

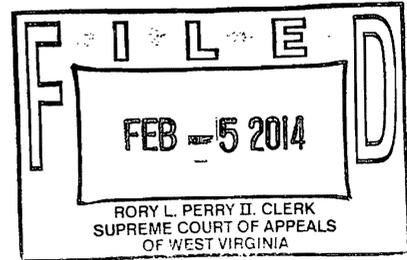
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**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)**

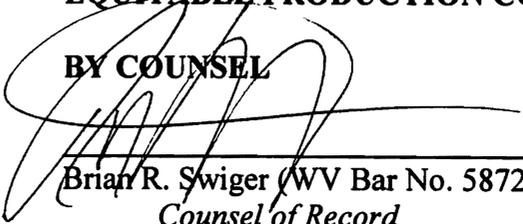
**CORA PHILLIPS HAIRSTON, et al.,  
Plaintiffs Below,**

**Respondent.**

**PETITIONER'S REPLY BRIEF**

**EQUITABLE PRODUCTION COMPANY**

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## ARGUMENT

### A. STANDARDS OF REVIEW

Equitable Production Company (“EPC”) now further clarifies the standards of review applicable to this appeal. As set forth in its Brief, “[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 EPC’s proposed punitive damages instructions during the liability phase of trial, and the Circuit Court’s failure to instruct the jury that the authority of the Federal Energy Regulatory Commission and the Natural Gas Act did not apply, are reviewed for an abuse of discretion.

Additionally, as set forth in its Brief, “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 Respondents’ archeologist to testify on matters outside the scope of his expertise is reviewed for an abuse of discretion.

Finally, “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). As such, this Court has the authority to consider the jury instructions as a whole to determine whether the jury was “carefully” instructed on the issue of punitive damages during the liability phase of trial, and also whether it was proper to provide the jury with an adverse inference instruction against EPC.

**B. ASSIGNMENTS OF ERROR.**

**1. Respondents Failed to Refute EPC's showing that the Jury was Not Adequately Instructed on Punitive Liability as a Matter of Law or that the Circuit Court Abused its Discretion in Failing to Provide Proposed Jury Instructions 52-54.**

The Circuit Court's failure to provide EPC's proposed punitive liability instructions was an abuse of discretion and resulted in insufficient jury instructions as a whole, such that the jury did not understand the issue of punitive liability when rendering its verdict. Despite Respondents' admission that a "*Mayer* instruction on punitive damages was appropriate,"<sup>1</sup> Respondents objected to and the Circuit Court refused EPC's Proposed Instructions 52-54. These instructions covered the *Mayer* guidelines, defined the elements of punitive liability, and differentiated punitive liability from ordinary negligence. Respondents did not, because they could not, point to a single instruction covering these issues that would have "carefully explain[ed]" the nature of the conduct needed to impose punitive liability. As such, this Court should reverse and remand this case for a new trial where the jury may be appropriately instructed.

*Garnes* and its progeny recognized the importance of meaningful and adequate jury instructions in the realm of punitive damages. *Garnes* followed the United States Supreme Court's lead in *Haslip* to develop a "system" for awarding and reviewing punitive damages awards that provides: "(1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well-established principles; and (3) a meaningful and adequate appellate review, which may occur when an application is made for an appeal." Syl. Pt. 2, *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 658, 413 S.E.2d 897, 899 (1991). This Court also noted "[w]hen the trial court instructs the jury on punitive damages, the court should,

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<sup>1</sup> See Respondents' Brief at 9.

at a minimum, carefully explain the factors to be considered in awarding punitive damages.” *Id.* at syl. pt. 3 (emphasis added). Although the *Garnes* factors pertained to the jury’s discretion in setting the “amount” of a punitive damages award, the critical notion of limiting jury discretion and providing “careful” instructions apply equally to the jury’s imposition of punitive liability.

First, the jury should have been instructed that punitive damages could only be imposed if the jury found by a preponderance of the evidence that EPC acted in a willful, wanton, reckless, or malicious manner.<sup>2</sup> The proffered instruction—Respondents’ No. 26—included the punitive liability terms as an after-thought and outside the context of an actual liability instruction. (See SCT000144.) It did not instruct that Respondents must establish such elements by a preponderance of the evidence, nor, as discussed below, did it differentiate punitive conduct from ordinary negligence. (*Id.*) The appropriate “*Mayer*” instruction was included within EPC’s Proposed Instruction Nos. 52 and 53, which should have been given by the Circuit Court.

Second, West Virginia “has long required more than a showing of simple negligence to recover punitive damages.” *Bennett v. 3 C Coal Co.* 180 W. Va. 665, 671, 379 S.E.2d 388, 394 (1989); Robin Jean Davis & Louis J. Palmer, *Punitive Damages Law in West Virginia* 25, at 5 (2010), available at: <http://www.courtswv.gov/PunitiveDamages2010.pdf>. Distinguishing punitive liability terms from negligence was the core of the Fourth Circuit’s analysis in reversing the verdict in *Worldwide*. See Petitioner’s Brief at 20-21. Despite this deep-rooted principle of West Virginia jurisprudence, the jury was never told that negligence was not enough to warrant

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<sup>2</sup> In her article regarding punitive damages law in West Virginia, Justice Davis aptly noted that:

Pursuant to *Mayer v. Frobe*, a trial court should instruct the jury that it may return an award for punitive damages if the jury finds by a preponderance of the evidence that the defendant acted with gross fraud, malice, oppression, or with wanton, willful or reckless conduct, or with criminal indifference to civil obligations.

Robin Jean Davis & Louis J. Palmer, *Punitive Damages Law in West Virginia* 25, 32 (2010), available at: <http://www.courtswv.gov/PunitiveDamages2010.pdf>.

punitive liability. This differentiation-instruction was not covered by any other instruction provided to the jury and it involved a key element of liability. The absence of this instruction then precluded EPC from making this critical distinction during closing arguments—thus, substantially impairing its defense.<sup>3</sup>

Third, particularly in the absence of a differentiation-instruction, the Circuit Court should have provided EPC's Proposed Instructions 53 and 54 to define the terms willful, wanton, reckless, and malicious. A trial court should provide specific instructions when requested by a party. *Berkeley Homes, Inc. v. Radosh*, 172 W. Va. 683, 686, 310 S.E.2d 201, 204 (1983). Further, Respondents acknowledged that EPC's proposed instructions contained accurate statements of law. See Respondent's Brief at 11. Notably, a trial court's refusal to provide an accurate instruction does not constitute error only where it is not covered by another instruction. See Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 51[4], at 1129 (4<sup>th</sup> ed. 2012) (citing *Roberts v. Stevens Clinic Hosp. Inc.*, 176 W.Va. 492, 345 S.E.2d 791 (1986)).

EPC's Brief illustrated how the Fourth Circuit and other courts have found it is necessary and appropriate to define such punitive terms. Petitioner's Brief at 19-23. In addition, Justice Ketchum recently acknowledged that definition-type instructions were appropriate in punitive cases, stating:

Actual malice should be defined as: (1) "the state of mind under which the defendant's conduct is characterized by hatred, ill will or a spirit of revenge or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987). Because "state of mind" is difficult to prove, actual malice can be inferred from the defendant's conduct and the surrounding

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<sup>3</sup> The transcripts of closing arguments were not included in the appendix as they would only be cited to show the absence of these arguments. To the extent this Court would deem it necessary to include these transcripts in its review of the record, the entire record is available to the Court pursuant to Rule 7(e) of the West Virginia Rules of Appellate Procedure.

circumstances. *Burns v. Prudential Securities, Inc.*, 167 Ohio App.3d 809, 857 N.E.2d 621 (2006).

*Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 586, 694 S.E.2d 815, 919 (2010) (Ketchum, J., concurring). Justice Ketchum also noted that the bifurcation of punitive liability from damages was an appropriate mechanism to prevent a defendant's wealth from being "improperly used as a weapon to induce the jury to find for the plaintiff on the issue of liability."

*Id.*

The Supreme Court of Florida has also considered the issue of bifurcated punitive liability instructions and adopted a set containing definition-type instructions in the liability phase:

*PD 1 Punitive Damages-Bifurcated Procedure:*

*a. First stage of bifurcated punitive damages procedure:*

*(1) Introduction:*

If you find for (claimant) and against defendant (name person or entity whose conduct may warrant punitive damages), you should consider whether, in addition to compensatory damages, punitive damages are warranted in the circumstances of this case as punishment and as a deterrent to others.

The trial of the punitive damages issue is divided into two stages. In this first stage, you will decide whether the conduct of (name defendant whose conduct may warrant punitive damages) is such that punitive damages are warranted. If you decide that punitive damages are warranted, we will proceed to the second stage during which the parties may present additional evidence and argument on the issue of punitive damages. I will then give you additional instructions, after which you will decide whether in your discretion punitive damages will be assessed and, if so, the amount.

\* \* \*

Punitive damages are warranted if you find by clear and convincing evidence that (name person whose conduct may warrant punitive damages) was personally guilty of intentional misconduct or gross negligence. **"Intentional misconduct" means that (name person whose conduct may warrant punitive damages) had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to (claimant) would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage. "Gross negligence" means that the conduct of (name person whose conduct may warrant punitive damages) was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.**

“Clear and convincing evidence” differs from the “greater weight of the evidence” in that it is more compelling and persuasive. “Greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case. In contrast, “clear and convincing evidence” is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

*In re Standard Jury Instructions-Civil Cases (No. 00-2)*, 797 So. 2d 1199 (Fla. 2001) (emphasis added). Not only do these instructions establish that definitions should be provided to the jury, they also establish—contrary to Respondents’ suggestion—that the jury can be informed about the two-stage process for deciding punitive damages without prejudice.

Importantly, the failure to instruct on critical elements in criminal cases has consistently been found to constitute reversible error. *See, e.g., State v. Miller* 184 W.Va. 367, 368-369, 400 S.E.2d 611, 612-613 (1990). In *Miller*, this Court noted that the “failure to instruct the jury on the material elements . . . essentially deprives the jury of the opportunity to consider whether the state has actually proven those elements.” *Id.* at 369, 400 S.E.2d at 613. Likewise, the failure to instruct on the element of intent has specifically been recognized as reversible error. *See id.* (citing *State v. Barnett*, 168 W. Va. 361, 364, 284 S.E.2d 622, 623 (1981)). Like *Miller* and *Barnett*, the terms willful, wanton, reckless, and malicious were critical elements Respondents had to establish to recover punitive damages.

Respondents’ reliance on *Walton* is inapposite as “reasonable doubt” is the burden of proof applicable in criminal proceedings, not a critical element that must be proven. Further, the term “reasonable doubt” is not used in conjunction with other terms and cannot be confused with other thresholds, *i.e.*, negligence versus willful, wanton, reckless, or malicious, when provided in instructions. Finally, even though “reasonable doubt” may not be defined, it must still stand out when the jury is instructed on the burden of proof and cannot be “buried as an aside.” *United States v. Walton*, 207 F.3d 694, 698 (4th Cir. 2000) (citing *United States v. Smith*, 46 F.3d 1223,

1238 (1st Cir.1995)). Thus, unlike the instruction at issue (Respondents' No. 26, SCT000144), the term "reasonable doubt," though undefined, still may not be included as a mere after-thought.

Finally, contrary to the Respondents' claim, the jury's "reckless only" finding on the verdict form does not establish clarity in their verdict. Rather, this specific finding to the exclusion of the other punitive terms raises an even greater red flag. Despite being one of the oldest terms in Anglo-American tort law, "recklessness has remained one of the murkiest standards . . . ." Geoffrey C. Rapp, *Wreckage of Recklessness*, 86 Wash. U. Law Rev. 1, 115 (2008).

The concept of recklessness "is most often explained as conduct falling somewhere along the spectrum between negligence and intentional tort." *Id.* at 117. It "is said to involve something 'worse' or 'more blameworthy' than unreasonably risky or careless conduct (negligence), but something 'better' or 'less blameworthy' than a desired injurious result flowing from an intentional unlawful act (intentional tort). *Id.* Furthermore, "[p]laintiffs' expanded efforts in recent decades to obtain punitive damages . . . has led to an increasing number of cases concerning recklessness; and **elevated the importance of the distinction between recklessness and mere negligence.**" *Id.* at 123 (footnotes omitted) (emphasis added).

The jury's singular focus on the term "reckless" illustrates how the members alienated that term from the others included on the verdict form. Without a definition-type instruction to outline and provide context to the punitive liability terms, or a clear statement that negligence is insufficient to impose punitive liability, there is no way to know where on the "spectrum" the jury placed recklessness when rendering its verdict. This uncertainty can only be resolved by the granting of a new trial with adequate instructions.

Respondents failed to point to any evidence in the record to establish that punitive liability was “carefully explain[ed]” to the jury in accordance with *Garnes*. The jury did not receive a complete *Mayer* instruction, was not instructed that negligence was insufficient to establish punitive liability, and received no instruction as to the meaning or the nature of the terms/elements needed to establish punitive liability. Numerous courts, including the Fourth Circuit, have found jury instructions lacking this information insufficient and grounds for reversal.

Based on the foregoing, this Court should find that the Circuit Court abused its discretion in failing to provide EPC’s Proposed Instructions 52-54. Alternatively, this Court should find as a matter of law that the jury was not adequately instructed on punitive damages during the liability phase. Under either standard, the verdict should be reversed and a new trial granted.

**2. Respondents Failed to Point to any Evidence Establishing that EPC Reasonably Anticipated Litigation at the Time of the Alleged Spoliating Act.**

The Circuit Court erred by giving an adverse inference instruction against EPC because there was no anticipation of litigation at the time EPC committed the alleged spoliating conduct. Respondents do not point to any finding by the Circuit Court that EPC engaged in conduct to destroy evidence at a time it anticipated litigation, because none exists. Instead, Respondents set forth a litany of could haves, would haves, and should haves regarding EPC’s conduct before the alleged desecration occurred and further misstate the evidence of what EPC did after it learned of the alleged desecration.

Conduct, which arguably led to the alleged desecration, cannot also be used to prove spoliation. If it could, there would be no need for a Circuit Court to perform the analysis required by *Tracy v. Cottrell ex rel. Cottrell*, 206 W.Va. 363, 524 S.E.2d 879 (1999) in order to determine if an adverse inference instruction was appropriate. Instead, every time a party

established that a tortious physical alteration of property occurred, an adverse inference instruction would be appropriate. Respondents' misunderstanding, and the Circuit Court's reliance on the same, is clear from the adverse inference instruction given over EPC's objection which provided, in pertinent part: "Consequently, the expert witnesses retained by the Plaintiffs did not have an opportunity to inspect the cemetery as it existed before the pipeline construction." (SCT000150.) It is hard to imagine a situation, with or without spoliation, where the Circuit Court's statement would not be true. The Circuit Court's peculiar rationale for allowing an adverse inference instruction begs the question: when has an expert retained by a plaintiff alleging tortious physical alteration to property ever been able to inspect the physical location at issue before the alleged tortious alteration occurred?

Respondents rely on the fact that EPC could have prevented the desecration by performing a walk-through of the area or by performing a more thorough survey prior to work beginning. Respondents' Brief at 14-15. Respondents argue that if EPC would have done these things no desecration would have occurred. Importantly, none of these contentions are relevant to the issue of whether EPC spoliated evidence.

Respondents next argue there was a reasonable anticipation the evidence would be needed for litigation because grave markers, graves, hand dug steps, and the dirt itself are "essential to a desecration case." Respondents' Brief at 13. Although Respondents' assertions may be true, they have no application to the instant assignment of error. No matter how crucial a piece of evidence *would be* to litigation, a party cannot be guilty of spoliation if there is no appreciation that there *will be* litigation at the time the evidence is misplaced or destroyed. Here, there is no evidence EPC took any action at the cemetery at a time it reasonably anticipated litigation.

Respondents ignore or misconstrue the evidence which established there was no anticipation of litigation at the time of the alleged spoliation. First, no one from EPC was present when Mr. Keaton trammed through the cemetery. (SCT000719.) Second, no one from EPC was present or told about the General Pipeline Construction, Inc. (“GP”) employees cleaning up the area with rakes and shovels. (SCT000732; 743; 751.) Third, although Mr. Keaton testified to providing his rendition of the incident to his EPC contact within a few days, the documents admitted as evidence do not show that anyone from EPC became aware of the incident until September 15, 2004, when Steve Purdue received a fax from Ted Streit. (SCT000592-593; 620; 206-210.) Fourth, all of the work at issue was completed on-site by October of 2004, at latest, no more than two months after the alleged desecration. (SCT000609-611; 613-614.)

Respondents’ assertions that this work, *i.e.*, alleged spoliation, occurred on multiple occasions as late as two years after the alleged bulldozer incident is inconsistent with the record. The evidence relating to this work came from Steve Purdue’s handwritten notes from “9/27/04” and “10/25/04”, (SCT000212), and the two Tom Morris memoranda relating to his inspections (SCT000212-214.) As Mr. Morris noted, neither GP’s version of the events nor EPC’s own investigation led it to believe that any graves had been dug-up, removed, or knocked over. (*See id.*) Rather, Mr. Morris indicated in his first memorandum that, (SCT000212), only “six to twelve inches of cover” appeared to have been removed, the boundaries of the cemetery were difficult to determine, many of the graves were not marked or were covered with brush, and it was “possible [that] a casual observer [could] walk through the [area] and not realize they were in a cemetery.” (SCT000212.)

Further, although the exact date of Mr. Morris' second memorandum is unknown<sup>4</sup>, Mr. Morris' follow-up email states it was sent within a week or two of his first report, and Mr. Perdue's email also indicates that it was his "follow up[sic] report from 2004." (SCT000213.) Accordingly, the restoration work, reseeding, and replacement of the headstones referenced in his second memorandum would have been completed by October of 2004. (See SCT000213-214.) As such, Respondents' contention that "Equitable . . . twice backfilled, graded, seeded and mulched the area" is inconsistent with the record.

Likewise, the "interesting exchange" referenced by Respondents does not demonstrate that EPC anticipated litigation at the relevant time, *i.e.* August through October 2004. Rather, Respondents portrayed that line of questioning completely out of context. The line of questioning between Mr. Swiger, counsel for EPC, and Mr. Perdue, came after Respondents' lengthy examination that morning wherein Mr. Perdue referenced his July 19, 2006 email to Lester Zitkus, which stated: "Stevie Joe Branham informed me this afternoon that no fencing was installed in 2004, only marking with ribbon." (SCT000287.) After that email was introduced as Plaintiffs' Exhibit 32, counsel for Respondents began this line of questioning:

- Q. Okay. Only marking it with ribbon, there was nothing to stop four-wheelers from going through that cemetery, was there?
- A. I would - - correct.
- Q. A fence might have stopped it, right?
- A. I don't know.
- Q. How much does a fence cost?
- A. Now, that, I don't know.
- Q. Not much, right?
- A. I guess it would depend on what type of fence you put up.
- Q. Okay. So is it your testimony today that Equitable Production had absolutely no responsibility to put a fence up to try to stop people from going through the road that Mr. Keaton had created?
- A. I can't say what Equitable's responsibilities would be.
- \* \* \*

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<sup>4</sup> As set forth in Petitioner's Brief, an auto-dating feature made the exact date of this memorandum unknown. (SCT000658.)

- Q. Well, isn't it obvious, Mr. Perdue, that the reason you put up a fence is so people won't go through the graveyard?
- A. Well, just to define the cemetery and identify it and so forth.
- Q. To keep people out?
- A. I guess so, yes.
- Q. Except for the Berlin Wall, do we have any other walls that are meant to keep people in, that you know of? I mean, we're not keeping anybody in the cemetery, are we?
- A. Well - -
- \* \* \*
- Q. Right, So a fence would have been to keep people out of the cemetery?
- A. Correct.
- Q. And you didn't do it, right?
- A. No.

(SCT000602-603.)

This line of questioning is what prompted EPC's counsel to engage in the "interesting" line of questioning about the Land Department's hands becoming tied once litigation was anticipated. As is apparent from the record, this line of questioning had nothing to do with the activities performed prior to October 2004. As is also apparent, Respondents sought to use the fence issue as a sword against EPC to suggest it should have done something after the bulldozer incident to prevent trespassers from entering the property with four-wheelers. Interestingly, had EPC done so, Respondents would likely have claimed that the installation of the fence would have amounted to further desecration or spoliation of evidence.<sup>5</sup>

Additionally, Respondents failed to mention the testimony of the first plaintiff to learn of the alleged desecration, James Olbert, to support their claim that EPC spoliated evidence. Mr. Olbert testified that he learned of the desecration during the first week of August 2004, while

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<sup>5</sup> It is also worth noting that Respondents' claim that EPC "had ultimate control of the area" is entirely contrary to the jurisprudence of West Virginia. It is well established that a lessee of oil and gas rights may only make such use of the surface estate as "reasonably necessary" to further its mineral interest. *See Martin v. Hamblet*, 230 W. Va. 183, 191, 737 S.E.2d 80, 88 (2012); *Buffalo Mining Co. v. Martin*, 165 W. Va. 10, 14, 267 S.E.2d 721, 723 (1980); *Squires v. Lafferty*, Pt. 1, Syl., 95 W. Va. 307, 121 S.E. 90 (1924); *Syllabus, Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 61 S.E.2d 633 (1950). To the extent a fence could have been erected, it would have required the consent of the surface owner of the property.

visiting the area as part of a family reunion. (SCT001001.) Mr. Olbert further testified that he returned to the cemetery to take photographs before the end of August. (SCT001020; 1032.) Mr. Olbert provided those photographs to Joan Hairston, who sent a letter to Gaddy Engineering, which was then forwarded to Steve Perdue on September 15, 2004. (SCT 001031; 001005; 000208-210.) Notably, the letter from Ms. Hairston does not indicate that anyone had retained counsel or that there was a potential for litigation to ensue. Rather, it simply states that she was a concerned citizen who was told something had taken place at the cemetery. (SCT 000210.)

Mr. Olbert went on to testify about conversations he had with an unidentified employee of EPC whose phone number he obtained from men in an “Equitable” truck during one of his visits to the cemetery. (SCT 001004.) Importantly, Mr. Olbert was unable to testify when he obtained this contact information and when he actually spoke to the unidentified individual. (SCT 001004-001005.) Similarly, Mr. Olbert was unable to testify when he obtained counsel in this case, other than sometime after his meeting with Ms. Hairston. (SCT 001004-001005.) Based on the record before this Court, there is no evidence to suggest there was any reasonable anticipation of litigation until after October of 2004.

Respondents’ brief misconstrues the evidence in the record in an attempt to support an otherwise unestablished claim of spoliation. There was simply no evidence to warrant the adverse inference instruction against EPC and the Circuit Court abused its discretion in giving the same, over objection.

**3. Respondents Failed to Rebut EPC’s Claim that the Circuit Court Abused its Discretion in Failing to Provide EPC’s Proposed Jury Instructions 50 and 51.**

The Circuit Court’s failure to provide EPC’s Proposed Instructions 50 and 51, which sought to instruct the jury that the authority of the Federal Energy Regulatory Commission (“FERC”) and the Natural Gas Act did not apply, was an abuse of discretion. 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. *State v. Derr*, 192 W.Va. 165, 180, 451 S.E.2d 731, 746 (1994). Respondents admitted that the first two prongs of the test were satisfied, but argue that the refusal to give these instructions was not error because "it did not concern an important point in the trial so that the failure to give it seriously impaired Equitable's ability to effectively present its defense." That is simply not the case.

At trial, Respondents sought to hold EPC liable for desecration in large part because EPC did not perform surveys, archeological inspections, and other pre-construction investigations and activities. Indeed, Respondents continue to repeatedly criticize EPC for not engaging in these activities throughout their Brief. A critical component of EPC's defense against these attacks was establishing that EPC had no duty to undertake archeological inspections because those pre-construction activities are mandated by Section 106 of the National Historic Preservation Act, (16 U.S.C. §470(f)), which is triggered by the authority of FERC and/or the Natural Gas Act. Establishing the parameters of EPC's duty can hardly be considered an unimportant point in the trial. In essence, if FERC and the Natural Gas Act did not apply, EPC was under no legal duty to perform the tasks Respondents' alleged it failed to perform.

Respondents assert that this is of no consequence because there is no dispute that the statutes did not apply. Respectfully, Respondents cannot possibly know that there was no dispute as to their applicability amongst the members of the jury. Even though a dispute may not have existed among counsel, the refusal, over objection, to instruct the jury with a correct statement of the law that would remove the possibility of any confusion was an abuse of

discretion. As explained in Petitioner’s Brief, Mr. Updike offered testimony suggesting to the jury that archeological surveys or investigations were regularly conducted in the natural gas industry prior to constructing or relocating pipelines. Petitioner’s Brief at pp. 31-33; (SCT001176-1187.) Specifically, Mr. Updike offered lengthy testimony concerning archaeological surveys and other work he was previously involved in related to pipelines. Importantly, Mr. Updike based this testimony upon his prior work on large interstate pipelines as opposed to non-jurisdictional gathering lines like the one at issue here. (SCT001184.) As a result, all the previous work Mr. Updike discussed involved pipelines subject to the authority of FERC and the Natural Gas Act. *See* Petitioner’s Brief at 30.

Respondents argue that Mr. Updike’s testimony was only part of his qualifications as to archeology in the gas industry and not part of his substantive opinion. Notably, while Respondents’ counsel may have astutely noted such distinction, there is no guarantee the issue was so clear to the jury. That, in fact, is why juries are instructed on the law.

The Circuit Court was required to “adequately inform the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party.” *See Worldwide Network Servs., LLC v. Dyncorp Int’l, LLC*, 365 Fed. Appx. 432, 447 (4<sup>th</sup> Cir. 2010); *see also State v. Skidmore*, 228 W.Va. 166, 170, 718 S.E.2d 516, 520 (2011) (“Jury 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.”). EPC’s Proposed Instructions 50 and 51 did just that, by clearly informing the jury that FERC and the Natural Gas Act did not apply. These instructions were designed to focus the jury on the actual issues involved and minimize the possibility of jury confusion. These instructions related directly to the issue of negligence and whether EPC had a legal duty to act as Respondents—at least

implicitly—claimed it should. The omission of these instructions was an abuse of discretion requiring reversal by this Court.

**4. Respondents Failed to Refute EPC’s Claim that the Circuit Court Abused its Discretion in Allowing Respondents’ Archeologist to Testify on Matters Outside the Scope of his Expertise Under Rule 702.**

Respondents failed to identify any skills, knowledge, education, experience, or training that would have qualified their expert archeologist to render opinions on EPC’s actions or inactions regarding the pipeline relocation at issue in this matter. They confused the issues and misconstrued the record to leave this Court with the impression that EPC admitted many of the same issues addressed by their expert archeologist. As set forth below, the record in this case does not support Respondents’ claims and the Circuit Court erred in allowing this unqualified expert testimony.

First, Respondents misrepresented the record when suggesting that “[EPC] chose not to order a survey of the area or conduct a walk-through of the area . . . .” Respondent’s Brief at 27. Mr. Gilmore unequivocally testified that the operations department walked and flagged the pipeline relocation route in January of 2004. (SCT000498; 507-508.) The relocation route was then provided to GP so that it could submit its bid for the construction work. (SCT000498.) Because the pipeline was being relocated on a large, rural tract of land, the points of ingress and egress to the pipeline relocation route were not significantly inhibited by houses, commercial properties, or other known structures. (SCT000509.) As such, EPC left the selection of the ingress and egress points, *i.e.*, access roads, to the pipeline contractor, (SCT000509; 511), with whom it had eight to ten years of experience, (SCT000553; 556), and who was in the business of constructing pipelines. (SCT000704.)

Second, Respondents misconstrued Mr. Gilmore's testimony to say that the desecration could have been avoided if EPC had walked the access road prior to construction. *See* Respondents Brief at 27. In reality, Mr. Gilmore testified that "if you could see, you could identify it, it wouldn't have happened." (SCT000512.) Mr. Gilmore's testimony was consistent with the report contained in Mr. Morris's first Memorandum from September of 2004 which indicated that it was "possible for a casual observer to walk through the [area] and not realize that they were in a cemetery." (SCT000212.) Mr. Gilmore never once testified, as Respondents insinuate, that EPC was required to select or walk the access points, or that the incident could have been avoided. To the contrary, the evidence presented at trial showed that GP, who held itself out to be a competent pipeline contractor, was expected to select appropriate ingress and egress points where it deemed necessary, based upon its own construction activities. (*See* SCT000703.)

Third, Respondents mischaracterized the evidence relating to statements made about the presence of "unmarked cemeteries" in Southern West Virginia. Respondents refer to cross-examination testimony pertaining to a press release issued by EPC, around the time that the Respondents filed this lawsuit, that indicated it was "not uncommon to encounter unmarked cemeteries due, in part, to West Virginia's deep history." (SCT000518; 622.) The testimony relating to this statement does not provide, as they suggest, that is a "common" occurrence, or that it would have been foreseeable for EPC to expect its pipeline contractor to construct an access road through a cemetery. Additionally, Respondents' focus on "unmarked" cemeteries is misplaced as the *Hairston* opinion clearly required that the cemetery at issue be "clearly marked" in a manner that indicated its use as a cemetery. *See* Syl. Pt. 8, *Hairston v. Gen. Pipeline Const.*,

*Inc.*, 226 W. Va. 663, 666, 704 S.E.2d 663, 666 (2010). Under the *Hairston* standard, issues relating to “unmarked cemeteries” have no relevance.

Respondents focused on these sorts of extraneous facts in hopes of diverting the Court’s attention from the issue squarely before it—Mr. Updike’s lack of qualifications. EPC has never contended that Mr. Updike was not qualified to render opinions relating to the field of archeology. Rather, EPC’s argument relates to Mr. Updike’s opinions as to what was foreseeable for an exploration and production company in the oil and gas industry when hiring a pipeline contractor to relocate a non-jurisdictional gathering pipeline.

Respondents do not dispute that Mr. Updike had no prior experience in the oil and gas industry as a whole, or in the business of relocating pipelines. They acknowledge that his only experience with the industry was during his work on federally regulated projects that required pre-construction archeological surveys. Nevertheless, Mr. Updike was permitted to offer opinions from the perspective of an exploration and production company regarding what was foreseeable, imply that archeological inspections are common place in the industry, and most importantly, that EPC had a duty to walk and select the access roads used during the construction process. (SCT1176-1187; 1270; 1353.)

Mr. Updike’s qualifications fail to satisfy even the minimal threshold test set out in Rule 702 of the West Virginia Rules of Evidence and discussed at length in *Gentry*. The expert in *Gentry* was a police officer who was asked to provide opinions about the insufficiency of the training, instruction, and supervision provided to the injured police officer-plaintiff. *Gentry v. Mangum*, 195 W.Va. 512, 525, 466 S.E.2d 171, 184 (1995). Accordingly, this Court had no problem concluding that the expert had “more than a passing knowledge of the subject” at issue—after all, he was a police officer opining on police policies. *Id.* at 526, 466 S.E.2d at 185.

This Court recently revisited the qualification issue in *Perrine*, where it found an environmental sciences expert was qualified to provide testimony relating to risk assessments in the realm of human exposure to toxic agents. *Perrine*, 225 W. Va. at 538, 694 S.E.2d at 871. There again, the expert provided testimony relating to his background in understanding the health effects of certain substances, his knowledge and experience in calculating such risks, and his role in developing the current risk assessments used in his field at present. *Id.*

Unlike *Gentry*, the expertise here is not an apples to apples comparison. Mr. Updike was an archeologist. He had no experience, knowledge, or training in the field of oil and gas, he had never managed oil and gas lease holdings, and he had never been responsible for relocating any sort of pipelines. Likewise, unlike *Perrine*, Mr. Updike provided no testimony establishing a foundation to support his opinion that EPC should have selected and walked the access road at issue, prior to GP beginning construction. Mr. Updike did not speak to any exploration and production companies about their policies and practices in contracting with pipeline contractors, what pre-construction activities they typically undertake, or what instructions they give to their contractors before construction begins. In fact, Mr. Updike admitted he had no knowledge as to how the contract between EPC and GP even worked, or what it required. (SCT0001270.)

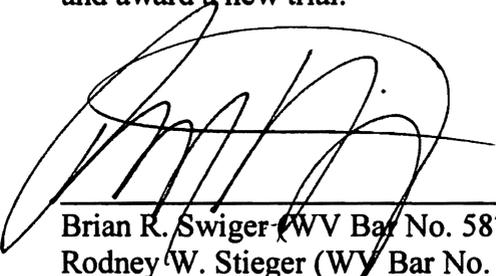
EPC's argument is consistent with the minimal threshold test expounded in *Gentry* which required a member of a particular profession, but not necessarily "a specialist in a particular branch" of that profession. *Gentry*, 195 W.Va. at 526, 466 S.E.2d at 185. As Justice Ketchum noted in *Perinne*, "Retained expert witnesses are like eggs. You can buy them by the dozen—they are just more expensive." *Perrine*, 225 W. Va. 482, 582, 694 S.E.2d at 915 (Ketchum, J., concurring). To the extent Respondents intended to put on evidence suggesting EPC was required to survey, select, or walk the access points all along the relocated pipeline route,

measuring over one-mile, (SCT000703), Respondents should have been required to obtain an expert who possessed the requisite knowledge, skill, experience, training, or education in the field of oil and gas to provide that opinion. The admission of this testimony, without the appropriate qualifications under Rule 702, was an abuse of discretion and this Court should reverse the verdict.

### **CONCLUSION**

The record below clearly establishes, as a matter of law, that the jury did not receive adequate instructions regarding punitive damages during the liability phase of trial. Further, the Circuit Court abused its discretion in failing to provide EPC's Proposed Instructions 50 and 51 pertaining to the inapplicability of FERC and the Natural Gas Act, and instructions 52-54 pertaining to punitive damages liability. The Circuit Court also erred as a matter of law, by providing an adverse inference instruction against the weight of the evidence. Finally, the Circuit Court abused its discretion by allowing Respondents' archeologist to offer opinions outside of his qualifications under Rule 702 of the West Virginia Rules of Evidence. For these reasons, Equitable Production Company respectfully requests that this Court reverse the verdict and award a new trial.

**EQUITABLE PRODUCTION  
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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**

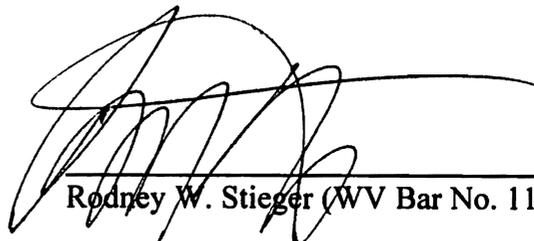
I, Rodney W. Stieger, counsel for defendant Equitable Production Company, do hereby certify that on **February 5, 2014** service of the foregoing *Petitioner's Reply Brief* was made upon counsel of record by causing a true and exact copy to be placed in the United States mail, postage prepaid, addressed as follows:

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