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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 12-0719

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HESS OIL COMPANY, INC.,

Defendant Below, Petitioner,

v.

(Circuit Court of Harrison County
Civil Action No. 10-C-20)

AIG DOMESTIC CLAIMS, n/k/a
AIG CLAIMS, INC., and
COMMERCE AND INDUSTRY INSURANCE COMPANY,

Defendants Below, Respondents.

BRIEF ON BEHALF OF PETITIONER, HESS OIL COMPANY, INC., IN SUPPORT OF ITS PETITION FOR APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REGULATIONS

OTHER AUTHORITIES

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ASSIGNMENTS OF ERROR[1]

I. THE CIRCUIT COURT'S DECISION TO REDUCE THE PUNITIVE DAMAGE AWARD BY APPLICATION OF A 5:1 PUNITIVE-COMPENSATORY DAMAGE RATIO STATED IN *TXO PRODUCTION CORP. V. ALLIANCE RESOURCES, INFRA* CONSTITUTES REVERSIBLE ERROR UPON THE FINDING THAT THERE WAS NO EVIL INTENT AS THE EVIDENCE AT TRIAL DEMONSTRATED THE AIG DEFENDANTS' MALICIOUS DISCLAIMER OF HESS'S CLAIM AND A CORPORATE CULTURE ENCOURAGING MALICIOUS CONDUCT TOWARD ITS INSURED.

II. THE CIRCUIT COURT'S DECISION TO REDUCE THE PUNITIVE DAMAGE AWARD IMPOSED BY THE JURY, AFTER HEARING ALL EVIDENCE AT TRIAL, CONSTITUTED REVERSIBLE ERROR BECAUSE THE AWARD WAS NOT EXCESSIVE UNDER THE WEST VIRGINIA CONSTITUTION OR THE UNITED STATES CONSTITUTION AND FELL WITHIN AN ACCEPTABLE RANGE FOR PUNITIVE TO COMPENSATORY DAMAGE RATIOS IN THIS JURISDICTION AS WELL AS UNDER FEDERAL CASE LAW AND CASE LAW FROM OTHER JURISDICTIONS.

STATEMENT OF THE CASE

Before the Court is a classic example of a West Virginia small business, Hess Oil Company, Inc. ("Hess") and its former shareholders being abused at the hands of an insurance company attempting to avoid coverage for the sake of profits. Hess was a small, family-owned business of two brothers, the William and Tom Brown families, with its principal office located in Elkins, West Virginia. Hess owned several gas stations and provided fuel to others. *(Tr. 11:228 Bill Brown).*[2] Hess was recognized as "the Brown Family Hess Oil" enjoying an excellent community reputation through years of supporting sports, arts, and local events. *(Tr. 11:219-20 Bill Brown).*

The Complaint in this action was initially filed by Plaintiff, Ryan Environmental ("Ryan") against Hess, AIG Domestic Claims (n/k/a Chartis Claims, Inc.)[3] and Commerce & Industry Insurance Company (collectively "AIG" or "AIG Defendants"), for payment of unpaid invoices for

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[1] Rule 10(c)(3) of the Rules of Appellate Procedure states, "[t]he assignments of error need not be identical to those contained in the notice of appeal." Pursuant thereto, Hess has divided the assignment of error contained in its Notice of Appeal into two separate issues for ease of discussion and analysis.

[2] References to the Trial Transcript are designated *Tr.* followed by the Trial Transcript volume number and page number, with the identity of the witness following.

[3] AIG Domestic Claims, Inc. adjusts claims for the AIG insurance companies. *(Tr. 11:627-628; Tr. 12:1193 Romano; Tr. 12:1248 Segal)*

environmental remediation/cleanup services performed at a Hess site, located in Mt. Storm, West Virginia ("Mt. Storm Location").[4] All of that remediation work was under the supervision and oversight of the AIG Defendants. The origin of the wrongful conduct by the AIG Defendants arises from a gasoline release at the Mt. Storm location first discovered on February 28, 1998 ("1998 Release"). At the time, Hess had been insured by the AIG Defendants since October 21, 1996, for such claims pursuant to a specialized policy of insurance.

In January 1999, following Hess's investigation of the 1998 Release in accordance with the policy, the AIG Defendants accepted coverage and liability for the 1998 Release assuming exclusive supervision and oversight of the cleanup of the Mt. Storm site. The Browns continued to operate Hess until 2006, after Tom unexpectedly passed away and Bill suffered a heart attack, prompting the sale and liquidation of Hess. *(Tr. 11:237-238)*. By May 2008, Hess liquidated and dissolved and a Certificate of Dissolution was issued by the West Virginia Secretary of State. *(Tr. 11:473-474 Bill Brown; A3573 Certificate of Dissolution).*[5] At the time Hess' dissolution, the shareholders of Hess were Bill Brown, Brenda Brown and the Trust of Tom Brown. *(Tr. 11:242 Bill Brown).*

In 2009, more than a decade after finding coverage and assuming supervisory responsibility for the cleanup of Mt. Storm, the AIG Defendants conjured a coverage dispute, without substantive investigation, by associating the 1998 Release with routine and minor overflow/overfill contamination in the Mt. Storm location tank pit discovered in 1997. Solely on those grounds, discussed below, the AIG Defendants falsely claimed that Hess failed disclose the 1998 Release on a 1997 renewal application and disclaimed coverage. Despite having pre-approved of Ryan's services with written promises to pay promptly, the AIG Defendants reneged on paying Ryan relying on the disclaimer, guaranteeing that it and Hess would be sued as Ryan promised.

In Answer filed to the Complaint, the AIG Defendants, cross-claimed against Hess for breach

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[4] The AIG Defendants wrongfully removed the Ryan Complaint to federal Court in February, 2010. The case was remanded to state court on May 14, 2010.

[5] References to the Appendix are designated *(A___)* proceeded by the volume and page numbers.

of contract and negligent misrepresentation demanding compensatory damages, interest and costs. *(AIG Ds' Answer, Affirmative Defenses and Cross-Claims, A1:391-409).* In its Answer, Hess asserted cross claims against AIG seeking declaratory relief and damages for statutory and common law bad faith in the AIG Defendants' handling of Hess's claim. *(See Answer, Hess's Affirmative Defenses, Declaratory Action and Cross-Claims, A1:33-51).*

In May 2011, the AIG Defendants settled Ryan's claims against both them and Hess and obtained a release. While the settlement was without contribution from Hess, the AIG Defendants sought to recover the Ryan settlement from Hess as part of its cross-claims, demanding more than $822,000 in damages, the liability for which Hess's former shareholders would be solely responsible.[6] Ryan's Complaint contained separate counts against the AIG Defendants, namely breach of contract and negligent misrepresentation, that were resolved by the settlement, and the settlement payment was for more than the $252,000 originally claimed by Ryan. AIG attributed the entire settlement to Hess's insurance policy limits, even though coverage was disclaimed in 2009.

The trial of the instant civil action was held December 12-20, 2011. Upon hearing all of the evidence, the jury returned a verdict in favor of Hess for compensatory damages in the amount of $5,000,000, along with a finding of malicious conduct on the part of the AIG Defendants. Subsequently, the jury heard evidence in the punitive damages phase and returned a verdict in favor of Hess in the amount of $53,000,000. Following post trial motions, by Order entered May 1, 2012, the circuit court erred by reducing the punitive damages verdict to $25,000,000. It is from this Order that Hess appeals. *(See May 1, 2012 Order A4:3207-3236).*

A. HESS'S INSURANCE THROUGH THE AIG DEFENDANTS AND AIG'S ACCEPTANCE OF COVERAGE FOR A COVERED CLAIM IN 1998

On or about April 15, 1997, Hess received a Confirmed Release Notice to Comply ("Notice"

[6] West Virginia Code § 31D-14-1407 (2002) provides, recovery against a dissolved corporation is limited "to the extent of its undistributed assets" or "[i]f the assets have been distributed in liquidation, [recovery may be enforced] against a shareholder of the dissolved corporation to the extent of his or her pro rata share of the claim or the corporate assets distributed to him or her in liquidation, whichever is less . . ." W. Va. Code § 31D-14-1407(d)(1). Accordingly, only Hess's former shareholders were ever liable for any adverse verdict or the cleanup at Mt. Storm.

or "1997 Notice") from the West Virginia Department of Environmental Protection ("WVDEP") regarding the Mt. Storm site. *(1997Notice, Hess Tr. Ex. 8, A5:3365).* According to the WVDEP inspector, John Sneberger ("Sneberger") who issued the Notice, and in accordance therewith, Hess engaged a third-party, Subsurface, Inc., to investigate the potential contamination. *(Tr. 12:1085 Sneberger; Hess Tr. Ex. 10; Subsurface Report A5:3367-3383).* Subsurface concluded that the contamination was limited to routine overflow/overspill around the tank pit.[7] *Id.* Sneberger anticipated and agreed with this conclusion. *(Tr. 12:1089-1090 Sneberger).*

Hess knew that the contamination would be remedied during routine tank replacement which had been scheduled prior to the Notice, because it was common for most USTs during that period. *(Tr. 11:259-260 Bill Brown; Tr. 12:1079 Sneberger).* Because of the routine nature of the minor contamination, Hess also knew that cleanup costs were well within its self-retention limit and could never result in an insurance claim.[8] *(Tr. 11:262 Bill Brown).* Because the contamination was minor, there was no "confirmed release" to be reported under the AIG policy. *(Tr. 11:335 Bill Brown).*

Long before the 1997 Notice was received, Hess maintained a policy of insurance with AIG, effective October 21, 1996 through October 21, 1997, under policy number ST6163330, with a retroactive date of October 1, 1995. *(See Dec. Page Oct. 21, 1996 Policy, Hess Tr. Ex. 1-A, A5:3333-3349 at p. A3343)* Although the policy contained an automatic renewal provision, Hess completed two AIG applications for renewal dated October 15, 1997 and October 30, 1997.[9] *(See Oct. 15, 1997 Application for Ins, Hess Tr. Ex. 13, A5:3388-A3393; Oct. 30, 1997; Application for Ins., Hess Tr. Ex. 14, A5:3415-3418).* Hess's policy was renewed effective October 21, 1997 through October 21,

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[7] Michael Schmidt, the AIG Defendants' internal environmental expert, testified that the Notice, the Subsurface report and subsequent WVDEP correspondence in 1997 would not have alerted Hess of the release discovered on February 23, 1998, ("1998 Release") which was subject of the underlying claim and remediation supervised by the AIG Defendants. *(Tr. 11:689 Schmidt).*

[8] Hess did not own the Mt. Storm station; however, was liable for its USTs. The tank replacement scheduled for early 1997 was delayed months due to the unavailability of contractors and weather. After the completion of the tank replacement in or around February 1998, Hess received closure approval from the WVDEP showing no further contaminants. *(Tr. 12:1169 Sneberger; Hess Tr. Ex. 18.1, A5:3440-3447).*

[9] Adding to the uncertainty, each of the AIG applications completed by Hess covered more than thirty Hess sites even though the application was designed for a single location. *(Tr. 11:762 Resch).*

1998, bearing policy no. ST6169323.[10] *(See C&I Policy, Hess Tr. Ex. 13-A, A5:3394-3414).*

By separate endorsement, Endorsement No. 9, Hess, purchased an extended reporting period from May 5, 1998 through May 5, 1999 for its Mt. Storm site, based on advice of the selling agent.[11] *(Tr. 11:763-674 Resch; July 16, 1999 Letter from Perez to Bill Brown, Hess Tr. Ex. 22 at p. A5:3466)*. Such endorsements are automatically effective upon payment of an additional premium. *(Tr. 11:763 Resch).*

On February 23, 1998, months after either of Hess's AIG applications were delivered and the renewal of Hess's policy and the risk assumed, the WVDEP advised Hess by letter of an "observed changed condition" at the Mt. Storm Location as reported that very afternoon by a neighboring property ("1998 Release"). *(See Feb. 23, 1998 WVDEP Letter, Hess Tr. Ex. 16, A5:3436-3437).* The change was the discovery, for the first time to Hess's knowledge, of a significant release of gasoline product appearing at a church adjacent to the Mt. Storm Location. *(Tr. 12:1103 Sneberger).* Although fully covered by the AIG policy, Hess did not believe it was responsible for the 1998 Release due to a number of factors including the 1997 testing at the Mt. Storm site, inventory controls of the owner of the Mt. Storm site showing no fuel loss, many abandoned gasoline stations in the vicinity, and rumors of dumping on the neighboring property.[12]

After futile attempts to convince the WVDEP that the 1998 Release was not Hess's issue, Hess provided written notice of the potential claim to AIG, through the selling agent, DANA, on January

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[10] The initial AIG policy, effective October 21, 1996, and all subsequent renewals, provided the same UST coverage to Hess, liability limit $1 million and self-retention $25,000. *(Dec. Page Oct.21, 1996 Policy, Hess Tr. Ex. 1-A, A5:3333-3349 at p. A3343; Dec. Page Oct. 21, 1997 Policy, Hess Tr. Ex. 15 at p. A5:3420).*

[11] By Endorsement No. 7 within the policy, the Mt. Storm site was deleted from the site schedule, as Hess sold the tanks to the owner for $1.00 after paying for the replacement. *(See July 16, 1999 Letter from Perez to Bill Brown, Hess Tr. Ex. 22 at p. A5:3465).*

[12] Despite Hess's protests, the AIG Defendants never tested to determine the source at the time the claim was accepted in 1999 and only examined other potential sources of the 1998 Release in 2008 when the remediation they supervised had become expensive and was estimated to exceed its policy limits. *(Tr. 11:659 Schmidt).* Even in 2008, the presence of abandoned gas stations in the area, including one underneath the Mt. Storm Location that had exploded in the 1940's, and other subsurface anomalies, were easily confirmed. *(Tr. 11:659-660 Schmidt).*

6, 1999. *(See Facsimile Sheet from DANA with Notice of Claim, Hess Tr. Ex. 19, A5:3457-3458).* The AIG Defendants acknowledged receipt of Hess's claim in January 1999. *(See January 12, 1999 Letter, Hess Tr. Ex. 21, A5:3461).* It was not until July 16, 1999, however, after its purported full investigation under West Virginia law in which it failed to comply with even the basics, the AIG Defendants concluded that the 1998 Release was Hess's responsibility and that remediation was required and covered by the policy. *(Tr. 11:501 Terpstra; See, also, July 16, 1999 Letter from Douglas Terpstra to W. Brown, Hess Tr. Ex. 22, A5:3462-3468).*

B. AIG'S UNSUPPORTED AND WRONGFUL DISCLAIMER OF COVERAGE FOR HESS'S CLAIM MORE THAN A DECADE AFTER ACCEPTING COVERAGE AND LIABILITY RESULTED IN OBVIOUS DAMAGES AND EXPOSURE TO ITS INSURED, HESS AND ITS FORMER SHAREHOLDERS

From 1999 through 2009, pursuant to its right under the policy, the AIG Defendants chose to control all aspects of the remediation of the Mt. Storm Location, including the planning, approval, review, and subsequent payment of all services including pre-approving prospective work of Ryan. *(Tr. 11:613,655 Schmidt; 12:1286-1287,1317 Anderson).* Despite more than a decade of remediation which it wholly controlled, the AIG Defendants failed to determine the source of the 1998 Release and had not done so as of 2009 when it wrongfully disclaimed coverage for Hess's claim or to this very day.[13] *(Tr. 11:677 Schmidt; 12:1300 Anderson).* According to the AIG Defendants, they cannot say, even today, whether the 1998 Release was Hess's responsibility. *(Tr. 11:722-723 Schmidt).*

Relevant to AIG's wrongful disclaimer of coverage in 2009, during the AIG Defendants' initial claims investigation in 1999, Brenda Brown was asked by adjustor Douglas Terpstra to gather the expenses that Hess incurred for investigation of the 1998 Release at the Mt. Storm Location. *(Tr. 12:1378 Brenda Brown).* After review, the AIG Defendants reimbursed invoices pertaining to the gasoline vapors at the church initiating discovery of the 1998 Release, however, invoices relating to tank pit contamination and tank replacement were not approved. *(Tr. 12:1379 Brenda Brown).*

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[13] To clarify, the 1997 Confirmed Release Notice and the discovery of the 1998 Release were two separate events to Hess although the 1998 Release most likely existed hidden beneath the area around the Mt. Storm area undiscovered in 1997. Regardless of when the 1998 Release was discovered, Hess was fully insured by the AIG Defendants in 1996, 1997 and 1998 and thereafter.

Among the invoices submitted by Hess and reviewed by the AIG Defendants included the May 1997 independent testing conducted by Subsurface in response to the WVDEP's April 15, 1997 Notice. *(Tr. 11:1380-1381 Brenda Brown).* According to Brenda Brown, the AIG Defendants, examining the Subsurface testing which concluded that the contamination was limited to the left perimeter of the Mt. Storm tank pit, denied Hess reimbursement for the expenditure deeming it not related to the 1998 Release, but to the 1997 Notice. *Id.* This position taken by the AIG Defendants in July 1999 - concluding the 1997 Notice and the 1998 Release were two separate events - is the **exact antithesis** of the position they took in 2009 asserting both events were the same to disclaim coverage.

On August 19, 2009, long after Hess had been liquidated, dissolved and its former shareholders retired, the AIG Defendants disclaimed coverage based upon an alleged inaccuracy in Hess's October 30, 1997 application claiming the 1998 Release was known to Hess in 1997. *(See Denial Letter from Perez to Brown dated August 19, 2009, Hess Tr. Ex. 57, A5:3492-3500).* The October 30, 1997, AIG application asked Hess: "Question No. 9: [i]s there a history of leaks or releases at this facility not stated above?" Hess responded "Y", with the explanation "See previous applications." *(See Hess Tr. Ex. 14, Application for Insurance dated October 30, 1997, at p. A5:3415).* At no time, at renewal in 1997 or prior to the disclaimer of coverage in 2009, did the AIG Defendants ever investigate the disclosure in the application as they could not locate any prior applications. *(Tr. 11:927).* No one from AIG ever followed up on the response which would have yielded information regarding the Notice and prior minor overspill/overflow contamination from 1997 Notice. *(Tr. 11:841 Lokos).*

The contamination cleaned up after tanks were replaced was truly minor in nature and not the source of the 1998 Release which was the subject of the claim according to both the WVDEP investigator and Hess's expert based on WVDEP documents available since 1998. *(Tr. 12:1105 Sneberger; Tank Closure Report, Hess Tr. Ex. 18.1, A5:3440-3447).* Prior to 2009 when Hess's claim regarding the 1998 Release was wrongfully denied, the AIG Defendants had lost or destroyed Hess policies, declarations, endorsements, and most important, applications for all policies prior to the policy effective October 21, 1997, under which the claim for the 1998 Release was made.[14] *(Tr. 11:778,838-839 Lokos; 11:927 Perez).* The AIG environmental specialist, Michael Schmidt ("Schmidt"), on whose opinion AIG claims analyst Mileidy Perez ("Perez") relied to disclaim coverage, testified that the AIG Defendants made no attempt to determine what Hess knew or should have known about the 1998 Release at the time of 1997 applications, because no one at AIG asked his opinion. *(Tr. 11:694 Schmidt).* Schmidt testified that based on everything that Hess knew prior to the October 21, 1997 renewal, it could not have known about the 1998 release - the basis of the AIG Defendants 2009 disclaimer coverage. *(Tr. 11:689 Schmidt).*[15] After forming the intent to disclaim Hess's claim around May 2009, the AIG Defendants refused to pay invoices for services rendered by Ryan which the AIG Defendants had previously authorized. *(Tr. 11:701,791 Schmidt;12:1294-1296 Anderson).* AIG knew that its refusal to pay Ryan would result in the lawsuit by Ryan getting their own insured, Hess, sued, thereby putting Hess's former shareholders a risk and distress. *(Tr. 12:1295 Anderson; See also Complaint, AIG Ds'. Tr. Ex. 16, A5:3562-3572).*

C. THE JURY'S $53 MILLION PUNITIVE DAMAGE AWARD RESULTED FROM THE EGREGIOUS CONDUCT OF AIG

The jury was presented with the overwhelming evidence that the AIG Defendants put their own interests above those of their first-party insured. At trial, the AIG Defendants' own employees admitted double digit violations of the insurance law of this State, including their intentional failure to contact critical witnesses, document their own file, and their failure to obtain critical documents. In addition to the above, with a further rendition to follow, some of the AIG Defendants' egregious

[14] The AIG Defendants also claimed to have never received Hess's October 15, 1997 application. On this application, in response to Question No. 7: "[h]ave you, during the past five years, had any reportable releases or spills or regulated substances, hazardous waste or other pollutants, as defined by applicable environmental statutes or regulations" Hess responded, "Y" "[c]onfirmed release that was cleaned up." *(See Hess Tr. Ex. 13, Application for Insurance dated October 15, 1997, at p. A5:3388).*The AIG Defendants claimed never to have relied upon this application even though Hess's policy was renewed on October 21, 1997, before the October 30, 1997 application date.

[15] Before disclaiming coverage, the AIG Defendants did not even contact the AIG claims adjustor, Doug Terpstra, who determined coverage and liability for the 1998 Release even though he still worked for the AIG Defendants. *(Tr. 11:531 Terpstra; 11:894 Perez).*

conduction requires mention here. *(See Argument, infra).*

The evidence at trial was overwhelming that the AIG Defendants conjured up a "coverage dispute" to avoid completing the cleanup of Mt. Storm. The AIG Defendants put together two unrelated events - the 1997 Notice and the 1998 Release - by which they concocted a "*bona fide* coverage dispute" without any investigation. *(Tr. 12:1105,1108 Sneberger).* Prior to the 2009 disclaimer, AIG's employees admitted that they failed to ask their insureds what they knew about the relationship between 1997 Notice and the 1998 Release *(Tr. 11:694 Schmidt; 11:966 Perez);* failed to obtain critical WVDEP documents for more than 12 years *(Tr. 11:666-667, 669 Schmidt)*; failed to obtain the Tank Closure Report confirming the cleanup of the minor overflow/overspill prompting 1997 Notice *(Tr. 11:959 Perez)*; and, never informed Hess or its former shareholders that critical documents were missing, including the "prior application" referenced in the 1997 renewal application.[16] *(Tr. 11:927 Perez).* The jury heard undisputed evidence of a corrupt corporate culture that encouraged claim denials, here and in other claims including such as "business practices" as failure to take critical witness statements, having no standards or procedures, whatsoever, for claims adjustment and failing to conduct a full and prompt investigation before denying valid claims, *(Tr. 12:1248-1249 Segal)*, among other general business practices of the AIG Defendants including multiple violations of insurance standards and regulations. *(Tr. 12:1254 Segal).*

The AIG Defendants provide no training, whatsoever, for adjustors or environmental consultants, leaving it to on-the-job training, even with no claims adjusting standards or procedures, and did not perform any review of their claims adjustment conduct. *(Tr. 11:615 Schmidt).* The AIG environmental employees, even though employed by the AIG Defendants to assist with claims, performed only the specific tasks requested by the claims adjustor. *(Tr. 11:618-619 Schmidt).*

The evidence showed that the AIG Defendants sued their own insured seeking reimbursement of costs they incurred in the cleanup based solely on the assertion of the conjured misrepresentation

[16] AIG employee Stephen Lokos testified that he knew from conversations with Perez that nobody at AIG ever got the "prior application" to see what was on it. *(Tr. 11:841 Lokos).*

by their insured. *(See Ds' Answer, Affirmative Defenses and Cross-Claims at pp. A1:403-407).* Despite establishing that the AIG Defendants reneged on a promise to pay Ryan for preauthorized $252,000 in cleanup fees, and placing Ryan in financial distress, the evidence showed that AIG knowingly caused its insured to be sued. All of this evidence allowed the jury to conclude that the AIG Defendants' goal was to avoid all coverage and the costs of their mismanagement of the cleanup by demanding that Hess repay some $822,000 based on the conjured "*bona fide* coverage dispute." *(Tr. 11:408,412 Bill Brown).*

After hearing this evidence, and as discussed below, the jury made the following findings:

1. Do you find, by a preponderance of the evidence, that Hess's claim is covered under the Commerce & Industry Insurance Company policy? [Answer:] *Yes.*

2. Do you find that the AIG Defendants violated the Unfair Claims Settlement Practices Act with such frequency as to indicate a general business practice in adjusting the claims of Hess Company and its former shareholders? [Answer:] *Yes.*

3. Do you find that the AIG Defendants violated the duty of good faith and fair dealing in adjusting claims of the Hess Company and its former shareholders? [Answer:] *Yes.*

4. Do you find by a preponderance of the evidence that the conduct of the AIG Defendants proximately caused damages to Hess? [Answer:] *Yes.*

5. What amount of money do you find will fairly and reasonably compensate Hess through its former shareholders for the way that the AIG Defendants handled their underground storage tank claim? [Answer:] *$5,000,000.00*

6. Do you find that the AIG Defendants actually knew that Hess's claim was proper and that the AIG Defendants willfully, maliciously, and intentionally utilized an unfair business practice ins settling, or failed to settle in good faith, the claim of Hess and its former shareholders, thereby entitling Hess to punitive damages? [Answer:] *Yes (See Verdict Form A3:2866-2867).*

Following the jury's verdict of the tort phase, the circuit court convened the punitive damages phase of the trial. During this phase, the AIG Defendants waived the opportunity to present any witnesses. At the conclusion of the evidence, after deliberation, the jury returned a verdict in favor of Hess. In so doing, the jury completed the verdict form in the following manner:

1. We the jury assess punitive damages in the following amount: $53,000,000.00. The verdict form was signed and dated by the jury foreperson. *(See Verdict Form - Punitive Damages A3:2868).*

This verdict was fully supported by the evidence as set forth herein.

D. THE COURT'S REDUCTION OF THE JURY'S WELL-SUPPORTED PUNITIVE DAMAGE AWARD MISAPPLIES THIS COURT'S HOLDINGS IN TXO, *INFRA*

The AIG Defendants filed several post-trial motions, including (a) Motion for a New Trial on Punitive Damages and/or to Alter or Amend the Judgment under Rule 59(e) with Respect to Punitive Damages; (b) Motion for Judgment as a Matter of Law under Rule 50; and (c) Motion for a New Trial under Rule 59(a). (*See A4:2893-2972*). Hess filed timely responses to the foregoing post-trial motions *(See A4:2973-3016)*, and the AIG Defendants filed replies. *(See A4:3042-3206)*.

By Order entered May 1, 2012, the Honorable Thomas Bedell, Judge of the Circuit Court of Harrison County denied the AIG Defendants' Rule 50 Motion, as well as the AIG Defendants' Rule 59(a). Motion. Within the same Order, the Court denied the AIG Defendants' Motion for a New Trial on Punitive Damages, however, ordered that the punitive damages award be reduced to $25,000,000.00 Dollars, to bring the award within the perceived maximum punitive-compensatory ratio discussed in *Perrine* and *TXO, infra*. *(See May 1, 2012 Order A4:3207-3236).*

In ruling, the circuit court undertook a three step review, as set forth by this Court in *Perrine v. E.I. duPont De Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010). In the initial step of assessing aggravating factors, the circuit court detailed some of the AIG Defendants' conduct, noting:

> [t]he Court does not find the AIG Defendants' denial of coverage almost ten years after the cleanup began to be without moral or legal flaw. The Court most certainly finds the timelines of the denial suspect and, and it sympathizes with the insured for the large time gap imposed between clean up and subsequent denial of coverage. Furthermore, the AIG Defendants were found to have violated trade practices, which in itself could be considered reprehensible.

(See May 1, 2012 Order at p. 25, A4:3231). The circuit court also concluded that the AIG Defendants would have profited from their wrongful conduct and that, given the enormous sums of money with which the AIG Defendants deal, any punitive damages award must necessarily be large to accomplish deterrence and punishment. *Id.* The circuit court determined that the purpose of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed weighed in favor of Hess. *Id. at p. 26, A4:3232.* Finally, the circuit court took the high

cost of litigation into account in its three-step process. *Id.*

Examining the mitigating factors under *Perrine* and *TXO Production Corp.,* 187 W.Va. 457, 419 S.E.2d 870 (1992), *affirmed by* 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993), the circuit court summarily concluded that the punitive damages award did not bear a reasonable relationship to the actual harm wrought upon Hess. The circuit court concluded that the punitive-compensatory damage ratio of 10.6:1 exceeded the limit of 5:1 as established in *Perrine* and *TXO*, reasoning that, although the jury found the AIG Defendants to have acted with actual malice, such conduct fell short of the black-hearted actions contemplated in *TXO* necessary to exceed the cap. *Order at p. 28, A4:3234.* The circuit court further concluded that the aggravating factors outweighed the mitigating factors warranting a punitive damages award. *Id.* Moreover, the circuit court found that only a substantial award would fulfill the purposes of punitive damages against Defendants with such financial power. *Id.* However, despite these conclusions, relying upon *TXO*, the circuit court found the 5:1 ratio should be applied, and subsequently reduced the punitive damage award to conform to that ratio. *Id.*

SUMMARY OF ARGUMENT

In its Order of May 1, 2012, the circuit court reduced the punitive damages award to comply with the 5:1 ratio espoused in *TXO*. After hearing all of the evidence, the jury specifically found the AIG Defendants' conduct to be willful, malicious and intentional as it related to the handling of Hess's claim. Moreover, the jury found Hess to have been damaged by the AIG Defendants' malicious handling of Hess's claim and disclaimer of coverage more than a decade after finding coverage. The evidence established that AIG had mismanaged the Mt. Storm site and the costs were estimated to exceed the policy limits. The undisputed evidence established that the conduct of AIG Defendants knowingly caused Hess to be sued by Ryan. AIG then denied a defense to its insured, Hess. Then, when the AIG Defendants unilaterally settled with Ryan, they applied the settlement monies to the policy limits of Hess, even though at that point in time coverage had been disclaimed.

Despite not having conducted any substantive investigation, the AIG Defendants accused Hess of "duping" them. After pulling coverage, the AIG Defendants filed a cross-claim against Hess demanding repayment of all monies paid for the cleanup, as well as monies paid to settle with Ryan. All of this was with full knowledge that Hess had been dissolved and that any liability was born solely by Hess former shareholders under West Virginia law. *See W. Va. Code §31D-14-1407.*

Relating to the handling of the claim, the evidence at trial established that the AIG Defendants engaged in repeated violations of the Unfair Trade Practices Act, as well as malicious conduct toward its insured. All of these instances of malicious conduct on the part of the AIG Defendants warranted the imposition of the punitive damage award assessed by the jury. While the circuit court reduced the award to a 5:1 ratio, the AIG Defendants' conduct rose to the level of actual, evil intent, warranting a greater ratio as permitted under West Virginia law. *TXO, supra.*

The original punitive damage award was not excessive under the West Virginia Constitution or the United States Constitution and falls within an acceptable range for punitive to compensatory damage ratios in this jurisdiction. The premise behind the circuit court's reduction of the award was that the AIG Defendants' conduct, while malicious, did not rise to black-hearted evil intent necessary to exceed the 5:1 ratio set by *TXO* and was not reasonably related to the harm wrought upon Hess. The jury, having heard the evidence, found otherwise. The facts and circumstances of the instant litigation give rise to a deviation from the *TXO* ratio adopted by the trial court. Application of a single digit multiplier, although reasons exist for exceeding such a multiplier, would result in a reduction of 9:1 as espoused by the United States Supreme Court in *State Farm v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L.Ed.2d 585 (2003). The circuit court, however, imposed a reduction of 5:1, which should be overturned by this Court, and the jury's punitive damage award should be reinstated by this Court.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rules 10(c)(6) and 18 of the West Virginia Rules of Appellate Procedure, Hess requests that this Court grant it the opportunity to present oral argument on the issues herein. Oral argument is necessary, pursuant to the requirements listed in Rule 18(a) of the West Virginia Rules of Appellate Procedure. The parties have not waived oral argument. W. Va. R.A.P. 18(a)(1). The issues presented in this appeal are not frivolous, and are of critical importance in the area of punitive damages. W. Va. R.A.P. 18(a)(2). While authoritative decisions exist relative to the review of punitive damages, an analysis of the reprehensible conduct is warranted. W. Va. R.A.P. 18(a)(3).

While the issues and documentary evidence are fully presented in the brief, the decisional process will necessarily be aided by oral argument. It is anticipated that the Court may have specific questions concerning the factual development of the case before the circuit court. Hess requests the opportunity to fully explain the specific factual development of this case, as this information is critical for the Court's determination. Accordingly, Hess asserts that this case warrants proper consideration for oral argument. As such, Hess respectfully requests the opportunity to present a Rule 20 oral argument as this case involves issues of fundamental public importance, as well as constitutional questions regarding the validity of the circuit court's ruling.

ARGUMENT

Standard of Review

This Court has held that when reviewing an award of punitive damages in accordance with *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), and *Alkire v. First National Bank of Parsons*, 197 W. Va. 122, 475 S.E.2d 122 (1996), the review of the jury's award of punitive damages and the circuit court's ruling approving, rejecting, or reducing such award will be *de novo*. *Peters v. River Edge Mining, Inc.*, 224 W. Va. 160, 680 S.E.2d 791 (2009).

I. THE CIRCUIT COURT'S DECISION TO REDUCE THE PUNITIVE DAMAGE AWARD BY APPLICATION OF A 5:1 PUNITIVE-COMPENSATORY DAMAGE RATIO STATED IN *TXO PRODUCTION CORP. V. ALLIANCE RESOURCES, SUPRA,* CONSTITUTES REVERSIBLE ERROR UPON THE FINDING THAT THERE WAS NO EVIL INTENT AS THE EVIDENCE AT TRIAL DEMONSTRATED THE AIG DEFENDANTS' MALICIOUS DISCLAIMER OF HESS'S CLAIM AND A CORPORATE CULTURE ENCOURAGING MALICIOUS CONDUCT TOWARD ITS INSURED.

Under West Virginia law, "the outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not per se unconstitutional." *Boyd v. Goffoli*, 216 W.Va. 552, 608 S.E.2d 169 (2004), citing Syl. Pt. 15, *TXO Production Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), *affirmed by* 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (emphasis added). Hess submits that the AIG Defendants' conduct and the corporate culture which encouraged the same, rose to the level of evil intent in *Boyd*, as well as in *TXO*, warranting the 10.6:1 punitive damages ratio.

During the trial, the jury was presented with ample evidence regarding the AIG Defendants' bad, malicious and evil conduct, including that the AIG Defendants' repeated unfounded accusations of fraud on the part of Hess and its former shareholders. Stephen Lokos, Assistant Vice President for AIG Domestic Claims, testified: "Q: You have called my clients liars, essentially. You may not have used that exact word, but the position you took after providing insurance coverage for them and taken over the claim and working it for over 10 years, you decided they duped you. And I think that's the word you used – A: Yes." *(Tr.11:803 Lokos).*

Mileidy Perez, the AIG employee who disclaimed Hess's coverage a decade after AIG accepted coverage, testified that the information that she reviewed indicated a single release going back to 1997. *(Tr.11:911 Perez).* However, all pertinent individuals, including AIG personnel, confirmed that the 1997 Notice of Confirmed Release and the 1998 gas fumes were separate events. WVDEP inspector Sneberger testified that the 1997 Confirmed Release did not involve anything other than tank pit contamination *(Tr.12:1107 Sneberger)*, where no free product was discovered *(Tr.12:1077 Sneberger)*, and the contamination was isolated to the left side of the pit. *(Tr.12:1090 Sneberger).* Sneberger further testified that the tank pit contamination was taken care of to the satisfaction of the WVDEP in November 1998 with the closure of the tank pit. *(Tr.12:1107, 1169 Sneberger).*

Sneberger testified regarding the initial complaint of gas fumes by the neighboring property in 1998. *(Tr.12:1102 Sneberger).* Sneberger testified that there was no relationship between the gasoline fumes investigated on February 23, 1998 and the 1997 Confirmed Release Notice to Comply issued on April 15, 1997. *(Tr.12:1108 Sneberger).* Of course, the AIG Defendants, including the AIG adjustor that reached the conclusion that the two events were one and the same, resulting in the withdrawal of Hess's coverage, never spoke with Sneberger or bothered to contact him. *(Tr.12:1560 Perez)*. Amazingly, Sneberger testified that no one from AIG ever talked to him from 1999 until he was contacted by Hess's counsel in this case. *(Tr.12:1172 Sneberger).*

In 1999, after AIG's acceptance of the claim, Brenda Brown was asked by Terpstra to gather the expenses that Hess had paid at the Mt. Storm site. *(Tr.12:1378 Brenda Brown)*. Upon review of the invoices, the AIG Defendants approved invoices pertaining to the gasoline vapors at the church resulting from the 1998 release. *(Tr.12:1379 Brenda Brown)*. According to Brenda Brown, invoices relating to tank replacement and minor contamination were not approved. *Id.*

Among the invoices submitted by Hess and reviewed by AIG included the 1997 independent investigation and testing conducted by Subsurface in response to the WVDEP's April 15, 1997 Notice. *(Tr.11:1380-1381 Brenda Brown).* According to Brenda Brown, the AIG Defendants denied Hess reimbursement for the expenditure, concluding it was before the claim and thus not related to the 1998 Release.[17] *Id.* Yet, in its coverage disclaimer, AIG opined that the 1997 tank pit contamination and the 1998 release were the same event. In fact, Perez testified that the information that she reviewed indicated the events to be a single release dating back to 1997. *(Tr.11:911 Perez).*

Michael Schmidt, AIG environmental expert, on whose opinion Perez relied to disclaim pull Hess's coverage testified that a source and timing investigation, which would have indicated the source of the 1998 release, was never done in 1999. *(Tr.11:661 Schmidt).* According to Schmidt, as of the date of the trial, the AIG Defendants still did not know the source of the 1998 release. *(Tr.11:677,723 Schmidt)*. Schmidt testified that even after 10 years the AIG Defendants still did not have all of the facts necessary to conclude, from a scientific standpoint, that the release that the AIG Defendants remediated for 10 years had anything to do with the Hess's Mt. Storm site. *(Tr.11:723 Schmidt)*. Regarding the clean up, Schmidt testified that there was free product in the 1998 release

[17] The results of the Subsurface testing showed only minor contamination on the left perimeter of the Mt. Storm tank pit, not a "release" or "spill" as defined by the policy.

that AIG oversaw. *(Tr.11:673 Schmidt).* Further confirming the fact that there were two separate incidents, Schmidt admitted that, based upon his review of the 1997 Notice and subsequent testing, there was not any free product discovered in relation to the April 15, 1997 Notice of Confirmed Release. *(Tr.11:672 Schmidt).* Schmidt also testified that Hess would not have known nor should they have known that there was anything else on the Mt. Storm site in 1997 other than some contamination in the tank pit. *(Tr.11:689 Schmidt).*

At trial, the AIG Defendants' own employees admitted repeated violations of the law, their failure to contact important witnesses, such as Sneberger or any DEP employee, and their failure to obtain critical documents. *(Tr.12:1272 Sneberger; Tr.11:698 Schmidt; Tr.12:1560 Perez)*;The AIG Defendants' employees admitted that documents critical to the disclaimer of Hess's coverage were lost or destroyed by AIG. *(Tr.11:927,928 Perez).* Lokos acknowledged the AIG Defendants' duty to keep all documents that may be pertinent to an ongoing claim. *(Tr.11:838-839 Lokos).* Mysteriously, the AIG Defendants were unable to locate the Hess underwriting file, even though underwritten by its third-party agent, Sedgwick James. *(Tr.11:839 Lokos).* Lokos acknowledged that applications are usually kept with the underwriting file. *(Tr.11:841 Lokos).*

During the trial, demonstrating a corrupt corporate culture, testimony and evidence was presented that the AIG Defendants had no written policies or procedures for the adjustment of claims or the proper documentation of the claims file. *(Tr.11:509 Terpstra; 11:615-616,624,626 Schmidt; 11:799 Lokos; 11:894 Perez).* According to Terpstra, the AIG adjustor that originally handled the Hess claim in 1999, the AIG Defendants did not have any guidelines or directives or anything to help move the case forward, to define claims handling responsibilities or to instruct on the "best practices" for handling a claim fairly. *(Tr.11:509 Terpstra).* Terpstra did not know whether there was a regulation in West Virginia that established a time line for the period in which you must acknowledge or deny coverage. *(Tr.11:510-511,571)*. Terpstra acknowledged that there was never a point in time wherein he wrote a letter to Bill Brown explaining the status in the claim handling process *(Tr.11:571 Terpstra)* and that there was never a point in time that he picked up the phone and spoke with Bill Brown or anyone at Hess or provided correspondence seeking specific information that he needed to move forward with the claim. *(Tr.11:572 Terpstra).* In violation of the West Virginia insurance law, Terpstra admitted that he failed to send a letter to Bill Brown or Hess regarding the need for additional time for the investigation and that each failure to do so would constitute a separate violation of the insurance regulations. *(Tr.11:599 Terpstra). See also C.S.R.114-14-1.* It took AIG more than six months to admit coverage in 1999 after receiving notice of the claim. *(July 16, 1999 Acceptance Letter, Hess Tr. Ex. 22, A3462-3468).*

The AIG Environmental Technical Consultants, even though employed by AIG to assist with claims, took direction solely from the claims adjuster at AIG Domestic Claims and performed solely the tasks requested. *(Tr.11:618-619 Schmidt).* All AIG employees testified that AIG provided no training, whatsoever, for adjustors, leaving it to on the job training without any periodic review of their claims adjustment; *(Tr.11:615 Terpstra; Tr.11:905 Perez)*; that it reviewed employees involved with claims for "cost containment" *(Tr.11:706 Schmidt; Cost Control and Cost Containment, Part of M. Schmidt Evaluation, Hess. Tr. Ex. 66 A5:3507-3513)* and that it evaluated adjusters for revisiting coverage determinations. Specifically, Perez's 2009 evaluation noted, "Mileidy does not hesitate to take a second look at coverage if determination is already made and when appropriate, change coverage position when subsequent facts supporting such action." *(Tr.12:1569; Hess. Tr. Ex. 69, at p. A5:35*34). Not such subsequent facts existed as to this claim. It was this corporate culture of not training adjustors on fair claims practices, but rewarding them for cutting costs and finding grounds to deny previously accepted claims, that was a large part of the malicious conduct.

In violation of the Unfair Trade Practices Act, the AIG Defendants did not have any standards regarding the investigation of claims. *See W. Va. Code §33-11-4(9).* The jury heard undisputed evidence of the general business practice by the AIG Defendants during the handling other claims, including the failure to take statements from witnesses, having no guidelines, and failing to conduct a full and prompt investigation of claims. *(Tr.12:1248-1249 Segal).* The jury further heard evidence regarding the general business practice of the AIG Defendants regarding violations of standards and insurance regulations with frequency. *(Tr.12:1254 Segal). See Dodrill v. Nationwide Mut. Ins. Co.*, 201 W.Va. 1, 491 S.E.2d 1 (1996). All of the above is evidence of a complete and utter failure to follow West Virginia law, so to conjure a "dispute" to avoid coverage and sue its insured for $622,000, plus the additional $260,000 AIG paid to settle all of Ryan's claims herein, all for the purpose of greater profit at the expense of AIG insureds and claimants.

In reaching her decision to disclaim coverage, Perez reviewed and relied upon Hess's October 30, 1997 renewal application. *(Tr.11:924 Perez).* Yet, despite the clear reference within the October 30, 1997 application to previous applications, i.e., "is there a history of leaks or releases at this facility not stated above?" *(See Oct. 30, 1997 Application, Hess. Tr. Ex. 14 at p. A5:3415)* to which Hess responded, "Yes", Perez was unable to locate those applications.[18] *(Tr.11:927 Perez).*

AIG employee Lokos testified that he knew from his conversations with Perez that nobody at AIG ever went out and got the prior application to see what was on it. *(Tr.11:841 Lokos).* Lokos testified "Q: You just made the decision that no matter what's in it, it's not important, because you all have made the decision that all of this was one release, right? A: Well, that's the information that we had and we were basing it on a specific factual setting with specific dates, specific information and that was a decision that we made, yes." *(Tr.11:844 Lokos).*

Thus, despite an affirmative response by Hess regarding previous leaks, the AIG Defendants denied Hess's claim a decade later, conjuring misrepresentations within the October 30, 1997 application. *(See Aug. 19, 2009 Letter from Perez to Brown, Hess. Tr. Ex. 57, A5:3492-3500).* Despite this conclusion, Perez admitted that she never tried to speak with Sneberger *(Tr.12:1560 Perez),* or any other WVDEP employee *(Tr.11:920)*, and never asked Bill Brown, the insured, for any specific documents, including the Tank Closure Report, which the AIG Defendants, claimed to have to never found before disclaiming coverage. *(Tr.11:959 Perez).*

More than a decade after accepting coverage and dealing exclusively with the environmental

[18] The Oct. 30, 1997 application was received <u>after</u> the Oct. 21, 1997 effective date of the renewal policy.

consultant, on August 19, 2009, the AIG Defendants wrongfully and maliciously disclaimed coverage for Hess based upon a conjured inaccuracy in Hess's October 30, 1997 application claiming the 1998 Release was known to Hess in 1997. *(See Denial Letter from Perez to Brown dated Aug. 19, 2009, Hess Tr. Ex. 57, A5:3492).* As reflected above, this conclusion was made by the AIG Defendants based on knowingly partial picture of the true story, due to the AIG Defendants' failure to maintain their file, even though AIG knew that important documents had been lost or destroyed and failing to conduct a basic investigation to support their disclaimer.

After forming the intent to deny Hess's claim around May 2009, the AIG Defendants refused to pay invoices for services rendered by Ryan, which AIG itself authorized, knowing full well that the failure to pay those invoices would result in Hess being sued. *(Tr.11:791 Lokos).* Al Anderson, a principal in Ryan, told the jury that Ryan had to file suit against Hess and AIG in order to get paid for the services that AIG preapproved in advance. *(Tr.12:1295 Anderson).* Then, when its insured was sued as a result of the AIG Defendants' conduct, the AIG Defendants failed to provide Hess with a defense to the suit and attempted to have itself dismissed based on a legal technicality and abandon Hess and its former shareholders to sole liability.

In its analysis of the jury's punitive damage award, the circuit court noted that AIG Defendants disclaimer of coverage came more than 10 years after the cleanup began was not "without moral or legal flaw." *(See May 1, 2012 Order at p. 25, A4:3231).* The Court found that timeliness of the denial of coverage "suspect" and the it sympathized with the insured "for the large gap between the clean-up and subsequent denial of coverage." *Id.* The Court also confirmed that the AIG Defendants were found to have violated trade practices, which in itself "could be considered reprehensible." *Id.*

This evidence established that coverage was in place and the AIG Defendants knew the claim was proper, but willfully, and without any standards for investigating claims, written or otherwise, withdrew coverage for Hess's claim, despite having fully controlled the clean up in excess of 10 years. Then, despite disclaiming coverage based upon a conjured misrepresentation in the application, at no point did the AIG Defendants' offer any evidence that the alleged misrepresentation was material its risk, by way of testimony or otherwise. In fact, the only evidence on the issue was the testimony of David Resch of DANA Insurance, the selling agent, who testified that this type of policy was written all the time, despite previous contamination. *(Tr.11:753 Resch).*

The jury heard evidence that after the AIG Defendants' refused to pay Ryan for pre-approved cleanup fees at the Mt. Storm site, which resulted in Hess being sued. The AIG Defendants settled Ryan's suit against them and under the limits of Hess's coverage, even though they continued to assert that coverage was void. Hess was not advised of the settlement or the application of the settlement to their limits to do so. This conduct by the AIG Defendants went so far as the AIG Defendants getting themselves released from other Ryan claims and attributing all of the settlement against the Hess policy limits, even beyond the amount of Ryan's unpaid bill. Charles Henderson, an insurance industry expert, opined that such payment would be an acceptance of coverage, and, that Hess should have been consulted. *(Tr.12:1037 Henderson).* Lokos and Perez. acknowledged that if a bill was charged against the coverage limits that was because it was concluded to be an aspect of coverage. *(Tr.11:830 Lokos; Tr.11:954 Perez).* Yet, despite the pulling of Hess's coverage in 2009, AIG paid the Ryan settlement attributed it to Hess's policy limits in 2011.

The AIG Defendants sued their own insured seeking reimbursement of all costs paid, $882,000, knowing full well that Hess had dissolved and that under controlling West Virginia law, Hess' former shareholders would be solely responsible for the verdict as well as the remaining remediation costs at Mt. Storm. *(See Answer, Affirmative Defenses and Cross-Claims of Defendants Chartis Claims, Inc. And C & I Ins. Cos., A1:391-409 at pp. A1:403-407).* Despite the evidence establishing AIG reneged on a promise to pay Ryan for $252,000.00 in preauthorized cleanup fees, and placing Ryan in financial distress, the evidence permitted the jury to conclude that the AIG Defendants' goal was to avoid coverage and avoid the additional cost for their mismanagement of the cleanup.

The jury heard evidence of AIG's demand for Hess to repay some $622,000 based on the conjured "*bona fide* coverage dispute" then adding the $260,000 settlement paid to Ryan to the demand. The AIG Defendants maintained this position throughout the entirety of Hess's case in trial. At the close of Hess's case in chief, the AIG Defendants, after two years of refusing to do so, proffered a Stipulation that they would not seek to collect any judgment against Hess from its former shareholders. *(See Tr.12:1404-1405; A3:2838).* Of course, at that point, the jury had heard the evidence regarding AIG's malicious conduct. The Court, however, allowed Hess's counsel to comment on this timing of this during closing, knowing that AIG would want to argue that the former shareholders were not at risk, while overlooking the long period of time that the former shareholders anguished over AIG's claim against them. Collectively, these actions demonstrate not only "reprehensible" conduct, but conduct that constituted the "evil intent" that this Court has found to warrant imposition of punitive damage awards in excess of the 5:1 established in *TXO, supra.*

While the circuit court did not address all of the conduct of the AIG Defendants in its Order resolving post-trial motions, the limited recitation of malicious conduct toward Hess firmly established that the AIG Defendants' conduct was viewed as "reprehensible" by the jury. See, Syl. Pt. 6, *Perrine, supra.* The punishment for the AIG Defendants' collective wrongdoing comports with well settled principles of punitive damage jurisprudence:

> [i]n determining the amount of punitive damages, as well as in deciding whether they should be given at all, the trier of fact can properly consider not merely the act itself but all the circumstances including the motives of the wrongdoer, the relations between the parties and the provocation or want of provocation for the act.

Restatement (Second) of Torts, § 908 cmt. e (1979). The motives of the AIG Defendants were varied, including the testimony of Mr. Lokos, who erroneously believed Hess had "snookered" the AIG Defendants. *(Tr.11:801-802 Lokos).* With full appreciation of his erroneous belief, Lokos was keenly aware that the decision to pull the insurance coverage from Hess after 10 years would have a significant economic impact on the insured. *(Tr.11:851 Lokos).*[19]

In *Boyd v. Goffoli*, 216 W.Va. 552, 608 S.E.2d 169 (2004), this Court affirmed the holding of the circuit court on the reprehensibility factor. In its evaluation, the *Boyd* court noted that the

[19] Perez's claim that the AIG Defendants were looking at the prospect of increasing reserves due to increased cost projections, prior to the belated disclaimer of coverage, presenting strong evidence of the bad-faith motives of the AIG Defendants, in seeking to avoid those additional costs. *(Tr.11:906 Perez).*

defendant's actions were illegal and illegal conduct is reprehensible; that the defendant was aware of proper licensing procedures but disregarded the same to circumvent the law for economic gain. During the trial at hand, the Defendants admitted to multiple violations of the law as well as their failure to implement procedures to comply with the law to avoid a claim, i.e., economic gain.

In addition, financial vulnerability existed, as well as a risk to the health and safety factors of Hess's former shareholders and the environment as the AIG Defendants abandoned the remediation in 2009. Bill Brown testified that the lawsuit had caused a "tremendous amount of stress, emotionally and financially." *(Tr.11:421 Bill Brown).* Mr. Brown noted the possibility of being required to repay $1,000,000 caused significant stress on him. *(Tr.11:421 Bill Brown).* This was compounded with the stress over the additional costs that had still to be spent finishing the remediation of the site for which Hess and its former shareholders were responsible. *(Tr.11:421-422 Bill Brown).* Brown succinctly stated that if AIG were to somehow prevail in the suit, he and his wife would be "devastated." *Id. at p. 422.* Brown detailed the fact that his retirement plans had been entirely disrupted as a result of the AIG Defendants permitting Hess to be sued. He confirmed the stress over the exposure of his financial assets and noted that he had not had a "chance to do a thing" pertaining to his retirement. *Id. at p. 11:422-423.* Bill Brown testified as to the former shareholders' payment of $30,000 in attorneys' fees to defend the dissolved Hess against the Ryan claims when AIG failed to provide a defense. *(Tr.11:422 Bill Brown).*

Brenda Brown, wife of Bill Brown, noted that when they received notice of the termination of coverage, they were "shocked" and "very concerned." *(Tr.12:1381 Brenda Brown).* She testified that not a day went by that the Browns had not thought about AIG's pulling of coverage and impact upon the family. *(Tr.12:1381 Brenda Brown).* She noted that they thought about it every day and the disclaimer of coverage had changed the lives of her and her husband. *Id. at p. 12:1381.* She also testified concerning how the suit had effected her entire family. *Id. at p. 12:1382.* Mrs. Brown testified that she had concerns for her husband and his health, divulging to the jury that he's been very stressed and that she did not want to lose him. *Id. at p. 12:1382.*

Testimony was presented to the jury as to what lay ahead of the Browns at the Mt. Storm site to complete the remediation. Specifically, Lawrence Rine, an environmental expert, testified that the costs to finish the remediation started by the AIG Defendants is in the range between $561,475.00 and $878,475.00. *(Tr.12:1349 Rine).* Rine provided the jury with a cost estimate setting for the cleanup remaining at the site, which went unrebutted. *(Hess Tr. Ex. 61, A5:3501-3504).*

Regarding the evidence of "repeated actions", the AIG Defendants own employees testified as to the multiple violations of the UTPA during the handling of this claim, as well as the failure to implement reasonable standards regarding claims adjustment even today. Testimony was presented from two independent witnesses regarding the AIG Defendants' claims handling practices in other claims, as well as from an expert witness regarding the AIG Defendants' multiple violations in this claim. All of the evidence set forth above, clearly establishes that the conduct of the AIG Defendants warranted the imposition of the punitive damages award by the jury not only to punish the conduct here, but to deter the same conduct in future claims. Accordingly, pursuant to West Virginia law, the punitive damage award imposed by the jury should reinstated by this Court.

II. THE CIRCUIT COURT'S DECISION TO REDUCE THE PUNITIVE DAMAGE AWARD IMPOSED BY THE JURY, AFTER HEARING ALL EVIDENCE AT TRIAL, CONSTITUTED REVERSIBLE ERROR BECAUSE THE AWARD WAS NOT EXCESSIVE UNDER THE WEST VIRGINIA CONSTITUTION OR THE UNITED STATES CONSTITUTION AND FELL WITHIN AN ACCEPTABLE RANGE FOR PUNITIVE TO COMPENSATORY DAMAGE RATIOS IN THIS JURISDICTION AS WELL AS UNDER FEDERAL CASE LAW AND CASE LAW FROM OTHER JURISDICTIONS.

The jury's punitive damage award of $53,000,000.00 was rendered in response to the conduct of the AIG Defendants, described above, which constituted multiple, separate, bad-faith acts against Hess. The malicious actions of the AIG Defendants were concerted in design to deprive Hess and the former shareholders of a fair coverage determination and resolution of its claim.

Even if the factual basis of the punitive damage award is disregarded in favor of a strict, legal analysis of the award's compliance with state and federal due process constitutional standards, the circuit court erred through its reduction in the punitive damage award. The case law discussed below confirms that the jury's punitive damage award complied with state and federal due process standards and should be reinstated in full. It was error for the circuit court to reduce the award, thereby usurping the critical role of the jury as fact finder, in fashioning the proper deterrence and punishment for egregious conduct for the AIG Defendants. Hess respectfully renews its request for this Court to find error in the circuit court's reduction of the punitive damage award and reinstate the full punitive damage award.

A. THE JURY'S PUNITIVE DAMAGE AWARD MET THIS STATE'S DUE PROCESS REQUIREMENTS ESTABLISHED IN *GARNES V. FLEMING LANDFILL, INC.* AND *TXO PROD. CORP. V. ALLIANCE RESOURCES CORP.* AND WAS NOT EXCESSIVE

This Court has been clear that punitive damage awards in West Virginia must be reviewed utilizing the multi-factor analysis announced in *Garnes v. Fleming Landfill, Inc., supra,* and modified in *Syl. Pt. 6 of Perrine.* 225 W. Va. 482, 694 S.E.2d 815.[20] The circuit court's post-trial review found that the jury's punitive damage award met each of these factors demonstrating the clear error in ordering a reduction in the award. *See May 1, 2012 Order at pp. 24-26; A3230-3232.* This Court has confirmed the following standard when evaluating the evidence which supports or detracts from a jury's punitive damage award:

> In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Perrine, at 549, citing Syl. Pt. 5, *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983).

1. THE JURY'S PUNITIVE DAMAGE AWARD MET ALL REQUIREMENTS OF THE *PERRINE* FIVE FACTOR TEST SUPPORTING A SIGNIFICANT PUNITIVE DAMAGE AWARD[21]

The circuit court correctly noted that "[t]he AIG Defendants would have profited from the wrongful conduct." *May 1, 2012 Order at p. 25, A4:3231.* This statement summarizes, but does not convey the breadth of, AIG's motivations for its belated, ill-founded, and malicious disclaimer of

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[20] In *Perrine, supra*, this Court noted that "[the Court] cannot simply examine these . . . criteria *seriatim*, awarding a certain number of points for each. The *Garnes* factors are interactive and must be considered as a whole when reviewing punitive damage awards. *Perrine*, at 554, citing *TXO,* 187 W. Va. at 474, 419 S.E.2d at 887.

[21] See, Syl. Pt. 3, *Garnes, supra*. For a complete analysis of the reprehensibility factor, *see I.*

coverage and subsequent conduct. Clearly, had Hess not taken steps to protects its interests and expose AIG's egregious acts, the AIG Defendants would have been permitted to profit from their conduct. Considering the evidence most favorable to the prevailing party, the testimony confirmed that at the time the AIG Defendants disclaimed coverage, the company was experiencing financial upheaval *(Tr.12:1777-1778 Selby)* and was encouraging cost containment. *(Tr.11:706 Schmidt).*

Under the third aggravating factor to be analyzed pursuant to *Perrine, supra*, the circuit court analyzed the financial position of the AIG Defendants. Due to the "enormous sums of money" in which the AIG Defendants deal, the circuit court correctly recognized that "to accomplish punishment and deterrence for such a wealthy company [. . .], a punitive damage award must necessarily be large." *May 1, 2012 Order at p. 26, A4:3232.*; see also, *Perrine*, at 555. Thus, AIG's status as the largest insurance company warranted imposition of a punitive damage award significant enough to deter future bad faith conduct. This Court has previously recognized that the appropriate amount of punitive damages to impose against a defendant varies depending on a multitude of factors including the nature of the conduct by the defendant and, potentially the size of the defendant. *See TXO Prod. Corp. v. Alliance Resource Corp.*, 187 W. Va. 457, 476, 419 S.E.2d 870, 889 (1992).

The jury's punitive damage award was appropriate based on the enormity of the AIG Defendants' operations ($683 billion in assets) and resources ($114 billion in net worth) it was able to marshal in a concerted effort to deprive Hess of insurance coverage, subjecting Hess to the perils of litigation and disparage Hess's shareholders through malicious lies. These actions were based on a concocted rationale to justify AIG's egregious conduct, cloaked as a "*bona fide* coverage dispute."

The fourth factor considered by the Court in the analysis of the jury's punitive damage award is closely intertwined with the third factor. The jury's punitive damage award, if reinstated, will discourage the AIG Defendants from repeating the conduct that was perpetrated against Hess. It will encourage the AIG Defendants to conform to West Virginia insurance regulations, which would require appropriate claim settlement standards, claim file documentation, training of adjustors and evaluation of adjustors claim handing conduct. These small steps would eliminate the ability of the

AIG Defendants to even conjure up that its insureds "misrepresented" material facts pertaining to the claims of insurance.[22] A reinstatement of the punitive damage award will serve to deter the AIG Defendants from ever again using its own failures to abide by the rules and regulations established for fair claim conduct as a sword against its insureds. The circuit court, while attempting to balance the competing interests of punitive damages to encourage fair and reasonable settlements, found that this factor favored Hess's position, as was found in *Perrine*. *May 1, 2012 Order at p. 26, A4:3232.* This Court has previously interpreted this factor, stating:

> [t]he focus of the reviewing court's consideration of whether the punitive damages award would encourage fair and reasonable settlements is on the impact it is likely to have on future litigants. That is, was the award large enough so that a future defendant who has committed a clear wrong will be encouraged to accept a fair and reasonable settlement rather than force the wronged plaintiff into litigation and risk incurring a similarly large punitive damages award.

Perrine, at 556, 694 S.E.2d 889. Hess had no choice of whether it would choose to undertake litigation or alternatively accept a "reasonable settlement." It was sued as a result of the AIG Defendants' intentional conduct. This factor strongly favors a finding that the punitive damage award should be fully reinstated. The jury's punitive damage award will strongly encourage insurance companies from ever undertaking such malicious acts towards their insureds.

The circuit court's analysis of this factor took the "high" cost of litigation into consideration. *May 1, 2012 Order at p. 26, App. p. A4:3232.* This case is somewhat unique in bad-faith jurisprudence in West Virginia. Here, the cost of litigation to Hess and its former shareholders was exclusively the result of AIG's conduct. Hess was not a first-party insured suing its insurance company for the wrongful denial of a claim or other bad faith conduct. Rather, Hess and its former

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[22] For a discussion regarding Perez's conduct, *see § I., supra*. Such conduct provides undisputed evidence of at least eleven (11) individual acts that constitute bad-faith and/or violations of West Virginia Unfair Trade Practices Act, W. Va. Code § 33-1-1, *et seq.* and W.Va. Ins. Reg. § 114-14-1, *et seq.* If the law had been followed by the AIG Defendants, it is probable that the conjured coverage dispute would have never been asserted and Ryan's lawsuit never filed, rendering the trial and current appeal unnecessary. Instead, the AIG Defendants attempted to profit through the intentionally created void in its claims records. If the jury's award of punitive damages is reinstated, it will send a clear and unmistakable message that if the AIG Defendants wish to continue to do business in West Virginia, they must follow the law established by the legislature. The jury's award would stop the AIG Defendants self-created immunity from compliance with the insurance laws and regulations by which all, whether state, national or international must abide.

shareholders were involuntarily embroiled in litigation brought by Ryan, resulting solely from the conduct of the AIG Defendants. Only after being sued was Hess forced to assert its own cross-claims against the AIG Defendants. Hess and its former shareholders had no choice, but to defend their interests from Ryan's lawsuit and respond to AIG's bad-faith conduct. This factor strongly favors a finding that the jury's punitive damage award should be fully reinstated to deter AIG from again ignoring the law failing to put the interests of its insured above its own.

Most courts have established the principal that a defendant's wealth alone cannot be used as a rationale to punish said defendant. As Judge Richard Poser succinctly explained in *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003), *discussed infra*, a defendant's wealth is not a sufficient basis to impose punitive damages because it would constitute a punishment based on status and not conduct. However, Judge Posner noted:

> [w]here wealth in the sense of resources enters [the analysis of a punitive damage award] is in enabling the defendant to mount an extremely aggressive defense against suits such as this and by doing so to make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case, involving as it does only modest stakes, for the usual 33-40 percent contingent fee.

Id. The AIG Defendants "conduct" in this case caused its insured to be sued without the benefit of defense and indemnification from the insurer and its litigation conduct made it difficult for Hess.

Hess was then required to immerse itself in time-consuming and hard-fought litigation, involving multiple defense firms retained by the AIG Defendants.[23] This Court should find, as the circuit court did, that the cost of this litigation to Hess was significant. Expense of this magnitude incurred to resolve a conjured up coverage dispute dating back more than a decade prior to the disclaimer of coverage strongly support imposition of the full punitive damage award by the jury.

When viewed in totality, the circuit court found that each of the five (5) factors analyzed pursuant to *Perrine, supra*, supported imposition of a significant punitive damage award. When viewed through the prism of the jury's vantage point, with unrefuted evidence of the malicious, bad-

[23] Perhaps the only necessary proof on this issue is noting that the circuit court found that the AIG Defendants concealed relevant discovery by misrepresenting its existence and held them in contempt. *(Order Addressing Motion to Enforce, A3:2628-2635.)*

faith conduct of the AIG Defendants, there was ample justification for the jury's full punitive award.

2. THE *GARNES* AND *PERRINE* FACTORS REGARDING POTENTIAL MITIGATION OF PUNITIVE DAMAGES STRONGLY FAVOR REINSTATEMENT OF THE JURY'S FULL PUNITIVE DAMAGE AWARD

Pursuant to the guidelines announced at syllabus point 15 in *TXO*, *supra*, and the factors announced in *Garnes* and *Perrine*, potential mitigating factors must be examined to determine whether a reduction in the jury's punitive damage award was appropriate. The circuit court thoroughly examined the "aggravating" factors and evidence, which supported a finding for significant punitive damages. The circuit court, however, did not articulate a rationale in support of the factors that favored the ultimate reduction of the award.

This Court has previously noted that "[w]hen reviewing the punitive damages award, a West Virginia trial court should thoroughly set out the reasons for changing (or not changing) the award." *Garnes*, 186 W. Va. at 669, 413 S.E.2d at 910. The circuit court's analysis of mitigating factors warranting a reduction in the punitive damage award was not supported by sufficient rationale or evidence of record. This Court should find error and reinstate the jury's punitive damage award because the decision to reduce the punitive damage award was not supported by the evidence and the circuit court did not adequately detail the reasons for the reduction.[24]

Reviewing the first mitigating factor, the jury's punitive damage award was reasonably related to the harm that is likely to occur and/or occurred as a result of the Defendant's conduct. The circuit court's analysis of this factor in support of mitigation merely stated that the amount of punitive damages awarded [by the jury] does not bear a reasonable relationship to the actual harm wrought upon Hess. *May 1, 2012 Order at p. 26, A3232*. While noting that the "Court would not substitute its judgment for that of the jury . . . it does not believe that an award of $53,000,000 bears a

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[24] As noted by the May 1, 2012 order on post-trial motions, the AIG Defendants failed to address several potential "mitigating" factors supporting a reduction of the jury's punitive damage award. *May 1, 2012 Order at p. 26, fn. 10; A4:3232*. By failing to address these factors, it must be presumed that the AIG Defendants had no argument supporting reduction of the award providing further support for reinstatement of the jury's full punitive damage award, when the analysis of all factors are viewed in their totality. See, *TXO*, at 474. For purposes of this appeal, only the first three (3) mitigating factors are addressed as the only mitigating factors raised by the AIG Defendants in post-trial motions. *See May 1, 2012 Order at p. 26, fn. 10; A4:3232*; AIG Rule 59(e) Motion with Respect to Punitive Damages at pp. 9-10, *A4:3025-3026* .

reasonable relationship to the harm that Hess actually endured." *Id. at p. 27; A4:3233*. Without the benefit of insight or explanation, the court's holding that the punitive damage award did not bear a reasonable relationship to the harm inflicted upon Hess improperly usurped the role of the jury.

West Virginia jurisprudence has long held that the decision to award punitive damages is within the sound discretion of the jury. "The giving of punitive damages, as we have repeatedly held, is a matter purely discretionary with the jury. Even through the case may be one loudly calling for punishment, the jury may deny punitive or exemplary damages." *Kocher v. Oxford Life Ins. Co.*, 216 W. Va. 56, 602 S.E.2d 499 (2004). The jury's award of punitive damages in this instance was a clear and unequivocal indictment of the AIG Defendants' malicious conduct.

In a common law bad faith claim, the insured must establish "actual malice" by the insurer in the handling of the claim to hold the insurer liable for punitive damages. *McCormick v. Allstate Ins. Co.*, 202 W.Va. 535, 539-40, 505 S.E.2d 454, 458-59 (1998). With a statutory bad faith case, the insured must establish actual malice in the claims process. "Actual malice" means that the insurer knew that the claim was proper, but willfully, maliciously and intentionally utilized an unfair settlement practice in handling the claim. *Id.* The jury found actual malice and, accordingly, found that the AIG Defendants knew the claim was proper, but willfully, maliciously and intentionally utilized an unfair settlement practice in handling the claim. *Id.* Absent a strong rationale, the circuit court was obligated to affirm the jury's punitive damage award. Because the circuit court could not offer a sufficient factual basis to bolster its conclusory finding that the punitive damage award did not bear a "reasonable" relationship to the actual harm brought upon Hess, this Court should find that decision constituted error and reinstate the punitive damage award.

All analysis points to the conclusion that the punitive damages imposed by the jury were reasonably related to the compensatory damages as outlined in *TXO* and its progeny, under the second mitigating factor. As the circuit court noted, the punitive-compensatory damages ratio was 10.6:1. *May 1, 2012 Order at p. 27, A4:3233*. Clearly, the jury found that AIG acted with "actual malice" supporting the propriety of a punitive damage award. The circuit court also conceded that if the AIG Defendants' conduct constituted "actual evil intent," a ratio in excess of 5:1 may be appropriate. Syl. Pt. 15, *TXO, supra*. However, the circuit court misinterpreted the pertinent holdings in *TXO*, which, as more fully discussed below, support an award in excess of the 5:1 ratio.

Hess concedes, as it did before the trial court, that when a defendant has acted with extreme negligence or wanton disregard, but with no actual intention to cause harm, an outer limit ratio of punitive damages to compensatory damages is "roughly" 5:1.[25] The issue for this Court is whether the conduct of the AIG Defendants rose above extreme negligence or wanton disregard to the level of actual evil intent taking every legitimate and reasonable inference fairly arising from the evidence in favor of the party for whom the verdict was returned must be considered, and those facts which the jury might properly find under the evidence, must be assumed as true. *Perrine, supra.*; *See also*, Syl. Pt. 3, *Walker v. Monongahela Power Company*, 147 W. Va. 825, 131 S.E.2d 736 (1963).

The circuit court concluded that the jury's finding the AIG Defendants acted with "actual malice" was a leap to reach "actual evil intent." For purposes of West Virginia jurisprudence, these concepts refer to identical conduct using different terminology. This Court, in *TXO*, sanctioned a 526:1 punitive-to-compensatory damage ratio which was upheld by the U.S. Supreme Court. The conduct by the AIG Defendants herein, was at least, as egregious as that of the defendant in *TXO*.

Under the third mitigating factor, the circuit court found that the AIG Defendants had expended significant sums of money in this litigation, which favored mitigation of the punitive damage award. Respectfully, however, the circuit court's analysis of this factor was flawed. While the AIG Defendants argued that the case has been quite costly for them, only a recitation of the activities they conducted is provided, without reference to cost or fee invoices. See, *AIG Ds' Rule 59(e) Memo, at p. 10; A4:3183*. The AIG Defendants did not produce any evidence concerning the costs incurred by them during the litigation. *Id.*. As this Court has previously cautioned, the record on appeal must

[25] Even when evidence of record demonstrates that a defendant acted with only "extreme negligence" or "wanton disregard" the Court is not bound by a strict 5:1 punitive to compensatory damage ratio. The ratio may be exceeded due to the inclusion of the term "roughly" indicating that awards in excess of the 5:1 ratio are not *per se* prohibited.

be based on the evidence submitted to the trial court. See, *Boury v. Hamm*, 156 W. Va. 44, 47, 190 S.E.2d 13, 15-16 (1972) (declining issue that was not addressed before the circuit court). Most disturbing was that the AIG Defendants argued in mitigation that their litigation costs included the $882,000.00 allegedly paid on Hess' claim for mismanaged and abandoned cleanup. *Id.*. Surely, costs paid pursuant to valid insurance coverage cannot be considered under the third mitigating factor. *Perrine, supra.* Absent the cost of the cleanup, there is no evidence of record, or even a proffer, establishing a single "cent" incurred by the AIG Defendants in this litigation. Consequently, the Court should find the circuit court erred by crediting the AIG Defendants with unspecified litigation costs which negates any mitigation.

Even crediting the AIG Defendants with unspecified expenses, the circuit court should have considered that the AIG Defendants' legal fees was the direct result of their own wrongful conduct, their decision to involve multiple law firms during litigation, and to fight every almost every issue resulting in a contempt finding by the circuit court for their scorched earth litigation strategy. *(See Order Addressing Motion to Enforce A3:2628-2635*). Additionally, had the AIG Defendants merely handled the claim as required, they would have never spent any money on this litigation. This Court should find that based on the totality of the conduct detailed herein, the "cost" to the AIG Defendants should not be a mitigating factor that would warrant reduction in the jury's punitive damage award.

B. THE CIRCUIT COURT'S REDUCTION OF THE JURY'S WELL-SUPPORTED PUNITIVE DAMAGE AWARD WAS ERRONEOUSLY PREMISED ON A NARROW READING OF *TXO* AND THE COURT'S FINDING THAT AIG DID NOT ACT WITH "EVIL INTENT" IS CONTRARY TO THE EVIDENCE

The *TXO* decision does not stand for the proposition that punitive damage awards cannot exceed the 5:1 as the circuit court concluded in granting a remittitur in this case. To the contrary, this Court has found that punitive damage awards well in excess of the 5:1 ratio are constitutional when a defendant has acted with sufficient malice. The circuit court's interpretation discounted critical components in the *TXO* opinion mandating that intentional, bad faith conduct, such as that found by the jury here, warrants imposition of punitive damage awards in excess of the 5:1 ratio.

In *TXO*, the defendants knowingly and intentionally brought a frivolous declaratory judgment action to clear a purported cloud on title. *TXO Production Corp.,* 187 W.Va. 457, 419 S.E.2d 870 (1992), *affirmed by* 509 U.S. 443 (1993), at 462. The *TXO* jury found that defendant's filing of the quitclaim deed, in an effort to negotiate substantially lower royalty payments, constituted "malice." *Id.*, at 467 (holding that "after the testimony about TXO's efforts to reduce royalty payments and much testimony about previous similar bad acts by TXO, the jury found the requisite malice.") (internal citations omitted).[26] The Court in *TXO* further noted that ". . . the record shows that this was not an isolated incident on TXO's part – a mere excess of zeal by poorly supervised, low level employees – but rather part of the pattern and practice by TXO to defraud and coerce those in positions of unequal bargaining power *vis-a-vis* TXO's superior legal firepower." *Id.*, at 468. Here, trial testimony revealed a nearly identical destructive course of conduct, affirmed by multiple individuals within the hierarchy of the AIG Defendants, perpetrated against Hess and a corporate culture that encouraged such conduct. *(Tr.11:499,500,509-511,514,553-554,570-571,572,599 Terpstra; Tr.11:609,616,618-619,623,626,655,660,663,677,698,699 Schmidt; Tr.11:915,924,927-928,934,952,953,954-955,959; 12:1552,1560 Perez).*

In considering the appropriateness of the $10,000,000 punitive damage award, this Court in *TXO* focused around the "intent" or lack thereof in the defendants' actions. This Court found that in instances where intentional conduct was found, punitive damages, well in excess of the 5:1 ratio were appropriate. *TXO,* 187 W. Va. at 477-78, 419 S.E.2d at 889-890. The Court's discussion of conduct it deemed "intentional" and, therefore, warranting punitive damages in excess of 5:1 referenced *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991), in which a punitive damage award of $500,000 on $1,000 in compensatory damages was upheld.

The facts of the *Eichenseer* decision are strikingly similar to those now before the Court, with the exception that the AIG Defendants abandoned an environmental cleanup and caused Hess to be

[26] The jury here found "malice" as well, only in the first party insurance bad faith context.

sued thereby causing even greater suffering and compensatory damages than the plaintiff in *Eichenseer*. The *Eichenseer* court noted that it looked to guidance from the U.S. Supreme Court decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L.Ed. 2d 1 (1991). The *Eichenseer* court acknowledged that there were certain circumstances when an award of punitive damages may "cross the line into the area of constitutional impropriety." *Eichenseer*, 934 F.2d at 1380 (citing *Haslip*, 111 S. Ct. at 1046).[27]

Importantly, the *Eichenseer* court also noted an overlooked component of due process jurisprudence. Specifically, the *Eichenseer* court noted that the Due Process Clause does not prohibit large damage awards or substantial damage awards. Rather, the Due Process Clause forbids damage awards that are "grossly excessive," *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111, 29 S. Ct. 220, 227, 53 L.Ed. 417 (1909), or "so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable." *Id.*, citing *St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63, 66-67, 40 S. Ct. 71, 73, 64 L.Ed. 139 (1919). Consequently, the trial court's role should be to review the punitive damages award to determine if it was "oppressive" and disproportionate to the offense making it "obviously" unreasonable. *Id.*

The trial court's role should not be the mathematical reductions of a jury's award of damages to caps premised on punitive-to-compensatory damage ratios deemed appropriate under different factual predicates. The financial size of the AIG Defendants and the lack of a disproportionate award to the actual egregious conduct of the AIG Defendants establish that the jury's full punitive damage award was not "grossly excessive" or "unreasonable" so as to offend due process principles. The *Eichenseer* court confirmed these principles further noting that "the fact finder occupies the best position to determine the amount of punitive damages award because "'the degree of punishment

[27] The *Eichenseer* court noted that the punitive damage award in *Haslip* was found by the U.S. Supreme Court to not involve constitutional concerns. *Id.* at 1380. In *Haslip*, the U.S. Supreme Court affirmed an award of punitive damages from a state court noting that the jury's discretion was sufficiently constrained as a result of sufficient jury instructions concerning the deterrent and retributive purpose of punitive damages. *Id.* at 1044. The trial court and the initial appellate court in *Haslip* also applied a series of factors to ensure that the punitive damages were reasonable in amount and rational to the purpose to punish and deter wrongful conduct. *Id.* The *Haslip* court found these procedural mechanisms to be sufficient to constrain the discretion of the fact finders in awarding punitive damages. *Haslip* at 1045.

to thus be inflicted must depend on the peculiar circumstances of each case.'" *Eichenseer*, at 1382 (citing *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371, 14 L.Ed. 181 (1854)).

The *Eichenseer* court found a punitive damages award of $500,000 on $1,000 in compensatory damages appropriate. *Id.* at 1382-1383. That court noted that although the defendant did not "maliciously" handle the plaintiff's claim, it acted with reckless, if not intentional, disregard for the rights of its insured. *Id.*, at 1382. The *Eichenseer* court noted the specific conduct of the defendant:

> [The Defendant's] actions were far more offensive than mere incompetent record keeping or clerical error. Reserve Life refused to initiate even the most cursory investigation of Eichenseer's claim. The insurer failed to submit the claim to its in-house medical personnel for review, and in fact, it declined even to interview Eichenseer or her doctor. Understandably distressed, Eichenseer attempted to spur Reserve Life to investigate her claim more thoroughly. Eichenseer wrote Reserve Life several letters urging that the insurer provide specific reasons for the denial of her claim, and on her own initiative, Eichenseer submitted documents that indicated her claim was valid. Reserve Life, however, rebuffed Eichenseer's entreaties and lost the documents she submitted - often under suspicious circumstances. Reserve Life's cavalier handling of Eichenseer's claim is an unfortunate example of an insurer's desire to save money at the expense of its insureds. A mere slap on the wrist is inadequate to punish such conduct. Thus, the egregious nature of Reserve Life's conduct is a significant factor that supports the $500,000 award of punitive damages to Eichenseer.

Id., at 1382-1383. The *Eichenseer* court also noted that the punitive damage award properly served its deterrent purpose against the defendant due to its significant size and because most denials of claims are never challenged in court. *Id.*, at 1383.

A review of the facts of this case confirms that the AIG Defendants' actions were far more egregious and intentional than those perpetrated by the defendant in *Eichenseer*. Hess's actual damages were far more significant than the plaintiff's in *Eichenseer*. Reduction of the punitive damage award from a reasonable 10.6:1 ratio in the matter *sub judice* cannot be premised on the fact that Hess was subjected to more significant damages. To the contrary, the similarity to the facts in *Eichenseer* ends when one considers that AIG used its own failure to properly train adjustors and to have in place any standards or procedures for fair claims adjustment and documentation of its claims file to intentionally conjure up a coverage dispute a decade later too late to disclaim coverage. Because this Court has previously relied on the decision in *Eichenseer* as a basis to exceed the 5:1 ratio of punitive-compensatory damages in the type of case at Bar, it provides strong precedent warranting the reinstatement of the jury's full punitive damage award.

This Court's *TXO* opinion cited with approval to a punitive damage award in the amount of more than 117:1 in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). Included within the *TXO* opinion was a review of cases, in which the defendants were "mean" and presumably acted with malice towards the plaintiffs justifying punitive damages in excess of the 5:1 ratio.[28] As *TXO* and the referenced case law demonstrate, the circuit court erred in reducing the punitive damage award to a 5:1 ratio by finding that the conduct of the AIG Defendants did not constitute the type of "evil" intent that was present in the *TXO* decision. As noted above, the Court in *TXO* relied on precedent from other jurisdictions with much less egregious behavior to demonstrate the circumstances where punitive-compensatory damage ratios were permitted to exceed the 5:1 ratio. Here, the 5:1 ratio was justly exceeded by the jury.

C. CASE LAW ADDRESSING FEDERAL DUE PROCESS AND PUNITIVE AWARDS SUPPORTS REINSTATEMENT OF THE JURY'S PUNITIVE DAMAGE AWARD

The U.S. Supreme Court opinion in *State Farm v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L.Ed.2d 585 (2003), arose from claims of bad faith against State Farm, following an automobile accident in which State Farm insured individuals were found responsible for the death and serious injuries of several individuals. State Farm contested the liability of its insureds, refused to settle the claims within policy limits prior to trial and ultimately forced its insured to face an excess verdict that it declined to cover, despite assurances to the contrary. *Id.* at 413.

During the second phase of the trial, the jury considered appropriate compensatory and punitive damages against State Farm. The Campbells presented evidence of out-of-state bad faith conduct by State Farm over a period of 20 years and evidence concerning a national scheme to meet fiscal

[28] The cases and the punitive to compensatory damage ratios are: *Browning-Ferris v. Kelco Industries*, 492 U.S. 257 (1989), 117.6:1; *Glasscock v. Armstrong Cork Co.*, 951 F.2d 347 (5th Cir. 1991), U.S., S.Ct. 1992 W.L. 41923 rehearing denied, cert. denied, 19.2:1; *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991), 500:1; *Burke v. Deere & Co.*, 780 F. Supp. 1225 (S.D. Iowa 1991), 71.8:1; *Roberts Oil Co., Inc. v. Phillips Petroleum Co.*, 779 F. Supp. 994 (W. D. Ark. 1991), 10.7:1; *General Motors Corp. v. Johnson*, 592 So.2d 1054 (Ala. 1992), 100:1. Each one of these cases was upheld with punitive-to-compensatory ratios greater than the ratio imposed by the jury against the AIG Defendants in this case.

targets by capping payouts on claims from throughout the company. *Id.* The jury awarded $2,600,000 in compensatory damages and $145,000,000 in punitive damages. *Id.* at 415. The trial court reduced the award to $1,000,000 in compensatory damages and $25,000,000 in punitive damages. *Id.* Both parties appealed and the Utah Supreme Court reinstated the $145,000,000 punitive damage award, relying on the factors listed in *BMW of N. Am. v. Gore,* 517 U.S. 559 (1996).

On appeal to the U.S. Supreme Court, the *Campbell* Court placed significance on the fact that the case was used as a "platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country." *Id.*, at 420. The *Campbell* court did cite with approval to its previous admonishment that "[w]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award." *Id.* at 424-425 (internal citation omitted). The *Campbell* court rejected the chance to establish a "bright-line" punitive-compensatory damage ratio while stating that single digit multipliers are likely to comport with due process while still achieving the goal of deterrence and retribution, than awards with ratios of 500:1 or 145:1. *Campbell*, at 425 (citing *BMW* at 581-582).

It is imperative for this Court to take note of the submission of evidence in *Campbell* and its significant differences to submission of evidence by Hess pertaining to punitive damages. Hess submitted its evidence concerning the malicious conduct of the AIG Defendants during the initial trial portion of the case. During the bifurcated, punitive damage phase of the trial, Hess did not submit evidence of any out-of-state conduct of the AIG Defendants. *(Tr.12:1766- 1809).* Rather, during the punitive phase of the trial, the evidence submitted concerned the wealth of the AIG Defendants. *Id., at pp. 1771-1801.* In *Campbell*, the *Campbell* plaintiffs submitted the significant evidence of State Farm's out-of-state conduct during the trial's punitive phase, which logically provided the jury's rationale to impose the punitive damage award of $145,000,000. Here, the jury properly considered the evidence of the AIG Defendants' conduct in fashioning its punitive award, not its out-of-state conduct or other inappropriate factors. This significant differences in the evidence presented in this case, when compared with *Campbell*, supports a finding that the punitive damage award was proper and should be reinstated in full.

In *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003), rendered after the *Campbell* opinion, the Court approved a punitive-to-compensatory damage ratio of 37:1. *Id.* The opinion, written by Judge Richard Posner, noted that *Campbell* did not specifically lay down a 4:1 punitive ratio rule, but rather, the Court stated that there was a presumption against an award that had a 145:1 punitive-to-compensatory ratio. *Id.* at 676 (citing *Campbell* at 123 S. Ct. at 1524). The court found that the punitive damage award was not excessive, noting that the judicial function is to police a range, not a specific point. *Id.* citing *BMW*, at 582-583; *TXO*, 509 U.S. at 458.

Here, the circuit court made the decision to police a specific point, the 5:1 ratio - not the range (10.6:1) which, based upon the Defendants' conduct, was constitutionally appropriate. Accordingly, Hess respectfully requests that this Court adopt the well-reasoned methodology of Judge Posner and reinstate the jury's full punitive damage award, in lieu of a mathematical reduction in the punitive damage award which disregards egregious conduct in favor of adherence to sterile ratios. Decisions from other federal and state courts within the Fourth Circuit Court of Appeals have also agreed that awards in excess of 5:1, 9:1 or even 10.6:1 are appropriate, depending on the facts of the case.[29]

As further examples, in *Jones v. Rent-A-Ctr., Inc.*, 281 F. Supp. 2d 1277 (D. Kan 2003), the District Court of Kansas affirmed a ratio of 29:1, after the issuance of the opinion in *Campbell. See also, Craig v. Holsey*, 590 S.E.2d (Ga. Ct. App. 2003) (approving a ratio of 22:1); *Hollock v. Erie Ins. Exch.*, 842 A.2d 409 (Pa. Super. Ct. 2004) wherein Pennsylvania Courts upheld the imposition of a punitive damage award in an insurance bad-faith case, which was decided post-*Campbell*, with a ratio of approximately 10:1. Collectively, these decisions support the proposition that judicial evaluation of punitive damage awards must be made based on the specific evidence in the case with

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[29] See, *Mitchell v. Fortis Ins. Inc.*, 385 S.C. 570 (2006) (reducing 13.9:1 ratio to 9.2:1 ratio); *Cock-N-Bull Steak House, Inc., v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996) (upholding a 28:1 ratio); *Saunders v. Branch Banking & Trust*, 526 F.3d 142 (4th Cir. 2008) (affirming 80:1 ratio); *Coryn Group II, LLC v. O.C. Seacrets, Inc.*, 2012 U.S. Dist. LEXIS 49774 (D. Md. 2012) (reducing punitive award to a 50,000:1 ratio on a nominal compensable award); *EEOC v. Fed. Express Corp.*, 513 F.3d 360 (4th Cir. 2008) (cert. denied) (affirming 12.5:1 ratio); *Capital One Bank (U.S.A.) N.A. v. Carefree Debt, Inc.* 2010 U.S. Dist. LEXIS 101918 (D. S.C. 2010) (affirming 7:1 punitive to compensatory ratio).

deference granted to the jury's judgment. Applying these precepts to the jury's award of punitive damages to this case, the jury's punitive damage award should be reinstated.

D. PUNITIVE DAMAGE AWARDS IN EXCESS OF A 5:1 RATIO HAVE BEEN FOUND BY THIS COURT TO BE CONSTITUTIONAL FOLLOWING *CAMPBELL*

In a post-*Campbell* decision, this Court has already affirmed the right of parties to recover punitive damages in excess of the 5:1 ratio stated in *TXO*. See, *Boyd v. Goffoli*, 216 W. Va. 552, 608 S.E.2d 169 (2004). In the *Boyd* decision, this Court acknowledged the following:

> [i]n addition, even if we were to consider a portion of the compensatory damages in this case to be punitive damages so as to result in a ratio of 8.4:1, such a ratio *is by no means* necessarily unconstitutional. As the Supreme Court noted in *Campbell*, while single-digit multipliers (meaning a ratio of up to 9 to 1) are more likely to comport with due process, "there are no rigid benchmarks that a punitive damage award may not surpass[.]" 538 U.S. at 425, 123 S. Ct. At 1524. *In sum, there is nothing in our jurisprudence or that of the United States Supreme Court that renders the ratio of the punitive damages award to the compensatory damages in this case improper.*

Boyd, at 566-567 (emphasis added). Because this Court has confirmed that a punitive-to-compensatory ratio of 8.4:1 was constitutionally permissible, an award of 10.6:1 in this case also must be constitutional, given the conduct of these Defendants, and thus permissible. Simply stated, the circuit court's ruling mistakenly interpreted this Court's previous announcement of a 5:1 ratio in *TXO* as a "bright-line" rule for punitive damage awards.[30]

Likewise, if the circuit court was inclined to reduce the jury's full punitive damage award, the 9:1 ratio affirmed in *Campbell* was the only reasonable cap. States possess control and discretion over the imposition of punitive damages, subject to the procedural and substantive constitutional limitations on these awards. *Cooper Industries, Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, 149 L.Ed.2d 674, 121 S. Ct. 1678 (2001); *BMW*, 517 U.S., at 599; *Honda Motor Co. v. Oberg*, 512 U.S. 415, 129 L. Ed. 2d 336 (1994). However, the U.S. Supreme Court has definitively affirmed single digit multipliers are constitutional. See, *Campbell, supra.* When viewed in conjunction with the directives in *TXO*, if this Court is inclined to adopt the single digit multiplier formula in

[30] This Court's decision in *Boyd* appeared to address a situation that only dealt with economic harm to the respective plaintiffs.

Campbell, the award of punitive damages should have only been reduced to $45,000,000, reflecting a 9:1 punitive-to-compensatory ratio.

The jury's punitive damage award was intended to deter and punish the AIG Defendants, so that the egregious conduct perpetrated against insureds in West Virginia would stop. The jury's punitive damage award cannot be ignored by the AIG Defendants as the verdict imposed by the jury should remain in their corporate memory to prohibit them from attempting the type of conduct perpetrated against Hess and its former shareholders. The jury passed judgment on the AIG Defendants' actions and found them to be reprehensible. It is black-letter law that punitive damages are aimed at deterrence and retribution. *Campbell*, at 416, citing *Cooper Industries*, *supra*, at 432; see also *BMW, supra*, at 568; *Pacific Mutual Life Ins. Co v. Haslip*, 499 U.S. 1, 19, 113 L.Ed. 2d 1, 111 S. Ct. 1032. The jury's award served as notice to other insurance entities engaged in business in West Virginia that malicious, bad-faith conduct may be punished through significant awards.

If the type of unsupported reduction granted by the circuit court is permitted to stand, companies such as the AIG Defendants will engage in conduct so extremely detrimental to their insureds with the knowledge that, in the unlikely event that an insured attempts to protect its rights by resort to West Virginia courts, that their largest downside will be punitive damages imposed on a 5:1 ratio. The circuit court's reduction of the jury's punitive damage award only served to provide security to the AIG Defendants continue in their malicious actions on a cost-benefit basis.

CONCLUSION

For the foregoing reasons, the judgment of the trial court reducing the punitive damage award should be reversed and the amount of the punitive damages award, as set forth by the jury should be reinstated in full.

Respectfully submitted this
4th day of September, 2012.

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CERTIFICATE OF SERVICE

This is to certify that on the 4th day of September, 2012, the undersigned counsel served the foregoing "*BRIEF ON BEHALF OF PETITIONER, HESS OIL COMPANY, INC., IN SUPPORT OF ITS PETITION FOR APPEAL*" upon counsel of record by placing true copies thereof in the United States Mail, postage prepaid, in envelopes addressed as follows:

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