

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' REPLY 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

INTRODUCTION1

ARGUMENT.....1

I. HESS MISCONSTRUES WEST VIRGINIA’S LAW OF CORPORATIONS,
UNDER WHICH THE JUDGMENT BELOW REQUIRES REVERSAL1

 A. Hess Fails To Justify The Trial Court’s Disregard Of Hess’s Corporate
 Form.....2

 B. Hess Identifies No Basis For Merging The Chartis Defendants With Other
 AIG, Inc.-Related Entities.....6

II. HESS FAILS TO DEFEND THE JUDGMENT FROM THE NECESSITY OF
REMAND FOR A NEW TRIAL IF IT IS NOT REVERSED OUTRIGHT6

 A. Hess Fails To Defend The Trial Court’s Erroneous Instruction Procedure.....6

 B. Hess Neither Defends The Trial Court’s Irreconcilable And Erroneous
 Misrepresentation Instructions Nor Carries Its Burden Of Demonstrating
 The Absence Of Prejudice9

 C. Hess Failed To Make A Reasonable Demand Within Policy Limits, And
 Therefore Cannot Recover Future Remediation Costs10

 D. Hess Does Not Defend The Trial Court’s Inconsistent Discovery Rulings.....11

III. HESS FAILS TO JUSTIFY THE REMAINING \$25 MILLION PUNITIVE
DAMAGES AWARD.....12

 A. Hess Identifies No Evidence Of “Actual Malice”12

 B. Hess Fails To Rebut The Chartis Defendants’ Showing That The Punitive
 Damages Award Exceeds The Limits Set By The West Virginia
 Constitution.....15

 1. Hess Identifies No Aggravating Circumstances15

 2. Hess Misapplies *TXO*’s Ratio Limit17

 3. Hess Misapplies This Court’s Mitigation Jurisprudence18

 C. Hess Fails To Dispel The Trial Court’s Errors Of U.S. Constitutional Law19

CONCLUSION.....20

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Barlow v. Hester Indus., Inc.</i> , 198 W. Va. 118, 479 S.E.2d 628 (1996).....	11
<i>Burdette v. Maust Coal & Coke Corp.</i> , 159 W. Va. 335, 222 S.E.2d 293 (1976) (per curiam).....	9, 10
<i>Burkett v. AIG Claim Servs., Inc.</i> , No. 3:03-CV-1, 2007 WL 2059238 (N.D. W. Va. July 13, 2007).....	4
<i>Foster v. Sakhai</i> , 210 W. Va. 716, 559 S.E.2d 53 (2001).....	9
<i>Garnes v. Fleming Landfill, Inc.</i> , 186 W. Va. 656, 423 S.E.2d 897 (1991).....	16, 19
<i>Goff v. Penn Mut. Life Ins. Co.</i> , 229 W. Va. 568, 729 S.E.2d 890 (2012).....	4
<i>Hayseeds, Inc. v. State Farm Fire & Cas.</i> , 177 W. Va. 323, 352 S.E.2d 73 (1986).....	13, 14, 15
<i>Historic Smithville Dev. Co. v. Chelsea Title & Guar. Co.</i> , 445 A.2d 1174 (N.J. Ch. Div. 1981).....	5
<i>Hopkins v. DC Chapman Ventures, Inc.</i> , 228 W. Va. 213, 719 S.E.2d 381 (2011).....	2
<i>Jenot v. White Mountain Acceptance Corp.</i> , 474 A.2d 1382 (N.H. 1984).....	4
<i>Laya v. Erin Homes, Inc.</i> , 177 W. Va. 343, 352 S.E.2d 93 (1986).....	3
<i>Marshall v. Saseen</i> , 192 W. Va. 94, 450 S.E.2d 791 (1994).....	10
<i>Mass. Mut. Life Ins. Co. v. Thompson</i> , 194 W. Va. 473, 460 S.E.2d 719 (1995).....	9
<i>Matheny v. Fairmont Gen. Hosp.</i> , 212 W. Va. 740, 575 S.E.2d 350 (2002).....	10
<i>McCormick v. Allstate Ins. Co.</i> , 202 W. Va. 535, 505 S.E.2d 454 (1998).....	13, 14
<i>McDougal v. McCammon</i> , 193 W. Va. 229, 455 S.E.2d 788 (1995).....	12

<i>Miller v. Fluharty</i> , 201 W. Va. 685, 500 S.E.2d 310 (1997).....	10, 11
<i>Page v. Columbia Natural Res.</i> , 198 W. Va. 378, 480 S.E.2d 817 (1996).....	7
<i>Perrine v. E.I. du Pont de Nemours & Co.</i> , 225 W. Va. 482, 694 S.E.2d 815 (2010).....	15, 16, 17, 18, 19
<i>Philip Morris USA v. Williams</i> , 549 U.S. 346 (2007).....	16, 20
<i>Poling v. Motorists Mut. Ins. Co.</i> , 192 W. Va. 46, 450 S.E.2d 635 (1994).....	4
<i>Potesta v. U.S. Fid. & Guar. Co.</i> , 202 W. Va. 308, 504 S.E.2d 135 (1998).....	8
<i>Ryan v. Rickman</i> , 213 W. Va. 646, 584 S.E.2d 502 (2003)	8
<i>Shamblin v. Nationwide Mut. Ins. Co.</i> , 183 W. Va. 585, 396 S.E.2d 766 (1990).....	15
<i>Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC</i> , 209 W. Va. 318, 547 S.E.2d 256 (2001).....	17, 18
<i>Shute v. Chambers</i> , 492 N.E.2d 528 (Ill. App. Ct. 1986)	4
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003).....	19, 20
<i>State v. Crouch</i> , 229 W. Va. 618, 730 S.E.2d 401 (2012) (per curiam).....	10
<i>State v. Guthrie</i> , 194 W. Va. 657, 461 S.E.2d 163 (1995).....	9
<i>State v. Lindsey</i> , 160 W. Va. 284, 233 S.E.2d 734 (1977).....	7
<i>State v. Schermerhorn</i> , 211 W. Va. 376, 566 S.E.2d 263 (2002) (per curiam).....	8
<i>T & R Trucking, Inc. v. Maynard</i> , 221 W. Va. 447, 655 S.E.2d 193 (2007) (per curiam).....	2
<i>Tennant v. Marion Health Care Found., Inc.</i> , 194 W. Va. 97, 459 S.E.2d 374 (1995).....	8, 9
<i>Tracy v. Cottrell</i> , 206 W. Va. 363, 524 S.E.2d 879 (1999).....	5

<i>Tudor v. Charleston Area Med. Ctr.</i> , 203 W. Va. 111, 506 S.E.2d 554 (1997).....	17, 18
<i>TXO Prod. Corp. v. Alliance Res. Corp.</i> , 187 W. Va. 457, 419 S.E.2d 870 (1992).....	17, 18
<i>W. Va. Highlands Conservancy, Inc., v. Pub. Serv. Comm'n.</i> , 206 W. Va. 633, 527 S.E.2d 495 (1998) (per curiam).....	2, 6

Statutes and Rules

W. Va. Code § 31D-14-1405	3
W. Va. Code § 31D-14-1405(b)(1).....	5
W. Va. Code § 31D-14-1407	3, 4
W. Va. Code § 33-6-7(b)	9
W. Va. Code § 33-6-7(c).....	9
W. Va. Code § 33-11-6(a).....	19
W. Va. Code § 56-6-19	7
W. Va. R. Civ. P. 51	7
W. Va. R. Evid. 401	10
W. Va. R. Evid. 402.....	10

Other Authorities

ROBIN JEAN DAVIS & LOUIS J. PALMER, PUNITIVE DAMAGES LAW IN WEST VIRGINIA (2010).....	16
--	----

INTRODUCTION

Hess's response brief fails to justify the trial court's astounding \$30 million judgment:

First, Hess does not defend the court's failure to apply basic corporations law. West Virginia's statutes are clear that a corporation like Hess is distinct from its shareholders even once dissolved, and Hess does not attempt to satisfy the requirements for "piercing the corporate veil." Hess cannot assert its shareholders' putative rights, and there is thus no basis for its recovery. Nor is there any support for the trial court's merger of the Chartis Defendants with the other, separately incorporated entities that were the subjects of prejudicial testimony.

Second, Hess hardly disputes that the trial court made at least four other errors of law and procedure, and fails to carry its burden of showing that these missteps were harmless.

Third, Hess cannot defend the trial court's unconstitutional \$25 million punitive damages award. It identifies no evidence to support the necessary finding that the Chartis Defendants acted with actual malice. It fails to establish *any* of the aggravating factors that this Court has enumerated, and does not even acknowledge the rule that a 5:1 damages ratio is excessive where (as here) compensatory damages are "very high." Nor does Hess argue that the award comports with the "reasonableness" touchstone, instead pressing the startling and incorrect claim that it is "inappropriate" to consider whether the judgment complies with federal law.

The judgment below should be reversed, remitted, or vacated and remanded for new trial.

ARGUMENT

I. HESS MISCONSTRUES WEST VIRGINIA'S LAW OF CORPORATIONS, UNDER WHICH THE JUDGMENT BELOW REQUIRES REVERSAL

The judgment is grounded in repeated fundamental errors of West Virginia corporations law. Chartis Br. 12-19. *First*, the trial court treated Hess and its former shareholders as one, in derogation of the "presum[ption] 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) (citation and ellipsis omitted), and on the basis of a patent misreading of the West Virginia Code. *Second*, the court ignored the parallel “presum[ption] 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) (citation omitted), by disregarding the fact that the Chartis Defendants are separate both from AIG, Inc., and from all of its other subsidiaries. The *amicus* brief submitted by Law Professor Joshua Fershee of West Virginia University independently confirms these principles, and Hess cannot avoid reversal.

A. Hess Fails To Justify The Trial Court’s Disregard Of Hess’s Corporate Form

As the Chartis Defendants explained (at 14-18; *see also* Fershee Br. 16-17), the trial court’s disregard of Hess’s corporate form led it to err by admitting irrelevant and prejudicial evidence of injuries allegedly suffered only by Hess’s shareholders; by instructing the jury that it could award damages to Hess for harms it did not suffer;¹ and by failing to enter judgment as a matter of law for the Chartis Defendants in the absence of evidence that Hess suffered any injury at all. Hess makes no genuine effort to rebut these arguments. In particular, Hess points to no evidence that it was injured, and indeed admits that its shareholders “were the only entities” who could have been harmed by the Chartis Defendants’ alleged bad-faith conduct. Hess Br. 7, 38. This concession implies that Hess, the named party, cannot have suffered any injury unless its identity is merged with those of its shareholders. But this is not the case, and the Chartis

¹ To the extent Hess argues that the Chartis Defendants waived objections to the instructions and verdict form, that argument is belied by Hess’s acknowledgment to the contrary. *See* Hess Br. 21-22 & n.18.

Hess is also mistaken to suggest that the Chartis Defendants “invited” error by “refus[ing] to release the former shareholders before trial.” Hess Br. 18. The Chartis Defendants sought summary judgment on the very basis that “there won’t be an attempt to recoup” against the former shareholders. Tr. 56 (V10); *see also* A881-82, 1753-54 (A2); Tr. 57 (V10). Thus, in contrast to *Hopkins v. DC Chapman Ventures, Inc.*, 228 W. Va. 213, 219, 719 S.E.2d 381, 387 (2011) (quoted in Hess Br. 17), the Chartis Defendants repeatedly sought rulings that would have immunized the shareholders from any possibility of liability.

Defendants are therefore entitled to judgment as a matter of law, or at minimum to a new trial.

Hess acknowledges the “presum[ption] that corporations are separate fictional entities from ... their shareholders.” Hess Br. 10. But it ignores that this rule means, as Prof. Fershee’s brief (at 6-8) explains, that the corporate veil will be pierced only in “exceptional circumstances” and only upon careful attention to at least nineteen independent factors, *see Laya v. Erin Homes, Inc.*, 177 W. Va 343, 347-48, 352 S.E.2d 93, 97-99 (1986), which Hess does not address.

Instead, Hess relies on an incorrect reading of W. Va. Code § 31D-14-1407(d). That statute allows only claims “*against* a shareholder of the dissolved corporation,” *only* “[i]f the assets have been distributed in liquidation,” and *only* “to the extent of ... the corporate assets distributed to him or her in liquidation.” W. Va. Code § 31D-14-1407(d)(2) (emphasis added). It does *not* permit a dissolved corporation to sue for its former shareholders’ injuries, nor does it otherwise erase the line between a corporation and its owners. *See* Chartis Br. 17; Fershee Br. 10-11 (this section is a “shield only, and should not be used as a basis for recovery”). As Hess admits (at 15 n.13), West Virginia law explicitly provides that a “dissolved corporation continues its corporate existence” and that dissolution does not (*inter alia*) “[p]revent commencement of a proceeding by or against the corporation in its [own] name.” W. Va. Code § 31D-14-1405.²

² Hess serially misstates the facts underlying its misguided reliance on § 31D-14-1407(d). *First*, its contention that the pleadings somehow put the shareholders were “at risk” (Hess Br. 15) is wrong. The Chartis Defendants’ cross-claim does not name the Browns as parties or mention the word “shareholder.” *See* A391-409 (V1). And there is no basis for thinking that Hess’s own mention of its shareholders in its own counterclaims (A47-48 (V1)), without naming them as parties, exposed them to liability.

Second, while Hess claims that “[w]ith the sale of Hess, all of its assets were transferred to its former shareholders” (Hess Br. 19, 21, 27), Mr. Brown explained at trial that the company “dispense[d] with the remaining assets” *two years before* dissolving in 2008. Tr. 473 (V11); *see also* A5772 (V8). There is no evidence in the voluminous record to indicate that any former Hess shareholder received any assets at either liquidation or dissolution; the assertions that “Hess[] distributed substantial assets to its former shareholders” (Hess Br. 27, 19, 21) are free of citation and are contrary to sworn trial and deposition testimony. In the absence of such evidence, it was never possible that the shareholders could be liable.

Third, to the extent that the shareholders mistakenly believed themselves to be subject to potential liability, that possibility was left open only through Hess’s failure to disclose that it had not distributed

West Virginia law therefore provides no basis for Hess's flawed argument.

Hess cites not a single case holding that a corporation is entitled to sue on its shareholders' claims, in the insurance context or elsewhere. In particular, there is no basis for the assertion that the "former shareholders stood in Hess' 'shoes' as the beneficiaries of AIG's insurance contract." Hess Br. 19.³ The Browns are not contractual beneficiaries, and did not assume that role "by operation of law pursuant to W. Va. Code § 31D-14-1407" (*id.*), which says nothing about insurance. Hess's citations (*id.* at 19-20) to *Goff v. Penn Mut. Life Ins. Co.*, 229 W. Va. 568, 729 S.E.2d 890 (2012), and *Poling v. Motorists Mut. Ins. Co.*, 192 W. Va. 46, 450 S.E.2d 635 (1994), are mistaken: *Goff* concerned a life insurance beneficiary's right to sue the insurer on *his own* bad-faith claim, and *Poling* permitted the wife of an accident victim to sue *separately* for *her own* loss-of-consortium injuries resulting from an insurer's UTPA violation in respect of her husband's claim. Neither case allows one person to sue on another's claim. Hess's remaining cases purporting to show that a shareholder "stands in the shoes" of a dissolved corporation say nothing of the sort. See *Burkett v. AIG Claim Servs., Inc.*, No. 3:03-CV-1, 2007 WL 2059238, at *2 (N.D. W. Va. July 13, 2007) ("the alleged 'victim' of the UTPA violation was the plaintiff, as the personal representative of the estate, not the decedent"); *Shute v. Chambers*, 492 N.E.2d 528, 532 (Ill. App. Ct. 1986) ("The present action is not a suit by or against a dissolved corporation...."); *Jenot v. White Mountain Acceptance Corp.*, 474 A.2d 1382, 1386 (N.H. 1984) ("former principal stockholder of a dissolved corporation" sought "nothing for and on behalf of the corporation" but sued only in his individual capacity). And the possibility

any assets at liquidation until Mr. Brown's deposition, just a month before trial. A5778 (V8); see also, e.g., A1506.19-.20 (V2) (Hess refusing to disclose information about its corporate assets). Even the day before trial, Hess's counsel persisted in refusing to provide documents relating to the distribution of Hess's assets, erroneously claiming that such information was "irrelevant." Tr. 35-36 (V11).

³ While the shareholders were insured in their capacities as officers and directors (see A3398 (V5)), this fact has no bearing on this case, and Hess does not argue otherwise (see Hess Br. 16 n.16).

that, in 1981, a New Jersey shareholder was “invest[ed]” with a corporation’s property “by operation of law” upon dissolution (Hess Br. 20 (quoting *Historic Smithville Dev. Co. v. Chelsea Title & Guar. Co.*, 445 A.2d 1174, 1179 (N.J. Ch. Div. 1981))), has no bearing on present-day West Virginia, where a statute provides the reverse, *see* W. Va. Code § 31D-14-1405(b)(1).

Nor did the trial court cure its error of law by permitting the Chartis Defendants “to argue [to the jury] that Hess was the only entity that could suffer damages.” Hess Br. 22. “[Q]uestions of law are within the sole province of the court,” which “must resolve questions of law and cannot delegate that responsibility to the jury.” *Tracy v. Cottrell*, 206 W. Va. 363, 381, 524 S.E.2d 879, 897 (1999) (citations and internal quotation marks omitted). Hess cannot ameliorate one legal error by suggesting that the trial court instead committed another.

Finally, there is no merit to Hess’s purported reconstruction of the Chartis Defendants’ position, or to its contention that Petitioners are seeking “immunity.” Hess Br. 18-19. To the contrary, the Chartis Defendants have asserted only that they are not liable for damages *here*, in the absence of evidence that the party bringing suit has suffered harm. Hess itself had every opportunity to develop and present evidence that it suffered compensable harm, but failed to do so. The Browns likewise had every opportunity to file a lawsuit or to intervene in this action in order to pursue a cause of action in their own names, but they too failed. Instead, Hess and its shareholders chose to retain Hess as the only named party, and to present only evidence of alleged injuries with respect to which Hess is not entitled to recovery. The Chartis Defendants do not seek any form of immunity, but contend only that the named party to a lawsuit must have actually suffered damages in order to recover. Because there is no evidence of such damages, the Chartis Defendants are entitled to judgment as a matter of law. At minimum, the trial court’s admission of irrelevant and prejudicial evidence of the Browns’ alleged injuries, together with its instruction that Hess was entitled to recover for those injuries, entitle Petitioners to a new trial.

B. Hess Identifies No Basis For Merging The Chartis Defendants With Other AIG, Inc.-Related Entities

The trial court also committed reversible error by ignoring the distinctions between the Chartis Defendants, their ultimate parent (AIG, Inc.), and other separately incorporated entities. *See* Chartis Br. 14, 18-19. Hess does not contest that this legal error is a *per se* abuse of discretion (*see* Chartis Br. 12), does not dispute that “the law presumes that two separately incorporated businesses are distinct,” *W. Va. Highlands Conservancy*, 206 W. Va. 633 at 640, 527 S.E.2d at 502,⁴ and does not challenge the Chartis Defendants’ explanation that the trial court erred by “repeatedly referring to the Chartis Defendants as ‘AIG.’” Chartis Br. 18; *see also* Fershee Br. 14-15. Further, Hess does not dispute that a UTPA claim requires “[p]roof of other violations *by the same insurance company*” (Hess Br. 11 (emphasis added; citation and internal quotation marks omitted); *see* Chartis Br. 18), such that the admission of evidence concerning only policies issued by *other* non-party AIG, Inc. subsidiaries was error. Instead, Hess argues (at 11) that Chartis Claims “is the claims adjustor for all of AIG’s ... subsidiaries.” But that claim is both irrelevant and unsupported by evidence.⁵ Nor, as Prof. Fershee explains (at 14-15), is there any basis for the multi-level veil-piercing that would be required to hold Petitioners responsible for events involving other firms. Admission of such evidence requires reversal.⁶

II. HESS FAILS TO DEFEND THE JUDGMENT FROM THE NECESSITY OF REMAND FOR A NEW TRIAL IF IT IS NOT REVERSED OUTRIGHT

A. Hess Fails To Defend The Trial Court’s Erroneous Instruction Procedure

As the Chartis Defendants explained (at 19-22), the trial court’s procedure for receiving

⁴ The WVAJ’s suggestion that the onus was on the Chartis Defendants to establish their corporate separateness (WVAJ Br. 10) stands this rule on its head, and should be rejected out of hand.

⁵ None of Hess’s record citations establishes that Chartis Claims worked for *every* AIG, Inc. subsidiary.

⁶ The Chartis Defendants did not waive their objections (*see* Hess Br. 13), but filed motions *in limine* (A1512-29 (V2)), obtained a standing objection (Tr. 149 (V11)), and specifically objected prior to these witnesses’ testimony (Tr. 1177-78 (V12)). Nor was the error harmless: Hess relied on the inflammatory and irrelevant testimony to establish a “general business practice.” *See* Tr. 1190-91, 1248-55 (V12).

and issuing jury instructions was legally erroneous and manifestly prejudicial. Hess (at 22-25) neither justifies the procedure nor dispels the Chartis Defendants' showing of prejudice.

First, it is not true (*see* Hess Br. 23 & n.20) that the trial court complied with its duty under W. Va. Code § 56-6-19 to “submit in writing to counsel for each party all instructions it intends to submit to the jury.” *State v. Lindsey*, 160 W. Va. 284, 293-94, 233 S.E.2d 734, 740 (1977). What counsel received on the morning of the last day of trial were Hess’s “best six” *proposed* instructions. *See* Chartis Br. 20; Tr. 1658 (V12). The trial court revised the parties’ submissions before reading them to the jury (*see* A2843-62 (V3)), and did not provide the parties a full written set of its final instructions until well after trial had concluded.

Second, Hess’s defense of the court’s failure to permit objection prior to the charge—that such “is the customary procedure of most trial courts”—is supported nothing more than “counsel’s experience.” Hess Br. 23. To the extent that such “experience” is a proper subject of this Court’s consideration, the undersigned’s experience is the reverse. Even if the claim were true, the procedure it describes is contrary to law. *See* W. Va. R. Civ. P. 51 (“[o]ppportunity *shall be given to make objection*” to the instructions prior to closing arguments) (emphasis added); W. Va. Code § 56-6-19; *Lindsey*, 160 W. Va. at 293-94, 233 S.E.2d at 740; Chartis Br. 20-21. The court’s refusal to allow timely objections deprived the Chartis Defendants of the opportunity to advise the court of its errors, and thus deprived the court of the opportunity to correct itself. *See Page v. Columbia Natural Res., Inc.*, 198 W. Va. 378, 391, 480 S.E.2d 817, 830 (1996) (purpose of objecting to an instruction prior to argument “‘is to bring into focus the precise nature of the alleged errors so the trial court is afforded an opportunity to correct them’”) (citation omitted).

Third, Hess, like the trial court, offers no substantive defense of the arbitrary six-instruction limit. Instead, it primarily suggests that the instructions that the Chartis Defendants were forced to omit were repetitious of other instructions. Hess Br. 24-25. This is incorrect:

- The jury was not instructed that the amount of any compensatory damages award could not be based on speculation, nor was it told that such an award was required to be reasonable. *See* A1770 (V2).
- While the trial court gave two inconsistent instructions regarding the *consequences* of a misrepresentation (Tr. 1671-72, 1677 (V12); Chartis Br. 22-26; *infra* pp. 9-10), it did not give the jury a *definition* of the term. The Chartis Defendants’ proffered definition made clear that a “misrepresentation is *any* words or conduct which produce a false or misleading impression of fact” (A1781 (V2) (emphasis added)), in contradistinction to the court’s erroneous statement that a misrepresentation must be knowing and fraudulent in order to justify a denial of coverage (Tr. 1671-72 (V12)).
- The Chartis Defendants’ instruction on damages made clear that Hess is entitled to “only the sum of money sufficient to compensate Hess Oil Company, Inc. for its” injuries—properly omitting mention of the former shareholders (A1799 (V2))—whereas the court repeatedly and erroneously stated that damages should compensate “Hess Oil Company *and its former shareholders*” for their alleged losses (Tr. 1680-81 (V12) (emphasis added)).
- It is immaterial that it was Hess (and not the Chartis Defendants) that raised estoppel as a ground on which the jury may have found that Hess’s insurance claim was covered. The Chartis Defendants were entitled to submit a competing instruction and to have the jury hear a correct statement of the law on this potentially dispositive claim, which requires (*contra* Hess, A2834 (V3)) a misrepresentation or concealment of a material fact. Syl. pt. 1, *Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998).

Each of these omissions was manifestly prejudicial to the Chartis Defendants’ case, as any one of them would have given the jury correct and important legal information providing sufficient grounds on which to deny or reduce Hess’s recovery. Together, and particularly in light of the court’s erroneous and inconsistent instructions on misrepresentation (*see* Chartis Br. 22-26; *infra* pp. 9-10), they render the verdict unreliable: There is no way to know what the jury would have done if it had been instructed completely and correctly on the law. *See State v. Schermerhorn*, 211 W. Va. 376, 381, 566 S.E.2d 263, 268 (2002) (per curiam) (reversing for cumulative error where several assignments of error were supported by “credible argument”); *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 118, 459 S.E.2d 374, 395 (1995).

This Court should not sanction the trial court's abdication of its responsibility to instruct the jury fully and correctly. The decision below at a minimum should be vacated for new trial.

B. Hess Neither Defends The Trial Court's Irreconcilable And Erroneous Misrepresentation Instructions Nor Carries Its Burden Of Demonstrating The Absence Of Prejudice

As the Chartis Defendants explained (at 22-26), the trial court incorrectly advised the jury that a misrepresentation cannot justify denial of insurance coverage unless "knowingly made with an intent to deceive the insurer." A2848 (V3); Tr. 1671-72 (V12). The trial court admitted that this intent requirement was erroneous (A3225 (V4)), yet Hess continues to contend that the instruction was "an accurate recitation of misrepresentation" and that the court below "sufficiently instructed the jury" (Hess Br. 25-26). These assertions are incorrect.

The court committed reversible error by requiring the Chartis Defendants to prove a legal element that was not properly part of their case. *See* W. Va. Code 33-6-7(b)-(c); *Mass. Mut. Life Ins. Co. v. Thompson*, 194 W. Va. 473, 478, 460 S.E.2d 719, 724 (1995); Syl. pt. 2, *Burdette v. Maust Coal & Coke Corp.*, 159 W. Va. 335, 222 S.E.2d 293 (1976) (per curiam). Instructions warrant appellate deference only "so long as the charge accurately reflects the law." *State v. Guthrie*, 194 W. Va. 657, 671, 461 S.E.2d 163, 177 (1995) (citation and internal quotation marks omitted). This is not a case, as Hess argues (at 26), in which the court slightly misdescribed the applicable standard of care, *see Tennant*, 194 W. Va. at 116-17, 459 S.E.2d at 393-94, or in which a single instruction merely interposed the word "may" where "must" belonged, *Foster v. Sakhai*, 210 W. Va. 716, 727-28, 559 S.E.2d 53, 64-65 (2001). Hess offers nothing but *ipse dixit* in arguing that the error was harmless because misrepresentation "was not an issue even remotely considered by the jury." Hess Br. 26.

The issuance of inconsistent and erroneous instructions is ground for a new trial because it deprives the jury of a clear rule and leaves this Court unable to determine whether the law was

correctly applied. *E.g.*, *State v. Crouch*, 229 W. Va. 618, ---, 730 S.E.2d 401, 404-05 (2012) (per curiam); *Burdette*, 159 W. Va. at 343-44, 222 S.E.2d at 298; Chartis Br. 23-24. Here, the trial court's instructions leave no means of assessing what a correctly instructed jury would have concluded as to whether the Chartis Defendants' disclaimer was permissible. This problem is only underscored by the presence of "alternative theories" (Hess Br. 25), one of which (estoppel) was itself infected with instructional error (*see supra* p. 8). Hess cannot defeat the presumption that the court's errors were prejudicial. *See Matheny v. Fairmont Gen. Hosp.*, 212 W. Va. 740, 745-46, 575 S.E.2d 350, 355-56 (2002); Chartis Br. 11, 25-26. A new trial is warranted.⁷

C. Hess Failed To Make A Reasonable Demand Within Policy Limits, And Therefore Cannot Recover Future Remediation Costs

Hess's contention that the trial court properly allowed it to assert remediation costs beyond the policy limits as an element of damages is also unavailing. The Chartis Defendants previously explained that, under West Virginia law, an insurer is liable only for an insured's net economic loss up to "the policy limits [for] which the plaintiff had contracted." Chartis Br. 26 (quoting *Marshall v. Saseen*, 192 W. Va. 94, 101, 450 S.E.2d 791, 798 (1994)). The only exception requires proof that the policyholder made "a reasonable demand within the policy limits." *Id.* (quoting *Miller v. Fluharty*, 201 W. Va. 685, 698, 500 S.E.2d 310, 323 (1997)). Hess's failure to make such a demand rendered testimony regarding future remediation costs legally irrelevant and inadmissible. *See* W. Va. R. Evid. 401, 402.

In response, Hess asserts that, "[a]t the inception of the litigation, Hess demanded the full benefits available under the policy." Hess Br. 28-29 (citing A44 (V1)). This is startling, as the citation is to Hess's cross-claim against the Chartis Defendants for declaratory judgment—*i.e.*,

⁷ Hess's passing suggestion that the Chartis Defendants' appeal is moot (Hess Br. 25, 26) is wrong. The appeal covers the entirety of the judgment, and Petitioners are entitled, at minimum, to a full retrial.

not to a “demand” made during “the settlement process,” *Miller*, 201 W. Va. at 698, 500 S.E.2d at 323. Filing suit does not count as making a “reasonable demand.” *See id.* (“in order to substantially prevail [and thus to establish entitlement to consequential damages], a policyholder must *first* make a reasonable demand”) (emphasis added). If it did, a plaintiff could simply file suit for the entirety of her policy limit, and an insurer would have no choice but to pay immediately (regardless of the suit’s merit) or suffer liability above the contracted-for limits.

Hess’s failure to make a reasonable and legitimate demand within its policy limits vitiates the key precondition to allowing testimony of future remediation costs in excess of those limits. This error was prejudicial (and Hess does not claim that it was not), and requires a new trial.

D. Hess Does Not Defend The Trial Court’s Inconsistent Discovery Rulings

Finally, Hess’s arguments cannot overcome the plain facts showing that the trial court failed to remain “neutral in the area of trial management.” *Barlow v. Hester Indus., Inc.*, 198 W. Va. 118, 127, 479 S.E.2d 628, 637 (1996). The court’s discovery order established that “[d]iscovery shall be completed on or before the 3rd day of October, 2011.” A171 (V1). On November 1, 2011, the Chartis Defendants moved to exclude “any witnesses not previously disclosed during discovery.” A1514 (V2). Hess disclosed two such witnesses on November 4 (Tr. 40 (V10)), whereupon the Chartis Defendants noticed their depositions (A2589 (V3)). The trial court granted the Chartis Defendants’ motion *in limine* on December 6 (A2568 (V3)), and quashed the depositions the next day—on the basis that the notices to depose the late-disclosed witnesses were themselves “tendered outside of the discovery window” (A2590 (V3)). Contradicting its prior rulings in the midst of trial, the court then reversed itself without explanation, permitting the witnesses to testify without affording the Chartis Defendants any notice or opportunity to prepare. Tr. 1179 (V12). These failures to treat the parties equally and fairly constitute an abuse of discretion mandating a new trial. Chartis Br. 27-28.

Hess does not even attempt to argue that this “trial by ambush,” *McDougal v. McCammon*, 193 W. Va. 229, 237, 455 S.E.2d 788, 796 (1995), was not prejudicial, but instead argues incorrectly that the court did not abuse its discretion. *First*, Hess points to an ostensible “agreement” by the parties “to conduct discovery until a reasonable time prior to trial” (Hess Br. 29 (citing A2510 (V3))), but the agreement at issue only “extend[ed] the expert disclosures,” and specifically notes that the agreement does “not alter[] any other Trial Schedule deadline” (A2510 (V3)). *Second*, Hess argues that it was “unable to initially disclose the ‘business practice’ witnesses earlier as a result of [the Chartis Defendants’] refusal to disclose other bad faith cases” (Hess Br. 30), but it is implausible that Hess did not know about the witnesses prior to November 2011: One of the two witnesses is Hess’s counsel’s brother, and Hess’s other attorney has known the witness “for about thirty-five (35) years” (Tr. 1179-80 (V12)). *Third*, Hess argues that the motion *in limine* “did not apply to these witnesses” (Hess Br. 30), but in fact the motion expressly referenced “attorneys practicing in West Virginia ... who have knowledge regarding the [Chartis] Defendants’ past general business practices.” A1515 (V2). The trial court’s errors are prejudicial and indefensible, and justice requires a new trial free of such arbitrariness.

III. HESS FAILS TO JUSTIFY THE REMAINING \$25 MILLION PUNITIVE DAMAGES AWARD

Even if full judgment as a matter of law or a new trial were not required, the Chartis Defendants are entitled to reduction or vacatur of the trial court’s \$25 million punitive damages award. Chartis Br. 28-40. In response, Hess fails to establish the requisite “actual malice” or to correctly apply the West Virginia and federal Constitutions’ limits upon irrational and excessive punitive damages awards. The judgment below cannot stand.

A. Hess Identifies No Evidence Of “Actual Malice”

As the Chartis Defendants explained (Chartis Br. 28-30), this Court has established that

punitive damages are unavailable in an insurance case unless the plaintiff clears a “high threshold of actual malice” by proving that the defendant “*actually knew* that the policyholder’s claim was proper, but willfully, maliciously and intentionally denied the claim” or utilized an unfair business practice. *McCormick v. Allstate Ins. Co.*, 202 W. Va. 535, 539-40, 505 S.E.2d 454, 458-59 (1998) (quoting *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 330, 352 S.E.2d 73, 80-81 (1986)) (emphasis added). Hess’s brief (at 31-33) identifies *no evidence at all* of actual knowledge, let alone willful misconduct, and fails to rebut the Chartis Defendants’ explanation that the facts establish, at most, bureaucratic confusion and the good-faith assertion of a claim of right—neither of which can support “actual malice.”

Hess first fails to show that the Chartis Defendants possessed the requisite actual knowledge that Hess’s claim was proper at the time they rescinded coverage. The closest it comes is to claim to have “complet[ed] two applications in October 1997,” in which it allegedly “disclosed prior ‘leaks’ to” the Chartis Defendants. Hess Br. 32. This claim is mistaken: the Chartis Defendants never received the purported October 15, 1997 application (A3388-93 (V5)), and neither Hess’s insurance broker nor Mr. Brown himself could remember submitting it to anyone, A1614-17 (V2); Tr. 370-71 (V11).⁸ Because there is no evidence that the application reached the Chartis Defendants, it cannot show that they had actual knowledge of anything.⁹

⁸ Much of that application is handwritten and appears to be a draft that was subsequently revised before a typewritten version was submitted on October 30. See Tr. 1707-08 (V12) (Hess’s counsel suggesting in closing that the October 15 application was a draft); Tr. 436-37 (V11) (former Hess employee Eileen Holiday, who filled out the October 15 application, suggesting on direct examination that it was a draft and admitting that she did not know whether it had been sent to the Chartis Defendants).

⁹ The claim that it was “proven at trial” that the Chartis Defendants “failed to acknowledge the 10/15/97 application completed by Hess because [the Chartis Defendants] lost it” (Hess Br. 4 (citing Tr. 927 (V11))) is factually incorrect and legally self-defeating. The proffered transcript citation is concerned only, and in general terms, with Ms. Perez’s unsuccessful attempts to locate Hess’s underwriting file. It does *not* establish that the Chartis Defendants “lost” the application, which they could not have done because *they never actually received it*. Even supposing that the Chartis Defendants *did* possess and then

The October 30, 1997 application fares no better as a source of support for a finding of knowledge.¹⁰ That application directed the Chartis Defendants to “previous applications” (A3415 (V5)), but the only such application, completed in 1996, could not have disclosed the April 1997 Confirmed Release. Nothing in Hess’s brief or the record suggests that the Chartis Defendants “knew” that the claim was valid, and the requisite “actual malice” therefore was never established. *See McCormick*, 202 W. Va. at 540, 505 S.E.2d at 459; *Hayseeds*, 177 W. Va. at 330, 352 S.E.2d at 80. The punitive damages award should be reversed on this basis alone.

Furthermore, and as explained in the Chartis Defendants’ opening brief (at 30), Hess’s attempt to show malicious intent through listing supposed “practice violations” and “failures to investigate” (Hess Br. 32-33) is insufficient as a matter of law. To the extent that the Chartis Defendants can be said to have “failed” to obtain documents from the DEP and to interview DEP personnel between 1999 and 2009 (*id.* at 32), such “failure” is explained by the fact that (rightfully relying on Hess’s incomplete disclosures) they did not know that such an inquiry was necessary. In their 2009 investigation, the Chartis Defendants did not “fail[] to ask” Hess anything (*id.*), but requested, patiently and repeatedly, that Hess provide *any* information that could have confirmed the existence of coverage (*see* Tr. 1524-25, 1535-39 (V12); A1396-1400 (V2); A3620-23, A3625-30 (V5)). In response, Hess could have advised the Chartis Defendants of the purported distinction between the 1997 Notice and the 1998 Release, or it could have provided other information that would have dispelled any suspicion that the claim was improper. It declined to do so, opting instead to ignore the Chartis Defendants’ inquiries. *See* Tr. 1526,

lose the application before Perez began looking for it, the very assumption that it was lost would preclude it from serving as a basis for finding that the defendants actually knew that the claim was proper.

¹⁰ Hess’s brief (at 5) makes much ado about an inadvertent reference in the Chartis Defendants’ opening brief (at 6) to a “December 1997 application,” but the clear intent of the brief was to reference the October 30, 1997 application, pursuant to which the Policy was issued in December 1997.

1534, 1537, 1540, 1546-49 (V12). In light of Hess’s refusal to cooperate, the evidence did not establish that the Chartis Defendants “failed to investigate.” And even if they did, such an omission falls short of the requisite knowledge, intent, or malice. The various alleged failures of oversight (Hess Br. 33) likewise do not show knowledge or intent, but at most the sort of “negligence, lack of judgment, incompetence, or bureaucratic confusion” that does not suffice to establish actual malice. *Hayseeds*, 177 W. Va. at 331, 352 S.E.2d at 81.

Finally, Hess offers no basis for the assertion that the Chartis Defendants acted with malice by ceasing to pay Hess’s claim and seeking recoupment of monies already paid. Hess Br. 33. Actions taken in the good-faith belief that they were legally justified by a material misstatement in Hess’s application are a legitimate assertion of contractual rights, not a proper basis for an award of punitive damages. *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 576, 694 S.E.2d 815, 909 (2010); *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 592, 396 S.E.2d 766, 773 (1990); Chartis Br. 29-30.

Hess thus does not identify evidence that could satisfy the “actual malice” test. Its claim for punitive damages therefore fails, and the Chartis Defendants are entitled to judgment.

B. Hess Fails To Rebut The Chartis Defendants’ Showing That The Punitive Damages Award Exceeds The Limits Set By The West Virginia Constitution

Even if it could establish “actual malice,” Hess’s defense of the judgment founders at every step of West Virginia’s inquiry into the excessiveness of a punitive damages award.¹¹

1. Hess Identifies No Aggravating Circumstances

Hess’s attempt to satisfy *Perrine*’s first step primarily relies on its opening brief in its separate appeal, No. 12-0719. Hess Br. 33-34. That effort fails, for reasons explained in the

¹¹ At the outset, it may be noted that *amicus*’s discussion of “parsimonious” modern-day punitive damages awards goes only to show how far outside the mainstream the punitive award in this case sits. WVAJ Br. 5 & n.4. The \$25 million punitive damages award here hardly fits that description, and indeed is 500 times or more the size of the median figures cited by the WVAJ’s authorities.

Chartis Defendants' Response in No. 12-0719 (at 32-34; *see also* Chartis Br. 31-34), and the minimal analysis in Hess's brief here fares no better. *First*, like the trial court, Hess offers no basis (at 33-34) to think that the time between the Chartis Defendants' provisional acceptance of coverage and its eventual rescission was "suspect," let alone so reprehensible as to warrant a multi-million-dollar punitive award. To the contrary, the timing was a function of the date on which the Chartis Defendants learned of the information that led them to conclude that Hess's claim was improper. *See* A3619-31 (V5). *Second*, the Chartis Defendants did not in fact profit from their conduct, so there are no gains to be disgorged. *See Perrine*, 225 W. Va. at 554, 694 S.E.2d at 887 (purpose of this factor is to "remove the [defendant's] profit"); Chartis Br. 32-33.¹² *Third*, the record contains no evidence of the finances of the actual defendants in this case, which therefore cannot justify inflation of the punitive award. *See* Chartis Br. 33.¹³ *Fourth*, Hess misapprehends the factor requiring consideration of future settlement negotiations. Hess Br. 34. The question is not whether the punitive award will discourage wrongful conduct (an aim furthered by the first three factors), but rather whether it will encourage prompt settlements and thus avoid litigation. *See Perrine*, 225 W. Va. at 553, 694 S.E.2d at 886; 0719 Chartis Br. 34.

¹² Contrary to Hess's *amicus*, the Chartis Defendants have not advanced a "heads-we-win/tails-you-lose" argument. WVAJ Br. 8. A defendant's profits are relevant to the punitive damages analysis only because such damages may be used to disgorge an ill-gotten gain. This could perhaps include, for instance, interest earned in a particular case as a result of withholding payment without basis, if such a profit were proven. But where no actual profits are shown, there is nothing to disgorge; *amicus*'s citation to *Garnes*'s holding that punitive damages must bear a reasonable relationship to potential *harm* (*id.* at 9 (citing *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 667, 423 S.E.2d 897, 908 (1991))) is inapposite where the question under consideration is not harm to the plaintiff but gains by the defendant. And it is quite clear that punitive damages may *not* be used, as the WVAJ suggests (*id.*), to punish a defendant for speculative harms that the jury or the court imagines it may have perpetrated against other defendants. *See Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007).

¹³ The Court should ignore the suggestions (Hess Br. 39; WVAJ Br. 10) that the Chartis Defendants were obligated to present evidence of their own finances. Hess, like every plaintiff, bears the burden of justifying its claim for relief, including as to punitive damages. *See, e.g.*, ROBIN JEAN DAVIS & LOUIS J. PALMER, PUNITIVE DAMAGES LAW IN WEST VIRGINIA 6-7 & nn.22-23 (2010) (collecting cases and noting that the plaintiff bears the burden of proving entitlement to punitive damages). Plaintiffs, aided by the discovery process, are fully capable of gathering financial data on the defendants they hale into court.

The potential for a massive windfall judgment, with little or no downside risk for the plaintiff, will have precisely the opposite effect. Chartis Br. 33. Hess's claim that it was "denied th[e] choice" to settle (Hess Br. 34) is off-base as this factor considers *future* cases, not the present one.¹⁴ *Fifth*, Hess cannot rebut the Chartis Defendants' explanation (Chartis Br. 33-34) that Hess's litigation costs in this case are irrelevant, and that permitting that cost to serve as the basis for punitive damages would be duplicative in a case in which such costs are already recoverable. The punitive judgment is unjustified.

2. Hess Misapplies *TXO's* Ratio Limit

As the Chartis Defendants explained (at 34-35), the punitive award here exceeds the limits in *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992). Hess offers no sound rejoinder. *First*, Hess and its *amicus* do not acknowledge the rule that a 5:1 ratio is excessive where, as is indisputably true here, compensatory damages are "very high." *Perrine*, 225 W. Va. at 557, 694 S.E.2d at 890. Controlling law requires that the punitive award be stricken or further reduced due to the sheer size of the \$5 million compensatory award.

Second, Hess asserts that because the complaint here did not contain a nominal claim for intentional infliction of emotional distress, the "compensatory" verdict does not include a punitive element subject to the rule against double recovery. But while *Tudor v. Charleston Area Medical Center*, 203 W. Va. 111, 506 S.E.2d 554 (1997), has been limited to emotional distress torts, *see Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 209 W. Va. 318, 335-37, 547 S.E.2d 256, 273-75 (2001), it is nevertheless applicable here.¹⁵ Hess admits (at 10)

¹⁴ Moreover, while this factor targets cases in which a "clear wrong has been committed," *Perrine*, 225 W. Va. at 553, 694 S.E.2d at 886, the Chartis Defendants acted on the basis of a *bona fide* claim of right.

¹⁵ The Chartis Defendants' opening brief (at 34) inadvertently omitted to note parenthetically that its quotation of *Perrine* on this point was drawn from Chief Justice Davis's separate opinion. The oversight makes no difference to the analysis, however, because the quoted passage was simply a quotation of

that its claim is grounded entirely in the Browns' emotional injuries, thus disguising an emotional distress claim as an insurance case. The considerations that led the *Sheetz* Court to limit *Tudor* do not apply.¹⁶

3. Hess Misapplies This Court's Mitigation Jurisprudence

In their opening brief (at 35-37), the Chartis Defendants explained that mitigating circumstances warrant reduction of the punitive award. Hess's response is a series of attempts to dodge the question.¹⁷ It disagrees with the Chartis Defendants' articulation of the procedure applied in *Perrine*, without saying what the problem is. Hess Br. 36. But it is inarguable that *Perrine* addressed *TXO* before turning to mitigation, see 225 W. Va. at 556-61, 694 S.E.2d at 889-94, and with good reason: *TXO* requires reduction of an overlarge award to fit a 5:1 ratio, at which point a court should consider whether mitigation warrants a *further* reduction. See *id.* at 553, 558, 694 S.E.2d at 886, 890. The trial court's failure to adhere to this procedure was error.

Hess next makes the surprising claim (at 36-37) that a plaintiff's jury rights are abrogated by respect for constitutional guarantees of procedural and substantive due process, see *TXO*, 187 W. Va. at 474, 419 S.E.2d at 887. This contention is unsupported, and (*contra* Hess) a lack of legislative limits on punitive damages is irrelevant where constitutional principles already apply.

When Hess finally turns toward the mitigating evidence, its aim remains wide of the mark. *First*, Hess hardly bothers to contend that the punitive damages award bears a reasonable relationship either to Hess's harm or to the compensatory damages award. See Chartis Br. 36.

relevant language from *Tudor*. See *Perrine*, 225 W. Va. at 570-71, 694 S.E.2d at 903-04 (Davis, C.J., concurring and dissenting) (quoting Syl. pt. 14, *Tudor*, 203 W. Va. 111, 506 S.E.2d 554).

¹⁶ Contrary to Hess's claim (at 35 n.36), it has not paid any attorneys' fees: Mr. Brown testified that his family "personally" paid the \$30,000 in fees that Hess now cites. Tr. 476 (V11).

¹⁷ Perhaps chief among these is to quibble irrelevantly with the Chartis Defendants' description of the decision below. See Hess Br. 36. Even if the trial court did ultimately find that aggravating factors outweighed the mitigating ones, it clearly gave the latter considerations *some* weight. See A3233-34 (V4) (finding that the jury's award did not bear a reasonable relationship to actual harm, and that the Chartis Defendants "expended substantial resources in preparing and litigating this action").

Its objection to the Chartis Defendants' description of Hess's shareholders' alleged injuries as "irrelevant" to the reasonableness determination (at 37) is misplaced, because the shareholders are not parties to this suit.¹⁸ *Second*, Hess takes issue with the Chartis Defendants' citation of their litigation expenses (at 37), which the trial court correctly found to be "substantial" (A3233 (V4)). It is true that the record does not contain evidence as to the exact amount, but this is unimportant. Litigation costs inherently deter, *see Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 661, 413 S.E.2d 897, 902 (1991); Chartis Br. 36, and there is no need for accounting precision in assessing the effect.¹⁹ The punitive damages award should be reduced.

C. Hess Fails To Dispel The Trial Court's Errors Of U.S. Constitutional Law

Hess's attempt at defending the judgment below suffers from further fatal mistakes of federal law. *First*, although the U.S. Supreme Court has eschewed imposition of a rigid ratio cap (*see* Hess Br. 37-38), the Court has also held 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," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); Chartis Br. 38. As with West Virginia law, *see supra* pp. 17, Hess and its *amicus* fail even to acknowledge this rule—which (*contra* Hess) imposes a 1:1 ratio where, as here, compensatory damages are undisputedly "substantial."

Second, Hess's contention (at 38) that it is "inappropriate" to consider the Supreme Court's articulation of federal law flies in the face of this Court's observation in *Perrine* that there is at least one federal factor (comparison to civil penalties) that is not encompassed by the *Garnes* analysis. *See Perrine*, 225 W. Va. at 562, 694 S.E.2d at 895. On the merits, Hess does

¹⁸ Hess is incorrect to contend (at 37) that the Chartis Defendants have relied on civil penalties as a mitigating consideration. The Chartis Defendants raised W. Va. Code § 33-11-6(a) for purposes of *federal* constitutional law, and not in connection with West Virginia's mitigation analysis. Chartis Br. 38.

¹⁹ In the event this Court disagrees, the proper remedy would be to remand the case so that the trial court may take evidence and decide the question for itself in the first instance.

not dispute that the punitive award in this case “‘dwarf[s]’” the relevant \$10,000 fine, *Campbell*, 538 U.S. at 428; Chartis Br. 38, or that this points in the direction of a finding of excessiveness.

Third, Hess’s effort (at 38-39) to avoid application of *Williams*, 549 U.S. 346 is misguided for multiple reasons. For one thing, the flaw in the judgment is not lack of *notice* of the shareholders’ claims of injury (*see* Hess Br. 38), but the fact that Hess cannot constitutionally recover damages belonging to other persons. *See Williams*, 549 U.S. at 353 (due process “forbids a State ... to punish a defendant for injury that it inflicts upon nonparties”). For the same reason, Hess is mistaken to suggest (at 39) that *Williams* does not restrict evidence concerning other individuals in other cases: While such evidence might have permissible purposes, courts are required to provide procedural protections (*e.g.*, limiting instructions) to ensure that a defendant is not punished “for harm caused [to] strangers.” 549 U.S. at 355.

Last, Hess offers no valid defense of the admission of evidence concerning AIG, Inc.’s finances. Hess Br. 39-40. Again, the Chartis Defendants did not waive their objection, but moved *in limine* to exclude such evidence (A1538 (V2)), and were granted a standing objection (Tr. 149 (V11)). The irrelevant evidence of AIG, Inc.’s finances, and particularly the evidence of its executive compensation (which Hess does not even attempt to defend and which matches the punitive damages award to the penny), invited the irrational jury verdict. The judgment should be set aside and a new trial held. *See* Chartis Br. 39-40 & n.16.

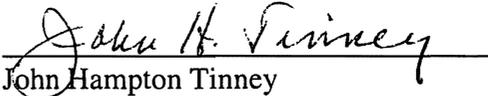
CONCLUSION

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 stricken or further remitted so as to comport with West Virginia and federal law.

DATED this 15th day of November, 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

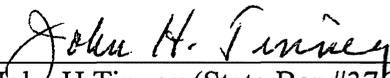
I, John H. Tinney, Counsel for Chartis Claims, Inc., and Commerce & Industry Insurance Company, hereby certify that on the 15th day of November 2012, I served the foregoing “**Petitioners’ Reply Brief**” upon counsel of record via facsimile and by depositing a true copy thereof in the United States first-class 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
Facsimile (304) 326-7800

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

Joshua P. Fershee
P. O. Box 6130
Morgantown, WV 26506-6130
Counsel for Amicus Curiae

Christopher J. Regan, Esquire
Bordas and Bordas
1358 National Road
Wheeling, WV 26003
Facsimile (304) 242-3936
Counsel for Amicus Curiae



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)