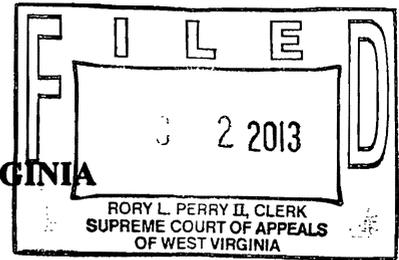


EBRIEF FILED
WITH MOTION



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

EQUITABLE PRODUCTION COMPANY,
Defendant Below,

Petitioner,

v.

No. 13-0934

**(ON APPEAL FROM THE CIRCUIT
COURT OF LOGAN COUNTY, WEST
VIRGINIA – CIVIL ACTION NO. 06-C-238)**

CORA PHILLIPS HAIRSTON, et al.,
Plaintiffs Below,

Respondent.

PETITIONER'S BRIEF

EQUITABLE PRODUCTION COMPANY

BY COUNSEL

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I. ASSIGNMENTS OF ERROR

- 1. The Circuit Court Erred By Failing to Give Any Punitive Damages Instructions During the Liability Phase of Trial.**
- 2. The Circuit Court Erroneously Gave an Adverse Inference Instruction Because There Was No Anticipation of Litigation at the Time of the Alleged Tortious and/or Spoliating Acts.**
- 3. The Circuit Court Erred in Failing to Instruct the Jury That the Authority of the Federal Energy Regulatory Commission and the National Gas Act Did Not Apply.**
- 4. The Circuit Court Erroneously Allowed Respondents' Expert to Proffer Expert Opinions Beyond the Scope of His Skill, Knowledge, Education, Experience, and Training.**

II. STATEMENT OF THE CASE

Introduction of the Parties

Petitioner, Equitable Production Company (“EPC”), now known as EQT Production Company, was a defendant below in this matter which arose from the alleged desecration of a gravesite area located in Logan County, West Virginia. EPC was an exploration and production company involved in the production of oil and natural gas. General Pipeline Construction, Inc. (“GP”), a construction company with numerous years of experience in the pipeline industry, was the other defendant below.

The Respondents are fourteen individuals who alleged to be the next of kin to seven decedents interred at the gravesite area which they referred to as Crystal Block Cemetery (“cemetery”). Respondents alleged that a bulldozer operator for GP, Vandle Keaton (“Mr. Keaton”), desecrated the graves of their decedents by tramping a bulldozer over what Respondents contended was a walkway leading through the cemetery at issue. (*See, e.g.*, SCT001000-1001; 1068.) Respondents further contended that the bulldozer may have removed portions of the cemetery or graves, or knocked over headstones. (*See* SCT001000-1004; 1067-

1068.) Respondents contended that EPC's liability arose from the alleged damage caused by the GP bulldozer operator, or based upon reclamation activities that were allegedly undertaken following the bulldozer incident.

Procedural History Leading up to Trial

Respondents initially filed their Complaints on or about August 7, 2006, and subsequently amended their Complaints on or about October 13, 2006. (See SCT000014-49.) On July 13, 2007, an additional Complaint was filed bearing Civil Action No. 07-C-234. (See SCT000050-57.) On February 20, 2009, the four separate civil actions were combined into one consolidated civil action bearing Civil Action No. 06-C-238. (See SCT00001-13.)

On November 16, 2009, the Circuit Court of Logan County certified five questions to this Court relating to Respondents' ability to pursue common law claims for grave desecration. After briefing and oral argument, this Court issued an opinion on November 18, 2010, in *Hairston v. Gen. Pipeline Const., Inc.*, 226 W. Va. 663, 704 S.E.2d 663 (2010), answering the certified questions as reformulated. By this Court's Administrative Order entered October 25, 2011, the Honorable Elliot E. Maynard, Senior Status Justice, was appointed to preside over this matter as a result of the voluntary recusals of both Roger L. Perry, Chief Judge of the Seventh Judicial Circuit, and Eric H. O'Briant, Judge of the Seventh Judicial Circuit. Upon Justice Maynard's appointment, the case was scheduled for trial on September 24, 2012.

Factual Background of Respondents' Claims

Respondents' desecration claims arose from the relocation of a non-jurisdictional gathering pipeline, which began construction in late July 2004. (SCT000548-549.) On or about October 27, 2003, EPC received a request from a third-party to relocate the subject pipeline to accommodate for surface mining operations in the area. After reviewing the pertinent title

documents, EPC determined that it was responsible for completing the relocation at its own expense. (SCT000549.)

As an exploration and production company, EPC was not in the business of relocating pipelines. Accordingly, it contracted the work out to GP—a pipeline contractor with whom it had eight to ten years of experience. (SCT000553; 556.) EPC and GP entered into a General Articles of Agreement (“Agreement”), which required, *inter alia*, the following:

[GP] to comply . . . with all applicable licensing or permit requirements of any nature . . . other applicable worksite rules and policies, and applicable Federal, State and Local laws, ordinances, orders, rules and regulation and/or other requirements . . . [and to] protect, defend, indemnify, release, and hold harmless [EPC] . . . from and against any and all claims, demands, causes of action, damages, losses, liabilities, and costs, including attorney’s fees, (a) which arise out of or in connection with the work or services provided by, or the presence of, [GP].

(SCT000557; 196-205 at ¶¶ 1.06; 6.01.)¹ Mr. Keaton was GP’s construction crew supervisor. (SCT000721.) Mr. Keaton testified that prior to beginning construction, EPC selected the right-of-way route for the portion of the pipeline being relocated and generally pointed out the areas where EPC held ingress and egress surface rights to access the pipeline. (SCT000703-704.)

At some point in early August 2004, Mr. Keaton trammed a small bulldozer from Conley Branch Road, up the hill turning left from an old gas well access road—generally referred to as Powderhouse Road—and up another hill, along what he characterized as an ATV trail, to the

¹ Paragraph 6.01 further provided:

It is the intent of this Indemnity provision to absolve and protect [EPC] . . . from any and all liability or loss resulting from or arising out of operations, work or services performed by the [GP], its subcontractors, its agents or employees, or others, whether or not said liability or loss results from or is caused by the sole or concurrent negligence, strict liability or fault of [EPC] or any other person or entity.

(SCT000200 at ¶ 6.01 (emphasis added)).

pipeline right-of-way.² (See SCT000710-713.) Respondents alleged that Mr. Keaton's operation of the bulldozer through the cemetery was the cause of the desecration. (See SCT001000-1001; 762-764.) The circumstances surrounding Mr. Keaton's tramping of the bulldozer along that path were heavily contested at trial. Respondents claimed that Mr. Keaton was told about the existence of an African-American cemetery in that area before tramping up the alleged ATV trail.³ (SCT000762-763; 894.) Conversely, Mr. Keaton testified that he was not told until after he had already tramped through the area that a cemetery was located there. (SCT000713-716.)

Importantly, there was no evidence presented that anyone from EPC was on-site the day of the bulldozer incident, or had any prior knowledge of the existence of the cemetery. In fact, Mr. Keaton specifically testified that no one from EPC was on site the day of the alleged desecration, that there was no need for anyone from EPC to be on-site every day because GP was very experienced in the pipeline business, and that he had control and oversaw the members of the GP crew. (SCT000699; 704; 719; 721.) Mr. Keaton testified that once he was told about the alleged cemetery, he placed a ribbon across the road to prevent others from passing through and did not re-enter or use that portion of the access road again. (SCT000725.)

Within a few days of the incident, Mr. Keaton testified that he relayed his version of the events to his EPC contact, *i.e.*, the EPC representative who monitored GP's progress on the relocation. (SCT000723-724.) The documents introduced into evidence did not show that anyone from EPC became aware of the incident until September 15, 2004, when Ted Streit sent a fax to

² Respondents' Amended Complaints allege this took place sometime prior to August 7, 2004. (See, e.g., SCT00017.)

³ Respondents also produced evidence that Mr. Keaton used a racial slur when informed about the presence of the African American cemetery. (SCT000763; 895.) No such evidence was submitted about any EPC employees.

Steve Perdue, Regional Land Director at EPC.⁴ (SCT000592-593; 620; 206-210.) Upon receipt of the fax, Tom Morris, a contract landman, was sent to conduct an investigation on behalf of EPC. (SCT000656.)

Mr. Morris went to the site on September 17, 2004, and prepared a memorandum dated September 22, 2004, describing his inspection. (*See* SCT000211-212.) The memorandum was provided to Joe Gilmore⁵ and Steve Perdue. (*Id.*; *see also* SCT000656.) Subsequently, on October 13, 2004, Mr. Morris returned to the gravesite area to take a video recording.⁶ (SCT000657.) Mr. Morris also visited the gravesite area on a third occasion and drafted a second memorandum to Joe Gilmore and Steve Perdue. (SCT000658.) The second memorandum was attached to an e-mail sent July 19, 2006, but indicated that Mr. Morris had sent it “within a week or two after the first report.” (SCT000213.) Due to an auto-dating feature, the exact date of the memorandum was unknown and Mr. Morris had no recollection of when this visit occurred or when he drafted the second memorandum. (SCT000658.) The second memorandum referred to certain “restoration work that had been done to repair the damages caused by a bulldozer . . . [and it indicated that] the site look[ed] much better than [his] September 17th visit.” (SCT000658; *see also* SCT000290.)

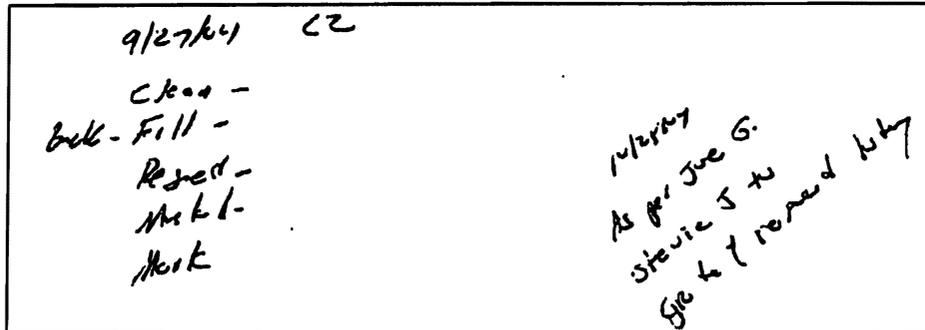
At trial, Respondents explored the “restoration work” reference contained within the second memorandum at great length during the questioning of Joe Gilmore and Steve Perdue.

⁴ Ted Streit worked for Gaddy Engineering, a former defendant in this case who was voluntarily dismissed. (*See* SCT0001-13.) Gaddy Engineering is a land management company that oversaw the property upon which the cemetery was located. (*See* SCT000987.) The September 15, 2004, fax would have been sent over a month after the alleged incident took place. (*See, e.g.*, SCT00017) (alleging incident occurred before August 7, 2004).

⁵ Joe Gilmore was Manager of Natural Resources Relations for EPC in 2004 and appeared at trial as EPC’s corporate representative. (*See* SCT000488.)

⁶ The video recording was admitted into evidence as Defendants’ Exhibit No. 9.

Respondents also inquired at great lengths about Mr. Perdue's handwritten notes on the bottom of the September 22, 2004 memorandum:



(SCT000212.)

Under the “9/27/04” date, Mr. Perdue testified the following words were listed: clean, backfill, reseed, mulch, and mark, and that the “LZ” to the right stood for Lester Zitkus, a fellow EPC employee. (SCT000609.) The note on the right hand side read: “10/25/04 As per Joe G. Stevie J. to grade and reseed today.” (SCT000609-610.) Mr. Perdue testified that these were his notes from EPC discussions about the cemetery, but he was unsure what reclamation or restoration work actually took place, when it was carried out, and by whom it was undertaken. (SCT000609-611; 613-614.) Mr. Perdue also testified that he did not visit the site personally until 2006. (SCT000609-611.)

Regardless of Mr. Perdue's testimony, the GP crew members who had worked at the site testified that the only post-bulldozer incident activities were part of GP's ordinary reclamation process upon completing construction. Mr. Keaton testified that in late October, his crew reclaimed and restored the access roads and did some mulching and seeding in the area.⁷ (SCT000719.) He further testified that none of these activities were conducted on the access road

⁷ This testimony is consistent with Mr. Perdue's email to Lester Zitkus, dated July 19, 2006, where he indicated that Stevie Joe Branham, an EPC employee at the time of the incident but who did not testify at trial, informed him that grading, seeding, and mulching was performed. (SCT000287.) The email did not state who performed these activities. (*Id.*)

leading through the gravesites, all of the activities were undertaken as part of the usual reclamation process, and that none of the activities were performed at the express direction of EPC. (*Id.*; see also SCT000529-530.)⁸

Respondents' Expert Testimony

At trial, Respondents relied upon the testimony of William D. Updike ("Mr. Updike"), an expert in the field of archeology, to support their desecration claims. Mr. Updike testified he graduated with a bachelor's degree in Anthropology and a master's degree in Historic Preservation. (SCT001167-1169.) The crux of Mr. Updike's testimony related to the elements set forth in syl. pt. 8, *Hairston v. General Pipeline Const., Ind.*, 226 W. Va. 663, 704 S.E.2d 663 (2010), which required Respondents to establish:

(1) the grave site in question must be within a publicly or privately maintained cemetery, clearly marked in a manner which will indicate its use as a cemetery, with identifiable boundaries and limits; (2) dedication of the area to the purpose of providing a place of burial by the owner of the property or that the owner acquiesced in its use for burial; (3) that the area was identifiable as a cemetery by its appearance prior to the defendant's entry or that the defendant had prior knowledge of the existence of the cemetery; (4) that the decedent in question is interred in the cemetery by license or right; (5) that the plaintiff is the next of kin of the decedent with the right to assert a claim for desecration; and (6) that the defendant proximately caused, either directly or indirectly, defacement, damage, or other mistreatment of the physical area of the decedent's grave site or common areas of the cemetery in a manner that a reasonable person knows will outrage the sensibilities of others.

⁸ Joe Gilmore, EPC's corporate representative at trial, testified that:

he did not know who did the restoration work. What I have determined is I don't believe [EPC] performed that restoration work The contractor [GP] . . . would have been responsible. Part of the conditions of that bid would be to perform reclamation work associated with the pipeline project.

(SCT000529-530.) Similarly, Messrs. Gary and Michael O'Dell, both of whom worked for Mr. Keaton on the GP crew, testified that the only work they did in the area of the gravesite took place immediately after the bulldozer's alleged entry. Each testified that their work was limited to an hour or two of moving dirt with a shovel and raking the area to try to clean it up. (SCT000732; 743; 751.)

Specifically, Mr. Updike offered testimony regarding the appearance of the cemetery, the presence of yucca and lilies as indicators of a cemetery or burial place, the alleged boundaries and limits of the cemetery, and the presence and demarcations of the graves and gravesites located within the cemetery. (See generally SCT001205-1230.) Mr. Updike's testimony, however, did not end there.

Mr. Updike also testified about previous projects that he and his archeological firms had worked on for companies in the coal and oil and gas industries. (See SCT001176-1187.) Importantly, the only pipeline related projects Mr. Updike had worked on were large interstate pipelines governed by the Federal Energy Regulatory Commission ("FERC") and the Natural Gas Act. (See SCT001350-1351.) The Natural Gas Act and FERC govern interstate pipelines that transmit gas across state lines and into interstate commerce. *Transcon. Gas Pipe Line Corp. v. F.E.R.C.*, 485 F.3d 1172, 1175 (D.C. Cir. 2007). They do not regulate gathering pipeline services which do not cross state lines and do not require a federal permit to construct or relocate. See *id.* at 1175-1176.

Where the Natural Gas Act or FERC govern, certain provisions of the National Historic Preservation Act can apply which may require cultural surveys, *i.e.* archeological inspections, prior to construction.⁹ At trial, Mr. Updike admitted that none of his previous pipeline projects related to the relocation or construction of non-jurisdictional gathering pipelines, and that none were ever performed for an exploration and production company.¹⁰ (See SCT001193-1194.) Mr. Updike also specifically admitted that he had never been an employee of oil and gas company, that he had never managed oil and gas lease holdings, that he had never been responsible for

⁹ See 16 U.S.C. §470(f); 18 C.F.R. §§ 380.12 and 380.14; 15 U.S.C. §717; 42 U.S.C. § 7171, *et seq.*; (see also SCT001173.)

¹⁰ In fact, Mr. Updike did not know what an exploration and production company was. (SCT001193-1194.) His pipeline experience came from work he was retained to perform by transmission companies, *i.e.*, companies in the pipeline business—not involved in exploration or production. (See SCT001176-1187.)

relocating a non-jurisdictional gathering pipeline, and that he had never served as a pipeline supervisor. (*Id.*)

Despite his lack of qualifications and experience in the oil and gas industry, Mr. Updike was permitted to offer opinions about what was foreseeable to EPC when engaging in a pipeline relocation project like the one at issue.¹¹ (*See* SCT001353.) He was also permitted to offer testimony which insinuated to the jury that pre-construction archeological studies were a common practice in the industry, regardless of the type of pipeline or project at issue. (*See* SCT001176-1187.)

Jury Instructions and Verdict

The punitive liability phase was bifurcated from the punitive damages phase at the pre-trial hearing held on September 21, 2012.¹² (SCT000329.) During argument of jury instructions, Respondents sought and were granted, over objection, an adverse inference instruction stating that EPC and GP had spoliated evidence. (SCT000413–416.) The Instruction specifically stated:

PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 34 (ADVERSE INFERENCE)

You have heard testimony that the Crystal Block Cemetery at issue in this litigation partially was destroyed during the construction of the subject pipeline and before the Respondents were aware of the construction. Consequently, the expert witnesses retained by the Respondents did not have an opportunity to inspect the cemetery as it existed before the pipeline construction.

Where, Defendants General Pipeline Construction, Inc. and Equitable Production Company had evidence in their possession, under their control or in their authority and they fail to preserve that evidence which should properly be

¹¹ In addition to EPC's pre-trial motions *in limine* regarding this anticipated testimony, EPC appropriately objected at trial before this testimony was elicited. (*See* SCT001178.)

¹² Due to the fact that the pre-trial hearing was conducted on September 21, 2012, the court issued its rulings from the bench and they were not memorialized in an order. The Court referenced its bifurcation again during consideration of jury instructions before the trial concluded. (SCT000472.) The bifurcation was based upon EPC's Motion in Limine to Bifurcate Respondents' Claims for Punitive Damages. This Motion was not included in the appendix, but is in the record below.

part of the Respondents' case, you may infer that the evidence, if it had been available, would have been unfavorable to the Defendants' case.

(SCT000150.)

Additionally, the Circuit Court, over EPC's objection, refused to provide the jury with EPC's proffered jury instructions numbers 50, 51, 52, 53, and 54. (SCT000468–475.) Instructions 50 and 51 were limiting instructions tailored to combat some of the opinions offered by Mr. Updike. Specifically, the instructions sought to inform the jury that the authority of the Natural Gas Act and FERC did not apply in this case. (SCT000116-117.) More specifically, Instruction 51 sought to inform the jury that Section 106 of the National Historic Preservation Act, the very Act under which Respondents' expert archeologist had conducted most if not all of his previous archeological investigations, did not apply in this case because the pipeline at issue was not governed by the Natural Gas Act. (SCT000117.)

Similarly, EPC proffered Instructions 52–54 to instruct the jury that a finding of negligence was insufficient to impose punitive liability and to define the terms malice, intentional, willful, wanton, and reckless. (SCT000118-121.) These instructions were significant because the issue of punitive liability was presented to the jury without any instructions regarding the nature of the conduct required to impose such liability. Importantly, there were only two references made to punitive damages before the jury began deliberating on liability: (1) Respondents' Requested Jury Instruction No. 26; and (2) the reference to "Punitive Issue" contained on the verdict form.

Respondents' Requested Jury Instruction No. 26 read:

The damages available in a common law cause of action for grave desecration include nominal damages; compensatory damages if actual damage has occurred; mental distress; and *punitive damages if the Defendants' conduct is determined to be willful, wanton, reckless, or malicious.*

(SCT000144) (emphasis added). This was the only instruction referencing punitive damages and it did not distinguish punitive conduct from ordinary negligence. Likewise, the verdict form stated:

<p>E. PUNITIVE ISSUE</p> <p>1. Have the plaintiffs proven, by a preponderance of the evidence, that General Pipeline Construction, Inc.'s conduct was willful, wanton, <u>reckless</u> or malicious?</p> <p>YES <input checked="" type="checkbox"/> <i>reckless only</i> NO <input type="checkbox"/></p> <p>2. Have the plaintiffs proven, by a preponderance of the evidence, that Equitable Production Company's conduct was willful, wanton, reckless, or malicious?</p> <p>YES <input checked="" type="checkbox"/> <i>reckless only</i> NO <input type="checkbox"/></p>
--

(SCT000176.) It similarly failed to elucidate the punitive damages standard for the jury.

Over Respondents' objection, EPC reiterated to the Circuit Court that these instructions were not only meant to define the terms included therein, but also to distinguish such conduct from ordinary negligence.¹³ (SCT000472-474.) Over EPC's objection, the Circuit Court ultimately refused to give these instructions finding the terms were common and could be defined by the jury based upon their ordinary experiences. (SCT000474.)

The case was ultimately submitted to the jury for deliberation on October 12, 2012.¹⁴ The jury found both defendants liable to each of the fourteen Respondents, apportioning seventy-percent (70%) of the fault to GP and thirty-percent (30%) to EPC. (See SCT000168-176.) The jury further found that at the time GP entered the gravesite area, it was providing services to EPC pursuant to the terms of the contract between the parties and was acting as an independent

¹³ Both the Circuit Court and the Respondents argument in opposition to these instructions seemingly missed the mark and misconstrued the nature of the bifurcation order separating the of the punitive liability phase from the punitive damages phase. Both seemed to believe that because punitive damages could not be awarded at this phase, the jury could not be provided any instructions regarding punitive liability. (See SCT000469-475.) This notion misses the point of a bifurcated punitive case which is simply to protect the defendants from prejudice by not allowing the jury to consider the financial worth until after there is a finding of liability.

¹⁴ On the issue of punitive liability, EPC had moved for judgment as a matter of law both at the closing of the Respondents' evidence and the closing of Defendants' evidence. (See SCT000860; 1149; 925.)

contractor. (*Id.*) The jury awarded each of the individual Respondents \$50,000.00 in damages for mental distress and an additional \$14,000.00 to Cora Hairston as the “overseer of restoration of the cemetery.” (*Id.*) As shown above, the jury found that each of the defendants had been “reckless.” (*Id.*)

The case then proceeded to a separate trial on October 17, 2012, solely on the issue of punitive damages. (*See* SCT000177-185.) The jury ultimately chose not to impose punitive damages on GP, but imposed an award of \$200,000.00 against EPC. (*Id.*) Based upon the award of punitive damages, the total verdict amounted to: \$914,000.00. (*Id.*) EPC timely moved for a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, which was denied, and a final appealable order was entered on July 29, 2013, pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure. EPC timely filed its Notice of Appeal on August 28, 2013, and now seeks reversal of the verdict and the granting of a new trial.

III. SUMMARY OF THE ARGUMENT

1. The Circuit Court’s Failure to Instruct the Jury on Punitive Liability.

West Virginia jurisprudence recognizes that trial courts must provide a careful explanation when instructing juries on punitive damages. *See Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 667-68, 413 S.E.2d 897, 908-09 (1991). Although punitive damages instructions may “bemuse” judges at times,¹⁵ the task of providing accurate and appropriate instructions cannot be avoided simply because it may be difficult. *See United States v. Barclay*, 560 F.2d 812, 813 (7th Cir. 1977). Here, the Circuit Court’s failure to instruct the jury on punitive damages during the liability phase constituted an abuse of discretion, resulting in a prejudice to EPC, which requires that the verdict be reversed and a new trial awarded.

¹⁵ *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 585-87, 694 S.E.2d 815, 918-20 (2010) (Ketchum, J., *dissenting in part, concurring in part*).

At the request of EPC, the punitive liability phase of trial was bifurcated from the punitive damages phase. At the conclusion of the liability phase of trial, the jury concluded that GP was seventy-percent (70%) liable for the alleged desecration of the cemetery at issue and that EPC was thirty-percent (30%) liable. As set forth above, the uncontroverted evidence established that EPC was not present on the day GP's bulldozer operator allegedly damaged the cemetery and had no prior knowledge of the cemetery's existence.

The Circuit Court refused to provide the jury with EPC's instructions 52 through 54, which sought to inform the jury that simple negligence was insufficient to award punitive damages and to differentiate negligence from willful, wanton, reckless, and malicious conduct. These instructions also sought to define each of these terms in order to prevent jury confusion as to their meanings and legal implications. Each of the proffered instructions contained accurate statements of law which were not addressed by any other instruction given by the court.

Several other courts have considered similar instructions and found the failure to provide them to the jury was reversible error. *See Worldwide Network Servs., LLC v. Dyncorp Int'l, LLC*, 365 Fed. Appx. 432, 447 (4th Cir. 2010); *Berberich v. Jack*, 709 S.E.2d 607, 612 (S.C. 2011); *Rickner v. Haller*, 116 N.E.2d 525 (Ind. App. 1954); *United States v. Barclay*, 560 F.2d 812 (7th Cir. 1977). Additionally, other jurisdictions have adopted form jury instructions defining the terms "willful, wanton, and reckless" to ensure uniformity and to prevent jury confusion. *See, e.g., Order Approving Publication and Distribution of the Hawai'i Standard Civil Jury Instructions*, J. Inst. Nos. 8.12–17 (1999); Del. P.J.I. §§ 05.09–10 (2000) (revised in part 2006); C.A.C.I. No. 3941 (Cal. Dec. 2012).

Like the aforementioned authorities, the jury must have been made aware and adequately instructed that negligence was insufficient to impose punitive liability, and informed of the legal

distinctions between negligence and the terms “willful, wanton, reckless, and malicious.” The Circuit Court’s failure to provide any instruction whatsoever on these terms and concepts, while allowing the jury to reach a conclusion as to whether EPC acted in a willful, wanton, reckless, or malicious manner, constituted an abuse of discretion requiring reversal by this Court.

2. The Circuit Court’s Erroneous Adverse Inference Instruction.

EPC’s second assignment of error relates to the Circuit Court’s abuse of discretion in providing the jury with an adverse inference instruction as a consequence of EPC’s alleged spoliation of evidence. Notably, this instruction should not have been given because the Respondents did not satisfy the four-factor test set out in *Tracy v. Cottrell ex rel. Cottrell*, 206 W. Va. 363, 524 S.E.2d 879 (1999):

(1) the party’s degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) *the reasonableness of anticipating that the evidence would be needed for litigation*; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party’s degree of fault in causing the destruction of evidence.

(emphasis added).

The third factor is dispositive as there was no evidence presented that EPC had any reason to anticipate litigation was going to arise at the time of the alleged spoliating activities. Without such evidence, the Circuit Court’s instruction constituted reversible error causing significant prejudice to EPC. *See Zubulake*, 220 F.R.D. at 219 (“In practice, an adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome.”). As such, this Court should reverse the verdict rendered against EPC and grant it a new trial.

3. The Circuit Court's Error in Failing to Provide Instruction Regarding the Inapplicability of the Federal Energy Regulatory Commission and the Natural Gas Act.

The Circuit Court erred in allowing Respondents' expert archeologist, William Updike, to provide testimony suggesting to the jury that archeological surveys were common practice or industry standard without providing EPC's requested jury instructions 50 and 51. Specifically, Mr. Updike spent considerable time at trial testifying about archeological surveys he had conducted prior to pipeline or other types of construction projects. The pipeline projects Mr. Updike previously participated in were all governed by the Federal Energy Regulatory Commission ("FERC") and the Natural Gas Act. These authorities govern large interstate pipeline projects that are part of interstate commerce.

Importantly, the pipeline at issue in this case was a non-jurisdictional gathering line, which did not fall within the parameters of FERC or the Natural Gas Act. As such, the archeological surveys which may be required under those authorities did not apply to the pipeline relocation project at issue here. Nevertheless, Mr. Updike's insinuations to the jury allowed it to impose a higher standard upon EPC than required by law, going directly to the issue of liability. The instructions contained accurate statements of law that were meant to guard against jury confusion and were not covered by any other instruction. As such, the court abused its discretion in failing to provide these instructions and the verdict should be reversed.

4. The Circuit Court's Erroneous Admission of Expert Testimony.

The uncontroverted evidence at trial showed that Respondents' expert archeologist had no knowledge, skill, experience, training, or education in the oil and gas industry. Mr. Updike admitted that he had never worked for an exploration and production or any other sort of natural gas producing company, that he had no degrees in petroleum engineering, that he had never

managed oil and gas lease holdings, that he was never responsible for relocating a non-jurisdictional gathering line, and that he had no experience as a pipeline supervisor. (SCT001193-1194.)

Despite his lack of qualifications, Mr. Updike was nonetheless allowed to opine that EPC, as an exploration and production company who retained an independent contractor to relocate a pipeline, should have expected to encounter a cemetery during the pipeline relocation project. Because Mr. Updike was an expert witness, the admission of testimony outside the scope of his expertise generally warrants a new trial. *See, e.g., Robertson v. Norton Co.*, 148 F.3d 905 (8th Cir. 1998); *McMillan v. Weeks Marine, Inc.*, 478 F. Supp. 2d 651 (D. Del. 2007); *Scott v. Yates*, 643 N.E.2d 105 (Ohio 1994); *Vanden-Brand v. Port Auth. of Allegheny Cnty.*, 936 A.2d 581 (Pa. Commw. Ct. 2007). Further, reversal and the granting of a new trial is even more appropriate where the erroneously submitted evidence goes “to the heart of the case.” *See Skaggs v. Elk Run Coal Co., Inc.*, 198 W. Va. 51, 78, 479 S.E.2d 561, 588 (1996).

The admission of Mr. Updike’s foreseeability opinion was even more prejudicial in this case because Respondents had no other evidence to establish that EPC should have known of the existence of the cemetery prior to the alleged bulldozer incident. The issue of foreseeability is one of the most critical factors in any negligence analysis. As such, the admission of Mr. Updike’s testimony in this regard was erroneous and constituted an abuse of discretion. Therefore, this Court should reverse the verdict and grant EPC a new trial.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner respectfully requests that this matter be scheduled for oral argument pursuant to Rule 20(a)(1)–(2). The assignment of error pertaining to the punitive damages instruction is a matter of first impression before this Court and involves a substantial issue that is of the utmost public importance.

V. ARGUMENT

A. STANDARDS OF REVIEW

The assignments of error fall into three distinct categories: (1) the Circuit Court refusing to give appropriate jury instructions; (2) the Circuit Court providing the jury with an erroneous jury instruction; and (3) the Circuit Court erroneously admitting certain expert testimony. Regarding the first category, “[a]s a general rule, the refusal to give a requested jury instruction is reviewed for abuse of discretion.” *Reynolds v. City Hosp., Inc.*, 207 W. Va. 101, 529 S.E.2d 341 (2000) (citing *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996)). Thus, the Circuit Court’s failure to provide a punitive damage instruction during the liability phase of trial is reviewed for an abuse of discretion. Additionally, the court’s failure to instruct the jury that the authority of the Federal Energy Regulatory Commission and the Natural Gas Act did not apply is reviewed for abuse of discretion.

As to the second category, “the question of whether a jury was properly instructed is a question of law, and the review is *de novo*.” Syl. pt. 1, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996). Thus, whether it was proper to provide the jury with an adverse inference instruction against EPC is a *de novo* review.

Finally, “rulings on the admissibility of evidence . . . are committed to the discretion of the trial court.” Syl. pt. 1, *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995).

Generally, such rulings are reviewed under an abuse of discretion standard. *Id.* Thus, whether it was proper to allow Plaintiff's expert archeologist to testify on matters outside the scope of his expertise is reviewed for abuse of discretion.

B. ASSIGNMENTS OF ERROR.

1. The Circuit Court Erred in Failing to Give Any Punitive Damages Instructions During the Liability Phase of Trial.

The verdict must be reversed because the Circuit Court failed to provide a single instruction to the jury on the nature of the conduct required under West Virginia law to award punitive damages during the liability phase of trial.¹⁶ Generally, punitive damages may not be awarded unless there is a finding of "gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations."¹⁷ Syl. Pt. 4, *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895). Importantly, the United States Supreme Court indicated in *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) that a punitive damage award is constitutional if the jury instructions "have enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory." *Id.* at 19. Here, the jury received no instruction as to the nature of the conduct that must be found before deciding whether defendants were liable.

¹⁶ As set forth above, the punitive liability phase was bifurcated from the punitive damages phase. (SCT001353.) The liability and damages portion of punitive damages may be bifurcated to prevent any prejudice to defendants during the liability portion of trial. *See* W. Va. R. Civ. P. 42(c); *Mattison v. Dollar Carrier Corp.*, 947 F.2d 95, 110 (4th Cir. 1991); Robin Jean Davis & Louis J. Palmer, *Punitive Damages Law in West Virginia* 25 (2010), available at: <http://www.courtswv.gov/PunitiveDamages2010.pdf>. The bifurcation of punitive liability from damages ensures that a *prima facie* case of intentional and malicious conduct is proven and liability imposed before any evidence is presented regarding the amount of punitive damages. *See Bennett v. 3 C Coal Co.*, 180 W. Va. 665, 379 S.E.2d 388 (1989). The purpose is "to prevent [the] jury from being influenced[] on the substantive claim[] by evidence of [corporate wealth]." Davis & Palmer, *supra*, at 25.

¹⁷ *Hairston* required evidence of "willful, wanton, reckless, or malicious" conduct. *See* syl. pt. 10, *Hairston*, 226 W. Va. 663, 704 S.E.2d 663.

In West Virginia, “[j]ury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law.” *State v. Skidmore*, 228 W. Va. 166, 170, 718 S.E.2d 516, 520 (2011) (citing syl. pt. 15, *State v. Bradshaw*, 193 W. Va. 519, 457 S.E.2d 456 (1995)). A trial court’s refusal to give a requested instruction is reversible error if: “(1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant’s ability to effectively present a given defense.” Syl. pt. 5, *Alley v. Charleston Area Med. Ctr., Inc.*, 216 W. Va. 63, 602 S.E.2d 506 (2004) (quoting syl. pt. 4, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994)).

A jury instruction is sufficient and should be given if it “accurately reflects the law.”¹⁸ *Bradshaw*, 193 W. Va. at 543, 457 S.E.2d at 480. “Instructions are adequate if construed as a whole . . . they adequately inform the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party.” *Worldwide Network Servs., LLC v. Dyncorp Int’l, LLC*, 365 Fed. Appx. 432, 447 (4th Cir. 2010) (quoting *S. Atl. Ltd. P’ship of Tenn., L.P. v. Riese*, 284 F.3d 518, 530 (4th Cir. 2002)) (quotation marks omitted). If a layperson is incapable of correctly interpreting a legal term of art such as “reckless” or “malice,” those terms should be defined in the jury instructions. *See Worldwide*, 365 Fed. Appx. at 447–48.

In *Worldwide*, a subcontractor (“WWNS”) sought punitive damages against a government contractor (“DynCorp”) for alleged racial discrimination in breach of contract under 42 U.S.C.A. § 1981. *See Worldwide*, 365 Fed. Appx. at 432. At trial, the jury found for the

¹⁸ “[A] jury instruction is erroneous if it has a reasonable potential to mislead the jury as to the correct legal principle or does not adequately inform the jury on the law.” *Tracy v. Cottrell ex rel. Cottrell*, 206 W. Va. 363, 376, 524 S.E.2d 879, 892 (1999) (citing *State v. Miller*, 197 W.Va. 588, 607, 476 S.E.2d 535, 554 (1996)).

subcontractor and awarded \$10 million in punitive damages. *Id.* at 439. On appeal, the contractor asserted the punitive damages instruction was erroneous. *Id.* at 447. The instruction at issue read: “[Y]ou may award punitive damages if WWNS . . . [has] shown by clear and convincing evidence that DynCorp maliciously, or with reckless indifference, discriminated against WWNS.” *Id.* at 447 (citations omitted).

On review, the Fourth Circuit noted that the district court should have defined the terms “malice” and “reckless indifference” because a layperson’s concept of those terms’ definitions may not comport with what those terms mean in a legal setting. *Id.* at 447–48. The Court explained that the word “malice” ordinarily means: “A desire to harm others or to see others suffer; extreme ill will or spite.” *Id.* (citing *American Heritage Dictionary of the English Language* 1059 (4th ed. 2006)). However, in a legal proceeding, “a layperson would not know that malice also has a technical legal meaning relating to awareness that one may be breaking the law.”¹⁹ *Worldwide*, 365 Fed. Appx. at 448 (citing *Perry v. McCaughtry*, 308 F.3d 682, 694 (7th Cir. 2002) (Posner, J., dissenting)).

The Court believed that the “jury could not have known that malice or reckless indifference pertain to [DynCorp’s] knowledge that it may be acting in violation of federal law or that punitive damages are improper unless DynCorp acted in the face of a perceived risk that [its] decision would violate federal law.” *Worldwide*, 365 Fed. Appx. at 448 (quoting *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 535 (1999); *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 443 (4th Cir. 2000)) (quotations marks omitted). As a result, the Fourth Circuit found the jury

¹⁹ The Eight Circuit has also adopted the view that the meanings of technical terms such as willful and wanton occurring in instructions to a jury “should be explained or defined when requested.” *Balt. & O. R. Co. v. Felgenhauer*, 168 F.2d 12, 19 (8th Cir. 1948).

instruction inadequate and reversed the verdict.²⁰ *Id.* at 448 (citing *Spell v. McDaniel*, 824 F.2d 1380, 1399 (4th Cir. 1987)).

Other jurisdictions have also recognized that “trial court[s] should instruct the jury on the definitions of these various terms [*i.e.*, ordinary negligence, gross negligence, and reckless, willful, or wanton conduct], in addition to ordinary negligence, when so requested by a party, even if punitive damages are not at issue.” See *Berberich v. Jack*, 709 S.E.2d 607, 615 (S.C. 2011); *Rickner v. Haller*, 116 N.E.2d 525 (Ind. App. 1954) (“ . . . the fact of wanton or willful misconduct is in issue. Appellant was . . . entitled to instructions which defined and distinguished such conduct from ordinary negligence . . . ‘Where the questions of ‘willfulness,’ ‘wantonness,’ and ‘recklessness’ are in issue, those terms should be defined and distinguished from ‘ordinary negligence’”);²¹ see also *Hicks v. McCandlish*, 70 S.E.2d 629, 631 (S.C. 1952) (noting that the “troublesome question of the distinction to be made in the degrees of negligence” has long been recognized in South Carolina).²²

Additionally, a number of jurisdictions—recognizing the dire consequences that can result from the misinterpretation of punitive terms—have adopted “form” jury instructions to define terms such as “willful, wanton, and reckless” to avoid any juror confusion. See, e.g., Order Approving Publication and Distribution of the Hawai’i Standard Civil Jury Instructions, J.

²⁰ Interestingly, the Fourth Circuit reversed despite having to apply an elevated standard of review requiring that the jury acted “in *complete ignorance of, or to have misapplied, fundamentally controlling legal principles* to the inevitable prejudice of an aggrieved party.” *Worldwide*, 365 F. App’x at 447-448.

²¹ Citing 65 C.J.S., Negligence, § 289c, at 1239; *Coconower v. Stoddard*, 182 N.E. 466 (Ind. App. 1932); *Armstrong v. Binzer*, 199 N.E. 863 (Ind. App. 1936). “[N]egligence and willful misconduct are not synonymous.” *Balt. & O. R. Co. v. Felgenhauer*, 168 F.2d 12, 16 (8th Cir. 1948) (citing *Bartolucci v. Falleti*, 382 46 N.E.2d 980 (Ill. 1943).

²² See also *Dauids v. Novartis Pharm. Corp.*, 06-CV-431 ADS WDW, 2013 WL 5603824 (E.D.N.Y. Oct. 9, 2013).

Inst. Nos. 8.12–17 (1999); Del. P.J.I. §§ 05.09–10 (2000) (revised in part 2006); C.A.C.I. No. 3941 (Cal. Dec. 2012).

In *Berberich*, the plaintiff-appellant argued “the trial court abused its discretion in denying his request to charge the jury on the definitions of recklessness, willfulness, and wantonness and to instruct the jury that heightened forms of wrongdoing could not be compared to ordinary negligence under comparative negligence.”²³ *Berberich*, 709 S.E.2d at 609. The Court noted “[t]he terms ‘willful’ and ‘wanton’ when pled in a negligence case are synonymous with ‘reckless,’ and import a greater degree of culpability than mere negligence.” *Id.* at 612 (citing *Marcum v. Bowden*, 643 S.E.2d 85, 88 n.5 (S.C. 2007)). The Court ultimately held that the jury should have been instructed on the terms “ordinary negligence, gross negligence, and reckless, willful, or wanton conduct,” at the plaintiff-appellant’s request. *Id.* at 615 (holding that the trial court’s failure to define the concepts of ordinary negligence versus recklessness, willfulness, and wantonness had the potential to confuse the jury).

Similarly, a court’s failure to adequately describe to the jury the difference between the terms “general intent” and “specific intent” in the criminal context has also been deemed reversible error. *See United States v. Barclay*, 560 F.2d 812 (7th Cir. 1977). In *Barclay*, the defendant was charged with, *inter alia*, conspiracy and aiding or abetting the misapplication of bank funds and false entries on bank records, in violation of 18 U.S.C. §§ 2, 371, 656, 1005. *Id.* at 813. Upon his conviction, the defendant/appellant argued the court’s refusal to tender his instruction on the nature of specific intent was error.²⁴ *See id.*

²³ *Berberich* was a case of first impression for the Supreme Court of South Carolina. *Id.*

²⁴ The district court offered the following explanation for this refusal: “As I indicated (at an informal off-the-record instructions conference), I do not think that in the [proposed] instruction, the courts distinguish between specific and general intent as comprehensible It is not comprehensible to me and I do not think it would be to a jury.” *Barclay*, 560 F.2d at 816.

On appeal, the Seventh Circuit admitted that formulating clarifying instructions can be difficult, but that such difficulty cannot prevent the court from adequately instructing. *Id.* (“the task cannot be avoided, as difficult as it may be.”). The court further lamented:

It would be, we reluctantly admit, unrealistic to think that every juror understands every concept to which he or she is exposed in the court's charge. The best we can do under our adversary system is to see that the necessarily applicable law is made available to the jury *in as understandable as possible form*.

Id. (emphasis added). Ultimately, the Court reversed finding the refusal to instruct “led to a jury charge which *failed to provide adequate criteria* by which the jury could determine whether [the defendant] had the requisite specific intent to injure or defraud the bank.”²⁵ *Id.* (emphasis added).

Like the aforementioned cases, West Virginia law recognizes that punitive jury instructions are important and should be “carefully explain[ed].” *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 667-68, 413 S.E.2d 897, 908-09 (1991). *Garnes* sought to ensure that West Virginia’s punitive damages jurisprudence remained consistent with the United States Supreme Court’s decision in *Haslip*. The *Garnes* decision essentially set out several layers of protection against unconstitutional punitive damages awards: (1) to ensure the evidence was sufficient to support a punitive award; (2) to ensure the jury was appropriately instructed as to the factors it could consider when assessing punitive damages; (3) to ensure an adequate review

²⁵ The defendant’s proposed instruction read:

The crime charged in this case requires proof of specific intent before the defendant can be convicted. *Specific intent, as the term implies, means more than the general intent to commit the act.* To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, (or knowingly failed to do an act which the law requires,) purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case (and from similar prior crimes and transactions).

Id. at 815 (emphasis added).

of any damages imposed by the trial court; and (4) ensure there is a meaningful and adequate appellate review of any award. *See Garnes*, 186 W. Va. at 667, 413 S.E.2d at 908.

The *Garnes* “careful explanation” requirement when instructing on punitive damages should apply equally here. The only difference is that instead of focusing on the amount or the factors used to determine the amount of punitive damages, the jury here needed instruction on the conduct needed to first impose liability. That was the critical distinction recognized by the other courts above.

The refusal to provide the appropriate liability instructions resulted in a questionable punitive damages verdict in multiple respects: (1) the jury found EPC was only thirty-percent (30%) liable, but solely awarded punitive damages against it; (2) the evidence was unconverted that EPC was not on-site for the alleged bulldozer incident and had no prior knowledge of the cemetery; and (3) the jury’s finding of “reckless only” as its support for imposing punitive liability.

West Virginia law “has long required more than a showing of simple negligence to recover punitive damages.” *Bennett*, 180 W. Va. at 671, 379 S.E.2d at 394. Further, “[a] wrongful act done by a defendant under a *bona fide* claim of right and without malice in any form does not constitute a basis for awarding punitive damages.” *Davis & Palmer, supra*, at 6 (citing syl. pt. 3, *Jopling v. Bluefield Waterworks & Improve. Co.*, 70 W. Va. 670, 74 S.E. 943 (1912)).²⁶ Nevertheless, the jury here was never instructed on the distinctions between negligence and the other punitive terms listed in *Hairston* before deciding whether EPC had acted in such a manner.

²⁶ *See also Gen. Motors Acceptance Corp. v. D.C. Wrecker Serv.*, 220 W. Va. 425, 647 S.E.2d 861 (2007); *Bennett v. 3 C Coal Co.*, 180 W. Va. 665, 379 S.E.2d 388 (1989). It has been said that where a defendant’s conduct was “willfully committed with such reckless, wanton and criminal indifference and disregard of plaintiff’s rights[,] the jury could infer malice therefrom, as a basis for allowing punitive damages.” *Raines v. Faulkner*, 131 W. Va. 10, 17, 48 S.E.2d 393, 397 (1947).

As noted in *Worldwide*, laypersons have difficulty in appreciating the legal effects and implications accompanying the terms “malice” and “reckless indifference.” The terms at issue here were largely the same, *e.g.*, willful, wanton, reckless, and malice. The most critical aspect of these instructions was differentiation. The first line of EPC’s Proposed Instruction No. 52 virtually mirrored Justice Davis’ publication on Punitive Damages. *Compare* Davis & Palmer, *supra*, at 5 (citing *Bennett*, 180 W. Va. at 671; 379 S.E.2d at 394) (“The law of West Virginia law has long required more than a showing of simple negligence to recover punitive damages.”), *with* EPC’s Prop. Inst. No. 52 at page 118 of appendix (“Proof, by a preponderance of the evidence, of more than simple negligence is required to support an award of punitive damages.”).

The instruction further provided:

Negligence and willfulness are mutually exclusive terms which imply radically different mental states. “Negligence” conveys the idea of inadvertence as distinguished from premeditation or formed intention. An act into which knowledge of danger and willfulness enter is not negligence of any degree, but is willful misconduct. Willful, wanton or reckless conduct cannot be regarded as accidental in any meaningful sense of that word. Accordingly, if you find from a preponderance of the evidence, that the Defendants’ actions were either accidental or negligent, your verdict should be for the Defendants on the issue of punitive damages.

(SCT000118.)

The distinguishing nature of EPC’s Instruction 52 was exactly what the *Berberich* court sought—to differentiate “ordinary negligence” from “recklessness, willfulness, and wantonness.” *Berberich*, 709 S.E.2d 607. Like the comparative fault scenario there, the Circuit Court’s failure to *distinguish* negligence from willful, wanton, and reckless conduct here “had the potential to confuse the jury and skew” the finding of punitive liability in favor of Respondents.

Further, the distinguishing concept was precisely what the Seventh Circuit was referring to in *Barclay* when addressing crimes of “general intent” versus “specific intent.” The Seventh

Circuit made clear that, no matter how “difficult [] it may be,” the court should have provided the jury with guidance as to what these closely-related terms meant “in as understandable as possible form.” To do anything less, is to deprive the justice system of its intent and legitimacy. Without a clear picture deciphering negligence from willful, wanton, or reckless activity, the jury was left to fill in the blanks with its own understanding, leading to a puzzling punitive award.

At a minimum, before it was asked to make a finding of liability, the jury needed to know that mere negligence or accidental conduct could not be used to support a finding of willful, wanton, reckless, or malicious conduct. Ultimately, the jury found Defendants had acted only in a “reckless” manner. While that term is appropriately included within the parameters of punitive liability, it is also the term that is most synonymous with negligence or accidental conduct. The term recklessness itself is “so inextricably connected and interwoven to the extent that negligence in its broadest sense is often said to encompass conduct of the former variety,” that is, negligence encompasses recklessness. *See Berberich*, 709 S.E.2d at 613.

Here, EPC proffered instructions 52–54 to inform the jury that a finding of negligence was insufficient to warrant punitive liability and to define the terms malice, willful, wanton, and reckless misconduct. (SCT000118-121.) Even accepting the Circuit Court’s rationale that those terms did not need to be defined, the court entirely failed to instruct the jury that ordinary negligence was insufficient. That is the determinative factor.

There is no issue of more paramount importance than the imposition of punitive damages. Each of EPC’s proffered instructions contained an accurate statement of the law which was not covered by any other instruction provided by the court. By omitting these instructions, the Circuit Court failed to fully and “accurately reflect[] the law,” *Bradshaw*, 193 W. Va. at 543, 457 S.E.2d at 480, and “carefully explain” to the jury the nature of the conduct required to impose

punitive liability. *Garnes*, 186 W. Va. at 667-68, 413 S.E.2d at 908-09. The Circuit Court's lack of instruction invited jury confusion, failed to distinguish punitive liability from ordinary negligence, and constituted an abuse of discretion requiring the verdict be reversed and the action remanded for a new trial.

2. The Circuit Court Erroneously Gave an Adverse Inference Instruction Because There Was No Anticipation of Litigation at the Time of the Alleged Tortious and/or Spoliating Act.

The Circuit Court's spoliation instruction was erroneous because there was no evidence to establish EPC had a reasonable anticipation of litigation at the time of the alleged spoliating conduct.²⁷ The Circuit Court's instruction was based upon the following rationale:

But this case is about desecration of a cemetery and this instruction wants me to tell the jury that once they—according to the Plaintiffs' case, once the Defendants disturbed these tombstones, knocked them over, covered them up, hauled them off, whatever the Plaintiffs say they must have done with them, they had a duty to preserve that evidence; that's evidence of spoliation. *A knocked over tombstone is evidence of spoliation and those aren't there today.* So I'm going to give this instruction over objection.

(SCT000416.) (emphasis added). The Circuit Court's holding seems to combine the alleged tortious conduct with the spoliation of evidence. That is contrary to the law.

A party requesting an adverse inference instruction for negligent spoliation of evidence has the burden to prove the following elements:

(1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) *the reasonableness of anticipating that the evidence would be needed for litigation*; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of evidence.

Tracy v. Cottrell ex rel. Cottrell, 206 W. Va. 363, 524 S.E.2d 879 (1999) (emphasis added);

Hannah v. Heeter, 213 W. Va. 704, 584 S.E.2d 560 (2003).

²⁷ As set forth above, this instruction was given over EPC's objection. (See SCT000413-416.)

The third factor—“the reasonableness of anticipating that the evidence would be needed for litigation”—is dispositive.²⁸ In *Zubulake*, an employee sued her employer for discrimination and “maintained that the evidence she need[ed] to prove her case exist[ed] in e-mail correspondence sent among various employees and stored only on [the employer’s] computer systems.” *Zubulake*, 220 F.R.D. at 215. Various monthly backup tapes were missing and “certain isolated e-mails . . . were deleted from [the employer’s] system.” *Id.* Noting the obligation to preserve evidence does not arise until “a party should have known that the evidence may be relevant to future litigation,” the court found the duty to preserve evidence commenced when the other employees began to exchange emails regarding the potential for a lawsuit. *Id.* at 216-217.

Importantly, the duty underlying an adverse inference instruction for spoliation is “a legal duty to *preserve* evidence that [litigants] know is or will be relevant in a *foreseeable* lawsuit.” Lauren R. Nichols, *Spare the Rod, Spoil the Litigator? The Varying Degrees of Culpability Required for an Adverse Inference Sanction Regarding Spoliation of Electronic Discovery*, 99 Ky. L.J. 881, 881 (2011) (emphasis added). The Circuit Court here failed to support its decision with a finding that defendants should have reasonably foreseen litigation at the time of the alleged spoliating act.

Additionally, assuming that the conduct could even be considered spoliation, there was no evidence that it was carried out by EPC. In fact, the uncontroverted evidence showed that no one from EPC was on-site when the bulldozer allegedly damaged the cemetery, or when the GP employees supposedly cleaned up the area with shovels and rakes. (See SCT000719; 732; 743;

²⁸ Although this Court has not addressed the contours of this element, the determination of other courts is instructive. Courts have noted “[i]t goes without saying that a party can only be sanctioned for destroying evidence if it had a duty to preserve it.” *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003). Further, courts have found that “[a] general concern over litigation does not trigger a duty to preserve evidence” and parties “ha[ve] no duty to preserve relevant documents or evidence until a potential claim was identified or future litigation was probable.” *Realnetworks, Inc. v. DVD Copy Control Ass’n, Inc.*, 264 F.R.D. 517, 518 (N.D. Cal. 2009) (citations omitted).

751.) To the extent these activities could have constituted spoliation, EPC was not there and, thus, they could not be imputed to EPC.

Further, any suggestion by the Respondents that the grading or seeding referenced in Mr. Perdue's handwritten notes established spoliation by EPC similarly misses the mark. The evidence showed that Mr. Morris' second memorandum, which described the restoration work, was sent within a week or two of his first, September 22, 2004 report. Further, Mr. Perdue's handwritten note suggested the activities occurred sometime on or before October 25, 2004. (*See* SCT000212; 609-610.) Regardless of which date was correct, unlike *Zubulake*, there was no evidence presented to establish that anyone from EPC knew or expected that EPC would be sued prior to those events taking place. As such, even if the activities could be considered spoliating acts, they should not have resulted in an adverse inference instruction because there was no reasonable anticipation of litigation at the time.

The adverse inference instruction essentially allowed Respondents to turn their almost entirely circumstantial case against EPC into one of iron-clad facts. *See Zubulake*, 220 F.R.D. at 219 ("In practice, an adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome."). Ignoring the insufficiency of the evidence to establish that EPC was even involved in the alleged spoliation, Respondents did not establish that EPC knew or should have known of any potential for litigation at the time the alleged spoliation occurred. Accordingly, the Circuit Court committed reversible error in providing the instruction to the jury and EPC is entitled to reversal and a new trial.

3. The Circuit Court Erred in Failing to Instruct the Jury That the Authority of the Federal Energy Regulatory Commission and the Natural Gas Act Did Not Apply.

The Circuit Court erred in refusing to instruct the jury that the authority of the Federal Energy Regulatory Commission (“FERC”) and the Natural Gas Act did not apply to this case as provided in EPC Jury Instructions 50 and 51.²⁹ It was undisputed at trial that the pipeline at issue was a non-jurisdictional gathering pipeline (SCT000548-549) and, thus, not subject to FERC or the Natural Gas Act. *See* 15 U.S.C. § 717, *et seq.*; 42 U.S.C. § 7171, *et seq.*; *see also* 15 U.S.C. § 717(b) (“The provisions of this chapter . . . shall not apply . . . to the production or gathering of natural gas.”); *Transcon. Gas Pipe Line Corp. v. F.E.R.C.*, 485 F.3d 1172, 1175 (D.C. Cir. 2007) (citing 15 U.S.C. § 717(b)) (“Gathering services typically are outside the scope of FERC’s jurisdiction unless the services are provided in connection with an interstate pipeline’s transmission of gas.”); *Conoco Inc. v. F.E.R.C.*, 90 F.3d 536, 540 (D.C. Cir. 1996) (stating that gathering is exempted from FERC’s jurisdiction by the Natural Gas Act).

The importance of this distinction is simple and was actually explained in EPC’s Proposed Jury Instruction No. 51—which the court refused to give. Namely, these authorities trigger the application of Section 106 of the National Historic Preservation Act, (16 U.S.C. §470(f)), which requires cultural resource surveys, *i.e.*, archeological inspections, in certain circumstances to be completed prior to potentially disruptive construction.³⁰ Importantly, however, because non-jurisdictional gathering lines are not governed by FERC or the Natural Gas Act, the provisions of the National Historic Preservation Act did not apply.

In West Virginia, “[j]ury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and

²⁹ As set forth above, the Court’s refusal to instruct was over EPC’s objection. (SCT000468-475.)

³⁰ *See* 16 U.S.C. §470(f); 18 C.F.R. §§ 380.12 and 380.14; 15 U.S.C. §717; 42 U.S.C. § 7171, *et seq.*; (*see also* SCT001173.)

were not misled by the law.” *Skidmore*, 228 W. Va. at 170, 718 S.E.2d at 520 (citing syl. pt. 15 *Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456). Indeed, “[t]he purpose of instructing the jury is to focus its attention on the essential issues of the case and inform it of the permissible ways in which these issues may be resolved. If instructions are properly delivered, they succinctly and clearly will inform the jury of the vital role it plays and the decisions it must make.” *Skidmore*, 228 W. Va. at 170, 718 S.E.2d 516 at 520 (citing *State v. Guthrie*, 194 W.Va. 657, 672, 461 S.E.2d 163, 178 (1995)). As noted above, “[i]nstructions are adequate if construed as a whole, and in light of the whole record, they adequately inform the jury of the controlling legal principles *without misleading or confusing the jury to the prejudice of the objecting party.*” *Worldwide*, 365 Fed. Appx. at 447 (4th Cir. 2010) (quoting *Riese*, 284 F.3d at 530) (quotation marks omitted) (emphasis added).

At trial, Respondents elicited testimony from Mr. Updike to suggest to the jury that archeological surveys or investigations were regularly conducted in the natural gas industry prior to constructing or relocating pipelines. For example, Mr. Updike offered the following line of testimony:

Q. Now, Cultural Resources – you talked about Section 106 and then we talked about Section 110; the National Historic Preservation Act. Is it your experience that the only time companies come to ask for archaeologist help is when there is a Federal statute requiring them?

A. It’s my experience that’s generally the case. However, there are some instances of projects that I’ve worked on that someone had a research question or they wanted to do more due diligence than was necessary for their project.

* * *

Q. What other . . . sorts of industries would hire you? Throughout your career do you have experience with other industries?

A. I do and this is primarily within Section 106; back to that for a minute. Within that environment I’ve worked a lot with the coal industry.

Mr. Swiger: Objection.

The Court: Overruled.

Mr. Swiger: If we're going to get into our motion in limine I want to preserve my motion, is all I want to do.

The Court: All right then.

* * *

A. That's correct. Back within the compliance—complying with Section 106 of the National Historic Preservation Act we worked—our primary business was with the coal industry and their requirements to have surveys done prior to surface mining or the surface disturbance caused by deep mining. We did a lot of that in the northern part of the state, specifically for CONSOL; airshaft or a new portal, beltline on the surface, that type of project. Here—

* * *

Q. Now power lines, roads, water lines, pipelines, things that are linear; are there different methodologies you would employ for some sort of linear disturbance like that?

A. The methodology, despite whatever the project is, is going to very similar.

* * *

Q. So with these linear projects—I'm saying linear: a line—describes roads, water lines, pipe lines, electric lines, things like that. Should you walk the route of the pipeline?

* * *

A. Yes . . . we did a project for a proposed wind farm and it had access roads, it had turbine sites, and then it had a transmission line that was, I think, seven or eight miles long But we would walk every inch of those alignments and that's some pretty rough terrain. If at all possible we started at the top and went down.

Q. Now what about access roads? Are access roads and landings commonly walked?

A. They are: [sic] Anything in a project that's going to be disturbed. Obviously with a surface mine permit they give you a vast area to look at. However, the specific hollows that are going to be the valley fills and specific areas for the silt ponds below those, and often any kind of access road that comes out of the permit boundary and around. So those would often be sort of a linear or sometimes amorphous extension of the much larger project.

* * *

Q. Back to scientific method?

A. Can we do that with these materials? And then the answer there is yes or no. And if the answer is no then the project is allowed to continue. If the answer is yes, then it becomes a larger excavation to gather—data collection; to gather more data from the site prior to it being destroyed by the project. Once that's completed then the project is cleared to move ahead.

Q. So sometimes you remove, and then sometimes does the project go in a different direction or use the land differently?

A. Yes, that's also an option such as the example I gave with Land Resources that wanted to know where the sites were and then avoid them in any construction activities they had.

We would often—well, we did some contract work years ago for the Forest Service and in their mind avoiding sites during logging activities was what they wanted to do so they would mark those off in the woods to keep the loggers from building skid roads through those or cutting the trees in those areas to keep those areas undisturbed.

(See SCT001176-1187.) This testimony essentially allowed Respondents to suggest to the jury that it was industry standard or common practice for archeological inspections to be undertaken before pipeline or other construction projects began. Later in his testimony, Mr. Updike actually opined that it was foreseeable for EPC to know that the pipeline relocation project would encounter a cemetery. (See SCT001353.) This opinion—while also the subject of its own assignment of error—provided further support for EPC's proposed limiting instructions.

Mr. Updike was an expert witness who was allowed to provide lengthy testimony about archeological investigations that were undertaken prior to other projects in rural locales. The cumulative effect of the testimony left the jury thinking, "if all these projects included pre-construction archeological investigations, why wasn't one of those done here?" While a jury is allowed to draw inferences, the proffered instruction would have simply instructed them that despite Mr. Updike's insinuations, EPC had no duty to undertake an archeological survey prior to construction.

Each of these instructions contained accurate statements of the law and should have been provided to the jury in accordance with West Virginia Code § 56-6-19 and Rule 51 of the West Virginia Rules of Civil Procedure. Without these instructions, the jury was permitted to draw one-sided conclusions from Mr. Updike's testimony and impose a heightened duty on EPC

relating to its pre-construction investigation or activities. Thus, the omission of EPC's limiting instructions constituted an abuse of discretion and should be reversed, EPC awarded a new trial.

4. The Circuit Court Erroneously Allowed Respondents' Expert to Proffer Expert Opinions Beyond the Scope of His Skill, Knowledge, Education, Experience, and Training.

To be entitled to a new trial predicated on improperly admitted evidence, a party must show: (1) the admission of the evidence was erroneous; and (2) the failure to exclude the evidence was "inconsistent with substantial justice." W. Va. R. Civ. P. 61; *see McDougal v. McCammon*, 193 W. Va. 229, 237, 455 S.E.2d 788, 796 (1995) ("[A] new trial will not be granted unless the moving party was prejudiced. In order to prevail on appeal, the Respondents must show admission of the video tape was error under prevailing law and the failure to exclude the video tape is inconsistent with substantial justice."). Because the admission of Mr. Updike's testimony satisfies both elements, EPC is entitled to reversal.

a. Respondents Failed to Establish Their Expert Had *Any* Knowledge, Skill, Experience, Training, or Education Sufficient to Provide an Expert Opinion Regarding Foreseeable Circumstances and Appropriate Procedures When Relocating or Constructing Non-Jurisdictional Gathering Pipelines.

The scope of an expert witness' area of expertise is determined by the expert's "knowledge, skill, experience, training, or education." W. Va. R. Evid. 702. Thus, "a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify." Syl. pt. 5, *Gentry v. Mangum*, 195 W. Va. 512, 520 n.6, 466 S.E.2d 171, 179 n.6 (1995); *see W. Va. Dept. of Transp., Div. of Highways v. Parkersburg Inn, Inc.*, 222 W. Va. 688, 671 S.E.2d 693 (2008) (finding expert's experience in appraisal work, including

hotel appraisals, permitted him to “opine[] that other factors may have caused a downturn in the Inn’s hotel business, such as room rates, competition from other hotels and the Inn’s need to renovate”).

Where an expert’s opinion is outside his or her “background, training, and experience,” the opinion must be excluded. *See Jenkins v. CSX Transp., Inc.*, 220 W. Va. 721, 731, 649 S.E.2d 294, 304 (2007); *see also Free v. Bando-Mar-Hyde Corp.*, 25 Fed. App’x 170, 172 (4th Cir. 2002) (excluding experienced metallurgist’s opinion on the cause of an aerosol can explosion because “he lack[ed] knowledge of the aerosol can manufacturing process, the process of filling aerosol cans, the testing performed on cans during the manufacturing process prior to their distribution, the pressurization of the can, or the normal pressure expected of this type of can”); *Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 799–800 (4th Cir. 1989) (excluding financial analyst’s opinion on credit decisions because “[t]here was no indication . . . that [the expert’s] general business education included any training in the area of antitrust or credit” and the expert “admitted that she lacked any other experience in such matters”).

Likewise, in *Shreve v. Sears, Roebuck & Co.*, 166 F. Supp. 2d 378, 393–94 (D. Md. 2001), the court found that, even an “eminently qualified mechanical engineer,” whose “background might permit him to learn faster than other” about design and safety issues, will not be qualified to testify as to certain subjects absent specific knowledge of a particular subject. *Id.* at 391, 394. In *Shreve*, Dr. Joseph Shelley sought to offer his expert opinion “on the safe design and operation of snow throwers.” *Id.* at 393. Despite finding Dr. Shelley was “an eminently qualified mechanical engineer” with teaching and authoring experience in the field, the court found he had “no professional experience with respect to the design, manufacture, operation, or

safety of outdoor power equipment, including snow throwers.”³¹ *Id.* at 393. Absent such *specific* experience, the court determined Dr. Shelley was not qualified to offer expert testimony regarding snow throwers and was, in fact, “a classic ‘hired gun.’” *Id.* at 394.

Additionally, in *Duncan v. ICG Beckley, LLC*, No. 5:12-CV-00235, 2013 WL 1331226 (S.D. W. Va. Apr. 2, 2013), the Southern District of West Virginia found that an expert unfamiliar with an industry could not offer expert opinion regarding inspections. *Id.* at *7–8. The plaintiff’s expert, Robert Wells, sought to offer an opinion regarding the adequacy of the defendant’s pre-shift mine examination. *Id.* at *6. Upon review of plaintiff’s disclosures, the court found Wells “[did] not possess any experience or education relative to the pre-shift inspection required” and had “limited education of the mining industry” from a course taken twenty-six years prior to the litigation. *Id.* at *7. Because of Wells’ wholesale lack of specialized knowledge and skill regarding mine inspections, the court held Wells’ could not offer the proffered opinion. *Id.* at *8.

Like *Duncan* and *Shreve*, the expert in the instant case, William Updike, lacks any specialized knowledge, skill, experience, training, or education that would permit him to testify regarding foreseeable circumstances and appropriate procedures when relocating or constructing, any sort of pipeline—let alone a non-jurisdictional gathering pipeline. Mr. Updike was proffered as an expert in the field of archeology. Mr. Updike expressly admitted he had no direct experience in the oil and gas industry:

Q. Have you ever been an employee of a E&P company?

A. What is E&P?

Q. That would be the type of company my client is; exploration and production. Have you ever been employed by any of them.

A. No, sir, I have not.

³¹ The court further noted the court noted “[t]he fact that a proposed witness is an expert in one area, does not *ipso facto* qualify him to testify as an expert in all related areas.” *Id.* at 391 (citations omitted).

Q. So you didn't even know what that was before you entered the courtroom today?

A. That is correct.

Q. Have you ever been employed by any natural gas production company?

A. I have not.

* * *

Q. Do you have any degrees in petroleum engineering?

A. I do not.

* * *

Q. Do you ever manage any oil and gas lease holdings?

A. I do not.

Q. Are you ever responsible for relocating a non-jurisdictional gathering pipeline?

A. I am not.

Q. Have you ever been asked to advise someone what a non-jurisdictional gas pipeline is or is not?

A. I have not.

* * *

Q. Did you ever write any articles regarding a non-jurisdictional gathering line?

A. No, sir, I have not.

Q. Were you ever employed as a pipeline supervisor?

A. I was not.

(See SCT001193-1194.) Instead, Mr. Updike claimed expertise based upon limited exposure to the industry while working on archeological projects conducted under the National Historic Preservation Act. (See SCT001176-1187; 1350-1352.) Further, Mr. Updike's pipeline experience came from transmission company projects, *i.e.*, companies specifically in the business of transmitting gas through pipelines and not in the business of exploring or producing it. (See *id.*) Nevertheless, Mr. Updike was permitted to testify that it was foreseeable for EPC, an exploration and production company, to expect to encounter a cemetery. (See SCT001350-1354.)

As noted in *Duncan*, the foundation for Mr. Updike's experience was insufficient to allow him to testify as to foreseeable circumstances and appropriate procedures when relocating or constructing non-jurisdictional gathering pipelines. Mr. Updike admitted he possessed no relevant knowledge, training, or experience with regard to these industry-specific subjects. The admission of this testimony was significant in that if the jury believed that EPC should have expected to encounter a cemetery during the pipeline relocation, then by implication the jury would have expected EPC to conduct an archeological investigation or survey prior to construction.

Like *Shreve*, although Mr. Updike *may* have been qualified to testify on general principles of archeology, his opinion regarding the reasonable expectations of EPC fall well outside the parameters of his expertise. Absent *specific* experience or knowledge from within the oil and gas industry, or as an employee of an exploration and production company, Mr. Updike was not qualified to render such an opinion. Without the appropriate expertise, these opinions were "based merely on his belief and speculation and [are] therefore not reliable" and should have been excluded. *Free*, 25 Fed. Appx. at 172.

b. The Admission of Mr. Updike's Testimony Concerned Substantial Issues of Liability and Was Not Harmless.

Granting a new trial predicated on improperly admitted evidence is warranted when the error is "inconsistent with substantial justice." W. Va. R. Civ. P. 61. This inquiry "involves an assessment of the likelihood that the error affected the outcome of the trial." *State v. Bradshaw*, 193 W. Va. 519, 539, 457 S.E.2d 456, 476 (1995); *see also Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 111, 459 S.E.2d 374, 388 (1995) ("A party is entitled to a new trial only if there is a reasonable probability that the jury's verdict was affected or influenced by trial error.").

Where evidence is “not significant when viewed from the perspective of the evidence as a whole,” erroneous admission of such evidence is generally harmless. *Geary Land Co. v. Conley*, 175 W. Va. 809, 812, 338 S.E.2d 410, 413 (1985). On the other hand, the admission of substantial evidence that goes “to the heart of the case” is generally harmful and necessitates a new trial. *See Skaggs v. Elk Run Coal Co., Inc.*, 198 W. Va. 51, 78, 479 S.E.2d 561, 588 (1996) (finding flawed jury instruction on burdens of proof “went to the heart of the case” and such error “require[ed] a new trial”). Due to the weight afforded to expert opinions, courts have generally found a new trial appropriate where a trial court admits an expert opinion outside the scope of the expert’s area of expertise. *See, e.g., Robertson v. Norton Co.*, 148 F.3d 905 (8th Cir. 1998); *McMillan v. Weeks Marine, Inc.*, 478 F. Supp. 2d 651 (D. Del. 2007); *Scott v. Yates*, 643 N.E.2d 105 (Ohio 1994); *Vanden-Brand v. Port Auth. of Allegheny Cnty.*, 936 A.2d 581 (Pa. Commw. Ct. 2007).

For example, in *Lacy v. CSV Transp. Inc.*, 205 W. Va. 630, 520 S.E.2d 418 (1999), this Court held that an error is not harmless when it leaves this Court with “grave doubts” about the underlying verdict. *Id.* at 644, 432. In *Lacy*, the circuit court allowed the defendant “to inform the jury about the possible legal effect of joint and several liability [and] allowing it to go so far as to effectively exhort the jury to absolve it of all liability on such basis.” *Id.* 643, 431. This Court found that defendant’s statements “gave the misleading impression that if [the defendant] was found in any way at fault, it would invariably be left to pay the entire judgment.” *Id.* Because the jury found the defendant not responsible for the accident at issue and these “broadly prejudicial remarks advocated such an outcome” this Court determined it was “left with grave doubts” regarding the outcome of the case and, therefore, “precluded from finding that the trial court’s error was harmless.” *Id.* at 644, 432.

In the instant case, Respondents sought to prove EPC—as an exploration and production company—should have expected to encounter a cemetery in the course of its operations and, thus, should have taken preemptive steps to ensure no harm was done. Mr. Updike’s “expert” opinion was the only evidence Respondents could hope to submit in order to support this theory. As set forth above, because of the weight given to expert opinions, the admission of that opinion itself is sufficient to warrant a reversal.

Furthermore, the significance of the testimony is apparent when considered in the context of the evidentiary hurdle Respondents’ had to overcome. Specifically, Respondents had to get around the uncontroverted testimony that EPC was not on site during the bulldozer incident that allegedly caused the desecration and was only provided with its contractor’s version of the events after-the-fact. Thus, this unqualified foreseeability opinion was essentially Respondents only way to tie EPC to the cemetery before its alleged desecration. Accordingly, the opinion could not have been more critical to Respondents’ case.

Because Mr. Updike’s unqualified opinion pertained to perhaps the most critical issue in this case, there is virtually no way it could not have had a significant impact on the jury’s deliberations or ultimate outcome. Mr. Updike simply was not qualified to render that opinion and the Court’s admission of the same was an abuse of discretion. Accordingly, EPC is entitled to reversal.

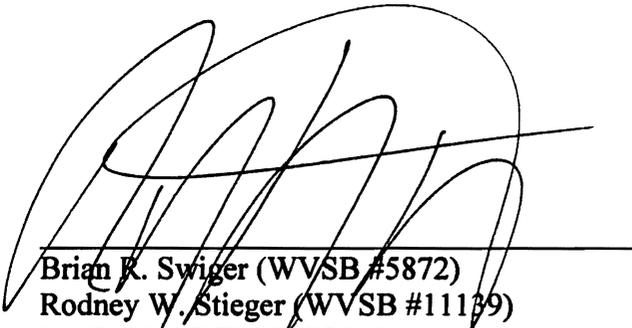
VI. CONCLUSION

As set forth above, the Circuit Court abused its discretion and committed error requiring reversal. Specifically, the Circuit Court failed to provide the jury with any instructions on punitive liability, failed to provide appropriate instructions regarding the inapplicability of certain Federal authorities impacting the issue of liability, improperly gave an adverse inference

instruction, and allowed an unqualified expert to render a liability opinion against EPC. For these reasons, EPC requests that this Court reverse the verdict and award a new trial.

**EQUITABLE PRODUCTION
COMPANY**

By Counsel

A large, stylized handwritten signature in black ink, appearing to be 'B. Swiger', is written over a horizontal line. The signature is highly cursive and loops around the line.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**EQUITABLE PRODUCTION COMPANY,
Defendant Below,**

Petitioner,

v.

No. 13-0934

**(ON APPEAL FROM THE CIRCUIT
COURT OF LOGAN COUNTY, WEST
VIRGINIA – CIVIL ACTION NO. 06-C-238)**

**CORA PHILLIPS HAIRSTON, et al.,
Plaintiffs Below,**

Respondent.

CERTIFICATE OF SERVICE

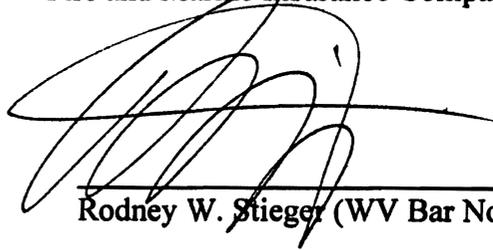
I, Rodney W. Stieger, counsel for defendant Equitable Production Company, do hereby certify that on December 2, 2013 service of the foregoing *Petitioner's Brief* was made upon counsel of record by causing a true and exact copy to be placed in the United States mail, postage prepaid, addressed as follows:

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