No. 12-0719

SUPREME COURT OF APPEALS OF WEST VIRGINIA

HESS OIL COMPANY, INC.,
Defendant/Petitioner,

v.

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

On Appeal from the
Circuit Court of Harrison County, West Virginia
No. 10-C-20, The Honorable Thomas A. Bedell

RESPONDENTS' BRIEF

John H. Tinney
(W.V. No. 3766)
John H. Tinney, Jr.
(W.V. No. 6970)
THE TINNEY LAW FIRM PLLC
222 Capitol Street, Ste. 500
Charleston, WV 25301
Telephone: (304) 720-3310
johntinney@tinneylawfirm.com
jacktinney@tinneylawfirm.com

Christopher P. Ferragamo
(W.V. No. 11496)
JACKSON & CAMPBELL, P.C.
1120 Twentieth Street, N.W.,
South Tower
Washington, D.C. 20036
Telephone: (202) 457-1600
cferragamo@jackscamp.com

Kathleen M. Sullivan
(*Pro Hac Vice* admission granted on June 5, 2012)
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Telephone: (212) 849-7327
kathleensullivan@quinnemanuel.com

Attorneys for AIG Domestic Claims, Inc., n/k/a Chartis Claims, Inc., and Commerce and Industry Insurance Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes and Rules

PRELIMINARY STATEMENT

Not content with $30 million in damages in a case in which it suffered no economic harm, Hess Oil Company ("Hess") has lodged this appeal in an attempt to extract another $28 million from two insurance companies, Commerce and Industry Insurance Company ("C&I") and Chartis Claims, Inc. ("Chartis Claims," and, together with C&I, the "Chartis Defendants"), whose only conduct here was to act on their good-faith interpretation of an insurance contract. Even the trial court's remaining judgment violates numerous provisions of West Virginia and federal law; to uphold it and then to tack on tens of millions more would be an affront to due process.

In October 1997, Hess filed an application for insurance with C&I, in which it stated that it had not in the preceding five years been subject to a claim for "cleanup[] or response action" and that it did not "know of any facts or circumstances which may reasonably be expected to result in a claim or claims being asserted against [it] for environmental cleanup or response." A3415 (V5). The policy issued, and Hess subsequently filed a claim, which C&I honored and paid for a decade. In 2009, Chartis Claims employee Mileidy Perez discovered on her own that, in April 1997, Hess had received from the West Virginia Department of Environmental Protection ("WVDEP") a document entitled "Confirmed Release—Notice to Comply." Tr. 1518-22 (V12). At that point, the Chartis Defendants asked Hess's former principal, patiently and repeatedly, to explain how or why this Notice did not render the representations in its application false. Hess refused to provide any information or explanation, and the Chartis Defendants, through their own unassisted investigation, reached the conclusion that the 1997 application had been so incomplete and misleading that the policy should not have issued in the first place. Faced with an apparently false application and a client who refused to explain the inaccuracies, the Chartis Defendants made a legitimate choice to disclaim coverage.

Against all evidence, Hess decided that this disclaimer was in bad faith. It sued, presenting as the only evidence of damages its non-party former shareholders' testimony about their personal emotional harms. After a jury awarded *Hess* $5 million in damages for *its shareholders'* alleged psychological injuries, Hess pursued punitive damages by presenting evidence of the finances of the Chartis Defendants' ultimate corporate parent, AIG, Inc. The jury heard specific testimony that six of AIG, Inc.'s executives had received $53 million in total compensation in 2010; it then awarded Hess precisely $53 million in punitive damages.

That award grossly exceeds the bounds set by the Constitutions of West Virginia and of the United States, and the trial court at a minimum was correct to remit that amount to $25 million, reducing the total judgment to $30 million (an amount the Chartis Defendants contend is itself erroneous and subject to vacatur or reversal in their own appeal to this Court). In order to ensure that punitive damages maintain a reasonable relationship to the injury involved in a given case, West Virginia presumptively prohibits punitive damages awards more than five times larger than the corresponding compensatory verdict. This rule admits of only rare exceptions, as where extraordinary punishment is needed to ensure adequate deterrence of those who act with "actual evil intention" or "intention to cause harm." Hess has not shown and cannot show the existence of any such intention here. Even assuming *arguendo* that the Chartis Defendants misinterpreted their contractual obligations, the evidence supports their good-faith belief that they were acting within the terms of the insurance policy to disclaim coverage upon learning of a material misstatement in Hess's policy application. There is no evidence from which to infer malevolent intent to harm Hess or anyone else. Hess cannot avoid application of West Virginia's constitutional limitation on its recovery, and its appeal should be denied.

COUNTERSTATEMENT OF THE CASE

The Chartis Defendants set out their statement of the instant case in their opening brief in appeal No. 12-0705 (the "0705 Opening Brief"), which is incorporated herein by reference. The additional facts that follow provide further context to explain why Hess's allegations of the Chartis Defendants' so-called "black-hearted actions" (Hess Br. 12) were in fact nothing more than the Chartis Defendants' pursuit of a good-faith inquiry about the existence of insurance coverage, in which Hess refused to cooperate outside of litigation.

A. The Chartis Defendants' Decade-Long Coverage Of Hess's Claims

The Chartis Defendants had insured Hess for environmental remediation claims since 1995. Specifically, in 1996, C&I issued Hess an insurance policy, retroactively effective to October 1, 1995, that provided coverage until October 20, 1997. A3333 (V5). In an application dated October 30, 1997, Hess applied to renew its environmental remediation coverage. A3415-18 (V5). C&I issued a new policy on December 8, 1997, retroactively effective to October 21, 1997 (the "Policy"). A3419-35 (V5). As explained to the jury at trial, it was C&I's practice to "issue renewals automatically even if we don't have an application at the time" (Tr. 933 (V11)), so as to avoid any gap in coverage (Tr. 1440 (V12)). Hess also purchased from C&I an extended reporting period for the Policy through May 5, 1999. A3466 (V5).

On January 6, 1999, Hess submitted a claim to C&I under the Policy, relating to "found contamination" upon the removal of an underground storage tank ("UST") at the Mt. Storm Exxon site. A3459-60 (V5). The Chartis Defendants acknowledged receipt of the claim on January 12 (A3461 (V5)), and accepted coverage of the claim on July 16 (A3462-68 (V5)). In accepting coverage, the Chartis Defendants noted their understanding that the contamination at issue "was identified in March 1998," and "was discovered when [USTs] were removed following notification from the adjoining landowner that a fuel smell was detected in the basement of their building." A3467 (V5). The coverage acceptance letter also noted that any "costs incurred to reconstruct, repair, replace, upgrade or rebuild a[] [UST] system are precluded from coverage" under the Policy, as well as "any costs, charges, or expenses incurred to investigate or verify that a[] Confirmed Release took place at the site." A3467-68 (V5).

The Chartis Defendants began paying Hess Oil's costs almost immediately. As former Hess shareholder and employee Brenda Brown testified, upon acceptance of coverage she "sent in all of the invoices that we had in the Mount Storm site folder" to the Chartis Defendants. Tr. 1378 (V12); *see also* Tr. 513-14 (V11) (the Chartis Defendants' initial work on the Hess claim involved "just reviewing of the invoices that would—you know, whether or not they would have fallen within the coverage"). The invoices totaled $42,043, and the Chartis Defendants approved payment of $27,463 of these costs on July 20, 1999. A1392 (V2). The Chartis Defendants refused to pay the remaining $14,580 "because the invoices pertain to costs which are not covered under the policy" in that they related to "Tank Replacement," "Tank Testing," or "Investigative Cost." A1392-94 (V2). The Chartis Defendants continued to cover Hess's claims throughout that year, and to pay for the work of Hess's consultants, including Ryan Environmental ("Ryan"), to remediate the Mt. Storm site into the next decade. A3637-52 (V5).

B. The Chartis Defendants' Discovery Of The 1997 Release

In the summer of 2007, Mileidy Perez, a Senior Analyst at Chartis Claims, was assigned to Hess's claim. Tr. 891-92 (V11); 1503 (V12). Shortly thereafter, Al Anderson, Ryan's lead investigator, raised concerns with Perez that their monitoring equipment had begun "to see sampling again that was too high" and that "spur[red] a whole different investigation." Tr. 964 (V11). By the spring of 2008, it had become clear that "[t]he remediation results ha[d] not turned out as anticipated" at the Mt. Storm site, and that "there[was] a need to determine whether there [was] another contributing factor" to the petroleum contamination. Tr. 1509

(V12); A3634 (V5).[1] The Chartis Defendants sent their in-house environmental consultant, Michael Schmidt, to visit the site in April 2008, along with Anderson and a representative of the WVDEP. Tr. 1511-12 (V12); A3633 (V5). The Chartis Defendants also authorized the use of a ground penetrating radar test to look for other abandoned USTs in the area. Tr. 1512-13 (V12); A3633 (V5). Throughout this time, the Chartis Defendants continued to pay Hess's claim, authorizing payment of over a quarter of a million dollars from July 2007 to May 2009 (Tr. 1517-18 (V12)), and over six hundred thousand dollars in total (A3622 (V5); A141 (V1)).

As a result of these investigative activities, Ryan proposed a much more aggressive remediation plan that would cost an estimated $500,000. Tr. 1516 (V12); A3632 (V5). Ms. Perez "understood that the remediation at the site was going to cost more money and [the Chartis Defendants] had money on reserve, but we didn't have enough for continuing to do the remediation." Tr. 1519 (V12). In order to justify her request for additional reserves, Perez needed to verify the history of the Mt. Storm claim, including the WVDEP's original notice of confirmed release issued. Tr. 1519-21 (V12). In addition, Perez was interested in Hess's Tank Closure Report, as she knew the original contamination was initially reported in 1998 when Hess's USTs were removed, and wanted to see "whether there was any information in there that could indicate anything concerning this release"—in particular, whether there were other potential sources of contamination at the site. Tr. 964 (V11); *see* Tr. 1519 (V12).[2] Accordingly, she instructed Ryan to file a Freedom of Information Act ("FOIA") request with the WVDEP to find these historical documents. Tr. 666-67 (V11); Tr. 1519, 1560 (V12).

[1] As Anderson explained to the jury, the continued remediation and investigation of the Mt. Storm site "was delayed until spring" 2008 due to bad weather. Tr. 1293 (V12).

[2] Perez explained that she conducted a very thorough search for the entire Hess underwriting file, but because the file was kept by a third-party underwriter, she was unable to find it and thus unable to find the Tank Closure Report. Tr. 926-28 (V11).

C. The WVDEP's 1997-1999 Correspondence With Hess

The FOIA request returned documents that were "dramatically different" from what Perez expected to receive. Tr. 1522 (V12). Instead of information showing a release in February or March 1998,[3] the WVDEP's response to the FOIA request contained a lengthy series of notices, letters, and inspection reports—all relating to Leak ID # 97-040—suggesting that Hess had been aware of a release since April 1997, well before the Policy came into effect in October of that year. Specifically, on April 15, 1997, the WVDEP had issued a "Confirmed Release—Notice to Comply" to Hess for the Mt. Storm site, where the WVDEP had detected both "soil contamination" and "groundwater contamination." A3365-66 (V5). In a letter dated September 9, 1997, the WVDEP again told Hess that "[i]t has been confirmed that a petroleum release has occurred at the [Mt. Storm] facility" and that "[t]his contamination may be considered a threat to human health and the environment." A3385 (V5). The WVDEP ordered Hess to conduct an investigation and to complete a Corrective Action Plan ("CAP"), due to the WVDEP in December 1997. A3385-86 (V5).

The documents Perez reviewed further showed that, on February 23, 1998, the WVDEP issued a letter to Hess, reporting an "observed changed conditions" at the Mt. Storm site that included "the presence of [petroleum] vapors, as well as petroleum slicks and globules on the water from the footer drain around the church" located on the adjoining property. A3436 (V5). In the same letter, the WVDEP noted that "as was previously specified in [the WVDEP's] letter dated September 9, 1997, by now you should have conducted and submitted a subsurface investigation to define the extent of contamination of soils and ground water associated with the release." A3436 (V5). The WVDEP requested copies of the CAP and other reports that had

[3] The WVDEP documents sent to the Chartis Defendants did not contain a Tank Closure Report. Tr. 1375 (V12); *see* A3614-16 (V5).

been due at the end of 1997, but which Hess had never completed. A3436 (V5).

Hess's failure to comply with its obligations to the WVDEP continued for months on end. On June 12, 1998, the WVDEP issued a "Notice of Non-Compliance," stating that Hess had still "failed to submit a complete site assessment report and corrective action plan as required in previous correspondence from the agency, dated September 9, 1997 and February 23, 1998." A3559 (V5) (citations omitted). The WVDEP again ordered Hess to submit the required reports, this time by June 24, 1998. A3559 (V5). On August 6, 1998, the WVDEP issued Hess an "Inspection of Non-Compliance" report, noting that Hess had still failed to issue any reports or abate the contamination, and extended Hess's time to comply the with the notice of non-compliance to August 14, 1998. A3560 (V5).

Hess (via its contractor, Marcum Environmental) ultimately submitted its initial report in August 1998. A3602 (V5); *see* Tr. 308-09 (V11). In a September 23, 1998 letter, the WVDEP acknowledged receipt of this report, but noted that Hess had still failed to submit a CAP "in compliance with the CONFIRMED RELEASE-NOTICE TO COMPLY issued on the 15th day of April 1997." A3602-03 (V5). The WVDEP emphasized to Hess that "your failure to aggressively assess, abate, and control the contamination may very well result in additional vapor problems [a]ffecting the church when the water table rises again, as well as allowing the continued migration of the contamination onto previously uncontaminated properties." A3602 (V5). Hess did not comply, and the WVDEP issued another letter on November 19, 1998, this one emphasizing that Hess "still ha[s] failed to submit a complete assessment report and Corrective Action Plan (CAP), as required in previous correspondence from the agency, dated September 9, 1997, February 23, 1998, June 12, 1998, August 6, 1998, and September 23, 1998." A3558 (V5). The WVDEP concluded: "Denial, unrealistic optimism, or naivete will not change reality." A3558 (V5). Hess did not comply, and the WVDEP wrote yet another letter to

Hess on April 26, 1999, noting that Hess had failed to submit a CAP that "has been specifically required in no less than six (6) separate, written correspondences to you since September 9, 1997." A3561 (V5). Hess ultimately paid the WVDEP a $6,000 fine to resolve its case. Tr. 309-10 (V11).

D. Hess's Failure To Provide Additional Information To The Chartis Defendants

Reviewing the above documents, Schmidt issued a "claim history review" memorandum to Perez. A3614-16 (V5); Tr. 717-18 (V11). Schmidt's review concluded that, while he could not point "to the exact source of the subject release," it was clear "that the subject release was reported to the WVDEP on April 15, 1997," and that "[t]he report of petroleum odors made to the agency on February 24, 1998 did not consist of a new release; rather it was attributed to the April 15, 1997 release." A3616 (V5). Schmidt testified that, on the basis of his review of theWVDEP and Hess remediation documents, the ground penetrating radar study, and additional forensic testing done in 2008, as well as his visits to the Mt. Storm site, he was of the opinion that the April 15, 1997 and February 24, 1998 releases were the same, and that groundwater had moved the contaminant from Hess's USTs to a nearby church. Tr. 714-20 (V11). Schmidt also testified that, based on the information available to Hess in 1997, he "would've had concern[s]" that there was additional contamination. Tr. 689-90 (V11). The Chartis Defendants' expert, John A. Simon, agreed with Schmidt, explaining that "the contamination [was] coming from the [UST] system that was located in the approximate former tank pit." Tr. 1602 (V12). And while WVDEP inspector John Sneberger testified that two apparently unconnected releases had occurred (Tr. 1107-08 (V12)), his opinion was hardly universal.[4]

[4] Sneberger was the inspector on the ground, but the WVDEP's letters to Hess were authored by Michael S. Sutphin, a Geologist (A3387 (V5)), or by Sneberger's supervisor Donald W. Martin, II, a Project Manager (Tr. 1139 (V12); A3437, A3558, A3561, A3602 (V5)).

In response to this report from Schmidt and her own review of the documents (*see* Tr. 924-25 (V11)), Perez reached out to Hess for additional information. On June 19, 2009, Perez spoke with William Brown, the former president of Hess, over the telephone, advising him that the WVDEP documents indicated that Hess was aware of the release at issue as early as April 15, 1997—a date outside the relevant coverage period. Tr. 1524-25 (V12); A3627-30 (V5). Perez sent Mr. Brown a letter on the same day, noting that the Chartis Defendants "value[d Hess] as a client" and asking Mr. Brown "to provide any additional information that you believe [Chartis] should consider before making its final coverage determination." A3628 (V5); *see also* A1396-1400 (V2); A3627-30 (V5) (asking for "any information which [Hess] believes either contradicts the [WVDEP documents] or entitles [Hess] to continued coverage under the Policy"). Mr. Brown stated during the phone call that "he had a claim file of his own for this [claim] and [that] he would look at it" for any additional information. Tr. 1525 (V12); A3627 (V5). Mr. Brown never provided any information from that claims file to the Chartis Defendants. Tr. 1526, 1534 (V12).

The Chartis Defendants continued to reach out to Hess over the summer of 2009. On June 25, 2009, Perez called and left a message with Mr. Brown, as she had promised to do on their June 19 call. Tr. 1535-36 (V12); A3625-26 (V5). On June 30, Perez received a call from Eric Dana of Dana Insurance, the broker who had sold Hess the Policy, saying that he was reviewing the letter with Mr. Brown; Perez emailed both Dana and Mr. Brown, "thanking them for this cooperation in this matter" and "stat[ing] that we recognize that they may have questions following their review of our letter and that we look forward to discussing this matter in detail at their convenience and in a timely matter." A3625 (V5); *see* Tr. 1537 (V12). Perez "encourage[d] them to contact our office," and Dana promised that the Chartis Defendants "should receive a response on this matter within the next two weeks." A3625 (V5); Tr. 1537 (V12). The Chartis Defendants never received any such response. Tr. 1537 (V12).

Perez again emailed Hess and Dana on July 22, requesting a response to the June 19 letter and the June 30 email. Tr. 1538-39 (V12); A3623 (V5).[5] Again she received no response. Perez testified that "Mr. Brown, aside from telling me that he was going to look at his claim file, did not give me any information or tell me anything further." Tr. 1540 (V12).

On August 19, 2009, the Chartis Defendants sent Mr. Brown a disclaimer of coverage letter as a result of Hess's failure to disclose the April 15, 1997 release and its later interactions with the WVDEP. Tr. 1540 (V12); A3620-23 (V5); A138-41 (V1). Perez reiterated, both in the opening and closing of the August 19 letter, that "we value you as a customer" and requested that Hess "please contact me directly ... so we can discuss the matter in detail and address any questions or concerns the letter may have raised." A3623 (A5); *see* A3620 (A5). Hess requested a conference call in response (Tr. 1546-47 (V12)), but failed to provide any information on the call or after it (Tr. 1548-49 (V12)). Ryan subsequently filed suit against both Hess and the Chartis Defendants. A1 (V1). Hess cross-claimed against the Chartis Defendants for common-law and statutory insurance bad faith, and sought punitive damages. A33-51 (V1).

E. The Proceedings Below

After hearing the above evidence, as well as the testimony and evidence discussed in the 0705 Opening Brief, the jury returned a verdict in Hess' favor. Tr. 1759-60 (V12); A2866-67 (V3). Specifically, after finding that the Chartis Defendants acted in bad faith had denied Hess's claim despite knowing that it was proper, the jury awarded "Hess Oil through its former shareholders" $5 million in compensatory damages. Tr. 1760 (V12); A2867 (V3).

The trial then moved to the punitive damages phase. Hess offered no evidence of the Chartis Defendants' financial positions, but only that of their ultimate corporate parent, AIG, Inc.

---

[5] During the same time period Perez was in contact with Ryan, who advised Ryan that a coverage issue had arisen with Hess and directed Ryan to speak with Hess about its payment obligations. A3624-26 (V5); Tr. 1536-38 (V12).

Tr. 1770-85 (V12). Hess's sole witness at this phase, accounting expert Daniel Selby, admitted that he had not reviewed data concerning the Chartis Defendants, and emphasized that, in 2010, the top six AIG, Inc. executives received some $53 million in compensation. Tr. 1783-84, 1790-91 (V12). In closing arguments, Hess's counsel advised the jury that, "if [the relationship is] a single digit multiplier and that's up to nine, that's fine, that's Constitutionally valid.... So if nine is the single digit multiplier, once you go up to forty five million, it's still Constitutionally valid." Tr. 1807-08 (V12). The jury returned a verdict imposing $53 million in punitive damages against the Chartis Defendants—exactly the amount of AIG, Inc.'s 2010 total executive compensation identified by Hess's witness. Tr. 1812 (V12); A2868 (V3).

Upon consideration of the Chartis Defendants' post-trial motion under W. Va. R. Civ. P. 59(e), the trial court (Bedell, J.) examined whether the punitive damages award was excessive. A3227 (V4).[6] The trial court correctly observed that, "[a]s Hess Oil concedes, 'the outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1.'" A3233 (V4) (quoting Syl. pt. 15, *TXO Prod. Corp. v. Alliance Res. Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992)). The court noted that a higher ratio may be justified if a "defendant has acted with 'actual evil intention'" (A3233 (V4) (quoting Syl. pt. 15, *TXO*, 187 W. Va. 457, 419 S.E.2d 870)), but concluded that "the actions of the AIG Defendants [sic] are a far cry from 'actual evil intent,'" which is a "much higher standard" than the "actual malice" threshold for imposition of *any* punitive damages award in an insurance case (A3233-34 (A4)). The trial court concluded

[6] The Chartis Defendants also filed motions for judgment as a matter of law under W. Va. R. Civ. P. 50 and for a new trial under W. Va. R. Civ. P. 59(a), both of which the trial court denied. A3207-26 (V4). For the reasons explained in the 0705 Opening Brief, that denial was erroneous and should be reversed. This appeal implicates only the trial court's treatment of their Rule 59(e) motion.

that, while arguably "improper," the Chartis Defendants' conduct fell "far from the black-hearted actions contemplated in *TXO* that would cause this Court to neglect the 5:1 damage cap that has been a mainstay of West Virginia punitive damages law." A3234 (V4). Because the Chartis Defendants' "conduct in no way approached the 'actual evil intent' that would deem an award exceeding the prescribed 5:1 ratio proper," the trial court reduced the punitive damages award to $25 million. A3235 (V4).

The parties filed cross-appeals. In their appeal, No. 12-0705, the Chartis Defendants seek judgment as a matter of law or a new trial of the entire action, on the basis of numerous errors of trial procedure, evidence, and substantive law. The Chartis Defendants also seek elimination or further reduction of the remaining $25 million punitive damages award, which is not justified by the requisite showing of "actual malice," and which is in any event unconstitutionally excessive—particularly in light of the jury's massive, baseless, and already-punitive $5 million compensatory damages award. In the instant appeal, Hess expresses the belief that it is entitled to a punitive damages award that is larger than the amount that Hess's own counsel acknowledged at trial to be the federal constitutional maximum, on the supposed basis that the Chartis Defendants acted with "actual evil intention"—despite the absence of either a jury finding to that effect or any evidence that could support such a determination.

SUMMARY OF ARGUMENT

Hess's appeal is meritless. To achieve reinstatement of the jury's irrational and unjustified $53 million punitive damages award, Hess would have to overcome this Court's settled rule that the "outer limit" on the ratio of punitive to actual damages is "roughly 5 to 1" unless compensatory damages are "negligible" or the defendant has acted with "actual evil intention." The Chartis Defendants vigorously contest the judgment that remains following the trial court's limited remittitur, but the court was at least correct to take the first step of heeding

TXO's outer limit. Nor can Hess surmount the numerous problems with the trial court's ultimate $30 million judgment, which (as explained in the 0705 Opening Brief) rests on misapplications of basic corporations law, glaring instructional and evidentiary errors, and violations of state and federal due process through entry of an irrational and excessive punitive damages award.

First, the jury's baseless $5 million compensatory damages award is obviously not "negligible"; to the contrary, it is so "substantial" and indeed "very large" that punitive damages should be capped at a ratio *below* 5:1. Nor can Hess demonstrate that the Chartis Defendants acted with "evil intention" in the events that led to this litigation so as to allow a punitive damages award at a ratio greater than 5:1. This is a far heavier evidentiary burden than the "actual malice" required for the issuance of *any* punitive award in an insurance case. "Actual malice" merely requires that a defendant know that a claim is proper and yet deny it or utilize an unfair business practice in settling it; as explained below and in the 0705 Opening Brief, even the lesser "actual malice" test is not satisfied. The Chartis Defendants' actions here were grounded not in malice of any kind, but in their *bona fide* belief that they were not obligated to continue paying Hess's claim—a legitimate coverage dispute. By contrast, an "evil intention" requires an "actual intention to cause harm" to the defendant. Petitioner's brief is devoid of any evidence from which it could be inferred that the Chartis Defendants had any intention of harming Hess. Indeed, The jury made no finding that the Chartis Defendants acted with an "intention to cause harm," and no such finding is possible on the record here. *TXO*'s ratio limit applies and prohibits any punitive damages award exceeding a 5:1 ratio in this case.

Second, Hess's contention that the trial court misapplied this Court's punitive damages jurisprudence is misplaced. As explained here and in the 0705 Opening Brief, the circumstances of this case tilt the scale firmly toward a *further* reduction of the punitive award, to an amount well below the trial court's remittitur. Hess's citations to cases approving large damages ratios are misleading and inapposite, as the cases themselves were decided under circumstances far removed from the instant case: all of them involved either negligible compensatory damages or events evincing truly "evil intention," or both.

The jury's verdict is unsupportable and cannot be reinstated. Hess's appeal should be swiftly and summarily rejected.

COUNTERSTATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Chartis Defendants submit that oral argument is unnecessary in this matter. The errors identified in the Chartis Defendants' separate appeal (No. 12-0705) necessitate reversal or vacatur of the entire judgment. In either case, Hess's claims of error would be rendered moot, and its appeal subject to summary dismissal. *See, e.g., Sydenstricker v. Mohan*, 217 W. Va. 552, 563-64, 618 S.E.2d 561, 572-73 (2005) (summarily dismissing appeal rendered moot by disposition of a separate appeal). Even if the Court were to consider the merits of this appeal, Hess's assignments of error involve only the application of authoritatively settled legal precepts to the facts developed at trial. In particular, it primarily presents the narrow and fact-bound question whether the circuit court was correct to conclude that Hess failed to present evidence that the Chartis Defendants acted with "actual evil intention." Contrary to Hess's assertion (Hess Br. 14), this question is not one of "fundamental public importance," and does not present a genuine question whether the circuit court exceeded its constitutional authority. If the Court does not believe Hess's appeal to be frivolous, it is at least true that the dispositive issue is settled and that the facts and arguments are adequately presented in the briefs and the record. *See* W. Va. Rev. R. App. P. 18(a)(2)-(4). Oral argument would not benefit the Court or the judicial process, and it should be denied.[7] For similar reasons, resolution of this appeal by

[7] This suggestion is without prejudice to the Chartis Defendants' request for oral argument in No. 12-0705, which presents substantial questions of West Virginia and federal law warranting careful judicial

memorandum decision or summary order would be appropriate.

ARGUMENT

I. THE TRIAL COURT CORRECTLY REMITTED THE AWARD OF PUNITIVE DAMAGES TO COMPORT WITH THE WEST VIRGINIA CONSTITUTION

Long-settled West Virginia law holds that an award of punitive damages is presumptively limited to five times the plaintiff's compensatory damages; absent unusual circumstances, a judgment with a ratio greater than "roughly" 5:1 is *ipso facto* unconstitutionally excessive. The jury's award in this case went far beyond that maximum, and neither of the exceptions to the rule—"actual evil intention" on the defendant's part, or a trivially small compensatory damages award—applies to exempt the verdict from the ordinary strictures of due process. The trial court correctly concluded that an unremitted judgment would have violated the West Virginia Constitution. Hess's appeal should be rejected.

A. Established West Virginia Law Imposes A Presumptive 5:1 Limit On The Punitive Damages Ratio

As Hess is forced to acknowledge (Hess Br. 14-15), West Virginia law has held for two decades that "[t]he outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1." Syl. pt. 15, *TXO Prod. Corp. v. Alliance Res. Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443 (1993). This rule is not optional: despite the limited degree of indeterminacy suggested by the qualifier "roughly," this Court has consistently stressed that a 5:1 ratio is a fixed constitutional maximum in any case not involving negligible compensatory damages or "actual intention to cause harm." *See Perrine v. E.I. du Pont de*

consideration. In the event that the Court grants oral argument in this matter, the Chartis Defendants respectfully request that the appeals be argued separately rather than consolidated.

Nemours & Co., 225 W. Va. 482, 557, 694 S.E.2d 815, 890 (2010) ("[A] court is *required* to reduce a punitive damages award that is found to be unconstitutionally large under the [ratio] analysis set out in *TXO* ...."); *Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 604, 606, 490 S.E.2d 678, 691, 693 (1997) (per curiam) (remitting a punitive damages award to reduce the ratio from 7:1 to 5:1 on the ground that "[o]nly in those cases where the defendant can be shown to have actually intended to cause harm is the ratio of punitives to compensatories permitted to climb higher without 'raising a suspicious judicial eyebrow'") (citation and brackets omitted).

Hess's attempt to avoid this constitutional rule (Hess Br. 39)—which is in fact a "bright line" test—consists of a single citation to a passage of inapposite *obiter dicta* in *Boyd v. Goffoli*, 216 W. Va. 552, 608 S.E.2d 169 (2004). The jury in *Boyd* found the defendant liable for fraud and conspiracy, whereupon it awarded each of several plaintiffs $75,000 for "wages, aggravation, and inconvenience" and $250,000 in punitive damages. *Id.* at 559, 608 S.E.2d at 176. Because the 3.3:1 ratio was well within constitutional limits, the defendant endeavored to convince the court that the compensatory damages award was in large part in fact punitive in nature—such that only a small portion of the compensatory award should be counted for purposes of ascertaining the damages ratio. Using this lesser amount as the denominator yielded a ratio of 8.4:1. This Court rejected this argument on the ground that there was "no reason to conclude that the punitive damages award is duplicative of the compensatory damages award." *Id.* at 566, 608 S.E.2d at 183. Only after reaching this holding did the court briefly address the defendant's contention that 8.4:1 was an excessively large ratio. In so doing, the court did not discuss *TXO* or its 5:1 presumptive cap, but relied only on *Campbell*'s indication that under federal law "'there are no rigid benchmarks that a punitive damages award may not surpass.'" *Id.* at 567, 608 S.E.2d at 184 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)).

Hess's reliance on *Boyd* is misplaced. The Court in that case reaffirmed *TXO*'s 5:1 rule in both Syllabus point 5 and in the text of the opinion, *id.* at 564, 608 S.E.2d at 181, but did not mention it when considering the defendant's ratio argument—apparently because the defendant had rested its argument primarily on federal law rather than on West Virginia's punitive damages jurisprudence. *See id.* at 564-67, 608 S.E.2d at 181-84. The Court thus did not consider whether this State's more restrictive limitation on punitive damages was applicable, and subsequent cases, including *Perrine*, 225 W. Va. at 557, 694 S.E.2d at 890, make clear that *TXO*'s rough 5:1 cap remains the law of this State. Absent a showing of "negligible" compensatory damages or "actual evil intention," a punitive award roughly five times larger than compensatory damages is the largest that the West Virginia Constitution permits. *See, e.g., id.* The circuit court did not err in its statement of the law governing this issue.

B. Hess Cannot Establish "Actual Evil Intention"

In this case, the jury's $53 million punitive verdict was 10.6 times the size of its compensatory award (and many more times larger than any plausible measure of Hess's actual loss). As explained, mandatory West Virginia law required the circuit court to reduce the award in the absence of either of the two enumerated exceptions. Hess does not and cannot contend that the jury's $5 million compensatory damages award is "negligible."[8] The only possible route to reinstatement of the verdict would be to establish that the Chartis Defendants acted with "actual evil intention." Syl. pt. 15, *TXO*, 187 W. Va. 457, 419 S.E.2d 870. This Hess cannot do.

---

8 Indeed, the only sensible conclusion is that the "compensatory damages are very high," such that even the circuit court's 5:1 ratio is excessive. *See* 0705 Opening Brief 35 & n.14; *Perrine*, 225 W. Va. at 557, 694 S.E.2d at 890; *TXO*, 187 W. Va. at 476 n.12, 419 S.E.2d at 889 n.12; *accord Campbell*, 538 U.S. at 425 ("When compensatory damage are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."). Hess fails to acknowledge this rule or the obvious fact that it applies.

1. "Actual Evil Intention" And "Actual Malice" Are Separate And Discrete Legal Terms Of Art

Hess asserts, without analysis or citation, that, "[f]or purposes of West Virginia jurisprudence," the concepts "actual malice" and "actual evil intent" are not distinct but "refer to identical conduct using different terminology." Hess Br. 31. This bald assertion is not only unsupported, but false: the two terms have different origins and different meanings, and erasing the distinction between them would drastically alter West Virginia law by placing *every* insurance bad-faith case into the small class of cases in which punitive damages are effectively unbounded. The trial court quite correctly concluded that "'actual evil intention' is a … much higher standard" than the "threshold requirement" of "actual malice," and that this case's "facts fall far from the black-hearted actions contemplated in *TXO*." A3233-34 (V4).

This Court established the "actual malice" standard for an award of punitive damages in insurance bad-faith actions in *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 330-31, 352 S.E.2d 73, 80-81 (1986), and then extended the test to statutory claims under the Unfair Trade Practices Act ("UTPA") in *McCormick v. Allstate Ins. Co.*, 202 W. Va. 535, 540, 505 S.E.2d 454, 459 (1998). That test, which *Hayseeds* drew from First Amendment jurisprudence, denotes action taken with knowledge or reckless disregard of the fact that it is legally improper. *See Hayseeds*, 177 W. Va. at 330-31, 352 S.E.2d at 80-81 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (public official cannot recover damages for a defamatory falsehood "unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not")). But the test "in no way requires that the [actor] have a specific intent to harm …." *United States v. White*, 670 F.3d 498, 511 (4th Cir. 2012). The U.S. Supreme Court has specifically distinguished the *N.Y. Times* test from "the concept of malice as an evil intent or a motive arising from spite or ill will."

Masson v. New Yorker Magazine, 501 U.S. 496, 510 (1991). *See also, e.g.*, *Hinerman v. Daily Gazette Co.*, 188 W. Va. 157, 170, 423 S.E.2d 560, 573 (1992) ("[P]artisanship, animus toward the subject of a libel, or other 'malicious' motives are not, alone, conclusive evidence of 'actual malice'. . . .").[9]

Hayseeds adapted this rule to the insurance bad-faith context, by defining "actual malice" to mean that "the company actually knew that the policyholder's claim was proper, but willfully, maliciously and intentionally denied the claim." 177 W. Va. at 330, 352 S.E.2d at 80-81. *McCormick* in turn applied the test to a statutory unfair settlement practices claim, revising it to mean that "the insurance company actually knew that the policyholder's claim was proper, but willfully, maliciously and intentionally utilized an unfair business practice in settling, or failing to settle, the insured's claim." 202 W. Va. at 540, 505 S.E.2d at 459. Both tests fit the pattern of *N.Y. Times* and its progeny: action in disregard of a known material fact (*i.e.*, that a statement is false, or that a claim is proper).

TXO and its progeny impose a separate and more demanding requirement that a plaintiff demonstrate "actual evil intention," or "actual intention to cause harm," before he is permitted to recover punitive damages more than five times the size of his compensable injuries. The meaning of this test is best illustrated by *Vandevender*, 200 W. Va. 591, 490 S.E.2d 678. The plaintiff in that case lost her job following a back injury, and sued her former employer both for unlawful termination and for the company's retaliatory actions upon her eventual return to work. With respect to the former claim, the Court concluded that "Sheetz'[s] conduct ... falls into a

---

[9] *Hinerman*, it should be noted, required more than "actual malice" before sanctioning a large punitive award in a libel action: "Actual malice" is required before punishment can be imposed at all in the case of libel against a public official, and a further step (failure to issue an apology and an offer to compensate the victim of the libel) is required before "*TXO*-type" damages may be considered "reasonable." *See* 188 W. Va. at 176, 178-79 & n. 35, 423 S.E.2d at 579, 581-82 & n. 35.

category of reckless disregard of Appellee's rights, rather than malice committed towards her"; it therefore reduced the trial court's punitive damages award so as to comport with *TXO*'s 5:1 rule. *Id.* at 606, 490 S.E.2d at 693. Specifically, the Court concluded that the evidence depicted "an employer who clearly acted in contravention of state law and policies, but not an employer whose conduct indicates a malicious intent to prevent Appellee from returning to its employ." *Id.* at 604, 490 S.E.2d at 691. The Court recognized that "bad or legally incorrect corporate policy is not the equivalent of a mean-spirited, evil intent to cause harm," and therefore held that *TXO* required that punitive damages ratio be reduced from 7:1 to 5:1. *Id.* at 603, 490 S.E.2d at 693. This was true notwithstanding the facts that everyone (including the *Vandevender* defendant) is presumed to know and understand his legal obligations, *see Hartley Hill Hunt Club v. Ritchie Cnty. Comm'n*, 220 W. Va. 382, 391 n.13, 647 S.E.2d 818, 827 n.13 (2007), that Sheetz's breach of those obligations was "clear[]," *Vandevender*, 200 W. Va. at 604, 490 S.E.2d at 691, and that terminating an employee in contravention of state law is plainly harmful to that employee's interests. Such knowing wrongdoing—the equivalent of "actual malice"—was sufficient to justify punitive damages, but not to permit an award even modestly in excess of the *TXO* cap: Sheetz had not acted with an "actual evil intention" to harm the plaintiff.

In contrast, the Court concluded that Sheetz *had* acted with such "evil intention" when it retaliated against the plaintiff for bringing her lawsuit by (*inter alia*) feigning ignorance of her work restrictions in the assignment of projects and assigning her to physically demanding tasks that exceeded her abilities. *See id.* The court observed a "mean-spirited intent to punish Appellee for her injury and the resulting claims made against Sheetz," *id.*, and indeed a desire "to cause [the plaintiff] physical or emotional harm," *id.* at 606, 490 S.E.2d at 693, permitting an exemplary damages award in excess of the 5:1 ceiling. *TXO* itself involved an equally "evil" scheme, in which the defendant fraudulently devised a frivolous cloud on the plaintiff's title to a tract of land, for the purpose of coercing the plaintiff into relinquishing its property rights.[10] *See* 187 W. Va. at 462-64, 419 S.E.2d at 875-77. Such a carefully premeditated attempt at theft by deceit and extortion was held permissibly subject to an unusually large punitive damages award, particularly given that the mere $19,000 in compensatory damages were unlikely to effectively deter future similar conduct. *See id.* at 476-77, 419 S.E.2d at 889-90.

TXO and its progeny thus distinguish between a defendant who has merely violated the law and one who has done so not only knowingly but with "intent to cause [the plaintiff] specific harm." *Vandevender*, 200 W. Va. at 606, 490 S.E.2d at 693. A plaintiff in the former category may recover to the limited extent necessary to deter violations of legal requirements. But there are fewer restrictions on the punishment of individuals who act with deliberate intent to injure others, where a greater need for deterrence is present. *See id.* at 606-607, 490 S.E.2d at 693-94; *TXO*, 187 W. Va. at 476, 419 S.E.2d at 889 (where there is intention to cause harm, "punitive damages limits must be greater in order to deter future evil acts by the defendant").

It follows that there is a crucial distinction between acts undertaken with "actual malice" (as that term is defined in *N.Y. Times*, and *Hayseeds*) and "evil intention" (as described in *TXO* and *Vandevender*). *Hayseeds*, for instance, offered as an example of "actual malice" a "company-wide policy of delaying the payment of just claims through barraging the policyholder with mindless paperwork." 177 W.Va. at 330 n.2, 352 S.E.2d at 81 n.2. That standard could be met by conduct that falls short of a desire to hurt someone else: thus the requisite "intention" for "actual malice" purposes is an intent to act in a way that violates the law, and does not require an intent to injure another. Such conduct is closely analogous to the unlawful acts considered by *Vandevender* to be insufficiently evil to warrant an unusually large punitive award: corporate

[10] Contrary to Hess's unsupported assertion (Hess Br. 33), the Chartis Defendants did not engage in a "destructive course of conduct" that was "nearly identical" to that described in *TXO*. The cases have little or nothing in common, as evidenced by Hess's failure to specify any factual similarity at all.

misdeeds undertaken without a particularized desire to injure the plaintiff. And while it might be necessary to threaten certain individuals or companies with punitive damages liability in order to deter adoption of unlawful practices, far less opprobrium attaches to poor policy design than to purposeful impingement on another's rights. Both forms of misdeed may subject their perpetrator to punitive damages, but only the latter lifts *TXO*'s constitutional barrier.

Blurring or eliminating the line between "actual malice" and "intent to cause harm" would impose virtually limitless punitive liability on *every* insurance company accused of "bad faith": If the terms mean the same thing, then *any* plaintiff who established the knowledge sufficient to satisfy *Hayseeds* and *McCormick* would automatically qualify for a punitive award many times larger than the damages actually endured. Such a result is directly contrary to the policies that undergird *Hayseeds* and *McCormick*, which imposed a heightened threshold standard for the recovery of punitive damages in recognition of the rule that breach of contract (including of the covenant of good faith and fair dealing) is not ordinarily considered tortious. *See, e.g.*, *Hayseeds*, 177 W. Va. at 330, 352 S.E.2d at 80 ("Generally, punitive damages are unavailable in an action for breach of contract unless the conduct of the defendant constitutes an independent, intentional tort."); *id.* at 330-31, 352 S.E.2d at 81 ("We intend this to be a bright line standard, highly susceptible to summary judgment for the defendant ...."). As *TXO* recognized, ordinary tortious action likewise does not suffice to justify *any* punitive judgment; an extraordinary award can be justified only by extraordinarily bad behavior. Yet if "actual malice" and "evil intent" were identical, *any* conduct sufficient to cross the line between breach of contract and tortious bad faith would instantly be adjudged to be so beyond the pale that ordinary due process norms may be set aside. Neither *Hayseeds* nor *TXO* provided for such a result, and this Court should not sanction Hess's unsupported attempt to upend West Virginia's law of insurance and punitive damages.

Thus, to prevail in this appeal, Hess is required to establish that the Chartis Defendants committed their putatively wrongful acts out of an "actual intention to cause harm" to Hess. Syl. pt. 15, *TXO*, 187 W. Va. 457, 419 S.E.2d 870. There is no evidence of such an intention.

2. Hess Fails To Identify Evidence Of "Evil Intention"

Although Hess previously argued to the jury that only a "single digit multiplier" for punitive damages is "Constitutionally valid" (Tr. 1807 (V12)), it now argues that "the AIG Defendants' [sic] conduct and the corporate culture which encouraged the same, rose to the level of evil intent ... warranting the 10.6:1 punitive damages ratio" (Hess Br. 15). This is wrong. Applying *TXO*'s standard of "actual evil intention" or "actual intention to cause harm" to this case, it is beyond peradventure that the trial court correctly concluded that the facts of this case "in no way approach[]" that line. A3234 (V4). The jury made no finding of "evil intention," and there is no evidence from which it could have done so. Perhaps in recognition of these insurmountable obstacles, Hess's brief attempts to transform a *bona fide* insurance dispute into "black-hearted actions" (Hess Br. 12) by setting out a litany of half-truths and selective quotations from the record. These arguments fail. Hess's representation of the record is misleading at best, and *even if it were accurate* it would not establish even "actual malice," let alone "evil intention."

First, nowhere in Hess's ten-page laundry list of alleged bad acts (Hess Br. 14-24) does it ever point to any evidence that actually shows that the Chartis Defendants acted with "evil intention." The closest it comes is the contention that the Chartis Defendants disclaimed coverage "based on [a] knowingly partial picture of the true story." Hess Br. 20. But as the evidence showed, the Chartis Defendants repeatedly reached out to Hess, their valued client (A3628 (V5)), throughout the summer of 2009, asking him to send any information "which [Hess] believes either contradict[s] the [WVDEP documents] or entitle[s Hess] to continued coverage under the Policy." A3630 (V5); *see also* A3625-29 (V5); Tr. 1524-40 (V12); pp. 8-10, *supra*. These repeated requests make clear that Hess's accusation that the Chartis Defendants failed to "ask[] Bill Brown ... for any specific documents, including the Tank Closure Report" (Hess Br. 19), is disingenuous at best: the Chartis Defendants spent months asking Mr. Brown for *any* information that would shed additional light on what happened at the Mt. Storm site in 1997. Had Mr. Brown asked, he would likely have learned that Perez was particularly interested in the Tank Closure Report. Tr. 964 (V11). Yet Mr. Brown, who indicated he had a "claims file" and promised that he would look into it, failed to give the Chartis Defendants any information at all. Tr. 1537-40 (V12). Even if the Chartis Defendants had experienced "bureaucratic confusion" in misplacing certain Hess records in its claims files, that is insufficient as a matter of law to qualify as actual malice, *Hayseeds*, 177 W.Va. at 331, 352 S.E.2d at 81, let alone "actual evil intention."[11]

Nor can Hess succeed in claiming that the Chartis Defendants acted "knowing full well that Hess had dissolved and that under controlling West Virginia law, Hess's former shareholders would be solely responsible for the verdict as well as the remaining remediation costs at Mt. Storm." Hess Br. 21. This argument is both legally unsound and factually false. Legally, as explained in the 0705 Opening Brief (at 12-18), Hess's attempts to equate itself with its former shareholders is erroneous. Hess addresses this point by selectively quoting W. Va. Code § 31D-14-1407(d)(1) (Hess Br. 3 n.6), but even if Hess's discussion of that provision were accurate (and it is not, *see* 0706 Opening Brief 17 & n.5), Hess fails to inform the Court that the undisputed testimony at trial was that Hess did not distribute any assets to its shareholders at

[11] Hess also argues, implausibly, that because it placed a "Y" and "see previous applications" on its October 30, 1997 application, the Chartis Defendants acted evilly by being "unable to locate those applications." Hess Br. 19. But as the Chartis Defendants explained in the 0705 Opening Brief (at 5), the only prior application available to them was Hess's 1996 application, which could not have disclosed the WVDEP's April 15, 1997 discovery of a Confirmed Release.

dissolution (Tr. 415, 474-75 (V11)). The absence of such a distribution fully insulated the shareholders from liability under § 31D-14-1407(d)(1).[12]

Factually, Hess is incorrect that the Chartis Defendants "knowingly" targeted Hess's former shareholders, who were never named parties in the suit. *See* A1, A392 (V1). Hess highlights the fact that the Chartis Defendants only stipulated that they would not seek any judgment against Hess's former shareholders at the end of Hess's case in chief as evidence that the former shareholders were "targets" in the suit. Hess Br. 22. In reality, the Chartis Defendants only learned that Hess sold all of its assets and distributed nothing at its liquidation during Mr. Brown's deposition, taken just *a month* before trial. A5778 (V8). Even on the first day of trial, the Chartis Defendants had to seek the trial court's intervention to compel Hess to produce documentary evidence of Hess's asset distribution. Tr. 33-39 (V11). Once that evidence was produced, the parties stipulated, once and for all, that Hess's former shareholders could not be held liable for damages. Tr. 1404-05 (V12). Had Hess disclosed earlier that it had not distributed any assets to its shareholders at dissolution, the Chartis Defendants could have agreed then that no recovery could be had against them as a matter of law, and the Browns' minds could have been put at ease, as the dissolved corporations statute clearly shields them from suit. Hess, however, elected to withhold this information and to fight its production throughout the litigation. At all events, the Chartis Defendants never actually sued the Browns, and certainly did not act with the intent to injure them.

Second, Hess incorrectly blames the Chartis Defendants for "conjuring" a coverage dispute over the 1997 release, because, according to Hess, "all pertinent individuals, including AIG personnel, confirmed that the 1997 Notice of Confirmed Release and the 1998 gas fumes

[12] Hess's suggestion that there existed a "risk to … the environment" as a result of the coverage dispute (Hess Br. 23) is not supported by any citation to the voluminous record. This case is (or was) about who should pay Ryan for its remediation work, not whether that work would be completed or abandoned.

were separate events." Hess Br. 15, 19. That assertion is both irrelevant and false. It is irrelevant because the issue in this case was not whether or not the two spills were one and the same, but rather whether Hess made a misrepresentation in failing to accurately disclose the pollution conditions that existed at the Mt. Storm site prior to its 1997 application for insurance and that could have given rise to a claim for coverage under the Policy. *See* A45 (V1); A404 (V1). The Chartis Defendants presented evidence at trial that they learned of the 1997 release only when they obtained the WVDEP's 1997 Confirmed Release—Notice to Comply through their FOIA request (Tr. 1521-22 (V12)); the 1998 release's relationship to the 1997 release was not relevant.

Even if the connection between the two spills were relevant, Hess's statement that "all pertinent individuals" found the two releases to be "separate events" (Hess Br. 15) is untrue. Both Schmidt and the WVDEP reached the conclusion that the events were linked. Schmidt, the Chartis Defendants' technical consultant, reviewed numerous WVDEP filings, traveled multiple times to the Mt. Storm site, and examined other technical reports such as Ryan's ground penetrating radar study, and on that basis concluded that "[t]he report of petroleum odors made to the [WVDEP] on February 24, 1998 did not consist of a new release; rather it was attributed to the April 15, 1997 release." A3616 (V5). Schmidt reiterated this conclusion at trial. Tr. 714-20 (V11). The WVDEP reached the same conclusion by specifically linking the 1997 and 1998 releases when it fined Hess $6,000 for failing to comply with its orders. *E.g.*, A3558 (V5) (November 19, 1998 WVDEP letter informing Hess that it was "in violation of 'Notice of Non-Compliance' #9806-1406 (issued June 12, 1998), *in that you still have failed to submit a complete site assessment report and Corrective Action Plan (CAP), as required in previous correspondence from the agency, dated September 9, 1997*, February 23, 1998, [etc.]") (emphasis added); A3561 (V5) (April 26, 1999 WVDEP letter notifying Hess that its case has been sent to the WVDEP's enforcement division due to Hess's failure to submit a CAP that "*has been specifically required in no less than six (6) separate, written correspondences to you since September 9, 1997*") (emphasis added). And while Hess attempts to use Schmidt's testimony to make its point that "Hess would not have known or should they have known that there was anything else on the Mt. Storm site in 1997" (Hess Br. 17 (citing Tr. 689 (V11))), in fact Schmidt testified that had he possessed the same information as Hess did in 1997, he "would have taken a different course" and "would've had concern[s]" about the extent of contamination at the site (Tr. 689-90 (V11)).

Hess's own vacillation about the facts in this case, moreover, belies any claim that the Chartis Defendants acted with evil intent by "conjuring" a coverage issue. At times, Hess appears to argue that the 1997 release was "contamination [that] was limited to routine oveflow/overspill around the tank pit" and that thus "there was no 'confirmed release'" at all. Hess Br. 4. At other times, Hess concedes that the 1997 release was a "Confirmed Release" (Hess Br. 15)—a description consistent with the WVDEP's own documentation of a "Confirmed Release" on April 15, 1997 (A3365 (V5))—but argues that it properly disclosed to the Chartis Defendants a "confirmed release that was cleaned up" (Hess Br. 8 n.14) (brackets omitted).[13] Along similar lines, Hess continues to protest "that the 1998 Release was not Hess's issue" (Hess Br. 5), despite the WVDEP's contrary conclusion and undisputed testimony; Hess's own witness, Anderson, testified on direct examination that, as long as a release is "on your property

[13] Hess's reliance on the purported October 15, 1997 application for insurance is questionable at best. The alleged application is of dubious provenance: Hess waited over a year into the litigation to produce this application (A1593-94 (V2)), which the Chartis Defendants never received in connection within the issuance of the Policy (*id.*), which Hess's insurance broker could not remember submitting it to the Chartis Defendants (A1614-17 (V2)), and which Mr. Brown could not recall ever submitting to anyone (Tr. 370-71 (V11)). In any event, Hess never explains why, if it had an application in its own files that proved it disclosed the 1997 Confirmed Release, it failed to head off this entire lawsuit by sending that application to the Chartis Defendants in 2009.

[the WVDEP] designate[s] you the responsible party whether you—unless you had proved somehow differently" (Tr. 1300 (V12)).

The Chartis Defendants do not dispute that Hess presented a contrary theory at trial regarding the connection between the two releases. But for present purposes, a *bona fide* insurance dispute between an insurer and its insured is not a ground for finding "actual malice," let alone "actual evil intention." *See Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 592, 396 S.E.2d 766, 773 (1990); 0705 Opening Brief 28-30. And again, the Chartis Defendants' reaction to learning about Hess's previous interactions with the WVDEP was not to deny coverage, but instead to reach out to Mr. Brown, to ask for any additional information that might clarify matters (Tr. 1524-40 (V12))—a request that was repeatedly spurned (Tr. 1540 (V12)). Moreover, during the same time period in which the Chartis Defendants discovered the existence of the 1997 release, they continued to reimburse Hess for hundreds of thousands of dollars. Tr. 1517-18 (V12). The Chartis Defendants subsequently settled Ryan's claims against Hess, paid another $260,000, and obtained a full release for Hess. A419 (V1); Tr. 409 (V11). These are not the actions of a company bent on "evil," and the fact that the Chartis Defendants took a position consistent with its own technical consultant's view and the WVDEP correspondence it reviewed does not warrant a departure from *TXO*'s well-established 5:1 limit.

Third, Hess focuses on a brief passage of testimony from Mrs. Brown, discussing her first submission of invoices to the Chartis Defendants after they accepted Hess's claim in 1999, to argue that the Chartis Defendants took inconsistent positions with regard to the 1997 and 1998 releases. Hess Br. 7, 16. Specifically, Hess argues that, because the Chartis Defendants did not reimburse Hess for "invoices relating to tank replacement and minor contamination," the Chartis Defendants believed the 1997 release to be a separate event. Hess Br. 16. The suggestion is false. The Chartis Defendants declined to pay for the tank replacement and related expenses (even as it was paying others) *because they were not covered by the Policy that Hess owned.* A1392-94 (V2). This position is consistent with both the Policy and the Chartis Defendants' representations when they accepted Hess's claim in June 1999: they would reimburse Hess for claims relating to contamination discovered in March 1998, but "costs incurred to reconstruct, repair, replace, upgrade or rebuild an underground storage tank system are precluded from coverage," as were "any costs, charges, or expenses incurred to investigate or verify that a[] Confirmed Release took place at the site." A3467-68 (V5).[14] Thus, all of the invoices that were not accepted in July 1999 properly were those designated as relating to "Tank Replacement," "Tank Testing," and "Investigative Cost." A1394 (V2).[15]

The rest of Hess's arguments are baseless. Nowhere in the Chartis Defendants' July 1999 letter is there any indication that any of the costs were disapproved because, as Hess now suggests on appeal, they related to "minor contamination" (Hess Br. 16). Nor did Mrs. Brown so testify; rather, she told the jury that the Chartis Defendants had denied these costs because they were "before the claim." Tr. 1381 (V12). Mrs. Brown was correct: costs incurred prior to the claim, such as investigative costs and costs related to USTs, were not covered. Tr. 513 (V11). But this in no way suggests, as Hess does, that the Chartis Defendants somehow viewed the unreimbursed expenditures as "not related to the 1998 Release" (Hess Br. 16). And despite Hess's careful wording, the Chartis Defendants never "reviewed ... the 1997 independent investigation and testing conducted by Subsurface in response to the WVDEP's April 15, 1997

---

[14] Hess also argues, irrelevantly, that "[i]t took AIG [sic] more than six months to admit coverage in 1999 after receiving notice of the claim" (Hess Br. 18), without mentioning that the Chartis Defendants acknowledged receipt of the claim within a week (A3461 (V5)), without explaining why an acceptance of coverage indicates an "evil intention," and without showing how the *acceptance* of coverage could possibly damage an insured.

[15] The July 1999 letter that the Chartis Defendants sent to Hess contains a minor typographical error: while it stated that "[t]he costs highlighted in bold have been approved" (A1392 (V2)), the list of invoices shows that the bolded costs were those that were *not* approved (*see* A1394 (V2)).

Notice" (Hess Br. 16), but rather only reviewed the *invoice* for that study (Tr. 513-14). There is thus no inconsistency, and no evidence was ever presented to the jury that the Chartis Defendants reversed their position. And in any event, Hess again fails to offer any explanation as to how the immediate reimbursement of thousands of dollars in remediation costs upon acceptance of coverage qualifies as "actual evil intention" by the Chartis Defendants.

Fourth, Hess inveighs against a supposed "corrupt corporate culture" at the Chartis Defendants. Hess Br. 17. But once again, these arguments are both legally and factually meritless. Legally, as the Chartis Defendants explained in their 0705 Opening Brief (at 18-19), the vast majority of the evidence relating to the "corrupt corporate culture" came from two attorney witnesses who were improperly testifying about other, unrelated AIG, Inc. subsidiaries. *See* Tr. 1185-91 (V12) (testimony by David Romano about practices of National Union Fire Insurance and American General); Tr. 1247-55 (testimony by Scott Segal about practices of the Adjustment Corporation). This evidence never should have reached the jury: beyond its undeniably prejudicial effects (*see* 0705 Opening Brief 18-19 & n.7), the testimony was irrelevant because it did not relate to "'other violations by the *same insurance company*.'" *McCormick v. Allstate Ins. Co.*, 197 W. Va. 415, 427, 475 S.E.2d 507, 519 (1996) (emphasis added). Factually, the only remaining evidence of the Chartis Defendants' alleged "corruption" is Hess's allegation that the Chartis Defendants "had no written policies or procedures for the adjustment of claims or the proper documentation of the claims file." Hess Br. 17. But all of the employees from the Chartis Defendants testified that they received on-the-job training from their supervisors (Tr. 509-10 (V11) (Terpstra); Tr. 615 (V11) (Schmidt); Tr. 799 (V11) (Lokos); Tr. 905 (V11) (Perez)), which, as the jury heard, is not a violation of insurance industry standards (Tr. 1493 (V12)). The fact that witnesses on a jury stand did not point to a specific memorandum or regulation that controlled their conduct does not translate into evil intent.

In sum, Hess's ten-page diatribe against the Chartis Defendants, even if it were not unfounded, is devoid of any evidence of "actual evil intention." The Chartis Defendants accepted coverage, reimbursed Hess for over $600,000 over the course of a decade, and then, upon discovering documents that called into question certain of Hess's representations, spent two months asking their valued client to provide them with additional information so that they could clear up the matter. These are not the actions of a company acting with *N.Y. Times-Hayseeds* "actual malice," let alone *TXO*'s "actual evil intention" or "intention to cause harm."[16] The trial court was correct to conclude that the jury's punitive award could not survive scrutiny under the West Virginia Constitution.

II. THE JURY'S PUNITIVE DAMAGES AWARD WAS EXCESSIVE UNDER BOTH WEST VIRGINIA AND FEDERAL LAW

For the reasons set forth above, *TXO* and *Perrine* required the trial court, at a minimum, to reduce the punitive damages award to $25 million even assuming for the sake of argument that the trial were not infected with irreparable error. Much of Point II of Hess's brief[17] in this appeal is nevertheless devoted to an attempt to paper over the myriad other constitutional infirmities from which the jury's irrational $53 million verdict suffered. As explained in the 0705 Opening Brief (at 30-37),[18] even the trial court's ultimate $25 million punitive damages award exceeds the bounds of permissibility set by the West Virginia Constitution.[19] The $53 million award is *a*

---

[16] Even if "actual malice" were the sole applicable standard, the evidence in this case would not be sufficient. The Chartis Defendants did not act with such malice, or even in bad faith, but instead engaged in a legitimate, *bona fide* dispute over the propriety of Hess's insurance claim in light of the inaccuracy in its application. *See* 0705 Opening Brief 28-30; *Shamblin*, 183 W. Va. at 592, 396 S.E.2d at 773.

[17] Substantial portions of Hess's Points II.A.2 (Hess Br. 30-31), II.B (*id.* at 32-33), and II.D (*id.* at 39-40), concern "evil intention" and the applicability of the *TXO-Perrine* 5:1 damages ratio. Those issues are addressed in Section I, *supra*.

[18] The arguments pressed in the 0705 Opening Brief are incorporated herein by reference, and are repeated only to the extent necessary to rebut Hess's contentions.

fortiori unconstitutional, and Hess's bid to restore it should be rejected.

A. The Jury's Award Was Excessive Under The West Virginia Constitution

As explained in the 0705 Opening Brief, the West Virginia Constitution precludes issuance of a multi-million-dollar punitive damages award on the facts of this case. Even setting aside the fact that the jury's 10.6:1 damages ratio was unconstitutionally large, its verdict was subject to remittitur because mitigating factors far outweigh the nonexistent aggravating ones.

1. Hess Identifies No Aggravating Circumstances

Perrine restated the aggravating and mitigating considerations under which a trial court's award of punitive damages is to be assessed. On the "aggravating" side of the ledger are: "(1) the reprehensibility of the defendant's conduct; (2) whether the defendant profited from the wrongful conduct; (3) the financial position of the defendant; (4) the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed; and (5) the cost of litigation to the plaintiff." 225 W. Va. at 553, 694 S.E.2d at 886. Hess fails to identify any reason for thinking that these factors justify *any* substantial punitive award in this case, let alone the jury's $53 million figure. Indeed, Hess's attempts are so unavailing that they can for purposes of this appeal be disposed of summarily:

First, the Chartis Defendants' supposed reprehensibility—"the most important indicium of the reasonableness of a punitive damages award," *Boyd*, 216 W. Va. at 564, 608 S.E.2d at 181 (quoting *Campbell*, 538 U.S. at 419)—is relegated to a footnote (Hess Br. 25 n.21) directing the reader to Point I of the brief, which as explained above lacks merit. The Chartis Defendants did not act "reprehensibly," but disclaimed insurance coverage only after reaching the good-faith

---

[19] The trial court did not specifically rely on federal law in rendering its decision, and Hess does not separately analyze the case under that rubric. But for reasons explained in the 0705 Opening Brief (at 37-40), the $25 million remitted punitive award and thus the $53 million jury verdict both violate the federal Constitution as well as that of West Virginia.

conclusion that they had the right to do so under West Virginia law and the terms of the Policy.

Second, the question whether the Chartis Defendants actually profited from their conduct can only be answered in the negative, as they have now paid out some $882,000 as a result of the events underlying this case. *See* A141 (V1), Tr. 409 (V11). Hess instead parrots the trial court's claim that the Chartis Defendants "would have profited" from their conduct. Hess Br. 25-26; A3231 (V4). But this is irrelevant, for the purpose of inquiring into the defendant's profit is to ensure that punitive damages strip him of any *actual* profit. *See Perrine*, 225 W. Va. at 554, 694 S.E.2d at 887 (this factor "instructs that punitive damages should remove the profit, and be in excess of the profit, so as to discourage future bad acts by" the defendant). Here, there was no profit to remove, and indeed there could never have been any such benefit: even if the Chartis Defendants had prevailed in the litigation (in which case its actions could not possibly have been called "wrongful") they could at most have avoided paying someone else's obligations.

Third, and again contrary to Hess's contention (Hess Br. 26), *no evidence of the Chartis Defendants' financial positions was presented to the jury.* The only evidence adduced at trial or referenced in Hess's brief concerns not the Chartis Defendants but AIG, Inc., a separate company with its own assets and income. *See* 0705 Opening Brief 39-40. There is no evidence that the Chartis Defendants would be able to tap AIG, Inc.'s resources to fund any hypothetical judgment in this case, so there is no basis for using its wealth to calibrate a punishment against these defendants.[20]

[20] More problematic still is the jury's use of the testimony concerning AIG, Inc.'s 2010 executive compensation ($53 million) in determining the size of the punitive award (also $53 million)—which the trial court also did not address. Courts around the country properly hold that admission of such data is prejudicial and violative of due process, *even when it concerns the defendant itself. See, e.g., Graef v. Chem. Leaman Corp.*, 106 F.3d 112, 119 (5th Cir. 1997) (admitting evidence of "the total annual salary [the defendant] paid to all of its officers" was "an abuse of discretion"); *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 25 (S.C. 2010) (such evidence goes "far beyond the pale" and violates due process by "introduc[ing] an arbitrary factor in a jury's consideration and assessment of punitive damages"); *Grefer*

Fourth, Hess misapprehends the nature of the fourth *Perrine* factor. The question is not, as Hess suggests (Br. 26-27), whether large punitive awards serve as a deterrent to wrongdoing.[21] (The extent to which deterrence of wrongdoing is necessary is measured by the reprehensibility of the defendant's acts.) Instead, the issue is whether the threat of punitive damages will encourage settlement of claims. *Perrine*, 225 W. Va. at 553, 694 S.E.2d at 886. The facts here show that it will not. The events that led to this litigation began when the Chartis Defendants uncovered what they believed to be information that called Hess's claim into question, at which point they sought information which could confirm coverage. Hess was afforded every opportunity to come forward with that information before the Chartis Defendants ceased paying Ryan, and before Ryan brought suit. Instead, it stonewalled its insurers' inquiry, forcing the case to litigation. Reinstating the jury's verdict ($58 million in a case that began with a dispute over no more than $378,000 in insurance proceeds), or even affirming the trial court's judgment without further reduction, would encourage future insureds to take the same tack, leading to more lawsuits and fewer settlements (or otherwise amicable resolutions) when disputes arise.

Finally, as explained in the 0705 Opening Brief (at 33-34), Hess has borne no litigation costs and will (if it prevails) recover its attorneys fees and expenses as a component of its compensatory damages. *See* Tr. 476 (V11); *Hayseeds*, 177 W. Va. at 329, 352 S.E.2d at 79-80. Hess's brief (at 27-28) fails even to acknowledge these facts. To consider its litigation expenses as a justification for punitive damages would be to sanction an unlawful double recovery.

---

v. Alpha Technical, 965 So.2d 511, 524, 526 (La. Ct. App. 2007) (evidence "of the salaries, bonuses, stock options, etc., of Exxon's corporate executives . . . provide[d] an open-ended basis for inflating the punitive award").

[21] Hess also suggests, in a footnote, that a large punitive damages award is appropriate as a means of compelling compliance with West Virginia's UTPA. Hess Br. 27 n.22. This is false: the Code provides mechanisms for enforcing the UTPA's requirements, *see* W. Va. Code §§ 33-11-6, 33-11-8, and the basis for punitive damages in a bad-faith action is not "wrongful conduct which affects merely *the rights of others,* generally, but instead requires proof of malicious conduct in the insurer's handling of *the policyholder's claim.*" *McCormick*, 202 W. Va. at 539, 505 S.E.2d at 458.

2. The Trial Court Correctly Found That Mitigating Circumstances Necessitated A Remittitur

Despite its incorrect assumption that a large punitive award was warranted by aggravating factors just shown to be nonexistent, the trial court concluded that mitigating considerations were substantial enough to warrant a reduction in the jury's award. As explained in the 0705 Opening Brief (at 35-37), the court's failure to consider mitigation on top of the mandated *TXO* reduction meant that it did not go far enough. But Hess is wrong to fault the court for finding mitigating circumstances to exist on the record here.

Most important, the court was correct to conclude that the jury's $53 million bore no reasonable relationship to the harm that Hess allegedly endured. A3232 (V4). As explained in the 0705 Opening Brief (at 15-18), and indeed by William Brown himself (Tr. 409, 476, 480 (V11)), Hess suffered no injury here. Ryan's claims are settled, Hess has not paid any attorneys' fees, the company is dissolved, and there were no assets that it could have lost in the course of litigation. Hess's brief (at 29-30) does not even purport to offer a measure of its actual injuries for comparison against the punitive damages award, and its citation to *Kocher v. Oxford Life Ins. Co.*, 216 W. Va. 56, 602 S.E.2d 499 (2004) (per curiam) is a *non sequitur*: The sole syllabus point in that case holds only that a jury cannot be charged that it "*shall* or *should* find exemplary damages," because *whether* to award punitive damages is within the jury's discretion in an appropriate case. But *McCormick* and *Hayseeds* explicitly limit the jury's discretion as to whether to award punitive damages in insurance bad-faith cases; even where such discretion exists, it does not extend to the *amount* of such damages. A jury is not permitted to exceed the bounds set by the federal and state Constitutions, and more than two decades' worth of punitive damages jurisprudence in this State holds that this Court has a responsibility to police those bounds. *See, e.g.*, Syl. pt. 5, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897

(1991).

Nor was the jury's 10.6:1 ratio of punitive to compensatory damages reasonable. A3233-34 (V4). The primary (if not the only) basis for the $5 million compensatory damages award was emotional injuries allegedly suffered by individuals who are not parties to the case. *See* 0705 Opening Brief 15-18. Those purported injuries are not accompanied by any physical trauma or ongoing treatment, and therefore "necessarily encompass punitive damages," such that "an additional award for punitive damages would constitute an impermissible double recovery." *Tudor v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 111, 131-32, 506 S.E.2d 554, 574-75 (1997);[22] *see also Campbell*, 538 U.S. at 426 (an award of compensatory damages for emotional distress "already contains" a "punitive element"). The punitive damages award therefore must be compared to some measure of concrete injury actually or potentially suffered by Hess. The only possible such loss is Ryan's $253,000 claim for unpaid remediation costs (which Hess never would have paid given that it is dissolved and holds no assets). *See* A6-7 (V1). The jury's award is more than 209 times larger than that figure, and even the trial court's remitted judgment is nearly 100 times its size. These are not reasonable ratios in a case involving no more than a good-faith insurance coverage dispute resulting in no physical or economic harm. Nor was even the 10.6:1 ratio reasonable: it more than doubles West Virginia's presumptive 5:1 "outer limit," Syl. pt. 15, *TXO*, 187 W. Va. 457, 419 S.E.2d 870, and exceeds even the federal Supreme

[22] Although *Tudor* has been limited to the torts of intentional and reckless infliction of emotional distress, *see* Syl. Pt. 11, *Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 209 W.Va. 318, 547 S.E.2d 256 (2001), its holding is nevertheless applicable here. Hess's claim for recovery is grounded solely in the Browns' emotional injuries—as is tacitly admitted by Hess's failure to identify any concrete harm that the company itself suffered. Intentional or reckless infliction of emotional distress is the only plausible theory under which they could have recovered their alleged non-physical, non-economic losses. If Hess is somehow allowed to recover damages for the Browns' purported injuries, its cause of action will be nothing more than an intentional infliction of emotional distress claim disguised as an insurance case. The considerations that led *Sheetz* to limit *Tudor* do not apply in this situation, because there is no legitimate underlying non-IIED claim involved here. *See id.* at 337, 547 S.E.2d at 275.

Court's single-digit guideline, *see Campbell*, 538 U.S. at 425. And all of these problems are the more acute when considered in light of the undeniably "very high" compensatory damages figure—a consideration counseling additional reductions in the punitive damages award. *Perrine*, 225 W. Va. at 557, 694 S.E.2d at 890.

Finally, Hess mistakenly argues (Hess Br. 31-32) that the trial court should not have considered the Chartis Defendants' substantial litigation costs in determining the need for a large punitive judgment (A3233 (V4)). Litigation expenses are relevant in that they diminish the need for additional deterrence, not because they must factor into a precise, to-the-penny calculation. And the expenses here are undeniably large enough to serve as an effective deterrent. This litigation has been ongoing for more than three years. The case has been to federal court and back, and involved lengthy motion practice and cumbersome discovery before a full trial, post-trial briefing, and now an appeal to this Court. This has undeniably been expensive, irrespective of the fact that the Chartis Defendants have not put their legal bills into evidence. The trial court was justified in considering these expenses as a factor weighing against a large punitive award.

* * *

In sum, the trial court addressed a massive punitive damages award that was unsupported by aggravating circumstances and that was out of all proportion both to the plaintiff's injuries and to the jury's compensatory judgment (which was itself unjustified and requires reversal or vacatur). Following *Garnes*, *TXO*, and *Perrine*, the court rightly concluded that the $53 million punitive damages award was unsustainably large. The trial court's error was in failing to reduce the judgment further or to eliminate it entirely—not in determining to order a remittitur to $25 million.

B. The Jury's Award Finds No Support In The Case Law

Hess errs by contending that reinstatement of the jury's award is supported by case law approving large damages ratios. *See* Hess Br. 33-39 & n.29. Most obviously, only one of the cited cases (*Boyd*) hails from West Virginia, and as explained above (*see* pp. 16-17, *supra*) that case's *dicta* considered only federal law and did not alter the *TXO* rule. The remaining cases do not relate to West Virginia's presumptive 5:1 limitation and in any event do not support the proposition that the jury's award in this case is constitutionally permissible.

Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257 (1989), for instance, was decided before the U.S. Supreme Court had adopted a due process limitation on the size of punitive damages; indeed, the Court explicitly refused even to consider the question. *Id.* at 276-77. *Eichenseer v. Reserve Life Insurance Co.*, 934 F.2d 1377 (5th Cir. 1991), was likewise handed down before the now-controlling U.S. Supreme Court case law. Moreover, and contrary to Hess's representations, the facts of that case are sharply different from those presented here. Whereas the insurer there refused to investigate the plaintiff's claim and ignored the plaintiff's attempts to provide corroborating documentation, *id.* at 1383, the Chartis Defendants attempted earnestly and in good faith to obtain information that would dispel their doubts about Hess's coverage. Only after receiving no response to their repeated requests for clarification and confirmation of coverage did the Chartis Defendants rescind Hess's policy. Further, the 500:1 ratio in *Eichenseer* was affirmed only on the ground that a punitive award in line with the jury's minimal $1,000 compensatory verdict would have been insufficient to achieve adequate deterrence. *Id.* at 1383-84. Here, by contrast, the compensatory portion of the judgment is a massive $5 million, far larger than any plausible measure of Hess's actual harm. Such an award is on its own sufficient to achieve whatever deterrence may be necessary, and there is no need at all for additional punishment. *See Perrine*, 225 W. Va. at 557, 694 S.E.2d at 890; *Campbell*, 538

U.S. at 426.[23]

Hess's attempt to avoid application of *Campbell* (Hess Br. 36-37) fares no better than its effort to have the case decided as though it were similar to *Eichenseer*. Much of the evidence used to establish the Chartis Defendants' alleged reprehensibility concerned dissimilar cases and insurance policies not issued by C&I. *See* 0705 Opening Brief 18-19, 39; *Campbell*, 538 U.S. at 422 (error to "award[] punitive damages to punish and deter conduct that bore no relation to the [plaintiffs'] harm," because a "defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages"); *Philip Morris USA v.*

---

[23] The rest of Hess's cases are inapposite for similar reasons. In both *Mitchell v. Fortis Insurance Co.*, 686 S.E.2d 176 (S.C. 2006), and *Cock-N-Bull Steak House, Inc., v. Generali Insurance Co.*, 466 S.E.2d 727 (S.C. 1996), the insurer defendants had no reasonable basis for denying the plaintiffs' recovery: In the former, the plaintiff had forwarded numerous documents proving the propriety of his claim, and the court found that the defendant had acted with intentional deceit. 686 S.E.2d at 186. In the latter, the defendant acted willfully and with no evidence whatsoever to justify its claim denial. 466 S.E.2d at 731. The defendant in *Capital One Bank (USA), N.A. v. Carefree Debt, Inc.* 2010 U.S. Dist. LEXIS 101918 (D. S.C. 2010) deprived the plaintiff of substantial sums of money by deceiving its debtors into believing that they could or should withhold payments in order to obtain debt relief. *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003), likewise involved a defendant that was fully aware that it was subjecting the plaintiffs and numerous others to injury (through its bedbug-infested motel rooms); the court observed that its failure to warn its guests "amounted to fraud and probably to battery as well." *Id.* at 675. All of these cases involved truly indefensible and reprehensible wrongdoing, in contrast to the legitimate insurance dispute that is the genesis of this case.

In other cases, the large damages ratios were justified by small or even nominal compensatory damages, necessitating large punitive awards to achieve effective deterrence. *See Saunders v. Branch Banking & Trust*, 526 F.3d 142 (4th Cir. 2008) ($1,000 in compensatory damages); *EEOC v. Fed. Express Corp.*, 513 F.3d 360 (4th Cir. 2008) ($8,000); *Coryn Group II, LLC v. O.C. Seacrets, Inc.*, 2012 U.S. Dist. LEXIS 49774 (D. Md. 2012) (striking more than four fifths of the jury's $265,035 punitive damages award even where compensatory damages were a nominal $1); *Jones v. Rent-A-Ctr., Inc.*, 281 F. Supp. 2d 1277 (D. Kan. 2003) ($10,000, which the court considered "little economic damage"); *Craig v. Holsey*, 590 S.E.2d 742 (Ga. Ct. App. 2003) ($8,801.40 in actual damages where defendant's decision to drive under the influence of alcohol and marijuana could easily have killed the plaintiff or someone else); *Hollock v. Erie Ins. Exch.*, 842 A.2d 409, 419-22 (Pa. Super. Ct. 2004) (compensatory award of $278,825 comprised only attorneys' fees, costs, and interest, leaving plaintiff without recovery in the absence of punitive damages; defendant had deliberately provided false information and otherwise engaged in "blatant dishonesty" in the course of refusing to pay a valid claim without any reasonable justification).

In short, none of Hess's cases support the contention that $53 million in punitive damages, on top of $5 million in compensatory damages, is a reasonable punishment for engaging in a good-faith insurance dispute that caused the plaintiff no actual physical or economic harm.

Williams, 549 U.S. 346, 353-54 (2007). Any evidence of supposed reprehensibility is at most insubstantial, *see* pp. 23-31, 33, *supra*; 0705 Opening Brief 31-32, and is insufficient as a matter of law to justify the jury's outsized punitive judgment. What is more, *Campbell* explicitly recognized that a $1 million compensatory award (one fifth of what the jury awarded in this case) was "substantial," such that "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425-26. Hess does not and cannot contend that the jury's verdict in this case does not fit this bill, and it cannot evade the conclusion that *Campbell* does not even permit the remitted judgment to stand—let alone allow reinstatement of the jury's verdict.

CONCLUSION

In the event the judgment below is not reversed, vacated, or further remitted pursuant to the Chartis Defendants' appeal in No. 12-0705, it should be affirmed.

DATED this 19th day of October, 2012.

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

By Counsel,

John Hampton Tinney
(W.V. No. 3766)
John H. Tinney, Jr.
(W.V. No. 6970)
THE TINNEY LAW FIRM PLLC
222 Capitol Street, Ste. 500
Charleston, WV 25301
Telephone: (304) 720-3310
johntinney@tinneylawfirm.com
jacktinney@tinneylawfirm.com

and

Kathleen M. Sullivan
(*Pro Hac Vice* admission granted on June 5, 2012)
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Telephone: (212) 849-7327
kathleensullivan@quinnemanuel.com

and

Christopher P. Ferragamo
(W. Va. I.D. No. 11496)
JACKSON & CAMPBELL, P.C.
1120 Twentieth Street, N.W., South Tower
Washington, D.C. 20036
Telephone: (202) 457-1600
cferragamo@jackscamp.com

Counsel for Defendants AIG Domestic Claims, Inc., n/k/a Chartis Claims, Inc., and Commerce and Industry Insurance Company

No. 12-719

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

HESS OIL COMPANY, INC.,

Defendant/Petitioner

v.

From the Circuit Court
of Harrison County, WV
Civil Action No. 10-C-20

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

Defendants/Respondents.

CERTIFICATE OF SERVICE

I, John H. Tinney, Counsel for Chartis Claims, Inc., and Commerce & Industry Insurance Company, hereby certify that on the 19th day of October 2012, I served the foregoing **"Respondents' Brief"** upon counsel of record via facsimile and by depositing a true copy thereof in the United States first-class mail, postage prepaid, and addressed to counsel as follows:

Michael J. Romano, Esquire
Law Office of Michael J. Romano
128 S. Second Street
Clarksburg, WV 26301
Counsel for Defendant, Hess Oil Company, Inc.
Facsimile (304) 326-7800

James A. Varner, Esquire
Geraldine S. Roberts, Esquire
McNeer, Highland, McMunn & Varner
P.O. Drawer 2040
Clarksburg, WV 26301
Counsel for Defendant, Hess Oil Company, Inc.
Facsimile (304) 623-3035

John H. Tinney

John H.Tinney (State Bar #3766)
John H. Tinney, Jr. (State Bar #6970)
222 Capitol Street, Suite 500
Charleston, WV 25301
(304) 720-3310 (Phone)
(304) 720-3315 (Facsimile)