FILED
4 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 12-0705

SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

v.

HESS OIL COMPANY, INC.,
Defendant/Respondent.

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

PETITIONERS' 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 iii

ASSIGNMENTS OF ERROR 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

STATEMENT OF THE CASE 3

A. The Parties 3

B. The Insurance Policy And Hess's Claim 4

C. The Disclaimer Of Coverage 6

D. The Proceedings Below 6

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 10

STANDARDS OF REVIEW 11

ARGUMENT 12

I. THE TRIAL COURT ERRED UNDER BASIC WEST VIRGINIA CORPORATIONS LAW, WHICH PROVIDES THAT A CORPORATION IS SEPARATE FROM ITS SHAREHOLDERS AND FROM OTHER SEPARATELY INCORPORATED ENTITIES 12

A. The Trial Court Erred In Allowing Testimony And Inviting And Entering Judgment For Hess Based Solely Upon Injury To Hess's Shareholders 14

1. The Trial Court Abused Its Discretion In Admitting Testimony About Injuries Borne Solely By Hess's Shareholders 15

2. The Trial Court Erred In Instructing The Jury That It Could Award Damages Based On Injury To Hess *And* Or *Through* Its Shareholders 16

3. The Trial Court Erred In Denying Judgment For The Chartis Defendants Based On The Absence Of Evidence Of Injury To Hess 16

B. The Trial Court Abused Its Discretion In Admitting Testimony Concerning Conduct Of AIG, Inc. Subsidiaries Other Than The Chartis Defendants 18

II. THE TRIAL COURT COMMITTED ADDITIONAL ERRORS REQUIRING NEW TRIAL 19

A. The Trial Court's Procedure For Submitting and Giving Jury Instructions Contravened West Virginia Law 19

B. The Trial Court's Instructions On Hess's Misrepresentation To The Chartis Defendants Were Inconsistent, Erroneous, And Prejudicial 22

C. The Trial Court Abused Its Discretion By Admitting Irrelevant And Prejudicial Testimony Concerning Future Remediation Costs 26

D. The Trial Court Abused Its Discretion By Unevenly Applying Its Own Discovery Rules 27

III. THE PUNITIVE DAMAGES AWARD VIOLATES WEST VIRGINIA AND FEDERAL LAW 28

A. The Evidence Of The Requisite "Actual Malice" Was Insufficient Under West Virginia Law 28

B. The Punitive Award Is Excessive Under The West Virginia Constitution 30

1. The Punitive Award Is Unsupported By Aggravating Factors 31

2. The $25 Million Punitive Award Violates *TXO* 34

3. Mitigating Factors Warrant Reduction Of The Punitive Award 35

C. The Judgment Below Violates The Federal Constitution 37

1. The Punitive Award Is Excessive Under Federal Law 37

2. The Judgment Is Impermissibly Based On Facts Concerning "Strangers To The Litigation" 38

CONCLUSION 40

TABLE OF AUTHORITIES

Page

Cases

Arnoldt v. Ashland Oil, Inc.,
186 W. Va. 394, 412 S.E.2d 795 (1991) 15, 20, 21

Barlow v. Hester Indus., Inc.,
198 W. Va. 118, 479 S.E.2d 628 (1996) 12, 27

BMW of N. Am. v. Gore,
517 U.S. 559 (1995) 37, 38

Boyd v. Goffoli,
216 W. Va. 552, 608 S.E.2d 169 (2004) 31, 32

Brammer v. Taylor,
175 W.Va. 728, 338 S.E.2d 207 (1985) 21

Branham v. Ford Motor Co.,
701 S.E.2d 5 (S.C. 2010) 40

Bridgeport Music, Inc. v. Justin Combs Pub.,
507 F.3d 470 (6th Cir. 2007) 35

Bullman v. D & R Lumber Co.,
195 W. Va. 129, 464 S.E.2d 771 (1995) 18

Burdette v. Maust Coal & Coke Corp.,
159 W. Va. 335, 222 S.E.2d 293 (1976) (per curiam) 23, 24

Cap Gemini Am., Inc. v. Judd,
597 N.E.2d 1272 (Ind. Ct. App. 1992) 40

Chrystal R.M. v. Charlie A.L.,
194 W.Va. 138, 459 S.E.2d 415 (1995) 11

CSX Transp., Inc. v. Smith,
--- W. Va. ---, 729 S.E.2d 151 (2012) (per curiam) 12

Dunfee v. Allstate Ins. Co.,
No. 10-C-01308, 2011 WL 4544079 (S.D. W. Va. Sept. 29, 2011) 29

Garnes v. Fleming Landfill, Inc.,
186 W. Va. 656, 413 S.E.2d 897 (1991) 12, 18, 28, 31

Graef v. Chem. Leaman Corp.,
106 F.3d 112 (5th Cir. 1997) 40

Graham v. Wallace,
214 W. Va. 178, 588 S.E.2d 167 (2003) (per curiam) 12, 15

Grefer v. Alpha Technical,
965 So. 2d 511 (La. Ct. App. 2007) 40

Hayseeds, Inc. v. State Farm Fire & Cas.,
177 W. Va. 323, 352 S.E.2d 73 (1986) 17, 18, 26, 28, 29, 33

Hollen v. Linger,
151 W. Va. 255, 151 S.E.2d 330 (1966) 12

Honaker v. Mahon,
210 W. Va. 53, 552 S.E.2d 788 (2001) 11

Janus Capital Grp., Inc. v. First Derivative Traders,
131 S. Ct. 2296 (2011) 14

Jenkins v. J. C. Penney Cas. Ins. Co.,
167 W. Va. 597, 280 S.E.2d 252 (1981) 18

John D. Stump & Assocs., Inc. v. Cunningham Mem'l Park, Inc.,
187 W. Va. 438, 419 S.E.2d 699 (1992) 23

Jones v. United Parcel Serv.,
674 F.3d 1187 (10th Cir. 2012) 35

Jurinko v. Med. Protective Co.,
305 Fed. App'x 13 (3d Cir. 2008) 35

Karr v. Balt. & O. R.R.,
76 W. Va. 526, 86 S.E. 43 (1915) 24, 25

Laya v. Erin Homes, Inc.,
177 W. Va. 343, 352 S.E.2d 93 (1986) 13, 18

Leach v. Biscayne Oil & Gas Co., Inc.,
169 W. Va. 624, 289 S.E.2d 197 (1982) 40

Liberty Fin. Mgmt. Corp. v. Beneficial Data Processing Corp.,
670 S.W.2d 40 (Mo. App. Ct. 1984) 40

Matheny v. Fairmont Gen. Hosp.,
212 W. Va. 740, 575 S.E.2d 350 (2002) 11, 16, 25

Marshall v. Saseen,
192 W. Va. 94, 450 S.E.2d 791 (1994) 26

Martin v. Franklin Capital Corp.,
546 U.S. 132 (2005) 27

Mass. Mut. Life Ins. Co. v. Thompson,
194 W. Va. 473, 460 S.E.2d 719 (1995) 23, 30

McCormick v. Allstate Ins. Co.,
202 W. Va. 535, 505 S.E.2d 454 (1998) 28, 29, 30, 32

McCormick v. Allstate Ins. Co.,
197 W. Va. 415, 475 S.E.2d 507 (1996) 18

McDougal v. McCammon,
193 W. Va. 229, 455 S.E.2d 788 (1995) 21, 27

Miller v. Fluharty,
201 W. Va. 685, 500 S.E.2d 310 (1997) 26

N. Am. Precast, Inc. v. Gen. Cas. Co. of Wis.,
413 Fed. App'x 574 (4th Cir. 2011) (per curiam) 29

Overton v. Fields,
145 W. Va. 797, 117 S.E.2d 598 (1960) 21

Penix v. Grafton,
86 W. Va. 278, 103 S.E. 106 (1920) 23

Perrine v. E.I. du Pont de Nemours & Co.,
225 W. Va. 482, 694 S.E.2d 815 (2010) 28, 29, 31, 33, 34, 35, 36

Philip Morris USA v. Williams,
549 U.S. 346 (2007) 37, 39

S. Elec. Supply Co. v. Raleigh Cnty. Nat'l Bank,
173 W. Va. 780, 320 S.E.2d 515 (1984) 13, 14

Shamblin v. Nationwide Mut. Ins. Co.,
183 W. Va. 585, 396 S.E.2d 766 (1990) 29, 30

Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC,
209 W. Va. 318, 547 S.E.2d 256 (2001) 34

Shenandoah Sales & Serv. Inc. v. Accessor of Jefferson Cnty.,
228 W. Va. 762, 724 S.E.2d 733 (2012) 13

Stanley v. Chevathanarat,
222 W. Va. 261, 664 S.E.2d 146 (2008) (per curiam) 11, 17

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003) 31, 32, 33, 34, 35, 36, 37, 38, 39

State Road Comm'n v. Darrah,
151 W. Va. 509, 153 S.E.2d 408 (1967) 24

State v. Crouch,
No. 11-0394, --- W.Va. ---, --- S.E.2d ---,
2012 WL 1912484 (May 24, 2012) (per curiam) 11, 23, 24, 25

State v. Cutlip,
131 W. Va. 141, 46 S.E.2d 454 (1948) 20

State v. Lindsey,
160 W. Va. 284, 233 S.E.2d 734 (1977) 19, 20

State v. Taylor,
215 W. Va. 74, 593 S.E.2d 645 (2004) (per curiam) 15, 19

T & R Trucking, Inc. v. Maynard,
221 W. Va. 447, 655 S.E.2d 193 (2007) (per curiam) 13, 18

Tennant v. Marion Health Care Found., Inc.,
194 W. Va. 97, 459 S.E.2d 374 (1995) 22, 24

Thomas v. iStar Fin., Inc.,
508 F. Supp. 2d 252 (S.D.N.Y. 2007) 35

Tudor v. Charleston Area Med. Ctr., Inc.,
203 W. Va. 111, 506 S.E.2d 554 (1997) 34

TXO Prod. Corp. v. Alliance Res. Corp.,
187 W. Va. 457, 419 S.E.2d 870 (1992) 28, 34, 35

United States v. Bestfoods,
524 U.S. 51 (1998) 14

W. Va. Dep't of Transp. v. Parkersburg Inn, Inc.,
222 W. Va. 688, 671 S.E.2d 693 (2008) (per curiam) 12

W. Va. Highlands Conservancy, Inc., v. Pub. Serv. Comm'n,
206 W. Va. 633, 527 S.E.2d 495 (1998) (per curiam) 14, 19

Walker v. Dominick's Finer Foods, Inc.,
415 N.E.2d 1213 (Ill. App. 1980) 40

Statutes and Rules

W. Va. Code § 31D-14-1405 ..... 3, 13

W. Va. Code § 31D-14-1407(d) 14, 17, 26, 32

W. Va. Code § 31D-6-622(b) 13

W. Va. Code § 33-6-7 ..... 8, 9, 22, 23, 30

W. Va. Code § 33-11-4 7

W. Va. Code § 33-11-6(a) 38

W. Va. Code § 56-6-19 ..... 19, 20

W. Va. R. Evid. 401 ..... 15, 26

W. Va. R. Evid. 402 ..... 15, 26

W. Va. R. Evid. 403 ..... 15, 19

W. Va. Rev. R. App. P. 19(a) 10

Other Authorities

ROBIN JEAN DAVIS & LOUIS J. PALMER,
PUNITIVE DAMAGES LAW IN WEST VIRGINIA (2010) 18

ASSIGNMENTS OF ERROR

1. The circuit court erred by disregarding the fundamental principle of corporate separateness under West Virginia law.

   a) The court erred in admitting evidence, issuing instructions and entering judgment on the premise that Respondent is identical to its former shareholders.

   b) The court abused its discretion in admitting evidence attributing to Petitioners supposed events involving policies issued by separately incorporated entities that are not parties to this case.

2. The circuit court committed additional errors independently warranting reversal.

   a) The court disregarded mandatory procedures governing jury instructions.

   b) The court gave the jury erroneous instructions regarding policyholder misrepresentation.

   c) The court admitted irrelevant and prejudicial evidence of future remediation costs.

   d) The court unevenly and prejudicially applied its own discovery rules.

3. The circuit court erred in awarding $25 million in punitive damages.

   a) There is no evidence to support a finding of "actual malice."

   b) The award is excessive under the West Virginia Constitution.

   c) The award is excessive under the United States Constitution.

   d) The court failed to consider whether its award was unconstitutionally based on facts and events concerning non-parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

The jury in this case awarded a jaw-dropping $58 million to Respondent Hess Oil Company, Inc. ("Hess")—$5 million in compensatory damages and $53 million in punitive damages—in a dispute over whether Petitioners Chartis Claims, Inc. ("Chartis Claims") and Commerce and Industry Insurance Company ("C&I") (collectively, the "Chartis Defendants") should have paid $253,000 in additional remediation expenses under an insurance policy with a $1 million limit. The circuit court (Bedell, J.) remitted the punitive award to $25 million on post-trial motion, but the remaining $30 million judgment warrants this Court's reversal or

vacatur.

First, the trial court misapplied basic West Virginia corporations law, which holds that a corporation is separate from both its shareholders and other separately incorporated entities. The court violated this fundamental principle by allowing the jury to award *Hess* damages for emotional injuries incurred only by *its shareholders*. It did so again by permitting the jury to hold the Chartis Defendants liable for *other* policies issued by *other* separate corporations affiliated with their ultimate parent, American International Group, Inc. ("AIG, Inc.").

Second, the circuit court committed four additional trial errors, each of which warrants a new trial: (i) At the close of trial, the court improperly refused to issue the Chartis Defendants' legally correct, factually supported, and timely submitted instructions; it then prevented counsel from reviewing and objecting to its final set of instructions until *after the jury had retired*; (ii) this disregard for mandatory procedural rules resulted in the issuance of a substantively erroneous instruction that incorrectly advised the jury that the Chartis Defendants were required to prove that Hess had acted "knowingly" and "with an intent to deceive the insurer" in order to disclaim coverage on the basis of a material misstatement or omission in Hess's application; (iii) the court abused its discretion by admitting irrelevant and prejudicial evidence regarding future remediation costs that the Chartis Defendants never had an obligation to pay; and (iv) reversing its own prior decision in the midst of trial, the court allowed two Hess witnesses to testify while depriving the Chartis Defendants of any opportunity to depose them or prepare for their testimony. These manifest errors of law and procedure denied the Chartis Defendants a fair trial.

Third, the trial court's award of $25 million in punitive damages (let alone the jury's *$53 million* award) violates West Virginia law and the West Virginia and United States Constitutions. There is no basis for the jury's finding that the Chartis Defendants acted with actual malice, a necessary requisite for punitive damages. And even if there were, the judgment is

unconstitutionally disproportionate to any injury here: The $25 million punitive award is almost *100 times* the $253,000 in remaining costs that Hess might have had to pay after the disclaimer of coverage, and *five times* larger than even the jury's baseless $5 million "compensatory" award—a ratio that exceeds the bounds of due process where, as here, compensatory damages are "substantial." Finally, the punitive award rests unconstitutionally upon facts concerning "strangers to the litigation," for the jury calculated the $53 million amount after hearing evidence of *AIG, Inc.'s* finances, including *the parent company's* total annual executive compensation.

The judgment is fatally flawed. It should be reversed, or vacated and remanded for a new trial. At minimum, the punitive award should be reduced to a fraction of the judgment below.

STATEMENT OF THE CASE

A. The Parties

Hess operated an oil distribution business, in connection with which it owned underground storage tanks ("USTs") at various service stations, including at an Exxon station in Mt. Storm, West Virginia. Tr. 228-29 (V11).[1] Hess sold its assets to another firm in 2006 and voluntarily dissolved in May 2008 (A133 (V1); Tr. 473-74 (V11)), but pursuant to W. Va. Code § 31D-14-1405, its corporate existence continues for purposes of litigation to which it is a party.

Hess's ownership was shared by William Brown, Brenda Brown, and the Brown Family Trust. Tr. 242 (V11). None of these shareholders is a party to this lawsuit. A1, A33 (V1).

C&I is an insurance company headquartered in New York, New York. A2, 298 (V1). Chartis Claims is a claims administrator with offices in Jersey City, New Jersey. A2, 298 (V1). Both Chartis Defendants are indirect subsidiaries of AIG, Inc. A3277 (V4); Tr. 67-68 (V11); Tr. 1790-91 (V12). Neither AIG, Inc. nor any of its other subsidiaries is a party to this case. A1,

[1] The parties have agreed to file a single Appendix for use in both this appeal and Hess's cross-appeal, No. 12-0719. Citations to "A__ (V_)" refer to an Appendix page and corresponding Volume number. Citations to "Tr. __ (V_)" refer to pages of the Transcript, separately bound in Volumes 10-12.

A33 (V1).

Nominal plaintiff Ryan Environmental, Inc. ("Ryan") is an environmental contracting firm headquartered in Bridgeport, West Virginia. A1 (V1). It is no longer an active party to this case, having released its claims pursuant to a 2011 settlement. A419 (V1); Tr. 792-93 (V11).

B. The Insurance Policy And Hess's Claim

In 1996, Hess applied for, and C&I issued, an insurance policy covering environmental remediation claims arising at Hess properties, including the Mt. Storm station. The policy was retroactive to October 1, 1995, providing coverage until October 20, 1997. A2129 (V3).

On or about April 15, 1997, Hess received a Confirmed Release Notice to Comply from the West Virginia Department of Environmental Protection ("DEP"), regarding an oil leak at the Mt. Storm site. A91 (V1). In a letter dated September 9, 1997, the DEP (i) confirmed that a petroleum release had occurred at the site; (ii) warned that the contamination may be considered a threat to human health and the environment; (iii) mandated that Hess conduct an investigation for soil and groundwater cleanup; and (iv) ordered Hess to submit a Primary Site Assessment Report and a Corrective Action Plan by November 5, 1997. A92-94 (V1). Hess tried to solve the problem by replacing an outdated UST and cleaning up the site through February 1998. Tr. 287-90 (V11). Hess did not submit the required Assessment Report or Corrective Action Plan (Tr. 454 (V11)), nor did it notify the Chartis Defendants of these developments (Tr. 346 (V11)).

In December 1997 (Tr. 1440 (V12)), C&I issued Hess a new one-year, $1 million policy ("the Policy"), effective October 21, 1997 (A213 (V1)), based on an application dated October 30, 1997 (A95-96 (V1)).[2] The Policy covered a claim only if it arose *and* was reported to the

[2] C&I renewed its insureds' annual policies as a matter of course (Tr. 923 (V11), 1439-41 (V12)), but required a new application with new representations each year (Tr. 1442-43 (V12)). C&I could thus rely on the application's contents even though it might not have received the paperwork prior to the Policy's effective date. Tr. 1441 (V12).

insurer during the Policy's term. A215 (V1). In accepting the contract, Hess agreed that "the statements in the . . . Application are [its] agreements and representations, [and] that this Policy is issued in reliance upon the truth of such representations . . . ." A225 (V1). These included representations that, in the preceding five years, Hess had neither "had any reportable releases or spills of regulated substances, hazardous waste or any other pollutants" nor 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." A95 (V1). Hess stated that there was "a history of leaks or releases at this facility," but for further explanation directed the reader to "see previous applications." A95 (V1). Hess said nothing about the April 15, 1997 Confirmed Release Notice to Comply (which could not have been mentioned in the prior, 1996 application).

On February 23, 1998, Hess received another letter from the DEP, which made specific reference to the September 9, 1997 letter and further advised Hess that petroleum fumes and visible oil slicks had been detected at a church near the Mt. Storm site. A1378 (V2). The parties disputed at trial whether this contamination was related to the 1997 release: Chartis presented testimony that the two had the same source (*e.g.*, Tr. 914-15, 924-25 (V11), 1602-07 (V12)), while Hess contended that they were separate events (Tr. 304-05 (V11)). The DEP treated the two incidents as resulting from a single event, and both were assigned Leak ID 97-040. A91 (V1); A1378 (V2)

On May 4, 1998, Hess sold the Mt. Storm USTs to a third party. On May 5, 1998, Hess secured an extended reporting period from C&I, allowing it until May 4, 1999 to report a claim related to the Mt. Storm USTs that had arisen during the Policy's term. Tr. 461 (V11).

The DEP held Hess liable for cleanup of the Mt. Storm site (A1000-06 (V2)), and Hess submitted a claim under the Policy on January 6, 1999 (A100-01 (V1)). C&I accepted coverage

on July 16, 1999. A102 (V1). Hess retained remediation contractors (including Ryan) (Tr. 1302-03 (V12)), to whom C&I paid some $622,000 between 1999 and 2009 (A141 (V1)).

C. The Disclaimer Of Coverage

The Chartis Defendants first learned of the 1997 DEP correspondence in 2009, when Chartis Claims employee Meleidy Perez determined that certain documents relating to the origins of the Mt. Storm spill (including a "tank closure report" relating to the UST replacement) were missing from Hess's claim file. Tr. 667-68, 906, 959, 964 (V11). To fill the gap, she directed another employee to file a Freedom of Information Act ("FOIA") request with the DEP. Tr. 666-67 (V11). To Ms. Perez's surprise, the DEP returned copies of its correspondence with Hess regarding the April 1997 release. Tr. 1521-23 (V12). This put Hess's right to coverage in jeopardy: Its failure to reveal the release in its December 1997 application was material to the Policy's issuance, and a claim arising in April 1997 would have fallen outside the coverage period. Ms. Perez called Mr. Brown (Tr. 1524-25 (V12)), and followed up with a letter dated June 19, 2009 explaining what she had found and requesting information to confirm coverage (A1396-1400 (V2)). Additional phone calls and e-mails between June 25 and July 22 failed to elicit any response from Mr. Brown (Tr. 1535-39 (V12)), and on August 19, 2009 Ms. Perez issued a letter disclaiming coverage with respect to the Mt. Storm site (A138 (V1)).

In a conference call held on August 31, 2009, Ms. Perez again asked for information to offset the DEP documents, but Mr. Brown did not respond. Tr. 1546-49 (V12). The Chartis Defendants thereafter ceased to pay Ryan's invoices. *See* A4866-67 (V7), Tr. 1549-50 (V12).

D. The Proceedings Below

In 2010, Ryan filed a complaint in Harrison County Circuit Court against Hess and the Chartis Defendants, asserting claims (now settled) for $253,000 of unpaid remediation costs. A1, A419 (V1). On June 29, 2010, Hess cross-claimed against the Chartis Defendants (A33

(V3)), contending that the denial of coverage was improper and that the Chartis Defendants had maliciously refused to pay the claim in violation of the common-law duty of good faith and fair dealing and the West Virginia Unfair Trade Practices Act ("UTPA"), W. Va. Code § 33-11-4, (A42-50 (V1)). On September 29, 2010, the Chartis Defendants filed their own cross-claims, alleging that Hess had breached its contract and committed negligent misrepresentation. A392 (V1). The Chartis Defendants also contended that their disclaimer of coverage was justified by material misstatements in Hess's October 30, 1997 insurance application. A402 (V1).

The Chartis Defendants moved *in limine* to exclude certain evidence and arguments, including testimony of witnesses disclosed outside the discovery window. A1507-79, A1589-97 (V2). On December 6, 2011, the trial court granted several of these motions, including the one concerning undisclosed witnesses, and denied the rest. A2567 (V3).[3]

A jury trial was held on December 12-16 and 19-20, 2011. Tr. 4 (V11) The trial produced no evidence that Hess, which dissolved in 2008 (before the dispute arose), suffered any injury. The only potential source of harm to Hess had been Ryan's lawsuit, but that claim was long since released without any contribution from Hess. A419 (V1); Tr. 409 (V11). And while there was evidence that Hess's counsel amassed $450,000 in attorneys' fees (Tr. 417 (V11)), Mr. Brown admitted that Hess had not paid any of those fees (Tr. 476 (V11)). Instead, the evidence of damages focused entirely on emotional harms suffered by members of the Brown family, none of whom is a party to the case. *E.g.*, Tr. 410 (V11); Tr. 1381-82 (V12). Mr. Brown admitted that Hess had not suffered such injuries. Tr. 480 (V11).

In support of Hess's claims under the UTPA, Hess introduced testimony from two attorneys, David J. Romano (brother to Hess's counsel Michael) and Scott Segal, to provide

[3] At the beginning of trial, the trial court notified the parties that they had sufficiently preserved any and all objections if they had filed motions *in limine*. Tr. 148-49 (V11).

supposed evidence of the Chartis Defendants' general business practices. Tr. 1179 (Romano), 1244 (Segal) (V12). Both testified about cases involving policies issued not by the Chartis Defendants, but by other AIG, Inc. subsidiaries. Tr. 1182-91 (Romano), 1247-55 (Segal) (V12). Because Hess had not disclosed these witnesses until after the close of discovery (A171 (V1), Tr. 38-40 (V10)), the Chartis Defendants believed their testimony to have been excluded by the Court's *in limine* order (Tr. 1177 (V12)). Hess called them anyway, and the trial court, without explanation, noted the Chartis Defendants' objection, reversed its prior order, and permitted their testimony (Tr. 1179 (V12)), despite having denied as untimely the Chartis Defendants' request to depose these witnesses once Hess disclosed them after the close of discovery (A2589-90 (V3)).

Prior to the final pretrial conference on November 29, 2011, each party had supplied the court with approximately 40 proposed instructions. A1759-1806 (V2). On the sixth day of trial (December 19), Hess submitted fifteen more. A2760-2834 (V3). The circuit court decided that this was too many and ordered "each counsel [to] give me your best six instructions and you're going to live with it." Tr. 1658 (V12). The Chartis Defendants presented six instructions drawn from their initial submission (*see* A2843-44, A2851, A2853-57, A2862 (V3)), but Hess selected five instructions (out of its six) that the Chartis Defendants had never seen before (Tr. 1751 (V12); *see* A2845-50, A2852 (V3)). The court read all twelve of these instructions to the jury together with its standard charge (A2840-655 (V3); Tr. 1664-88 (V12)), and did not provide written copies to counsel or allow the Chartis Defendants to object to its instructions until *after* the jury left to deliberate. *Id.* at 1750-56.

The trial court's instructions on whether Hess had made material misrepresentations in its insurance application (which would have justified the Chartis Defendants' denial of coverage) were internally inconsistent. One instruction, which the Chartis Defendants had proposed, correctly stated the law under W. Va. Code § 33-6-7(b) and (c):

> The Chartis Defendants contend that Hess Oil is prevented from recovering under the policy because it, or its representatives, made a misrepresentation(s) in its application for insurance. To succeed, the Chartis Defendants need only prove by a preponderance of the evidence that Hess [Oil] *made a misrepresentation(s) in its application for insurance and* [*that*] *those misrepresentations were material* to the Chartis Defendants' acceptance of the risk, or to the hazard assumed by Commerce & Industry.
>
> A misrepresentation may result from silence or from the suppression of facts as well as from an affirmative representation.

A2857 (V3); Tr. 1677 (V12) (emphasis added). The Chartis Defendants did not raise W. Va. Code § 33-6-7(a) (which requires intent to defraud), so their defense did not depend on Hess's state of mind. Hess nevertheless proposed an instruction (which the court also read) that stated:

> Misrepresentations, omissions, concealments of facts, and incorrect statements on an application for insurance by an insured *must be knowingly made with an intent to deceive the insurer* and relate to facts affecting the policy in order to be a legitimate basis for denial of a claim. Therefore, for an insurer to prevail *under W.Va. Code § 33-6-7(a)* the insurer must establish the insured's specific intent to deceive the insurer. . . .
>
> Accordingly in order to prevail, an insurer, AIG, must prove by a preponderance of the evidence that its insured, *Hess Oil, knowingly made misrepresentations with a specific intent to deceive AIG* and the misrepresentations must relate to material facts affecting the policy.

A2848-49 (V3); Tr. 1670-72 (emphasis added).[4]

The instructions also advised the jury that, if it found the Chartis Defendants liable on Hess's bad-faith claims, it had the "duty to determine the amount of money to fully and fairly compensate Hess Oil Company *and its former shareholders* for . . . damages *they* experienced as a result of the AIG Defendants' violation of the law of West Virginia," including for "[m]ental anguish," "[e]motional distress," "[h]umiliation," and "[a]nxiety." A2860-61 (V3); Tr. 1680-81 (V12) (emphasis added). Further, the verdict form asked the jury to decide whether "the AIG Defendants violated the duty of good faith and fair dealing in adjusting the claims of the Hess

[4] The trial court kept the references to "AIG" in Hess's instructions, and replaced every mention of the word "Chartis" in the Chartis Defendants' proposed instructions with "AIG". A2851-62 (V3).

Oil Company *and its former shareholders.*" A2867 (V3) (emphasis added). The jury deliberated briefly before returning a verdict finding that Hess was entitled to coverage, that the Chartis Defendants had acted in bad faith, and that "Hess Oil *through its former shareholders*" was entitled to $5 million in compensatory damages. A2867 (V3) (emphasis added); Tr. 1756-60 (V12).

Because the jury also found that the Chartis Defendants had acted with malice (A2867 (V3); Tr. 1760 (V12)), the trial moved to a punitive damages phase (Tr. 1766-1814 (V12)). The evidence in this phase comprised a single witness, accounting expert Daniel Selby, who testified about *AIG, Inc.*'s recent annual revenues, assets, liabilities, and net worth. Tr. 1771-1800 (V12). His testimony also included evidence that six executives of *AIG, Inc.* had earned a combined $53 million from AIG, Inc. in 2010. Tr. 1783-84 (V12). He did not testify about either of the Chartis Defendants. Tr. 1790-91, 1794 (V12). The jury again deliberated briefly before returning a $53 million punitive damages award. A2868 (V3); Tr. 1811-12 (V12).

The trial court entered judgment in Hess's favor, holding the Chartis Defendants jointly and severally liable for $58 million, plus statutory post-judgment interest and costs. A2878-84 (V3). The Chartis Defendants timely filed motions seeking judgment as a matter of law, a new trial, or remittitur. A2893-2972 (V4). On May 1, 2012, the trial court denied these motions, except to reduce the $53 million punitive award to $25 million in order to comply with this Court's "outer limit" of 5:1 on the ratio between punitive and compensatory damages. A3207-35 (V4). The parties timely filed cross-notices of appeal on May 31, 2012. A3268, A3325.1 (V4).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the assignments of error in this case primarily involve the misapplication of settled law and the return of a verdict that is unsupported by evidence, Petitioners request oral argument under W. Va. Rev. R. App. P. 19(a). However, Petitioners respectfully request that

each party be granted at least twenty minutes at oral argument, in view of the number and significance of issues raised. The importance of clarifying West Virginia's law of corporations, and of explaining proper application of this Court's punitive damages jurisprudence (should the Court reach that question), suggest that it would not be appropriate to resolve this case by memorandum decision.

STANDARDS OF REVIEW

This Court "applies a de novo standard of review to the grant or denial of a pre-verdict or post-verdict motion for judgment as a matter of law," subject to the requirements that it "(1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting the nonmovant which the evidence tended to prove, (3) give the nonmovant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn." *Stanley v. Chevathanarat*, 222 W. Va. 261, 263-64, 664 S.E.2d 146, 148-49 (2008) (per curiam) (internal quotation marks omitted).

"Where the issue on an appeal from the circuit court is clearly a question of law" and not a factual dispute, this Court "appl[ies] a *de novo* standard of review," without deference to the trial court's legal determinations. Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). In particular, claims of instructional error pose questions of law and are reviewed *de novo*. *Matheny v. Fairmont Gen. Hosp., Inc.*, 212 W. Va. 740, 745, 575 S.E.2d 350, 355 (2002). An erroneous instruction "is presumed to be prejudicial and warrants a new trial unless it appears that the complaining party was not prejudiced." *Id.* at 746, 575 S.E.2d at 356 (brackets omitted) (quoting Syl. pt. 3, *Honaker v. Mahon*, 210 W. Va. 53, 552 S.E.2d 788 (2001)). This presumption places upon the non-complaining party the burden of showing that the incorrect instruction did not harm the appellant's case. *See, e.g.*, *State v. Crouch*, No. 11-0394, --- W.Va. ---, --- S.E.2d ---, 2012 WL 1912484, at *4 (May 24, 2012) (per curiam)

(placing burden on the State to show absence of prejudice "result[ing] from the confusing and inconsistent instructions"); *Hollen v. Linger*, 151 W. Va. 255, 265, 151 S.E.2d 330, 336 (1966) (reversing where "[t]he record does not show that the foregoing [erroneous] instructions . . . did not injure the plaintiffs").

Evidentiary rulings, verdict forms, and other trial-management decisions are reviewed for abuse of discretion. *E.g.*, *W. Va. Dep't of Transp. v. Parkersburg Inn, Inc.*, 222 W. Va. 688, 693-94, 671 S.E.2d 693, 698-99 (2008) (per curiam). But "a trial judge must be neutral in the area of trial management," *Barlow v. Hester Indus., Inc.*, 198 W. Va. 118, 127, 479 S.E.2d 628, 637 (1996), and any ruling based "on an erroneous assessment of the evidence or the law" is an abuse of discretion, *Graham v. Wallace*, 214 W. Va. 178, 182, 588 S.E.2d 167, 171 (2003) (per curiam).

Because "detailed appellate review . . . of punitive damages awards [is] important in guaranteeing due process," *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 663, 413 S.E.2d 897, 904 (1991), this Court reviews "*all* punitive damages awards" *de novo*, Syl. pt. 5, *id.* (emphasis added); *CSX Transp., Inc. v. Smith*, --- W. Va. ---, 729 S.E.2d 151, 170 n.19 (2012) (per curiam).

ARGUMENT

I. THE TRIAL COURT ERRED UNDER BASIC WEST VIRGINIA CORPORATIONS LAW, WHICH PROVIDES THAT A CORPORATION IS SEPARATE FROM ITS SHAREHOLDERS AND FROM OTHER SEPARATELY INCORPORATED ENTITIES

Throughout this case, the trial court disregarded the distinction between Hess and the Brown family. Further, it treated the Chartis Defendants as though they were identical to AIG, Inc. and its other subsidiaries. The court thus doubly failed to respect basic West Virginia law, which holds that a corporation is distinct both from its shareholders and from every other

separately incorporated entity. Proper application of this rule necessitates vacatur or reversal.

"The law presumes that corporations are separate from their shareholders." Syl. pt. 4, *T & R Trucking, Inc. v. Maynard*, 221 W. Va. 447, 655 S.E.2d 193 (2007) (per curiam) (ellipsis omitted) (quoting Syl. pt. 3, *S. Elec. Supply Co. v. Raleigh Cnty. Nat'l Bank*, 173 W. Va. 780, 320 S.E.2d 515 (1984)). *See also Shenandoah Sales & Serv., Inc. v. Assessor of Jefferson Cnty.*, 228 W. Va. 762, 738, 724 S.E.2d 733 (2012) (a corporation must be represented by a lawyer in order "to preserve the corporation as a legal entity separate from its shareholders"). This principle is not disregarded except in the exceptional case where equity demands "piercing the corporate veil." *See, e.g.*, *Laya v. Erin Homes, Inc.*, 177 W. Va. 343, 347, 352 S.E.2d 93, 97 (1986) ("'[T]he corporate form will never be disregarded lightly.'") (citation omitted).

West Virginia's corporations statutes confirm this bright-line separation between a corporation and its owners. *See, e.g.*, W. Va. Code § 31D-6-622(b) ("Unless otherwise provided in the articles of incorporation, *a shareholder of a corporation is not personally liable for the acts or debts of the corporation* . . . .") (emphasis added). From the moment of its organization, a corporation is a legal entity wholly distinct from its shareholders; the corporation's obligations and liabilities are its alone. The Code makes clear that this remains true *even after dissolution. See, e.g.*, *id.* § 31D-14-1405(a) ("A dissolved corporation continues its corporate existence . . . ."); *id.* § 31D-14-1405(b) ("Dissolution of a corporation does not . . . (5) Prevent commencement of a proceeding by or against the corporation in its corporate name."). The Code allows a person with a claim against a dissolved corporation to proceed in only two ways:

> (1) Against the dissolved corporation, to the extent of its undistributed assets; or
>
> (2) If the assets have been distributed in liquidation, against a shareholder of the dissolved corporation *to the extent of his or her pro rata share of the claim or the corporate assets distributed to him or her in liquidation*, whichever is less, *but a shareholder's total liability for all claims under this section may not exceed the total amount of assets distributed to him or her.*

Id. § 31D-14-1407(d) (emphases added). This provision allows a plaintiff to pursue *distributed corporate assets* to prevent a corporation from evading liability by giving away its assets and then dissolving. But by limiting recovery to distributed assets, it protects shareholders' other property and thus maintains the corporation-shareholder distinction.

Similarly, "the law presumes that two separately incorporated businesses are distinct entities." *W. Va. Highlands Conservancy, Inc., v. Pub. Serv. Comm'n*, 206 W. Va. 633, 640, 527 S.E.2d 495, 502 (1998) (per curiam) (citing *United States v. Bestfoods*, 524 U.S. 51 (1998)); *see* Syl. pt. 3, *S. Elec. Supply Co.*, 173 W. Va. 780, 320 S.E.2d 515 ("The law presumes that two separately incorporated businesses are separate entities and that corporations are separate from their shareholders."). Thus, where "the corporate formalities [are] observed," a court may not disregard the corporate form and impose liability on one corporate subsidiary for the actions of another. *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2304 (2011).

As explained below, the trial court paid no heed to these basic principles of the West Virginia Code and settled decisional law. Affirming the decision below would leave West Virginia an outlier in its failure to respect the corporate form and the protections it affords to shareholder and corporation alike—thus undermining the expectations of the thousands of West Virginia businesses and non-profits that have incorporated in reliance on the rule of limited liability. This Court should reverse or vacate the judgment below to correct these errors.

A. The Trial Court Erred In Allowing Testimony And Inviting And Entering Judgment For Hess Based Solely Upon Injury To Hess's Shareholders

The circuit court repeatedly rejected the Chartis Defendants' arguments that Hess was a corporate entity distinct from its shareholders and that Hess could not be awarded damages based on injuries borne solely by the former shareholders, not Hess. The court erroneously admitted testimony of such injury to the former shareholders; erroneously instructed the jury that it could

find damages based on injury to Hess *and* or *through* its shareholders; and erroneously denied the Chartis Defendants' motion for judgment as a matter of law despite the lack of any evidence of injury to Hess. Together or separately, these errors require reversal or vacatur.

1. The Trial Court Abused Its Discretion In Admitting Testimony About Injuries Borne Solely By Hess's Shareholders

As former Hess shareholder William Brown admitted at trial, *Hess was not injured.* Tr. 409 (the Chartis Defendants paid Ryan's claim), 476 (Hess did not pay attorneys' fees), 480 (Hess did not suffer emotional harm) (V11). The damages award rested entirely on evidence of harms allegedly suffered not by Hess, but by its former shareholders—who are not parties here. *See* A1, A33 (V1). Admission of this evidence was legal error and thus an abuse of discretion.

West Virginia law provides that evidence is relevant and admissible only if it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." W. Va. R. Evid. 401, 402. Evidence of emotional upset or embarrassment to Hess's shareholders, however, was irrelevant and inadmissible here because it does not tend to prove anything about *Hess's* losses or any other material issue. Because the trial court's admission of this testimony was grounded in a fundamental error of corporations law (*i.e.*, that Hess and its shareholders were identical), it was a *per se* abuse of discretion. *See Graham*, 214 W. Va. at 182, 588 S.E.2d at 171. The evidence, moreover, prejudiced the Chartis Defendants by presenting the jury with an "improper basis" for calculating damages, and inviting a verdict based on emotion rather than fact. *See State v. Taylor*, 215 W. Va. 74, 78-79, 593 S.E.2d 645, 649-50 (2004) (per curiam). Its admission violated Rules of Evidence 402 and 403, and, at a minimum, requires a new trial. *See, e.g.*, *Arnoldt v. Ashland Oil, Inc.*, 186 W. Va. 394, 412-13, 412 S.E.2d 795, 813-14 (1991).

2. The Trial Court Erred In Instructing The Jury That It Could Award Damages Based On Injury To Hess *And* Or *Through* Its Shareholders

A new trial is required for the additional reason that the trial court erroneously instructed the jury that it should award damages to *Hess* in compensation for injuries that *its shareholders* had suffered. This error pervaded both the jury instructions and the written verdict form. *E.g.*, Tr. 1680 (V12) ("[I]t is your duty to determine the amount of money to fully and fairly compensate *Hess Oil Company and its former shareholders* for the items of damages they experienced . . . .") (emphasis added); A1681 (V12) ("You should find that the AIG defendants violated the law, *Hess Oil company and its former shareholders* are entitled to be compensated for the injury or harm or damage caused by such violation.") (emphasis added); A2867 (V3) ("What amount of money do you find will fairly and reasonably compensate *Hess Oil through its former shareholders* for the way the AIG Defendants handled their underground storage tank claim?") (emphasis added). Because Hess is distinct from its shareholders, and its shareholders were not parties to the case, these instructions were legally erroneous.

Such plain instructional error is presumed prejudicial. Syl. pt. 2, *Matheny*, 212 W. Va. 740, 575 S.E.2d 350. In any event, this error prejudiced the Chartis Defendants. Because the only evidence of actual damages related to Hess's former shareholders, the only possible basis for the jury verdict was the jury's belief that it could award Hess damages for injuries that the Browns had suffered. Because Hess is not entitled to such damages, a new trial is required.

3. The Trial Court Erred In Denying Judgment For The Chartis Defendants Based On The Absence Of Evidence Of Injury To Hess

While a new trial is the *minimum* relief to which the record entitles the Chartis Defendants, the absence of evidence of injury to Hess itself (*see* Tr. 409, 476, 480 (V11)) warrants the further relief of reversal of the trial court's decision denying the Chartis Defendants' motion for judgment as a matter of law. Setting aside the testimony concerning the Browns'

personal emotional injuries, there was no evidence to support the jury's $5 million compensatory verdict. Because, even "after considering the evidence in the light most favorable to [Hess], only one reasonable verdict is possible"—*viz.*, judgment in the Chartis Defendants' favor—reversal is required. *Stanley*, 222 W. Va. at 263, 664 S.E.2d at 148.

The trial court explained its denial of judgment as a matter of law on the ground that it had allowed Hess to recover damages for its shareholders' in juries based on W. Va. Code § 31D-14-1407(d), which "states that '[i]f the assets [of a corporate defendant] have been distributed in liquidation,' recovery may be enforced 'against a shareholder.'" A3215 (V4) (brackets in original). But that was error, for that statutory provision has no application here. The dissolved corporations statute allows a limited remedy *against* shareholders in certain cases. W. Va. Code § 31D-14-1407(d). It does not merge the firm with its owners, direct that a shareholder's injuries are suffered by the corporation, or contain any provision allowing a shareholder to recover for personal injuries without suing in his or her own name, as the Browns failed to do here.[5]

The trial court also relied heavily (A3214-16 (V4)) on this Court's suggestion in *Hayseeds, Inc. v. State Farm Fire & Cas. Co.*, 177 W. Va. 323, 330, 352 S.E.2d 73, 80 (1986), that "a large corporation with an in-place, organized collective intelligence ... may suffer substantial net economic loss but little aggravation and inconvenience," which the trial court interpreted as a holding that a corporation *is* capable of suffering emotional damages for "aggravation and inconvenience." This is a dubious reading of a passing suggestion, but even if correct, it has no bearing here. The issue is not whether Hess *could have* demonstrated that it

[5] In any event, the undisputed evidence at trial showed that Hess did not distribute any assets to its shareholders at dissolution. Tr. 415 (V11). The shareholders thus remained fully insulated from liability for Hess's debts under W. Va. Code § 31D-14-1407(d). Tr. 473-74 (V11); Tr. 1404-05. (V12)

endured intangible harm (had it been extant at the time the coverage dispute arose), but rather whether Hess provided any evidence that it actually suffered any such injury given the fact that it is an entity distinct from the Browns. *See* Syl. pt. 4, *T & R Trucking*, 221 W. Va. 447, 655 S.E.2d 193; *Laya*, 177 W. Va. at 347, 352 S.E.2d at 97. *Hayseeds* neither speaks to that issue nor supports the trial court's misapplication of corporations law. This Court should go beyond ordering a new trial, and should reverse and remand with direction to enter judgment in the Chartis Defendants' favor.[6]

B. The Trial Court Abused Its Discretion In Admitting Testimony Concerning Conduct Of AIG, Inc. Subsidiaries Other Than The Chartis Defendants

The trial court further erred under West Virginia corporations law by failing to recognize the Chartis Defendants as separate from other, separately incorporated entities under the AIG, Inc. umbrella. Beyond repeatedly referring to the Chartis Defendants as "AIG" (*see, e.g.*, Tr. 1669-83 (V12)), the court wrongly admitted testimony concerning policies issued by other AIG, Inc. subsidiaries that are not parties here. *See* A3220-21 (V4); Tr. 1182-91, 1247-55 (V12).

As with the evidence of injury to Hess's former shareholders, this testimony lacked relevance to the trial. The court apparently believed that it pertained to Hess's Unfair Trade Practices Act claim (*see* Tr. 1178-79 (V12); A3221 (V4)), but that statute requires "[p]roof of 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) (quoting *Jenkins v. J. C. Penney Cas. Ins. Co.*, 167 W. Va. 597, 610, 280 S.E.2d 252, 260 (1981)). The Chartis Defendants are not the same insurance company as the separate entities about which Messrs. Romano and Segal

---

[6] If the compensatory portion of the judgment is reversed or vacated, the punitive award must follow. *See, e.g.*, *Bullman v. D & R Lumber Co.*, 195 W. Va. 129, 135 n.8, 464 S.E.2d 771, 777 n.8 (1995) ("Lack of compensable damages normally operates as a bar to the recovery of punitive damages."); Syl. pt. 1, *Garnes*, 186 W. Va. 656, 413 S.E.2d 897; ROBIN JEAN DAVIS & LOUIS J. PALMER, PUNITIVE DAMAGES LAW IN WEST VIRGINIA 7-8 (2010).

testified. *See W. Va. Highlands Conservancy*, 206 W. Va. at 640, 527 S.E.2d at 502.[7] The court therefore erred as a matter of law, and thus abused its discretion, by admitting the testimony.

II. THE TRIAL COURT COMMITTED ADDITIONAL ERRORS REQUIRING NEW TRIAL

Even if the court had correctly applied West Virginia corporations law, a new trial would be required on the basis of four additional errors. *First*, the court denied the Chartis Defendants their rights to review and object to instructions prior to their issuance, and to have every legally correct and factually supported proposed instruction read to the jury. *Second*, the court's improper procedure led it erroneously to instruct the jury that the Chartis Defendants lacked the right to disclaim coverage unless Hess made the misstatements in its insurance application knowingly and intentionally. *Third*, the court abused its discretion in admitting evidence of future remediation costs at Mt. Storm, which had no bearing on the issues in this case. *Fourth*, the court abused its discretion by failing to apply its own discovery rules neutrally, allowing Hess to perpetrate a "trial by ambush" by calling witnesses for whose testimony the Chartis Defendants had no opportunity to prepare. Each of these errors independently requires vacatur.

A. The Trial Court's Procedure For Submitting and Giving Jury Instructions Contravened West Virginia Law

West Virginia law provides that "either party may pray the court to give to the jury *any instruction which has been reduced to writing and submitted to the other party.*" W. Va. Code § 56-6-19 (emphasis added). This statute requires *both* (i) that counsel have a full opportunity to review and object to proposed instructions, *State v. Lindsey*, 160 W. Va. 284, 294, 233 S.E.2d

[7] In addition to being irrelevant, the attorneys' testimony was prejudicial: the jury heard testimony falsely linking the Chartis Defendants with other insurance companies' alleged refusal to compensate a family after their house burned down (Tr. 1186-90 (V12)), rejection of a truck driver's widow's life insurance claim (*id.* at 1190-91), and failure to pay for the cleanup of a house flooded by raw sewage on Thanksgiving (*id.* at 1248-55). None of these events involved the Chartis Defendants, and this was textbook evidence that should have been excluded as "tend[ing] to suggest [a] decision on an improper basis." *Taylor*, 215 W. Va. at 78-79, 593 S.E.2d at 649-50; W. Va. R. Evid. 403.

734, 740 (1977), *and* (ii) that the trial court must read any legally correct and factually supported instruction to the jury when requested to do so, *Arnoldt*, 186 W. Va. at 400, 412 S.E.2d at 801. Each of these statutory requirements is mandatory. *See Lindsey*, 160 W. Va. at 294, 233 S.E.2d at 740; *Arnoldt*, 186 W. Va. at 400, 412 S.E.2d at 801.

The trial court improperly disregarded these mandatory requirements in all respects: On the eve of submitting the case to the jury, the court announced that it would not review in their entirety the jury instructions that the parties had exchanged. Instead, the court ordered "each counsel [to] give me your best six instructions and you're going to live with it." Tr. 1658 (V12). Hess submitted five new instructions that had not been part of the parties' pre-trial exchange,[8] but the judge gave them to the jury anyway (Tr. 1664-88 (V12)), affording the Chartis Defendants no opportunity to object until *after* the jury had retired (Tr. 1750-56 (V12)).[9] These departures from settled West Virginia procedure warrant vacatur.

First, the court denied the Chartis Defendants their right to notice and an opportunity to object to the instructions as given. As this Court explained in *Lindsey*, "*it is mandatory*, under the provisions of [§ 56-6-19], *that the trial court submit in writing to counsel for each party all instructions it intends to submit to the jury*. This is to afford counsel the opportunity to object to the giving or refusal of the proposed instructions." 160 W. Va. at 293-94, 233 S.E.2d at 740 (emphasis added). Violation of this compulsory rule of procedure is sufficient to necessitate a new trial. *See id.*; *State v. Cutlip*, 131 W. Va. 141, 148, 46 S.E.2d 454, 459 (1948). It is clear in any event that the trial court's procedure prejudiced the Chartis Defendants' case by depriving

---

[8] Specifically, Instructions No. 54 (concerning the statute of limitations for breach of contract); No. 47 (regarding ambiguity in an insurance application); No. 45 (the misrepresentation instruction); No. 56 (concerning estoppel); and No. 52 (concerning insurance policy exclusions). *See* A2345-61 (V3).

[9] Indeed, the court did not provide counsel a written set of instructions until weeks after trial had ended. *See* Tr. 1749 (V12).

them of the chance to review Hess's proposed instructions and to submit detailed objections (or competing proposals) until *after* the jury had been instructed and had set about deliberating.[10] In short, the trial court's *ad hoc* procedure violated the basic precept that "[t]rial by ambush is not contemplated by the Rules of Civil Procedure." *McDougal v. McCammon*, 193 W. Va. 229, 236-37, 455 S.E.2d 788, 795-96 (1995).

Second, the trial court's refusal to consider more than six instructions per side was a breach of its absolute "*duty* to give instructions which 'correctly state the law, are supported by sufficient evidence and are not repetitious of any other instruction.'" *Arnoldt*, 186 W. Va. at 400, 412 S.E.2d at 801 (emphasis added) (brackets and ellipses omitted) (quoting *Brammer v. Taylor*, 175 W.Va. 728, 734, 338 S.E.2d 207, 213-14 (1985)). The court's order effectively denied several of the Chartis Defendants' duly submitted and legally proper proposals, including:

- An admonishment not to base the verdict "upon sympathy, bias, guesswork or speculation." A1770 (V2).
- A full legal definition of "misrepresentation," stating clearly that intent is not an element. A1781 (V2).
- An instruction making clear that damages were to be awarded only for losses that *Hess* actually suffered. A1799 (V2).
- An instruction regarding Hess's estoppel argument that, in contrast to Hess's instruction (A2834 (V3)), correctly and clearly stated the law (A1805 (V2)).

A trial court's failure to give a correct, well-supported, and non-repetitive instruction is reversible error necessitating a new trial. *See, e.g.*, *Arnoldt*, 186 W. Va. at 400, 412 S.E.2d at 801 (reversing for failure to give a supported instruction without further discussion); *Overton v. Fields*, 145 W. Va. 797, 813, 117 S.E.2d 598, 609 (1960) (same).

The trial court offered no justification for its "best six" procedure: It neither gave reasons

[10] By contrast, the Chartis Defendants' timely November 15 submission afforded Hess ample opportunity for review. The trial court thus erred in asserting that "[b]oth parties had an equal ability to review the others' proposed instructions." A3222 (V4).

for preferring Hess's late-offered instructions to those that the Chartis Defendants had already reviewed, nor explained the merits of its decision to refuse the majority of the Chartis Defendants' instructions. Instead, the court sought to explain its procedure with vague references to "judicial efficiency" and "keeping matters understandable to a lay jury." A3222 (V4). But neither of these abstract considerations justifies instructing the jury without providing the parties with an equal opportunity to review the instructions in writing, and a set of instructions that omits crucial definitions in favor of an erroneous and contradictory statement of the law (*see* Section II.B, *infra*) is not more "understandable to a lay jury" than one that explains the rules correctly and completely. Each of these flaws in the court's procedure warrants a new trial. Taken together, they put the conclusion beyond doubt. *See, e.g.*, *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 118, 459 S.E.2d 374, 395 (1995) (reversal required where cumulative errors render a judgment "inherently unreliable").

B. The Trial Court's Instructions On Hess's Misrepresentation To The Chartis Defendants Were Inconsistent, Erroneous, And Prejudicial

The flawed instruction procedure resulted in substantive error: The trial court's instructions to the jury with respect to whether Hess made misrepresentations in its October 30, 1997 insurance application were internally inconsistent and legally incorrect. *See* A2963-66 (V4). Misrepresentation was an important issue at trial, because the Chartis Defendants contended, as a defense to bad faith, that Hess's failure to disclose in its application the DEP's April 15, 1997 notice concerning potential cleanup or response was a material omission and misrepresentation that legitimately excused them from continuing to honor the Policy.

The Chartis Defendants therefore proposed an instruction that correctly set forth settled West Virginia law under the relevant statutory provisions, W. Va. Code § 33-6-7(b) and (c). *See* A2857 (V3); *supra* pp. 8-9. Under those provisions, an omission or misstatement in an insurance

application permits denial of coverage if it "was material to the issuance of the policy," without any requirement "that an insurer prove the subjective element that an insured specifically intended to place misrepresentations, omissions, concealments of fact, or incorrect statements on an application in order for the insurer to avoid the policy." *Mass. Mut. Life Ins. Co. v. Thompson*, 194 W. Va. 473, 478, 460 S.E.2d 719, 724 (1995). Hess, by contrast, submitted an instruction that erroneously added an intent element drawn from an irrelevant statutory provision not raised by the Chartis Defendants, namely W. Va. Code § 33-6-7(a), telling the jury that "[m]isrepresentations, omissions, concealments of facts, and incorrect statements on an application for insurance by an insured *must be knowingly made with an intent to deceive the insurer* . . . in order to be a legitimate basis for denial of a claim," and that therefore "in order to prevail, an insurer, AIG, must prove by a preponderance of the evidence that its insured, Hess Oil, *knowingly made misrepresentations with a specific intent to deceive AIG* . . . ." A2848-49 (V3) (emphases added).

When the trial court read *both* Hess's and the Chartis Defendants' misrepresentation instructions to the jury (A2848-49, A2857 (V3); Tr. 1671-72, 1677 (V12)), leaving the panel of jurors to determine which was correct, it violated West Virginia law, which has long held that:

> It is error to give inconsistent instructions, even if one of them states the law correctly, inasmuch as the jury, in such circumstances, is confronted with the task of determining which principle of law to follow, and inasmuch as it is impossible for a court later to determine upon what legal principle the verdict is founded.

Crouch, 2012 WL 1912484, at*4 (quoting Syl. pt. 2, *Burdette v. Maust Coal & Coke Corp.*, 159 W. Va. 335, 222 S.E.2d 293 (1976) (per curiam)). *See also, e.g.*, *John D. Stump & Assocs., Inc. v. Cunningham Mem'l Park, Inc.*, 187 W. Va. 438, 447, 419 S.E.2d 699, 708 (1992); *Penix v. Grafton*, 86 W.Va. 278, 103 S.E. 106 (1920). Inconsistent instructions constitute reversible error because they create "a distinct tendency to confuse rather than to instruct or to enlighten the

jury." *State Road Comm'n v. Darrah*, 151 W.Va. 509, 513, 153 S.E.2d 408, 411 (1967). The presence of a correct instruction (here, the Chartis Defendants') among other, mistaken instructions thus does not excuse an erroneous one, because it cannot dispel the likelihood of jury confusion or enable a reviewing court to determine whether the jurors followed the law. *Id.*

In *Burdette*, for example, the trial court issued two instructions on concurrent negligence: one that correctly indicated that the plaintiffs were only required to show that "the alleged negligence of the various defendants together proximately caused or contributed to" their injury, and another that burdened the plaintiffs with proving "what the 'real cause' of the accident was." 159 W.Va. at 343, 222 S.E.2d at 298. This Court reversed, holding that the instructions improperly left the jury to decide which description of the law was correct and prevented review of whether the panel had applied the right rule. *Id.* at 343-44, 222 S.E.2d at 298. *Burdette* thus stands for the proposition that vacatur is required *whenever* an instruction incorrectly states the elements of a party's case. *See id.*

The trial court correctly acknowledged its error in its post-trial decision. A3225 (V4); *see Crouch*, 2012 WL 1912484, at *4; *Burdette*, 159 W.Va. at 343-44, 222 S.E.2d at 298. But rather than admit that the verdict was fatally tainted by its incorrect instructions, the trial court sought to defend itself on the ground that "the instructions, as given, were fair to both parties." A3224-25 (V4) (citing *Tennant*, 194 W. Va. at 116, 459 S.E.2d at 393). That misstates the governing standard. The test is whether "*the instructions given as a whole are accurate* and fair to both parties," such that "they *could not* have misled the jury." *Tennant*, 194 W. Va. at 116, 459 S.E.2d at 393 (emphases added) (citation and internal quotation marks omitted). *Accord* Syl. pt. 3, *Karr v. Balt. & O. R.R.*, 76 W. Va. 526, 86 S.E. 43 (1915) ("*If, when considered together, instructions state the law of the case*, and are not palpably inconsistent *or misleading*, mere inaptness of phraseology does not necessarily vitiate any one instruction.") (emphasis added). A

minor wording error will frequently not necessitate reversal, because the jury is unlikely to be confused when the instructions taken together get the essence of the law right. *See, e.g.*, *Karr*, 76 W.Va. 526, 86 S.E. at 45 ("promptly" versus "within a reasonable time"; the balance of the instructions made clear that "reasonable" was the correct standard). Here, however, the instructions did *not* accurately "state the law of the case": they gave two conflicting accounts of a crucial point of law—one of which was incorrect.

The judgment cannot be saved on this point by a finding of harmless error. The submission to the jury of erroneous and inconsistent instructions is presumed to be prejudicial, *Matheny*, 212 W. Va. at 746, 575 S.E.2d at 356, and there is no support for Hess's speculation (apparently adopted by the trial court) that the presumption is overcome here because "the inaccuracy was not considered by the jury." A3224 (A3). The jury was presented with sufficient evidence to support a conclusion that Hess had misrepresented a material fact in its insurance application—if it had not, submission of any misrepresentation instruction would have been improper, and Hess surely would not have submitted its own version. If the jury reached that conclusion without also finding intent (which the Chartis Defendants had not tried to prove), the two instructions would have pointed in opposite directions: Under Hess's version of the law, the defense would fail, while under the Chartis Defendants' correct enunciation it would succeed.[11] There is no way to know whether this happened, and the risk of such uncertainty is the very reason for placing the burden of demonstrating the absence of prejudice from an erroneous instruction on the non-moving party. *See, e.g.*, *Crouch*, 2012 WL 1912484, at *4; *Matheny*, 212 W. Va. at 746, 575 S.E.2d at 356. Neither the trial court nor Hess has identified a reason to

[11] Even if the jury had not concluded that a material misrepresentation existed, submission of the correct, less stringent legal standard could have led it to decide that the Chartis Defendants were involved in no more than a *bona fide* insurance coverage dispute—which would have vitiated its findings of "actual malice," eliminating the possibility of punitive damages. *See* Section III.A, *infra*.

conclude that the error was not prejudicial, for it is impossible to do so. A new trial is necessary.

C. The Trial Court Abused Its Discretion By Admitting Irrelevant And Prejudicial Testimony Concerning Future Remediation Costs

The trial court abused its discretion in allowing Hess to present irrelevant and highly prejudicial evidence to the jury relating to the costs of future remediation at the Mt. Storm site. Hess's expert testified about the additional costs that would allegedly be necessary to fully remediate the Mt. Storm site (Tr. 1338-48 (V12)), estimating those costs to be anywhere from $560,000 to $878,000 (Tr. 1348-49 (V12)). Hess's counsel highlighted those numbers in closing, claiming that "the future remediation is part of what the Browns are going to be stuck with here." Tr. 1704 (V12).[12]

This evidence bore no relevance to the issues in the case, and should have been excluded, contrary to the trial court's ruling. A3221-22 (V4). West Virginia law holds that an insurer is liable only for "the insured's damages for net economic loss," Syl. pt. 1, *Hayseeds*, 177 W. Va. 323, 352 S.E.2d 73, up to "the policy limits which the plaintiff had contracted for with his insurance carrier," *Marshall v. Saseen*, 192 W. Va. 94, 101, 450 S.E.2d 791, 798 (1994). An insurer can only be liable beyond its policy limits upon proof that, *inter alia*, the "policyholder [made] a reasonable demand within the policy limits." *Miller v. Fluharty*, 201 W. Va. 685, 698, 500 S.E.2d 310, 323 (1997). Hess presented no evidence that it made any such demand, that the Chartis Defendants refused to settle, or that Hess was in any way liable for the future remediation costs beyond the Policy's limit. The future remediation costs were therefore legally irrelevant and inadmissible. *See* W.Va. R. Evid. 401, 402.

This evidence, moreover, prejudiced the Chartis Defendants by providing a false

---

[12] No evidence was presented to support the contention that the Browns would be liable for future remediation costs, and indeed the fact that Hess did not distribute any assets to them at dissolution (Tr. 415, 474 (V11)) forecloses that possibility. *See* W. Va. Code § 31D-14-1407(d); Section I.A, *supra*.

justification for imposing liability beyond C&I's policy's limits, without evidence that the insured made any settlement demand—thus granting Hess an extralegal windfall. A verdict returned on such a basis cannot stand, and a new trial is necessary.

D. The Trial Court Abused Its Discretion By Unevenly Applying Its Own Discovery Rules

In derogation of its obligation to remain "neutral in the area of trial management," *Barlow*, 198 W. Va. at 127, 479 S.E.2d at 637, the trial court failed to evenhandedly apply its own discovery rules. The court set a discovery schedule (A170-72 (V1)) and then granted the Chartis Defendants' motion to exclude witnesses not disclosed during discovery—including witnesses "who have knowledge regarding the AIG Defendants' [sic] past general business practices" (A1512-17 (V2); A2567-68 (V3)). Hess did not disclose Messrs. Romano and Segal as witnesses until November 4, 2011 (Tr. 38, 40 (V10)), well outside the close of discovery on October 3, 2011 (A171). When the Chartis Defendants sought to depose these witnesses, the trial court granted a protective order on the ground that the deposition "notices were tendered outside the discovery window." A2590 (V3); *see also* A3221 (V4). At trial, Hess ignored the court's order *in limine* and called the witnesses, whereupon the court without explanation "reverse[d] [its] prior decision" and allowed them to testify without any opportunity for the Chartis Defendants to depose them or otherwise to prepare for their testimony. Tr. 1179 (V12).

This unfair and unjustified application of the trial court's discovery rules was an abuse of discretion. By denying the Chartis Defendants any opportunity to ready themselves or to develop a response, the court upended "one of the purposes of the discovery process," which "is to eliminate surprise. Trial by ambush is not contemplated by the Rules of Civil Procedure." *McDougal*, 193 W. Va. at 236-37, 455 S.E.2d at 795-96. A trial court's "[d]iscretion is not whim," *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005), and the court's failure to act

neutrally provides an additional reason to remand for new trial.

III. THE PUNITIVE DAMAGES AWARD VIOLATES WEST VIRGINIA AND FEDERAL LAW

Assuming *arguendo* that the trial court's unsupported and procedurally improper $5 million compensatory damages award is allowed to stand, its judgment should still be reversed or remitted with respect to the $25 million remaining in punitive damages. In West Virginia, every such award is subject to a three-step process of judicial review: (i) "the court must first evaluate whether the conduct of the defendant toward the plaintiff entitled the plaintiff to a punitive damage award"; if an award is justified, (ii) "the court must then examine the amount of the award pursuant to the aggravating and mitigating criteria set out in *Garnes*[, 186 W. Va. 656, 413 S.E.2d 897]"; and (iii) "the compensatory/punitive damage ratio established in *TXO* [*Prod. Corp. v. Alliance Res. Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992)]." Syl. pt. 6, *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010). The punitive damages judgment below fails every part of this analysis, and independently violates the federal Constitution even if it would otherwise survive state-law scrutiny.

A. The Evidence Of The Requisite "Actual Malice" Was Insufficient Under West Virginia Law

Before reaching any question of constitutionality, this Court should reverse the trial court's denial of the Chartis Defendants' post-trial motion for judgment as a matter of law on the punitive damages question because Hess failed to meet the "high threshold of actual malice" required under West Virginia law before punitive damages may be awarded in an insurance bad-faith case. *McCormick v. Allstate Ins. Co.*, 202 W. Va. 535, 540, 505 S.E.2d 454, 459 (1998) (UTPA); *Hayseeds*, 177 W. Va. at 330, 352 S.E.2d at 80 (common law). This is a "bright line" test that is "highly susceptible" to judgment as a matter of law; it requires a plaintiff to prove "that the [insurance] company actually knew that the policyholder's claim was proper, but

willfully, maliciously and intentionally" denied the claim or utilized an unfair business practice in settling or failing to settle the claim. *McCormick*, 202 W. Va. at 539, 540, 505 S.E.2d at 458, 459; *Hayseeds*, 177 W. Va. at 330, 331, 352 S.E.2d at 80-81.

Under this test, a jury is permitted to consider punitive damages only upon a finding of "'intentional injury—not negligence, lack of judgment, incompetence, or bureaucratic confusion.'" *McCormick*, 202 W. Va. at 539, 505 S.E.2d at 458 (quoting *Hayseeds*, 177 W. Va. at 330-31, 352 S.E.2d at 80-81). Thus, as a matter of law, a "*bona fide* dispute" between insurer and insured, including (for instance) the existence of "a legitimate issue as to the policy limits applicable in the underlying case," cannot support a finding of actual malice, for such a dispute precludes a finding that the insurer "knew" that the claim was valid. *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 592, 396 S.E.2d 766, 773 (1990). *See also, e.g.*, *Perrine*, 225 W. Va. at 576, 694 S.E.2d at 909 ("A wrongful act, done under a bona fide claim of right, and without malice in any form, constitutes no basis for [punitive] damages.") (citation and internal quotation marks omitted); *N. Am. Precast, Inc. v. Gen. Cas. Co. of Wis.*, 413 Fed. App'x 574, 579 (4th Cir. 2011) (per curiam) (under West Virginia law, a "disagreement over coverage . . . is not evidence of malice"); *Dunfee v. Allstate Ins. Co.*, No. 10-CV-01308, 2011 WL 4544079, at *6 (S.D. W. Va. Sept. 29, 2011) (similar).

Here, even assuming *arguendo* that the Policy required the Chartis Defendants to pay Hess's claim, there is no evidence that the Chartis Defendants "actually knew" that to be the case but nevertheless "willfully, maliciously and intentionally" denied the claim. *McCormick*, 202 W. Va. at 539, 540, 505 S.E.2d at 458, 459; *Hayseeds*, 177 W. Va. at 330, 352 S.E.2d at 80. Instead, the facts (even viewed in the light most favorable to Hess) demonstrate nothing more than a *bona fide* disagreement over the existence of coverage: In 2009, the Chartis Defendants discovered through their own investigation that Hess had received notice of a spill at Mt. Storm

in 1997 (Tr. 1521-23 (V12)) yet had subsequently denied the existence of any claims for cleanup or response action (*see* A95 (V1)). The Chartis Defendants believed in good faith that this misrepresentation was a valid basis for denying the claim under West Virginia law, because it was material to C&I's acceptance of risk and issuance of the policy. *See* Tr. 912-13 (V11); A138-41 (V1); W. Va. Code § 33-6-7(b), (c); *Thompson*, 194 W. Va. at 478, 460 S.E.2d at 724. Even if the jury ultimately found this defense insufficient to negate coverage, the very existence of a legitimate coverage dispute eliminated the possibility that the Chartis Defendants harbored such knowledge and willfulness as to rise to the level of "actual malice" against Hess. *See Shamblin*, 183 W. Va. at 592, 396 S.E.2d at 773.

The trial court's post-trial opinion never cites *Shamblin* or its progeny. It offers no reason to think that the dispute in this case was anything less than genuine, and it cites no evidence to support the jury's finding. Instead, it notes that "*Hess asserts* that there were a plethora of practice violations, . . . and that these violations were compounded by the fact that coverage was pulled ten years after the cleanup had been underway." A3217 (V4) (emphasis added). Even Hess's articulation of the purported "practice violations," however, consisted of nothing from which a reasonable juror could have inferred knowledge and willfulness. To the contrary, Hess cited only the Chartis Defendants' alleged failure to investigate various aspects of the claim and to provide adjustment training and procedures (*see* A2989-91 (V4)); even taken altogether, such alleged deficiencies can establish at most the "negligence, lack of judgment, incompetence, or bureaucratic confusion" that this Court has held falls short of the stringent actual malice standard. *McCormick*, 202 W. Va. at 539, 505 S.E.2d at 458. The punitive damages judgment should be reversed.

B. The Punitive Award Is Excessive Under The West Virginia Constitution

Even if punitive damages were warranted, the judgment, even as reduced from $58

million to $30 million, exceeds the bounds set by the West Virginia Constitution. The *Garnes* aggravating factors are absent, and the $25 million award figure is therefore unwarranted. And because the $5 million compensatory award is "very large," West Virginia law permits an award no larger than the value of the actual or potential harm caused by the Chartis Defendants' alleged conduct. Whatever damages ratio might otherwise be permissible, the award should be further reduced to account for the presence of substantial mitigating circumstances.

1. The Punitive Award Is Unsupported By Aggravating Factors

Perrine lists the factors to be considered in assessing whether the size of a punitive damages award is justified: "(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. None of these considerations supports the judgment here.

First, there is no basis for finding the Chartis Defendants' actions reprehensible. This factor requires consideration of whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Boyd v. Goffoli*, 216 W. Va. 552, 564, 608 S.E. 2d 169, 181 (2004) (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003)). None of these elements is present here: Hess suffered no physical harm, and no one's health or safety was threatened by the Chartis Defendants' temporary and partial withholding of payment under the Policy. Hess was not financially vulnerable: it had dissolved by the time the Chartis Defendants

denied coverage, and because it held no assets it had nothing to lose.[13] And as explained in Section III.A, *supra*, the Chartis Defendants exhibited no "intentional malice, trickery, or deceit"; they sought only to protect their rights under the Policy and West Virginia law.

The trial court's cursory discussion of this prong of the test does not cite the governing law, but it appears to hinge entirely on the "repeated actions" element: the opinion states that the "timeliness of the denial" of coverage was "suspect," and asserts that the jury's conclusion that the Chartis Defendants "violated trade practices" is alone sufficient to support a finding of reprehensibility. A3231 (V4). But the court provides no reason to think that the gap between the Chartis Defendants' acceptance of coverage and its subsequent denial of the claim should be considered "reprehensible." Indeed, the Chartis Defendants paid out some $622,000 to finance the cleanup of Hess's spill site during that period. A141 (V1). Equally absent is any reason to think that unidentified violations of "trade practices" are reprehensible under *Boyd* and *Campbell*; any such violations here were at worst the result of negligence that is not a proper basis for a punitive award. *See* Section III.A, *supra*; *McCormick*, 202 W. Va. at 539, 505 S.E.2d at 458. In short, the "most important indicium of the reasonableness of a punitive damages award" is wholly absent from this case; the award is therefore immediately rendered "suspect." *Boyd*, 216 W. Va. at 564, 608 S.E.2d at 181 (quoting *Campbell*, 538 U.S. at 419).

Second, there is no basis from which to conclude that the Chartis Defendants profited from their conduct. Indeed, the undisputed evidence is that the Chartis Defendants paid some $622,000 under the Policy before the initiation of this lawsuit, and that they have now paid out $882,000 of Hess's $1 million policy limit. A141 (V1), Tr. 410 (V11). The trial court's assertion that the Chartis Defendants "would have profited from the wrongful conduct" (A3231

[13] Hess's shareholders' financial situation is not relevant, but it bears noting that they also were not at any financial risk: because Hess did not distribute any assets at dissolution, they could not have faced liability for a judgment entered against it. *See* W. Va. Code 31D-14-1407(d); Section I.A, *supra*.

(V4)) is both false and a *non sequitur*: the Chartis Defendants could only have avoided payment of Hess's policy limits *if its denial of coverage had been adjudged within its rights*—in which case there would have been no reason to call its actions "wrongful."

Third, the record contains no evidence of the Chartis Defendants' finances. At the punitive damages phase of trial, Hess's sole evidence concerned AIG, Inc.—a separate corporation with its own finances. *See* Section I.B, *supra.* Contrary to the trial court's bald assertion (A3231-32 (V4)), none of the testimony tied the firms' holdings or income to one another, or provided a basis for ignoring their corporate separateness. The testimony concerning AIG, Inc. is thus irrelevant, and there is nothing else from which to draw conclusions regarding the Chartis Defendants' finances. This branch of the *Perrine* analysis bears no weight at all.

Fourth, affirming the punitive award in this case will have an effect that is precisely the opposite of encouraging settlement "when a clear wrong has been committed." *Perrine*, 225 W. Va. at 553, 694 S.E.2d at 886. Even if there were a "clear wrong" here, the prospect of a damages verdict of $30 million or $58 million or more (in a suit over insurance proceeds worth no more than $378,000) would lead *every* plaintiff to refuse *every* settlement offer—including the reasonable and even the exceedingly generous ones—in order to take his case to trial and roll the dice with a friendly jury. Affirmance would *discourage* settlement, imposing vast and unnecessary costs on West Virginia's judicial system—including on this Court.

Finally, the cost of litigation to the plaintiff is irrelevant to punitive damages in this case. Hess has paid none of its counsel's fees or expenses (Tr. 476 (V11)), and even if it had done so, the compensatory award already accounts for the plaintiff's litigation expenses. *See Hayseeds*, 177 W. Va. at 329, 352 S.E.2d at 80-81. Hess is not entitled both to recover its expenses as a measure of its compensatory damages *and* to recover them *again* as the basis of punitive damages: such a result would "duplicate[]" the compensatory award, *Campbell*, 538 U.S. at 426,

creating a "double recover[y]" that West Virginia law justly does not permit, *see Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 209 W. Va. 318, 337, 547 S.E.2d 256, 275 (2001). The record is thus devoid of any aggravating factors, and the punitive award cannot be justified.

2. The $25 Million Punitive Award Violates *TXO*

Following the roadmap set out in *Perrine,* the next step in the analysis is to consider the ratio of punitive damages to compensatory damages under *TXO*. *See* 225 W. Va. at 556, 694 S.E. 2d at 889. While the trial court correctly determined that the facts of this case do not justify an award *in excess* of *TXO*'s presumptive 5:1 cap on this ratio (*see* A3233-34 (V4)), its refusal to order a lower ratio was error, for two separate but overlapping reasons.

First, the trial court erred in using the jury's $5 million compensatory damages award as the denominator in its ratio calculation. "Compensatory damages are intended to redress the *concrete loss* that the plaintiff has suffered by reason of the defendant's wrongful conduct," *Campbell*, 538 U.S. at 416 (emphasis added) (citation and internal quotation marks omitted), and it is the "concrete loss" that must serve as the comparator under *TXO* There is no evidence that Hess suffered any such loss. *See* Section I.A, *supra.* And even indulging the false assumption that Hess can recover damages for the Browns' emotional injuries, the $5 million verdict would not be the right figure. As this Court has explained, an award for emotional injury in the absence of physical trauma or evidence of ongoing medical treatment "'necessarily encompasses punitive damages,'" such that "'an additional award for punitive damages would constitute an impermissible double recovery.'" *Perrine*, 225 W. Va. at 570, 694 S.E.2d at 903 (quoting Syl. pt. 14, *Tudor v. Charleston Area Med, Ctr., Inc.*, 203 W. Va. 111, 506 S.E.2d 554 (1997)). *See also Campbell*, 538 U.S. at 426 (an award of compensatory damages for emotional distress "already contains" a "punitive element"). Here, the Browns' alleged emotional damages were not supported by proof of physical trauma or ongoing treatment, and were therefore

"necessarily" punitive. They are to that extent duplicative of the punitive damages award, and cannot be considered for purposes of the *TXO* ratio. The court instead must consider only the evidence of "concrete loss" to Hess, and the only possible such "injury" was a bill from Ryan for some $253,000 (A6-7 (V1))—which Hess would never have satisfied given that it is dissolved. The trial court's punitive award is *almost 100 times* larger than this hypothetical measure of harm, and the West Virginia Constitution requires its reduction.

Second, even the trial court's 5:1 ratio is unconstitutionally large. That figure is the "outer limit," to be approached only in cases of especially egregious misconduct. Because the facts of this case demonstrate no such misconduct, any punitive award must bear a close relationship to the measure of actual harm. Further, this Court has explicitly stated that a 5:1 ratio is excessive where the compensatory damages award is "very high," *Perrine*, 225 W. Va. at 557, 694 S.E.2d at 890 (citation and internal quotation marks omitted), and the $5 million compensatory damages figure, if it stands, is "very high" by any measure. Courts in other jurisdictions routinely consider compensatory judgments of comparable and even much smaller sizes to be "large" or "substantial," necessitating a reduction in the damages ratio.[14] The same step is necessary here.

3. Mitigating Factors Warrant Reduction Of The Punitive Award

Whatever amount of punitive damages this Court might view as otherwise appropriate in light of the absence of *either* aggravating circumstances *or* actual injury to the plaintiff, the

[14] *See, e.g.*, *Campbell*, 538 U.S. at 426 ($1 million compensatory award was "substantial"); *Jones v. United Parcel Serv.*, 674 F.3d 1187, 1207-08 (10th Cir. 2012) (finding a $630,000 compensatory award to be "substantial" and reducing a punitive award to a 1:1 ratio); *Jurinko v. Med. Protective Co.*, 305 Fed. App'x 13, 27-28, 30 (3d Cir. 2008) (reducing a 3.13:1 ratio award to 1:1 where compensatory damages were a "substantial" $1.658 million); *Bridgeport Music, Inc. v. Justin Combs Pub.*, 507 F.3d 470, 488, 490 (6th Cir. 2007) (ordering reduction of a 9.5:1 ratio where compensatory damages were "very large" at $366,939); *Thomas v. iStar Fin., Inc.*, 508 F. Supp. 2d 252, 262-64 (S.D.N.Y. 2007) (reducing 4:1 ratio award to 1:1 where compensatory damages were $190,000, "a very substantial amount").

award should be reduced to account for the mitigating factors identified in *Perrine*. These include "whether the punitive damages bear a reasonable relationship to the harm that is likely to occur and/or has occurred as a result of the defendant's conduct," "whether punitive damages bear a reasonable relationship to compensatory damages," and "the cost of litigation to the defendant." *Perrine*, 225 W. Va. at 553-54, 694 S.E.2d at 886-87.

Although the trial court correctly found that each of these factors weighs against a large punitive judgment in this case (A3232-33 (V4)), it erred in finding that mitigation was a reason to reduce the ratio to 5:1, rather than first reducing the award to achieve compliance with the West Virginia Constitution and *then* considering mitigation, as this Court indicated was the proper route in *Perrine*. This backwards procedure obscured the fact that West Virginia law *required*, at a minimum, that the punitive award be reduced to fit a 5:1 ratio. As a consequence, the trial court never considered the substantial mitigating considerations that are present here.

First, the punitive judgment bears no reasonable relationship to actual harm: Hess has paid neither Ryan nor its own attorneys' fees, and its shareholders' damages are irrelevant. *Second*, the 5:1 ratio is not reasonable here, particularly in light of the size of the compensatory award, the fact that it is based on harms that Hess did not suffer, and the necessary inference that much of the "compensatory" award is punitive in nature. *Third*, the Chartis Defendants have borne substantial litigation costs in the course of defending this suit, which has involved motions *in limine* and for summary judgment; a two-phase jury trial; three post-trial motions; and now an appeal to this Court. Such expenses have an undeniable deterrent effect, and thus serve the purposes of punitive damages on their own, without need for an additional award.

In sum, West Virginia law necessitates a reduction in the punitive damages award, if it stands at all. The Chartis Defendants did not act in a "malicious" manner, the trial court's 5:1 damages ratio is too large, and mitigating considerations militate in favor of reducing the award

to an amount far smaller than the West Virginia Constitution would otherwise permit.

C. The Judgment Below Violates The Federal Constitution

Even if the trial court's judgment were permitted under West Virginia law, it would violate federal due process requirements. *First*, federal law imposes a more stringent limit on punitive damages than does West Virginia's jurisprudence, and the award in this case exceeds that cap. *Second*, the Constitution forbids punishing a defendant for events involving "strangers to the litigation," *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) , and the jury in this case issued its punitive award primarily on the basis of facts involving persons and entities that are not parties to the case.

1. The Punitive Award Is Excessive Under Federal Law

The Fourteenth Amendment requires that a state-law punitive damages award be "both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Campbell*, 538 U.S. at 426. The Supreme Court has articulated three "guideposts" to be applied in evaluating punitive awards under the Due Process Clause: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418 (citing *BMW of N. Am. v. Gore*, 517 U.S. 559, 575 (1995)). Each of these guideposts points away from the $25 million punitive damages award in this case.

First, as explained in Section III.B.1, *supra*, there is no basis for finding the Chartis Defendants' conduct reprehensible. None of the *Campbell* factors is present here, and the award is therefore immediately "suspect." *Id.* at 419.

Second, as explained in Section III.B.2, *supra*, a comparison between "the actual or potential harm suffered by the plaintiff and the punitive damages award," *id.* at 418, reveals that

the $25 million award is unreasonable. Hess did not suffer its shareholders' emotional harms, and the only *potential* harm was Ryan's claim for payment of the balance of its bills—just $253,000. The $25 million punitive award is *almost 100 times* that figure—well outside the single-digit range permissible under federal law. *See id.* at 425.

Further, the Supreme Court has stated clearly that, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps *only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." *Id.* at 425 (emphasis added). The measure of "potential" damages ($253,000) is "substantial," *see supra* note 14, particularly in light of the fact that Hess did not have to pay that amount; an award in that range therefore sits at the "outermost limit" of what due process permits. And even if the unsupported $5 million compensatory award were the correct reference point, that figure is undeniably "substantial" enough to cap the punitive-to-compensatory ratio at no greater than 1:1. *Id.*; *see supra* note 14.

Third, the $25 million punitive damages award in this case "is substantially greater than the statutory fines available" in West Virginia—confirming that the judgment is unsustainable. *Gore*, 517 U.S. at 584. The relevant civil penalty is a fine for unfair trade practices under W. Va. Code § 33-11-6(a), which is capped at $10,000. The fact that the punitive damages award "dwarf[s]" the amount that the legislature has deemed sufficient to punish and deter unfair trade practices is a clear signal that it should be reduced. *Campbell*, 538 U.S. at 428.

2. The Judgment Is Impermissibly Based On Facts Concerning "Strangers To The Litigation"

The federal Constitution also requires reversal for the independent reason that the jury based its punitive award on evidence pertaining to individuals and entities who are not parties to the litigation. "[T]o permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation," leaving the jury to speculate as to the

appropriate punishment without any factual grounding. *Williams*, 549 U.S. at 354. Due process therefore "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id.* at 353. The punitive damages award unconstitutionally does just that:

First, the jury was wrongly permitted to consider evidence of emotional harms allegedly suffered by Hess's shareholders, the Browns, even though the Browns were not parties to the lawsuit and *never filed a pleading or asserted a claim.*

Second, the trial court improperly allowed the jury to consider Messrs. Romano's and Segal's testimony about claims handling by *other* AIG, Inc.-affiliated entities, even though each is separately incorporated from the Chartis Defendants and thus their policyholders are "strangers to the litigation," *id.*, and their claimed injuries were "dissimilar acts, independent from the acts upon which liability was premised." *Campbell*, 538 U.S. at 422-23. "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . ." *Id.* at 423. The improper admission of this testimony allowed the jury to speculate about the number of alleged victims, the extent of their alleged injuries, and the hypothetical necessity of punishing the Chartis Defendants in response.

Third, the trial court violated due process in allowing the Chartis Defendants to be punished in an amount reflecting *AIG, Inc.'s* finances, including compensation paid to its executives—all of whom are also "strangers" to the case. An award large enough to deter an entity of AIG, Inc.'s size is far larger than can be considered necessary to deter the much smaller

entities that are the parties here.[15] And, as the South Carolina Supreme Court has concluded in a parallel context, evidence concerning executive compensation goes "far beyond the pale" and thus violates a defendant's due process rights by "introduc[ing] an arbitrary factor in a jury's consideration and assessment of punitive damages." *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 25 (S.C. 2010).[16] Such evidence is "highly prejudicial," *id.*, even where it concerns executives of a firm that is actually party to the case. Due process requires reversal.

CONCLUSION

The judgment below should be reversed, and the matter remanded with instructions to enter judgment in the Chartis Defendants' favor. In the alternative, the judgment should be vacated, and the matter remanded for a new trial. At a minimum, the award of punitive damages should be reduced to an amount not more than $253,000.

---

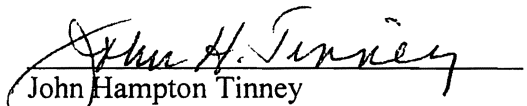
[15] *See, e.g.*, *Leach v. Biscayne Oil & Gas Co., Inc.*, 169 W. Va. 624, 628, 289 S.E.2d 197, 199 (1982) ("'[I]t would require, perhaps, a larger fine to have this deterrent effect upon one of large means that it would upon one of ordinary means, granting that the same malignant spirit was possessed by each.'") (citations omitted). Numerous other states have recognized that evidence regarding the wealth of a corporate parent is prejudicial and inadmissible. *See, e.g.*, *Cap Gemini Am., Inc. v. Judd*, 597 N.E.2d 1272, 1286 (Ind. Ct. App. 1992) (Because "the corporate form will not be disregarded solely because a corporation is the parent of another," "evidence of the wealth of the parent corporation is irrelevant and inadmissible in assessing punitive damages against a subsidiary corporation."); *Liberty Fin. Mgmt. Corp. v. Beneficial Data Processing Corp.*, 670 S.W.2d 40, 52 (Mo. App. Ct. 1984) (corporate parent's wealth "clearly left [the jury] with the notion that resources available to pay any verdict for any damages included the billion dollars of the parent, but non-party, corporation"); *Walker v. Dominick's Finer Foods, Inc.*, 415 N.E.2d 1213, 1216-17 (Ill. App. 1980) (error "to disregard the distinct corporate existence of the defendant" and therefore to admit financial records of a non-party).

[16] Courts in other jurisdictions have reached similar conclusions. *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"); *Grefer v. Alpha Technical,* 965 So.2d 511, 524, 526 (La. Ct. App. 2007) (plaintiffs' presentation of evidence "of the salaries, bonuses, stock options, etc. of Exxon's corporate executives . . . provide[d] an open-ended basis for inflating the punitive award").

DATED this 4th day of September, 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. 12-0705

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

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

Defendants/Petitioners,

v.

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

HESS OIL COMPANY, INC.,

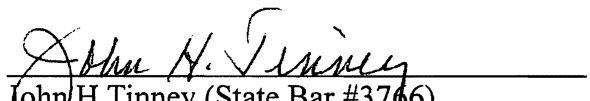
Defendant/Respondent.

CERTIFICATE OF SERVICE

I, John H. Tinney, Counsel for Chartis Claims, Inc., and Commerce & Industry Insurance Company, hereby certify that on the 4th day of September 2012, I served the foregoing **"Petitioners' 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 (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)