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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

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NO. 12-0705

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

Petitioners

v.

HESS OIL COMPANY, INC.,

Respondent.

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BRIEF FILED  
WITH MOTION

**AMICUS CURIAE BRIEF**  
**ON BEHALF OF THE WEST VIRGINIA ASSOCIATION FOR JUSTICE**

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## INTRODUCTION AND INTEREST OF *AMICUS CURIAE*, WEST VIRGINIA ASSOCIATION FOR JUSTICE

This *amicus* brief is submitted on behalf of the West Virginia Association for Justice (“WVAJ”) in support of the Respondent, Hess Oil Company, Inc.<sup>1</sup>

The WVAJ is a private, non-profit organization consisting of attorneys licensed in the State of West Virginia who represent, among other clients, citizens of the State of West Virginia harmed by the wrongful conduct of others. The Membership of WVAJ is particularly interested in protecting ordinary West Virginians and securing for them the rights enshrined in the State Constitution, the West Virginia Code and the decisions of this Court. It has filed *amicus* briefs on more occasions than could conveniently be counted and its briefs have been acknowledged as useful to this Court on multiple occasions.<sup>2</sup>

No party to this appeal has authored or paid for any part of this brief.

### ARGUMENT

#### **I. West Virginia allows punitive damages for critical reasons of public policy that should guide the analysis of when an award is proper and how large it should be.**

At least since *Mayer v. Frobe* in 1895, West Virginia has expressly recognized the availability of punitive damages in civil cases. The 117-year-old syllabus of *Mayer* has stood the test of time:

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<sup>1</sup> All parties have consented to the filing of this brief.

<sup>2</sup> See e.g. *Taylor v. Nationwide Mut. Ins. Co.*, 214 W.Va. 324 (2003); *State ex rel. Charles Town General Hosp. v. Sanders*, 210 W.Va. 118 (2001); *Riggs v. W. Virginia Univ. Hospitals, Inc.*, 221 W. Va. 646, 648, 656 S.E.2d 91, 93 (2007); *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, n. 168, 724 S.E.2d 250, 296 (2011). The WVAJ was previously named the “West Virginia Trial Lawyers Association.”

In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous.

40 W. Va. 246, 22 S.E. 58 (1895), *cited in CSX Transp., Inc. v. Smith*, 229 W. Va. 316, 729 S.E.2d 151, 156 (2012). Justice Dent went on to say, for himself alone, that punitive damages are allowed for “a more valid, ancient, and sacred reason . . . having for its object the suppression or prevention of all wrong, and the extermination of the desire or motive to commit wrong,” citing to Blackstone, the Holy Bible, and the natural law. *Id.* The *Mayer* Court observed that “[e]xemplary or punitive damages [are] awarded not by way of compensation to the sufferer, but by way of punishment of the offender and *as a warning to others.*” *Id.* at 59 (emphasis supplied).

*Mayer* gave specific attention to a short-lived experiment, begun by the case of *Pegram v. Stortz*, 31 W. Va. 220, 6 S.E. 485, 486 (1888), in which West Virginia left the main stream and disallowed punitive damages. The *Mayer* Court concluded that the effects were disastrous: “[*Pegram*’s] attempt, however meritorious, has utterly failed of its purpose beyond our own borders, and within it has only served to produce perplexity and confusion, without any benefit, public or private, *except to protect lawbreakers and wrongdoers from the just consequences of their illegal and wrongful acts.*” *Mayer* at 59 (1895) (emphasis supplied).

The prolifically-cited case of *Kessel v. Leavitt*, 204 W. Va. 95, 191, 511 S.E.2d 720, 816 (1998) expounded on the multiple public-policy grounds that underlie the availability of punitive damages. Chief Justice Davis wrote for the Court in *Kessel*:

In this vein, we have determined punitive damages awards to be permissible to *achieve a myriad of important objectives.*

“[P]unitive damages serve several purposes. Among the primary ones are: (1) to punish the defendant; (2) to deter others from pursuing a similar course; and, (3) to provide additional compensation for the egregious conduct to which the plaintiff has been subjected.” . . . Furthermore, “[p]unitive damages] encourage a plaintiff to bring an action where he might be discouraged by the cost of the action or by the inconvenience of

a criminal proceeding... [They also] provide a substitute for personal revenge by the wronged party.’ ”

*Coleman v. Sopher*, 201 W.Va. at 603 n. 22, 499 S.E.2d at 607 n. 22 (quoting *Harless v. First Nat'l Bank in Fairmont*, 169 W.Va. at 691 & n. 17, 289 S.E.2d at 702-03 & n. 17

*Id.* (emphasis supplied). These diverse public-policy goals are served by the availability of punitive damages and remain necessary to enforce justice in our state across a variety of substantive legal areas. This solidly main stream jurisprudence upholds the rights of West Virginians against wrongdoers.

*Kessel* (and later cases following it) showed that Justice Dent’s view of the deterrence purpose of punitive damages prevailed in substance, if not on the theological basis he offered in 1895. See e.g., *Peters v. Rivers Edge Min., Inc.*, 224 W. Va. 160, 185, 680 S.E.2d 791, 816 (2009), citing *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 661, 413 S.E.2d 897, 902 (1991). *Garnes* put it simply, saying: “[n]o one (except for a few academic commentators) questions the value of punitive damages as a deterrent.” *Id.*

These carefully-articulated *purposes* of punitive damages must be borne in mind in evaluating a plaintiff’s entitlement to punitive damages, as well as their amount. For example, this Court has concluded that a punitive damage award will “necessarily” need to be large in order to effectively deter a wealthy defendant. See e.g., *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 555, 694 S.E.2d 815, 888 (2010) (“we agree with the circuit court’s conclusion that “to accomplish punishment and deterrence for such a wealthy company [as DuPont], a punitive damages award must necessarily be large.”). Likewise, punishment must be sufficiently substantial “so that a future defendant who has committed a clear wrong will be encouraged to accept a fair and reasonable settlement rather than force the wronged plaintiff into

litigation and risk incurring a similarly large punitive damages award.” *Perrine* at 556, 889 (2010).

A crucial difference from run-of-the-mill punitive damage analysis exists in West Virginia’s insurance bad faith law. In the specialized context of insurance bad faith litigation, punitive damages are awarded only under circumstances of “actual malice.” As *Hayseeds, Inc. v. State Farm Fire and Cas.* Court held:

Accordingly, punitive damages for failure to settle a property dispute shall not be awarded against an insurance company unless the policyholder can establish a high threshold of actual malice in the settlement process. By “actual malice” we mean that the company actually knew that the policyholder’s claim was proper, but willfully, maliciously and intentionally denied the claim.

177 W. Va. 323, 330, 352 S.E.2d 73, 80-81 (1986). A defendant who acts with malice outstrips the villainy of one who is “merely” reckless and therefore illustrates starkly the need for severe punishment. Moreover, malicious conduct, by its nature, may be deterred more effectively than merely reckless conduct because of the premeditation involved. *TXO* post at 476, 889. Therefore, when a jury finds this high standard to have been met, it is beyond cavil that the policy reasons behind punitive damages are invoked.

**II. The federal trend in review of punitive damages incorporates questionable empirical assumptions that may threaten to undermine the purposes of punitive damages.**

Limiting punitive damages – damages for willful, reckless and malicious misconduct has been a *cause célèbre* in American politics for more than a generation now. Notions of “runaway juries” and “out of control punitive damages” are so ingrained they are the stuff of bestsellers, blockbuster movies and cable news features. But for almost as long as various special interests have been shouting from the rooftops that American juries and punitive damages endanger our economy, real social scientists have been gathering data and facts about our cherished jury

system. The results serve to calm down the overheated, politicized discussion and are very pertinent here.

A detailed study, entitled “The Empirical Effects of Tort Reform” has recently become available and explains:

The attention punitive damages receive is disproportionate to their real world impact. Evidence from reliable data on trial outcomes indicates that punitive damages are not sought in most cases that reach trial (Eisenberg et al. 2011) and that punitive damages are awarded in well under 10 percent of trials. Settlement rates in cases involving punitive damages have not been shown to differ from settlement rates in cases not involving punitive damages claims (Eaton et al. 2005).

Theodore Eisenberg, *Research Handbook on the Economics of Torts* (Jennifer Arlen, ed.).<sup>3</sup> Hard data de-bunks the runaway jury concept. Detailed figures assembled by Professor Eisenberg show that, contrary to popularized views, whether a jury or a judge awards the punitive damages, the amounts are fairly consistent. *Id.* at 5. Moreover, there has been little to no change in what amounts are being awarded over time. *Id.* Strikingly, the issuance of landmark U.S. Supreme Court opinions in *BMW v. Gore* and *Campbell v. State Farm* had little to no effect on ratios of punitive damages (*id.* at 6-9) – strongly suggesting that awards outside the limits of due process were so rare to begin with that much-ballyhooed due process review didn’t move the average. The study concluded: “[l]ittle evidence exists that reform of punitive damages affected the ratio between punitive and compensatory damages. This is consistent with punitive damages not having been out of control and in need of reform.” *Id.* at 31.

Evidence accumulated over decades show that juries are parsimonious with punitive damage awards, making them only rarely and modestly.<sup>4</sup> Large awards, motivated by the most

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<sup>3</sup> [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2032740](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2032740)

<sup>4</sup> U.S. Dept. of Justice BJS Bulletin, *Civil Justice Survey of State Courts, 1996: Tort Trials and Verdicts in Large Counties* (1996), p. 1 (August 2000) (about 3% of plaintiff winners in tort

egregious conduct, or inspired by repeat offenders, are appropriately rare.<sup>5</sup> Hollywood portrayals and special-interest propaganda have created undue suspicion about a cornerstone of our justice system – using firm punishment of wrongdoing as an example to other would-be-transgressors. Accordingly, jury decisions such as the one in this case should be assigned the same presumption of correctness that other jury decisions enjoy.

To take one example, we trust juries with the greatest punishments meted out under our law – including the decision to allow mercy, or to withhold it, when a life sentence is in question. As *State v. Triplett* holds: “[t]he recommendation of mercy in a first-degree murder case lies solely in the discretion of the jury. Therefore, it would be improper for the trial court to set aside a jury verdict of first degree murder without a recommendation of mercy in order to give a recommendation of mercy.” *State v. Triplett*, 187 W. Va. 760, 762, 421 S.E.2d 511, 513 (1992).

It borders on unseemly to allow the jury this awesome power over the freedom of individuals while embracing a suspicious view of a jury when it metes out punishment in the form of mere monetary damages against a wrongdoer. In both situations, the jury represents the people of West Virginia, *governing themselves*, and serving as a bulwark against wrongdoing in our State. Justice Dent, again:

The legislature, having great confidence in the integrity and purity of the jury system, and a *full reliance on the intelligence, moral uprightness, clear sense of justice, and impartiality of their fellow citizens* when called upon, in the capacity of jurors, to sit in solemn judgment upon the lives, liberty, and property of others,

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trials were awarded punitive damages; median award was \$38,000); BJS Special Report, *Civil Justice Survey of State Courts, 1992: Civil Jury Cases and Verdicts in Large Counties (1995)*, p.1 (about 6% of plaintiff winners received a punitive award; median award was \$50,000).

<sup>5</sup> William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 304-07 (1987) at 185; *see also* Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 Cornell L. Rev. 743, 756 (2002); *see also*, Cass R. Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2084 (1998).

clothed the jury with full power to determine the amount and character of damages that should be imposed upon a wrongdoer who by his negligence caused the death of his neighbor . . . In doing so, it was the plain and expressed intention to take away from the courts all power to control the jury either as to the amount or character of the damages to be inflicted. The court is thus inhibited from instructing the jury that they should give or withhold punitive, consolatory, pecuniary, or compensatory damages. *This is their sacred province, in which they are the supreme judges.*

*Couch v. Chesapeake & O. Ry. Co.*, 45 W.Va. 51, 30 S.E. 147, 149 (1898) (emphasis supplied); *see also Kocher v. Oxford Life Ins. Co.*, 216 W. Va. 56, 57, 602 S.E.2d 499, 500 (2004) (it is error to tell a jury it must award punitive damages, “such damages being wholly within the discretion of the jury”). When the matter of punitive damages is committed to the jury, it is committed to the People of West Virginia, where such momentous decisions belong, subject only to review for legal error, or results that defy all reasonable proportions.

**III. In this case, the jury’s verdict on punitive damages comports with the policies behind punitive damages and the principles laid down in *Mayer, Kessel, and Peters*. The verdict should therefore be upheld.**

**A. The jury’s verdict on punitive damages was proper and AIG’s analysis of the *Garnes* factors, as explained in *Perrine*, is erroneous.**

The Petitioners herein argue that there should be no award of punitive damages at all, and alternatively that the award should be reduced even further than the trial court’s original \$25,000,000.00 reduction. The Court’s *amicus* will not comment on Petitioner’s fact-specific appeals to its own interpretations of the evidence and how the jury could have credited its witnesses (as it clearly did not), leaving those issues to the Respondent and to the familiar rule that is on review, the evidence is construed in the manner most favorable to the prevailing party.

As this Court has often pointed out:

in determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2)

assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

*Orr v. Crowder*, 173 W. Va. 335, 347-48, 315 S.E.2d 593, 606 (1983). While AIG declines to see the reprehensibility of its conduct, it is evident that the jury did see it, on a record more than adequate to allow the inference.

The Court's *amicus* does wish to address how AIG attempts to analyze this Court's precedents on punitive damages, however. Because this is a bad faith insurance practices case, Hess, simply to prevail, was *required* to show a "general business practice" on the part of AIG. Syl. Pt. 3, *Jenkins v. J. C. Penney Cas. Ins. Co.*, 167 W. Va. 597, 598, 280 S.E.2d 252, 253 (1981). Moreover, to receive an award of punitive damages, Hess could not rely on recklessness or "bureaucratic confusion," but instead satisfied the high standard of "actual malice" required by *Hayseeds*, *supra*. The repeated nature of AIG's conduct, coupled with its high degree of reprehensibility, militate in favor of a substantial award of punitive damages. *Garnes*, *supra*, at Syl. Pt. 3, 4. AIG fails to grapple with the finding of malice, repeatedly trying to analyze its actions under the portions of *TXO*, *supra*, that deal with merely reckless defendants. AIG's Brief at 34.

Even more disconcerting is AIG's manipulation of the "profitability" analysis under *Garnes* and *Peters*. See Petitioner's Brief at 32-33. Accordingly to AIG, its bad faith can never be profitable because when it wins, it was right and there was no bad faith, but when it loses, it pays the coverage and thus makes no unfair profit. *Id.* But the law is not a child's game, as AIG's "heads-we-win/tails-you-lose" argument suggests. Obviously, AIG's intention in committing bad faith is to gain an unfair profit at the expense of its insureds. Moreover, when committing bad faith as a "general business practice," AIG can expect to win, albeit unfairly,

some of the time and lose some of the time. Only on some of the losses will it ever be sued for bad faith and it has a chance to win some of those suits as well. Therefore there is *considerable* profit for AIG in its bad faith conduct far beyond an individual claim. As this Court explained in *Poling v. Motorists Mut. Ins. Co.*, 192 W. Va. 46, 48, 450 S.E.2d 635, 637 (1994)

Without the possibility of bad faith claims, hourly billing schemes will encourage lawyers to mine every seam of fool's gold from every possible motion, deposition opportunity, interrogatory exchange, declaratory judgment action, and occasion justifying a petition for extraordinary relief, leaving the policy holders paying the freight.

*Id.* Not only does AIG hold on to its insureds money far longer than it should, but, through unfair practices, it avoids some claims entirely, and others partially, as well as avoiding the attorney's fees, costs, expenses and general damages it owes its insureds. AIG's pretense that there is no profit in what it did, because it got caught, misses the point.

This Court has made it clear, moreover, that not only harm, but the *potential* harm of an action, is a valid consideration in awarding punitive damages (*TXO* at 476), obliterating AIG's contention that since it 1) loses money when it gets caught and 2) can only be punished when it gets caught, that there are no harms to weigh. Petitioner's Brief at 32-33.

Punitive damages should bear a reasonable relationship to the *potential of harm* caused by the defendant's actions and that generally means that punitive damages must bear a reasonable relationship to actual damages because compensatory damages provide a reasonable measure of likely harm. However, in the narrow exception like that before the Georgia Supreme Court in *Jones*, where the actual harm was minimal but the potential harm was tremendous, a jury may reasonably find punitive damages commensurate with the potential harm.

*Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 667, 413 S.E.2d 897, 908 (1991) (emphasis supplied).

In discussing the evidence of the defendant's financial position, AIG entirely neglects that the adversary process involves more than one party. AIG, like any defendant in a punitive proceeding, had the right to place into evidence any matters as regards its finances that it desired.

In this case, it failed completely to distinguish AIG, Inc. from its wholly-owned subsidiaries (AIG Domestic Claims, INC., Chartis Claims, Inc. and Commerce and Industry Insurance Company) or present any evidence that it would be unable to pay the award made by the jury. It similarly failed to do so in any post-trial proceeding.<sup>6</sup> AIG relies on the opaqueness of its byzantine corporate structure to gain an unfair advantage now – when it had every opportunity to clarify matters and trial and failed to do so. This should not be permitted. Moreover, given the ever-more-complex structures of multi-national corporations, this Court should announce a rule that in a punitive phase, the defendant has the equal opportunity to place in evidence its net worth, just as the plaintiff does, and if it fails to do so, it cannot complain later about the quality of the plaintiff's evidence on the subject.

AIG makes a simple error in regard to the cost of the litigation being a factor in judging the amount of the punitive award – claiming it is part of the compensatory award. In this case, there are two separate litigations, the compensatory award accounts only for the *cost of the litigation of the underlying claim*, not the cost of the bad faith litigation, which is separate (the jury did not make an award for the attorney's fees, or litigation costs incurred in the bad faith case). Those fees are separately recoverable under *McCormick v. Allstate*, 197 W.Va. at 427-28,

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<sup>6</sup> In fact, the evidence showed that AIG's claims were adjusted by the same people according to the same policies, whichever corporate subsidiary was nominally involved. (*A 12:1770-1801, 1790, 1793, 1799, 1808-09*). See *Laya v. Erin Homes, Inc.*, 177 W. Va. 343, 344, 352 S.E.2d 93, 94 (1986) (discussing disregard of corporate formalities); see also *Goff v. Penn Mut. Life Ins. Co.*, 229 W. Va. 568, 729 S.E.2d 890, 896 (2012) (bad faith claim may be pursued on behalf of non-premium paying entity where the purpose of bad faith law is served thereby. "In bringing such a suit, the beneficiary stands in the shoes of the insured in asserting a first-party type of statutory bad faith action. Absent this type of putative recovery, insurance companies could arguably escape accountability with regard to the payment of life insurance benefits").

475 S.E.2d at 519-20 (1996), but the substantial cost of the litigation imposed on a plaintiff is a proper factor to consider in allowing punitive damages and in considering their amount. AIG's argument that considering those costs would amount to a "double recovery" makes no more sense than would claiming that considering the compensatory damages for ratio purposes amounts to a "double recovery."<sup>7</sup>

**B. The verdict comports with federal and state due process.**

AIG's brief seeks to perpetuate certain misconceptions about *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 1524, 155 L. Ed. 2d 585 (2003), and perhaps create some new ones. The much-cited quotation from *Campbell* about "single digit" ratios reads as follows: "Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, *to a significant degree*, will satisfy due process." *Id.* at 425 (emphasis supplied). It is no wonder that the eyes and minds of defendants, having acted with malice or wantonness, slide across that phrase, "to a significant degree," and try to convince courts that the Supreme Court limited punitive damages to single-digit ratios. *It did not.* The actual words chosen by the Supreme Court not only allow for greater ratios to comport with due process, they specifically state that even some ratios that exceed the single digits "to a significant degree" will still comport with due process. The original verdict ratio in this case *barely* exceeds single digits and certainly could not be said to exceed single digits "to a significant degree." *Campbell* is therefore no help to AIG in this case when read carefully.

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<sup>7</sup> AIG makes that claim also. AIG's Brief at 34.

*TXO Prod. Corp. v. Alliance Res. Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992) aff'd, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993) is considerably *less* help to AIG, as it points out 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. *However, when the defendant has acted with actual evil intention, much higher ratios are not per se unconstitutional.*

*TXO* at Syl. Pt. 15. AIG simply misrepresents the holding of *TXO* (calling it a holding of *Perrine* as well) by eliding the fact that this is *an actual malice case* and therefore the 5:1 “general guideline” (*Perrine* at 556) does not apply at all.<sup>8</sup> The 5:1 rule simply does not apply to these facts because this is not a recklessness case. *TXO* explained why:

When the defendant is not just stupid, but really mean, punitive damages limits must be greater in order to deter future evil acts by the defendant. For instance, the United States Supreme Court upheld a punitive damages award with a ratio of more than 117 to 1 in *Browning–Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989). In the really mean cases, the cynosure in determining the reasonableness of the jury's verdict under *Haslip* and *Garnes* is *the amount of punitive damages required to cause the defendant to mend its evil ways and to discourage others similarly situated from engaging in like reprehensible conduct.*

*TXO* at 889, 476 (emphasis supplied). While the “really mean” locution has left the lexicon (*Alkire v. First National*, 197 W.Va. 122,131, 475 S.E.2d 122, 131 (1996)), the same rules apply here where AIG is found to have acted with actual malice. Once that is determined, the ratio question is: “what ratio is necessary to deter this type of misconduct by this litigant and others similarly situated?” The 5:1 guideline of *TXO* or the not-over-9:1-to-a-significant-degree

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<sup>8</sup> Perhaps AIG does not want to expressly bootstrap its arguments, but in Part III of its brief, virtually every argument it makes is predicated on the idea, rejected by the jury, that AIG did nothing wrong in the first place. Once the jury's verdict of actual malice is upheld, as a not-unreasonable inference from the vast trial record (*Orr, supra*) all of AIG's arguments fall apart.

concept from *Campbell* have far less application, if any. Equally, the “if the compensatory damages are very high” clause of footnote 12 of *TXO* refers to the cases implicated by the 5:1 guideline – not cases of actual evil intention, where “*much higher ratios are not per se unconstitutional.*” *TXO* at Syl. Pt. 15.

AIG next resorts to mathematical sleight-of-hand by attempting to sequence the (mis)application of cases to the punitive award. It claims that a punitive award must die the death of a thousand cuts, by first being incorrectly reduced in ratio terms and then incorrectly reduced again according to “mitigating factors.” AIG then re-hashes misinterpretations discussed above, such as the trial court’s proper consideration of the compensatory award, the cost of the litigation, and allegations of “double recovery.” Finally, AIG’s *coup de grace* is a request that the court credit AIG *its own litigation expenses* against the plaintiff’s award (AIG’s Brief at 36)– an *exact reversal* of what justice would require for a litigant guilty of actual malice.

AIG’s attack on the basis of wrongs against “strangers to the litigation” ignores the “general business practice” requirement of *Jenkins*. Hess not only established a general business practice across the AIG entities involved, Hess was *required* to do so to prevail. Moreover, the plaintiffs established that AIG Domestic Claims is the claim handling entity of the AIG conglomerate, handling claims for *all AIG companies*. (*A. 11:606, 627 Schmidt; 11:567-568 Terpstra; see also, A. 12:1193 Romano; 12:1248 Segal*). Moreover, the defendant elicited evidence from witnesses across its own range of companies and failed to timely object on relevance grounds to evidence concerning its array of affiliated entities, waiving any objection. As with its financial position, AIG thinks a defendant should be permitted to lie in the weeds on an issue peculiarly within its knowledge, objecting only if it does not like the results.

**C. This Court should not reduce the verdict, so that the critical public policies behind punitive damages may be served.**

Ultimately, the misapplications and misinterpretations proffered in AIG's brief grow from misconceptions about why punitive damages exist. The policies of just punishment for malicious acts, deterrence of deliberate wrongs and encouragement of fair settlements must be served to protect the people from lawbreakers. AIG treats this Court's historic development of the law in *Mayer*, *TXO*, *Kessel*, *Perrine* and *Peters* as though the intention of the Court is to produce a series of one-way ratchets – always reducing punitive damages until there is nothing left to serve the ends of justice they are designed to address.

But that is not what the cases say at all. Rather, each of these landmarks sets forth the *purposes and policies* behind punitive damages and seeks to define an inquiry that serves justice by sternly punishing malicious misdeeds – without shrinking from the “necessarily large” punishments required to rein in wealthy corporations like AIG that feel they may act against West Virginians with (literal) impunity. The punishment meted out by the jury in this case matched the misconduct, and the malefactor, in a measured, balanced and reasonable way. As the authorities cited in Part I, *supra*, show, juries have a track record for getting these matters right – and why shouldn't they? After all, it was the jury that heard a lengthy trial day after day and the jury that was sworn to apply West Virginia law to the facts. Nothing in this record shows that this jury did anything less than its duty in rendering substantial justice between the parties.

Accordingly, the jury's decision should be accorded the respect given by *Couch*, *supra*. This Court may act in “full reliance on the intelligence, moral uprightness, clear sense of justice, and impartiality of [its] fellow citizens” and allow the jury's just punishment to be enforced.

**CONCLUSION**

WHEREFORE, the Court's amicus respectfully asks that the Court take notice of the views of the members of the WVAJ, and those they represent, as set forth herein, in deciding this weighty matter.

VERY RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

Service of the foregoing AMICUS CURIAE BRIEF ON BEHALF OF WEST VIRGINIA ASSOCIATION FOR JUSTICE was had upon the defendants by mailing a true copy thereof, by United States Mail, postage-prepaid, to their attorneys at their last-known addresses shown below, this 18<sup>th</sup> day of October, 2012 as follows:

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