory section is read as a whole it is clear that to avoid the cap on punitive damages the defendant must plead guilty to a felony criminal offense that contain one of the culpable mental states and that felonious conduct is the basis of the tort action. This section absolutely does NOT apply to this case.

CONCLUSION

From the outset of this litigation the Circuit Court ruled that Ohio law must be applied to the Petitioner's punitive damages claim based upon West Virginia's well settled conflict of laws doctrine of *lex loci delicti*. Petitioner never challenged that the application of *lex loci delicti* requires the application of Ohio law to this claim; however, Petitioner argues that Ohio's punitive damages laws are repugnant to the strongly held public policy of West Virginia. Petitioner's brief is devoid of any evidence to support this argument. At best, Petitioner has illustrated that West Virginia has a strong public policy in favor of compensating person injured by the negligence of others. There is no dispute that the jury awarded compensation to the Petitioner.

Petitioner also argues that the Circuit Court failed to properly apply Ohio law to mould the punitive damages award. Petitioner's argument in this regard defies logic and the very case law he cited. In summary, 1) pursuant to the doctrine of *lex loci delicti*, the Circuit Court was correct to apply Ohio law to Petitioner's punitive damages claim, 2) the application of Ohio law does not violate a strongly held public policy of West Virginia, and 3) the Circuit Court properly reduced the award of punitive damages in accord with Ohio law.

**OHIO POWER COMPANY and AMERICAN
ELECTRIC POWER SERVICE CORPORATION
By Counsel**


BRIAN R. SWIGER (WVSB #5872)
MICHAEL P. LEAHEY (WVSB # 9934)
JACKSON KELLY PLLC
Post Office Box 553
Charleston, West Virginia 25322
(304) 340-1000 (Phone)
(304) 340-1051 (Fax)

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0968

**ON APPEAL FROM THE CIRCUIT COURT OF
MARSHALL COUNTY (Civil Action No. 08-C-102M)**

**BRIAN TIMMONS, Administrator
of the ESTATE OF LEWIS C.
TIMMONS, Deceased,**

Petitioners,

v.

DOCKET NUMBER: 12-0968

**OHIO POWER COMPANY and
AMERICAN ELECTRIC POWER
SERVICE CORPORATION,**

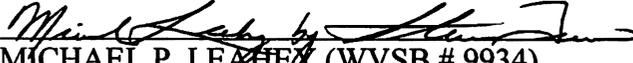
Respondents.

CERTIFICATE OF SERVICE

I, Michael P. Leahey, counsel for Respondents Ohio Power Company and American Electric Power Service Corporation, do hereby certify that on this 1st day of February, 2013, I served **RESPONDENTS OHIO POWER COMPANY and AMERICAN ELECTRIC POWER SERVICE CORPORATION'S BRIEF** upon all counsel and parties of record, via United States mail, postage prepaid, addressed as follows:

James G. Bordas, Jr. (WVSB #409)
Scott S. Blass (WVSB #4628)
Geoffrey C. Brown (WVSB #9045)
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, West Virginia 26003
P: (304) 242-8410
F: (304) 242-3936
Gbrown@bordaslaw.com
Counsel for Petitioners

Rodney C. Windom (WVSB #4091)
Scott A. Windom (WVSB #7812)
Paul V. Morrison, III (WVSB #7753)
LAW OFFICES OF RODNEY C. WINDOM
202 East Main Street
Harrisville, West Virginia 26362
P: (304) 643-4440
F: (304) 643-2947
rwindom@zoominternet.net
scottwindom@aol.com
Co-Counsel for Petitioners

 (WVSB 10872)
MICHAEL P. LEAHEY (WVSB # 9934)