No. 12-0705

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Defendants Below, Petitioners,

v.

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

HESS OIL COMPANY, INC.,

Defendant Below, Respondent.

RESPONSE OF HESS OIL COMPANY, INC. IN OPPOSITION TO PETITION FOR APPEAL FILED BY AIG DOMESTIC CLAIMS, n/k/a AIG CLAIMS, INC., and COMMERCE AND INDUSTRY INSURANCE COMPANY

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SUMMARY OF ARGUMENT

The arguments of Defendants, AIG Domestic Claims, Inc. ("AIG-DC") and Commerce and Industry Insurance Company ("C&I") (collectively "AIG") are of the same nature as its handling of Hess Oil Company, Inc.'s ("Hess") claim - blanket assertions and platitudes, unsupported by fact or law, and most important, evidence. In the case at Bar, the trial court correctly interpreted the law as to dissolved corporations and their former shareholders. AIG, which committed egregious, bad faith conduct toward Hess and its former shareholders conjuring a "coverage dispute" to avoid liability, now seeks immunity. AIG asserts that Hess was dissolved, and thus could suffer no damages, while Hess' former shareholders, involuntarily immersed in litigation and solely liable for any adverse verdict and completion of a mishandled remediation abandoned by AIG, cannot seek redress against AIG for its bad faith conduct. AIG ignores reality, however, the jury found otherwise.

Regardless of the AIG insurance subsidiary for which it was adjusting claims, the claims handling conduct of AIG-DC was properly admitted as general business practice evidence, because based on testimony of AIG's own employees, it was the claims handling entity for AIG insurance subsidiaries. *(Tr. A11:606, 627 Schmidt; 11:567-568 Terpstra).*[1] The trial court properly permitted timely disclosed fact witnesses to testify to "general business practices." Relevant rulings of the trial court were premised, in part, upon the dilatory and, oft times, contemptuous conduct of AIG, having manufactured disputes where there should have been none. A contempt order resulted. *(A3:2628-2634)*. Finally, there is no support in law or fact for a further reduction of the jury's punitive damage award as the jury found actual malice and the current award falls within the most restrictive punitive damage ratios. The original punitive award should be reinstated.

STATEMENT OF THE CASE

In its Memorandum in Support of its Petition for Appeal, Hess set forth its interpretation of the

[1] References to the Trial Transcript are designated *Tr.* followed by Appendix volume number and Trial Transcript page number.

relevant facts of this case.[2] With AIG's chronic misplaced and unsupported "sound bites" of how it wishes the evidence to be - not as it was, Hess addresses each incorrect AIG assertion contained in the Petitioner's Brief with factual support from the record.[3]

A. THE INSURANCE POLICY AND HESS' CLAIM

On 04/15/97, Hess received a Confirmed Release Notice to Comply ("Notice" or "1997 Notice") from the West Virginia Department of Environmental Protection ("DEP") regarding its Mt. Storm site. *(Hess Tr. Ex. 8, A5:3365)*. On that date, Hess was insured by AIG through a policy of insurance, effective 10/21/96. *(Hess Tr. Ex. 1-A, A5:3333-3349, p. A3343)*.

According to the DEP Inspector, John Sneberger ("Sneberger") who issued the Notice, Hess engaged a third-party, Subsurface, Inc., ("Subsurface") to investigate potential contamination. *(Tr. A12:1085 Sneberger; Hess Tr. Ex. 10, A5:3367-3383)*. Subsurface concluded that the contamination was limited to minor overflow/overspill around the tank pit. *Id.* Sneberger agreed. *(Tr. A12:1089-1090 Sneberger)*. While accurate that Hess received a DEP letter in September 1997 seeking compliance with the Notice, Bill Brown testified that the information sought had already provided to Sneberger. *(Tr. A11:293)*. Sneberger testified that the letter was a routine form letter from the DEP geologist, and he had already received all of the data sought, thus Hess had complied with both the time frames and other DEP requests per the 1997 Notice. *(Tr. A12:1106)*. AIG had no rebuttal. Sneberger further explained that such letters were automatic and the geologist was likely unaware of the documentation that Sneberger had before the letter was issued. *(Tr. A12:1106-07)*.

Evidence also showed that Hess submitted the Corrective Action Plan or Assessment Report. *(Tr. A12:1135-36 Sneberger)*. Hess knew that any contamination would be remedied during routine tank replacement already scheduled prior to the Notice. *(Tr. A11:259-260 Bill Brown; Tr. A12:1079*

[2] Hess incorporates its Statement of the Case, in full, as contained in *Brief on Behalf of Petitioner, Hess Oil Company, Inc. in Support of its Petition for Appeal, Hess v. AIG, No. 12-0719*, as if reprinted herein.

[3] Reference to "*AIG's Brief*" both herein and by citation is reference to the AIG Defendants' Brief filed on 09/04/12 in No. 12-0705.

Sneberger). Sneberger confirmed that the minor contamination subject of the Notice was cleaned up to the DEP's satisfaction.[4] *(Tr. A12:1107).*

AIG alleges that the applicable insurance policy was issued in December 1997. AIG is surely aware that the date of the policy's issuance is immaterial, as the Hess policy was renewed effective 10/21/97 and delivered by AIG's selling agent, DANA, in December 1997. *(Hess Tr. Ex. 13-A, A5:3394-3414).* In a misplaced effort to establish reliance upon the 10/30/97 application, rejected at trial, AIG conceded although C&I renewed its policies as a matter of course, it still required a completed application, even if not received prior to the effective renewal date of the policy. *AIG's Brief, p. 4.* AIG could not have relied upon an application it did not receive prior to the effective date. AIG readily admitted an automatic renewal provision existed within its policy. *Id.* Despite contrary inferences within AIG's Brief, the subject claim arose during the renewal period. On 02/23/98, when a second, separate contamination was discovered by Sneberger ("1998 Release"). *(Tr. A12:1108 Sneberger).* That claim was timely reported by Hess during the extended reporting period, rendering AIG's entire argument factually disingenuous.

In a statement unsupported by the record and the evidence, AIG argues, as it did to the jury, that the 1997 Notice and the 1998 Release were a single event, in part, because both were assigned the same Leak ID or LUST number.[5] Testimony from DEP inspector, Sneberger, as well as the environmental cleanup company in-charge, Anderson, handling the cleanup at the Mt. Storm site, directly contradicts this. Sneberger testified that the 1997 Confirmed Release only involved tank pit contamination *(Tr. A12:1107)* with no free product discovered *(Tr. A12:1077)*, that the contamination was isolated to the left side of the pit *(Tr. A12:1090),* and taken care of with the closure of the tank pit. *(Tr. A12:1107, 1169).* Sneberger further testified that the 1998 Release was

[4] As explained, *infra*, a separate spill was discovered in February 1998 - subject of the case at Bar.

[5] Regarding use of the LUST (Leaking Underground Storage Tank) No., Sneberger testified that the number relates to the site, not to a particular spill event. *(Tr. A12:1103; 1160).* This was confirmed by Al Anderson, Ryan's lead representative. *(Tr. A12:1298 Anderson).*

discovered after an initial complaint of gas fumes at the neighboring property on 02/23/98 *(Tr. A12:1102)*, and concluded that there was no relationship to the 1997 Notice. *(Tr. A12:1108 Sneberger; A12:1298-1299 Anderson)*. Amazingly, AIG contends that the two events had the same source despite the testimony of AIG's own employee and others that the source of the 1998 Release has never been identified. *(Tr. A11:677,723 Schmidt; A12:1300 Anderson)*.

Striving to establish a purported misrepresentation on Hess' application, AIG argues that the 1997 Notice could not have been disclosed on the 1996 application. The obvious problem with this argument, proven at trial, is that AIG failed to acknowledge the 10/15/97 application completed by Hess because AIG lost it. *(Tr. A11:927 Perez)*. The 10/30/97 AIG application asked Hess: Question No. 9: "[i]s there a history of leaks or releases at this facility not stated above?" Hess responded: "Y" with the explanation "[s]ee previous applications." *(See Hess Tr. Ex. 14, A5:3415)*. AIG claimed to have never received Hess' 10/15/97 application. In response to Question No. 7: "[h]ave you, during the past five years, had any reportable releases or spills or regulated substances, hazardous waste or other pollutants, as defined by applicable environmental statutes or regulations?" Hess responded: "Y" "[c]onfirmed release that was cleaned up." *(Hess Tr. Ex. 13, p. A5:3388)*. This was not investigated by AIG as it could not locate <u>any</u> prior applications. *(Tr. A11:927 Perez)*. AIG never followed up on either application response which would have yielded the 1997 Notice and the minor overspill/overflow contamination. *(Tr. A11:841 Lokos)*. AIG did not bother to contact Sneberger or anyone from the DEP, even before trial in 2011. *(Tr. A12:1272 Sneberger)*. Couched by AIG as "improper," Hess purchased an extended reporting period, effective upon payment of an additional premium, from 05/05/98 through 05/05/99 for Mt. Storm based on advice of the selling agent. *(Tr. A11:763-674 Resch; Hess Tr. Ex. 22, p. A5:3466)*.

The undisputed evidence at trial was that AIG completely controlled the remediation after accepting coverage. From 1999 through its disclaimer in 2009, AIG exercised it right under the policy to control the remediation including the planning, preapproval, review, and subsequent payment for all services of Ryan.[6] *(Tr. A11:613,655 Schmidt; A12:1286-1287,1317 Anderson).*

B. THE DISCLAIMER OF COVERAGE

After 10 years of remediation, AIG states that it first "learned" of the 1997 Notice in 2009. This is a result of AIG's complete failure to conduct an adequate investigation into Hess' claim in 1999 and the admitted absence of critical documents from its file, including the 1998 Tank Closure Report. *AIG's Brief, p. 6.* AIG failed to obtain critical DEP documents for more than 12 years *(Tr. A11:666-667, 669 Schmidt)*, and failed to contact important witnesses, such as Sneberger or any DEP employee. *(Tr. A12:1272 Sneberger; Tr. A11:698 Schmidt; Tr. A12:1560 Perez).*

AIG states that the revelation of the 1997 Notice "put Hess' right to coverage in jeopardy" as the release was not revealed in the December 1997 application. *AIG's Brief, p. 6.* There was NEVER a December 1997 application and no such evidence exists. Thus, any reference to such an application must be disregarded. Again, without the benefit of any support, AIG asserts that the failure to reveal the 1997 Notice was material to the policy's issuance and that an April 1997 claim would have fallen outside of the coverage period. *AIG's Brief, p. 6.* The actual evidence at trial was contrary to AIG's imagined facts. Despite its newly-asserted contention of materiality, AIG offered no evidence at trial to suggest that minor contamination marked by the 1997 Notice was material to the risk. To the contrary, David Resch of DANA Insurance, the selling agent, testified that this type of policy was written all the time despite previous contamination. *(Tr. A11:753 Resch).* Moreover, the 1997 Notice was not outside any coverage period as Hess was insured by AIG effective 10/21/96, with a retroactive date of October 1995 with the same coverage and limits and self-retention as the 1997 policy renewal and all subsequent renewals. *(Hess Tr. Ex. 1-A, A5:3333-3349, p. A3343).* As Hess was insured in April 1997, there would be no motivation for Hess not to report the 1997 Notice. Because the results of the Subsurface testing showed only minor contamination on the left perimeter

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[6] Pursuant to the policy, AIG had the right, but not the duty, to participate in decisions regarding the Corrective Action or Cleanup, or to assume direct control over all aspects of such Corrective Action or Cleanup. *Hess Tr. Ex. 13-A, p. A5:3396.* AIG chose the latter herein.

of the Mt. Storm tank pit, a reportable "release" or "spill" as defined by the policy never occurred. *(Tr. A12:1085 Sneberger; Hess Ex. 10, A5:3367-3383).*

AIG next conjures up an issue with the Browns' alleged failure to respond to AIG's requests in 2009. At the time, Bill Brown was retired, his brother Tom, primarily responsible for environmental issues, had passed unexpectedly in 2006, Hess had liquidated and dissolved, business records were hard to locate, and events forgotten. The Browns attempted to assist AIG, with the help of DANA to gather information.[7] However, the attempt to imply nefarious conduct by the Browns, after the passage of over a decade is ludicrous when AIG could not find its own file documentation.

C. THE PROCEEDINGS BELOW

AIG filed numerous motions including a motion *in limine* to exclude witnesses not disclosed in discovery. *(A2:1512-1517).* This motion was granted. *(A3:2569).* AIG now argues that this ruling precluded the testimony of Hess' "business practice" witnesses Romano and Segal. Both witnesses were timely disclosed. *(A2:1585)* The trial court denied AIG's untimely attempt to depose Messrs. Romano and Segal, and other like witnesses, upon a motion by Hess.[8] *(A3:2506-2511; Prot. Order A3:2589-2591).* The "business practice" witnesses were not disclosed earlier because AIG refused to disclose other bad faith cases requested in discovery, despite being ordered to do so, which led to an order of contempt by the Court. *(A3:2628-2634).*

At trial, evidence was presented regarding damages sustained by Hess and its former shareholders, the parties ultimately responsible for the loss. While AIG admits that the lawsuit and its conduct thrust upon Hess was a potential harm to Hess, AIG categorizes the Ryan lawsuit as being "long since released without any contribution from Hess." *AIG's Brief, p.* 7. This statement is again disingenuous. Despite causing Hess to be sued in 2010, it was not until May 2011 that AIG

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[7] Mr. Brown testified that he was informed that DANA, AIG's selling agent, was going to look into the request for information. *(Tr. A11:408).*

[8] AIG had unilaterally and untimely noticed depositions of six Hess' "business practice" fact witnesses just eight days prior to trial. *(A3:2506).*

settled Ryan's claims without telling Hess. *(A1:419).* While the settlement was without contribution from Hess, AIG then sought to recover the settlement from Hess as part of its cross-claims, and increased its demand to more than $882,000, the liability for which Hess' former shareholders would be solely responsible. *(Tr. A11:408, A12 Bill Brown).* AIG's demand was pursued through the close of Hess' presentation of evidence. *(Tr. A12: 1404-1405; A3:2838).*

AIG flippantly dismisses the attorney fees' of Hess, noting that Hess did not pay those fees. *AIG Brief, p. 7.* To the contrary, Bill Brown testified as to the former shareholders' payment of $30,000 in attorneys' fees to defend Hess against Ryan's claims when AIG failed to provide a defense *(Tr. A11:422)* and the fees for the remaining litigation (*Id. at 417-418).* Contrary to AIG's assertion, Hess' former shareholders were the only entities against whom a judgment could be enforced.[9] *See* W.Va. Code § 31D-14-1407 (2002).

Jury instructions were due prior to the Final Pretrial Hearing with a reservation that additional instructions could be submitted. *(Tr. A10:22).* During trial, based on the evidence, Hess revised its instructions, incorporating new language and withdrawing other instructions. *(A3:2760).* Hess did not submit 15 additional jury instructions as contended, but added, withdrew and reserved instructions while keeping the instructions numbers the same in order to avoid confusion. *Id.* AIG's assertion that Hess chose five instructions not previously seen is baseless. Per the Court's instruction to all parties at trial on 12/19/11, Hess revised its instructions to submit its "six best" served by hand-delivery to AIG on 12/19/11. *(A3:2835).* AIG had ample time to, and did, review Hess' "six best." AIG's asserts that Hess' instruction on misrepresentation was error, but was not, and error, if any, was harmless considering that AIG's instruction on the issue was given *(A3:2857),* and two additional AIG instructions on the same issue were also given. *(A3:2854; A3:2855).*

Finally, as to the punitive damages phase of the trial, Daniel Selby was Hess' sole witness. AIG offered no evidence. This reality is reflective of AIG's failure throughout the trial to contest

[9] *See* §I, *infra*, for a complete discussion regarding recovery against a dissolved corporation.

evidence or object. During the punitive phase, AIG could have offered any witness or provided financial information if it chose. AIG did neither, leaving Selby unrebutted. *(A12:1801 Tinney).*

STANDARDS OF REVIEW

The ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, and the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence. *Sanders v. Georgia-Pacific Corp.,* 159 W.Va. 621, 225 S.E.2d 218 (1976). This Court elaborated on the standards involving a lower court's ruling on a motion for a new trial in *Tennant v. Marion Health Care Found., Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995), where the Court held:

> We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, . . . the circuit court's underlying factual findings under a clearly erroneous standard [and] [q]uestions of law . . . [under] a de novo" standard.

Id. at 104, 459 S.E.2d at 381. The appellate standard of review for the granting of a motion for a judgment as a matter of law pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is *de novo*. *Brannon v. Riffle*, 197 W.Va. 97, 475 S.E.2d 97 (1996); *Smith v. First Cmty. Bancshares, Inc.*, 212 W.Va. 809, 575 S.E.2d 419 (2002). This standard is subject to the requirements that:

> (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, 664 S.E.2d 146 (2008)(per curiam).

"The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. . . [a]bsent a few exceptions, this Court will review evidentiary and procedural rulings . . . court under an abuse of discretion standard." *McDougal v. McCammon,* 193 W.Va. 229, 235, 455 S.E.2d 788, 794 (1995).

"As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion." *State v. Jett*, 220 W.Va. 289, 647 S.E.2d 725 (2007)(citing Syl. Pt. 1, *State v. Hinkle,* 200 W.Va. 280, 489 S.E.2d 257 (1996)). Moreover, "[t]he formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard." *Tennant*, at 104, 459 S.E.2d at 381.

This Court has held that when reviewing an award of punitive damages in accordance with *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), and *Alkire v. First Nat'l Bank*, 197 W.Va. 122, 475 S.E.2d 122 (1996), the review of the jury's award of punitive damages and the circuit court's ruling approving, rejecting, or reducing such award will be *de novo*. *Peters v. River Edge Mining, Inc.*, 224 W.Va. 160, 680 S.E.2d 791 (2009).

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rules 10(c)(6) and 18 of the West Virginia Rules of Appellate Procedure, Hess requests that this Court grant it the opportunity to present oral argument on several of the issues addressed in AIG's Brief. Oral argument is necessary, pursuant to the requirements listed in W. Va. R.A.P. 18(a) for the following reasons and those apparent to the Court. The parties have not waived oral argument. W.Va. R.A.P. 18(a)(1). The issues presented in this appeal addressing corporate law and punitive damages are clearly not frivolous, and are of critical importance. W.Va. R.A.P. 18(a)(2). Hess asserts that AIG's arguments concerning alleged errors by the trial court concerning jury instructions, remediation costs and application of discovery rules are without merit and would not be aided through oral argument. *AIG's Brief, pp. 19-28.* While decisions exist relative to the review of corporate law and punitive damages, an analysis of the issues posited by AIG is warranted. W.Va. R.A.P. 18(a)(3).

While the issues and documentary evidence are fully presented in the brief, the decisional process will necessarily be aided by oral argument on the aforementioned, limited issues. It is anticipated that the Court may have specific questions concerning the factual development of the case before the trial court. Hess requests the opportunity to fully explain the specific factual development of this case, as this information is critical for the Court's determination. Accordingly, Hess asserts that this case warrants proper consideration for a Rule 20 oral argument on the issues addressing corporate law and punitive damages, as this case involves issues of fundamental public importance, as well as constitutional questions regarding the trial court's ruling.

ARGUMENT

I. IGNORING THE UNDISPUTED EVIDENCE, AIG URGES APPLICATION OF CORPORATE LAW IN A VACUUM TO AVOID ANY PENALTY FOR ITS INTENTIONAL BAD FAITH CONDUCT.

AIG asserts a narrow view of West Virginia law to avoid any penalty for the knowing and intentional bad faith conduct committed against Hess - the damage which was borne solely by its former shareholders. Although the law generally presumes that corporations are separate fictional entities from other corporations or their shareholders, the AIG argument, if adopted, works a gross injustice against Hess. This Court has consistently recognized:

> While, legally speaking, a corporation constitutes an entity separate and apart from the persons who own it, such is a fiction of the law introduced for purpose of convenience and to subserve the ends of justice; and it is now well settled, as a general principle, *that the fiction should be disregarded when it is urged with an intent not within its reason and purpose, and in such a way that its retention would produce injustices or inequitable consequences.*

Syl. Pt. 2, *Laya v. Erin Homes, Inc.*, 177 W.Va. 343, 352 S.E.2d 93 (1986)(emphasis added) (citing Syl. Pt. 10, *Sanders v. Roselawn Memorial Gardens*, Inc., 152 W.Va. 91, 159 S.E.2d 784 (1968)).

As explained more fully below, AIG would have this Court grant it immunity from bad faith conduct if a first-party corporate insured is dissolved, because, in AIG's view, a dissolved corporation can sustain no damages even though its former shareholders are at risk. That proposition stands first-party protections of the common law and the West Virginia Unfair Trade Practices Act ("UTPA"), and regulations, on their proverbial head. Insurance companies like AIG would have *carte blanche* to commit bad faith with impunity anytime a corporate insured legally dissolved.

The correct resolution of AIG's position was that taken by the trial court in this case - allowing the former shareholders of Hess, whose personal assets were at risk, to testify as to the damages caused by the bad faith conduct of AIG. That reality notwithstanding, error, if any, was harmless, as the jury was instructed that any damage award was for Hess through its shareholders.

This Court has made clear the high burden that must be carried to justify a new trial stating, "[a] new trial should rarely be granted and then granted only where it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done." *In re State Pub. Bldg. Asbestos Litig.*, 193 W.Va. 119, 124, 454 S.E.2d 413, 418 (1994)(quoting Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2801 at 27). Based on the grounds fully set forth below, there simply is no basis to grant a new trial.

A. AIG-DC ADJUSTS CLAIMS FOR ALL AIG'S INSURANCE COMPANY SUBSIDIARIES, AND, BY DESIGN, ITS BAD FAITH CONDUCT IN OTHER CLAIMS WAS RELEVANT TO ITS "GENERAL BUSINESS PRACTICES," REGARDLESS OF SUBSIDIARY ISSUING THE POLICY.

AIG fails to acknowledge that AIG-DC is the claims adjustor for all of AIG's insurance company subsidiaries *(Tr. A11:606, 627 Schmidt; 567-68 Terpstra).* Accordingly, evidence of AIG-DC's bad faith settlement conduct in other claims was properly admitted as "general business practice" evidence even though Hess' policy was issued by a different AIG insurance subsidiary. AIG's assertion that the trial court erred by permitting "business practice" evidence from other insurance subsidiaries ignores reality. C&I, the AIG insurance company that issued Hess' policy, does not adjust any insurance claims and did not adjust Hess' claim.[10] It was AIG-DC that adjusted claims for AIG's insurance company subsidiaries and adjusted Hess' claim in bad faith - evidence of which was introduced by Hess, without rebuttal by AIG. Thus, evidence of a "general business practice" mandated by the common law, properly included AIG-DC's bad faith conduct regardless of the AIG insurance subsidiary for which the claim was adjusted. The "business practices" evidence presented at trial included two such claims adjusted by AIG-DC - again without rebuttal by AIG.

It is settled that, "[p]roof of other violations by the same insurance company to establish the frequency issue can be obtained from other claimants *and attorneys who have dealt with such company and its claims agents*, or from any person who is familiar with the company's general

[10] There was no evidence introduced at trial that C&I even had employees.

business practice in regard to claim settlement" *Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 W.Va. 597, 610, 280 S.E.2d 252, 260 (1981) (emphasis added). The trial court has significant discretion in making evidentiary rulings. Syl. Pt. 1, *McDougal,* 193 W.Va. 229, 455 S.E.2d 788. Accordingly, all evidence of bad faith settlement conduct by AIG-DC, the adjuster of Hess' claims and the adjuster of claims for AIG's insurance subsidiaries, was properly admitted regardless of issuer.

Should this Court adopt AIG's position, no jury could ever hear evidence constituting a general business practice by any AIG insurance subsidiary, because the insurance company does not adjust claims made by its insureds. Regardless of the insurance company subsidiary, common sense and settled law dictate that evidence of bad faith settlement conduct by that defendant, regardless of the insurance subsidiary for which it was adjusting claims, is proof of its "general business practice."

1. AIG'S BAD FAITH SETTLEMENT CONDUCT CONSTITUTED MORE THAN A SINGLE VIOLATION OF THE UTPA, ALLOWING THE JURY TO CONCLUDE AIG'S PRACTICES WERE A GENERAL BUSINESS PRACTICE.

Evidence at trial established multiple violations of the UTPA by AIG during the adjustment of Hess' claim, allowing the jury to properly conclude that such bad faith conduct was a general business practice. On proving a general business practice in a single claim, this Court has held:

> [T]he evidence should establish that the conduct in question constitutes more than a single violation of W.Va. Code § 33-11-4(9), that the violations arise from separate, discrete acts or omissions in the claim settlement, and that they arise from a habit, custom, usage, or business policy of the insurer, so that, viewing the conduct as a whole, the finder of fact is able to conclude that the practice or practices are sufficiently pervasive or sufficiently sanctioned by the insurance company that the conduct can be considered a "general business practice" and can be distinguished by fair minds from an isolated event.

Elmore v. State Farm Mut. Auto. Ins. Co., 202 W.Va. 430, 439, 504 S.E.2d 893, 902 (1998). Here, the evidence so demonstrated these multiple violations sanctioned by AIG's own corporate ideology. The trial court, in ruling on post-trial motions, noted as follows:

> The jury found that the bad practices took place willfully, maliciously, and intentionally utilized an unfair business practice in settling or failed to settle in good faith the claim. This Court will not disturb the jury's decision. The jury disagreed with the AIG Defendants. It did so with sufficient reasoning.

(A4:3207-3236 at 3217). AIG's employees admitted to at least 11 violations of the insurance laws

of this State, including its intentional failure to contact critical witnesses, document its claims file, and failure to obtain critical documents. *See, § III.A, infra.* The fact-finder concluded that the practice(s) were sufficiently pervasive or sufficiently sanctioned by the insurance company such that the conduct could be considered a "general business practice." *Dodrill v. Nationwide Mut. Ins. Co.*, 201 W.Va. 1, 10, 491 S.E.2d 1, 10 (1996). The proof of AIG's bad faith was overwhelming.

Admission of unrebutted evidence of bad faith conduct by AIG-DC in other cases was not error, however, assuming *arguendo* that such evidence was irrelevant or inadmissible, the evidence of double digit violations of the UTPA supports the verdict, thus, error, if any was harmless. The overwhelming evidence of AIG's multiple violations in Hess' claim alone were more than sufficient to establish a "general business practice," irrespective of Hess' general business practice witnesses.

This Court has held that "[a] judgment will not be reversed because of the admission of improper or irrelevant evidence when it is clear that the verdict of the jury could not have been affected thereby." Syl. Pt. 7, *Starcher v. South Penn Oil Co.*, 81 W.Va. 587, 95 S.E. 28 (1918); Syl. Pt. 7, *Torrence v. Kusminsky,* 185 W.Va. 734, 408 S.E.2d 684 (1991). The evidence of other violations was properly admitted, it had little, if any, affect on the jury's verdict, due to the significant bad faith conduct perpetrated against Hess, which established a general business practice.

2. AIG'S FAILURE TO OBJECT TO THE TESTIMONY OF THE "BUSINESS PRACTICES" WITNESSES CONSTITUTES WAIVER AND WAS INVITED.

AIG's failure to object to the testimony of Messrs. Segal and Romano on relevancy grounds of dissimilar claims or different companies must be deemed waiver. Further, AIG failed to cross-examine these witnesses on those issues, but instead elicited testimony regarding AIG's business practices as a whole. Thus, error, if any, was invited. *Jones v. Setser*, 224 W.Va. 483, 491, 686 S.E.2d 623, 631 (2009)(citing Syl. Pt. 6, *Yuncke v. Welker,* 128 W.Va. 299, 36 S.E.2d 410 (1945)).

B. THE DAMAGES CAUSED TO HESS BY AIG'S BAD FAITH CONDUCT HARMED HESS' FORMER SHAREHOLDERS WHO, BY LAW, WERE AT RISK.

AIG knew, from the beginning, that Hess' former shareholders were at grave risk by virtue of the conjured "coverage dispute." By operation of law, Hess' former shareholders were the only ones liable for completion of the remediation which AIG abandoned and the claims of Ryan, and the claims of C&I for recoupment of the costs of the cleanup. W.Va. Code § 31D-14-1407(d)(1). That is why AIG refused to release Hess' former shareholders from liability until the end of Hess' case-in-chief. *(A3:2838; Tr. A12:1404-1405)*. Had AIG prevailed on its conjured "coverage dispute," the former shareholders would be liable and AIG would have succeeded avoiding its obligations.

Upon dissolution, the liabilities of Hess became those of its former shareholders, but so did the right to insurance coverage through AIG's policy. AIG asserts that because Hess was dissolved, no one sustained any damages from its egregious bad faith. Not contesting that it committed bad faith, instead AIG prays that this Court grant them immunity. This position would devastate the shareholders of dissolved closely-held corporations allowing insurance companies to avoid liability.

Alternatively, from an evidentiary perspective, by refusing to release the former shareholders from liability until the day before jury deliberations, AIG own conduct rendered the testimony of Hess' former shareholders relevant to the damages caused by its bad faith conduct.[11] *Id.* Likewise, AIG invited error, if any, by rendering such testimony relevant. AIG cannot now complain of the make-up of the jury's compensatory damage award to Hess, through its former shareholders, as it failed to object to the general verdict form single damage line.[12] Accordingly, as fully discussed below, the trial court's ruling permitting Hess' former shareholders to testify as to the damages sustained by Hess was proper.

1. BY OPERATION OF THE LAW, HESS' FORMER SHAREHOLDERS WERE LIABLE UP TO THEIR PRO RATA SHARE OF ASSETS RECEIVED IN LIQUIDATION, FOR RYAN'S AND AIG'S CLAIMS, THE COMPLETION OF THE MT. STORM CLEANUP, AND LITIGATION COSTS.

[11] This Court has previously noted that "[t]he conduct of an insurance company or other person in the business of insurance during the pendency of a lawsuit may support a cause of action under the West Virginia Unfair Trade Practices Act, W. Va. Code § 33-11-1 to 10." Syl. Pt. 9, *Barefield v. DPIC Cos.*, 215 W.Va. 544, 600 S.E.2d 256 (2004). AIG not only committed bad faith by disclaiming coverage, but also by its litigation conduct - getting its insured sued and asserting its own claims against Hess for damages.

[12] Of course, AIG's written objections were made to a verdict form not used by the Court.

Pursuant to West Virginia law, the former shareholders of Hess, a liquidated and dissolved corporation, were personally liable for claims made by Ryan, the claims of AIG, and for the completion of the remediation abandoned by AIG based on the conjured "coverage dispute." West Virginia Code § 31D-14-1401, *et seq.*, the West Virginia Business Corporation Act ("Act"), controls the legal fiction that is a corporation. The Act controls the creation, existence, and dissolution of a corporation. *Id.* Even after dissolution, a corporation continues for the purposes of suit.[13] However, important to the burden faced by Hess's former shareholders caused by AIG's bad faith, the Act mandates from whom any recovery can be had for claims against a dissolved corporation, stating:

> A claim may be enforced under this section: (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.

W.Va. Code § 31D-14-1407(d)(2). It is undisputed that Hess' former shareholders were solely at risk of an adverse verdict for Ryan's and AIG's claims totaling $882,000 and completion of the remediation abandoned by AIG. *(A1:391-409, pp. 403-407; Tr. A11:408, 412 Bill Brown).* Likewise, the litigation costs, aggravation and inconvenience, distress, and other damages fell solely on the "shoulders" and the pocketbook of Hess' former shareholders. *(Tr. A11:416-417, 420-424 Brown).*

2. FROM THE BEGINNING, AIG KNOWINGLY KEPT THE FORMER SHAREHOLDERS AND THEIR ASSETS AT RISK.

AIG knew from the beginning of this action that Hess had liquidated and dissolved, making its former shareholders the sole parties at risk, not only for the claims of Ryan and the cross-claims of AIG, but for the cleanup of Mt. Storm. *(A1:391-409, pp. 403-407).* AIG refused to release Hess' former shareholders from the risk of an adverse verdict until the day before jury deliberations.[14] *(Tr.*

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[13] "[D]issolution of a corporation does not . . . prevent commencement of a proceeding by or against the corporation in its corporate name." W.Va. Code § 31D-14-1405(b)(5).

[14] The testimony of Hess' former shareholders as to the injuries and damages sustained by Hess was properly admitted. Error, if any, was invited by AIG by its refusal to release them from liability before trial. *See, § II(B)(3), infra.*

A12:1398-1402; A3:2838). The pleadings and actions by AIG confirm that AIG was aware that Hess' former shareholders were solely at risk for all claims made against Hess. With the filing of Hess' Answer and Cross-Claim in June 2010, AIG had notice that its bad faith conduct placed Hess' former shareholders solely at risk.[15] Further, Hess' Answer unambiguously sought damages on behalf of Hess through its former shareholders.[16] *(Id., A1:46-49).* The effect of AIG's conduct on the former shareholders, however, was made clear to AIG even earlier. In its remand order following wrongful removal by AIG, the federal district court found AIG's assertion that Hess was a nominal party, because it was dissolved without merit, stating that:

> If the assets have been distributed in liquidation, *"recovery may be enforced" 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." At oral argument, counsel for the C&I defendants conceded that it was unknown whether Hess Oil in fact possesses any undistributed assets. This fact aside, and even assuming that all of Hess Oil's assets were distributed upon dissolution, there would still be the possibility that Ryan Environmental would be able to recover against Hess Oil's former shareholders to the extent permitted under § 31D-14-1407(d)(2).

Ryan Envtl., Inc. v. Hess Oil Co., Inc., 718 F. Supp.2d 719, 724 (N.D.W.Va. 2010)(emphasis added). The real effect of AIG's conduct, undeniably known from the beginning of this case, was that the injuries and damages caused by bad faith conduct fell solely upon Hess' former shareholders by operation of West Virginia statutory law.

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[15] Hess' Answer and Cross-Claim alleged:

> 84. AIG knew or should have known that their conduct, acts, and failures to act, and other wrongful conduct, ...was reckless, willful and malicious and would cause Hess Oil and its shareholders to sustain and endure economic and emotional harm by depriving them of coverage under said insurance policy and further potentially placing such shareholders' personal assets at risk long after they divested from and dissolved Hess Oil.
>
> 85. The acts and conduct, both omissions and commissions, of AIG, their respective agents, servants and employees constitute violations of the duties owed by these insurance defendants to first-party claimants, in this case, Hess Oil (and its individual shareholders) under the West Virginia regulatory and statutory provisions regarding insurance claims handling and settlement practices, including W.Va. Code § 33-11-4(9), and the common law regarding insurance bad faith . . . . *(A1:46-49)*

[16] By the terms of the C&I policy at issue, that each of Hess' former shareholders were insureds, although in different capacities such as officers and directors. *(A5:3398).*

3. WITH KNOWLEDGE OF THE DAMAGES INFLICTED UPON HESS' FORMER SHAREHOLDERS, AIG INTENTIONALLY KEPT THEM AT RISK RENDERING EVIDENCE OF HESS' DAMAGES THROUGH THEM PROPER.

It is undisputed that AIG kept Hess' former shareholders at risk and under the constant burden of such risk from their denial of coverage in June 2009 through trial in December 2011. Despite repeated requests that the former shareholders be released from any claims, AIG refused, while, at the same time claiming that it did not believe the former shareholders could be held liable in a veiled effort to diminish Hess' damages against AIG. *(Tr. A11:417-420)*. Despite the 2010 federal court order setting forth the potential liability of Hess' former shareholders under the Act, AIG stated its intention to collect any judgment from the former shareholders at the final pretrial hearing:

> Mr. Tinney: Now, depending upon the Court's rulings with some of the motions that are -- yes, indeed, the recoupment [from the former shareholders] will be abandoned if the Court finds that the statute applies to the former shareholders. Of course, if the Court finds that it doesn't, then we'd want -- if they are indeed judicially found to be exposed to both being able to recover, then they have to take on the burden of being able to defend the recoupment, but assuming that our analysis is right and the Court agrees with it, then there won't be an attempt to recoup the eight hundred eighty-three thousand dollars ($883,000.00) that's been paid, that is correct.

(*Tr. A10:56*). While claiming § 31D-14-1407(d) did not make Hess' former shareholders potentially liable for any adverse verdict, AIG made clear its intention to "recoup" the $882,000 from the former shareholders and refused to release them. *Id.* Of course, AIG could not release Hess' former shareholders from liability for the cleanup of the Mt. Storm site which was abandoned by AIG.

The doctrine of invited error was developed not to make inadmissible evidence admissible, but to preserve judicial economy and integrity by allocating responsibility for error. *Hopkins v. D.C. Chapman Ventures, Inc.*, 228 W.Va. 213, 219, 719 S.E.2d 381, 387 (2011). This Court explained:

> It is well-established law in this state that "[a] party cannot invite the court to commit an error, and then complain of it." In Syllabus Point 1 of *Maples v. West Virginia Dep't of Commerce,* 197 W.Va. 318, 475 S.E.2d 410 (1996), this Court explained that: "A litigant may not silently acquiesce to an alleged error, *or actively contribute to such error*, and then raise that error as a reason for reversal on appeal." Likewise, this Court has held that "A judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal."

Id. at 219, 719 S.E.2d at 387-388 (internal citations omitted); *See also, Shamblin v. Nationwide Mut. Ins. Co.,* 183 W.Va. 585, 599, 396 S.E.2d 766, 780 (1990)(holding "the appellant cannot benefit from the consequences of error it invited.").

It was AIG that invited error, if any. It was not until the conclusion of Hess' case-in-chief, after AIG's conjured "coverage dispute" and multiple violations of the law were exposed to the jury following the testimony of some 17 witnesses, including AIG's own employees, that AIG finally dropped all claims for recoupment of any adverse judgment against Hess' former shareholders, via stipulation. *(Tr. A12:1398-1402).*[17] By its refusal to release the former shareholders before trial, AIG further imposed risks to Hess' former shareholders. Whether AIG's belief that the former shareholders could not be held liable under § 31D-14-1407(d) was real or feigned, it refusal to release them was real rendering evidence of the effect of its bad faith conduct on them proper.

By keeping the former shareholders at risk of an adverse verdict of more than $880,000 and completion of the abandoned cleanup of the Mt. Storm site, let alone the cost and expense of unnecessary litigation to vindicate their name and their claim until the close of Hess' case-in-chief, AIG invited error, if any, by the admission of such evidence.

4. AIG'S ASSERTION THAT ONLY HESS, A DISSOLVED CORPORATION, COULD SUSTAIN DAMAGES FROM ITS BAD FAITH CONDUCT SEEKS IMMUNITY WHILE ALLOWING THEM TO SEEK RECOVERY FROM HESS' FORMER SHAREHOLDERS UNDER THE LAW.

Let there be no mistake, AIG demands nothing less than immunity from this Court. AIG's position is simple. Hess was its insured. Hess was liquidated and dissolved during pendency of the claim. Once dissolved, Hess can no longer sustain damages by AIG's bad faith conduct no matter how egregious, therefore AIG is immune. At the same time, AIG can engage in further insurance bad faith conduct by seeking judgment against the dissolved corporation based on the same bad faith conduct and collect from its dissolved insured's former shareholders. However, those at-risk former

[17] The stipulation, agreed to by the parties, stated as follows:

At the close of Hess Oil's case in chief on December 16, 2011, the AIG Defendants stipulated that they would not seek to collect any damages awarded to them in the above styled action from the former shareholders of Hess Oil Company, Inc., in this action or in any other case or action. The AIG Defendants further stipulate that such recovery is barred by the application of the dissolved corporation statute. *(Stipulation A3:2838).*

shareholders have no damages, no matter that AIG's conduct is to their financial detriment and distress as they are separate from the dissolved corporate insured. AIG's position, if adopted, would give every insurance company immunity to commit in bad faith to avoid coverage when its corporate insured dissolves rendering the broad remedial purpose of the UTPA impotent. That result would be a disaster for former shareholders of every dissolved West Virginia corporation

Even though, by operation of West Virginia Code § 31D-14-1407(d), Hess' former shareholders bore the brunt of AIG's bad faith, at risk for any adverse verdict on AIG's cross-claim, AIG denies responsibility for such conduct, no matter how egregious, because its insured was a dissolved corporation. In such a world, insurance companies would be immune to walk away from any first-party claim without cause. Every insurance company could refuse to follow the insurance laws of this State, ignore its duty of good faith and fair dealing, refuse to investigate claims, refuse to respond to inquiries of its insured, and create false facts giving rise to "coverage disputes" with the slightest chance of prevailing. They could fail to properly investigate such a dispute, "low ball" settlement offers, deny payment to vendors, fail to document the claims file, and rely on that lack of documentation to deny coverage. Improper litigation tactics would be sanctioned to pressure former shareholders to give up in face of risking their assets. The possibility of such conduct if immunity is declared is real, as AIG seeks immunity for such conduct here.

A. BECAUSE ALL OF HESS' ASSETS WERE DISTRIBUTED IN LIQUIDATION TO ITS FORMER SHAREHOLDERS, THE BENEFITS OF AIG'S INSURANCE COVERAGE AND THE RIGHT TO PROMPT AND FAIR SETTLEMENT BELONGED TO THOSE SAME FORMER SHAREHOLDERS.

With the sale of Hess, all of its assets were transferred to its former shareholders. By operation of law pursuant to W.Va. Code § 31D-14-1407, the former shareholders stood in Hess' "shoes" as the beneficiaries of AIG's insurance contract. This Court just recently held that, "[u]pon the death of the insured, a primary beneficiary of a life insurance policy has standing to bring a statutory bad faith claim against the insurer pursuant to West Virginia Code § 33-11-4(9) (2011)." *Goff v. Penn*

Mut. Life Ins. Co., 229 W.Va. 568, 729 S.E.2d 890 (2012). At the time AIG disclaimed coverage in 2009, Hess was long dissolved and its former shareholders stood in its proverbial "shoes."

Other courts have held that the protection of insurance coverage transfers to the shareholder receiving corporate assets in liquidation. In *Historic Smithville Dev. Co. v. Chelsea Title & Guar. Co.,* 445 A.2d 1174 (Ch. Div. 1981), *aff'd in part and rev'd in part on other grounds*, 464 A.2d. 1177 (App. Div. 1983), a shareholder who received real property pursuant in the dissolution of a corporation, acquiring title by operation of law, as here, was held to be an insured under a title insurance policy covering the property. The *Historic Smithville* court held:

> [T]ransfers in dissolution, pursuant to a statute, in cases where, as here, there are no creditor problems, are the perfunctory discharge of a legal obligation to invest shareholders with assets to which they are entitled. Such action is required by law and may therefore be said to be 'by operation of law.'

Chelsea, 445 A.2d at 1179; *Accord Shute v. Chambers*, 492 N.E.2d 528 (Ill.App.1st Dist. 1986)(holding former shareholders had right to sue on purchase agreement and note transferred in dissolution); *Jenot v. White Mountain Acceptance Corp.*, 474 A.2d 1382, 1386 (N.H. 1984) (former shareholders had right to foreclose for corporation's mortgage and note following dissolution).

Examining bad faith in the context of successors in interest of an estate, the U.S. District Court in *Burkett v. AIG Claim Services, Inc.,* 3:03-CV-1, 2007 WL 2059238 (N.D.W.Va. July 13, 2007), held that as the Estate of John Burkett suffered as a result of violations of the UTPA, the Estate could bring a statutory bad faith claim against, ironically, AIG Claims Services, Inc. The Court also permitted the recovery of common law *Hayseeds*-type damages. *Id.*

This Court has even held that a bad faith claim can be derivative to first-party claim. In *Poling v. Motorist Mut. Ins. Co.*, 192 W.Va. 46, 450 S.E.2d 635 (1994), the Court permitted a spouse to bring a loss of consortium claim pursuant to the UTPA, as UTPA violations are tortious conduct that can give rise to a cause of action for loss of consortium. Individuals upon whom UTPA violations are inflicted are permitted to bring causes of action, regardless of their status, just as Hess was permitted to do so. The former shareholders occupy the same position here. The dissolution of Hess did not change the nature of the insureds risk. No additional liability was transferred - it simply transferred the benefits of the C&I policy to Hess' former shareholders. *See, e.g., Pittston Co. v. Allianz Ins. Co.*, 905 F. Supp. 1279 (D.N.J.1995) *aff'd in part and rev'd in part on other grounds*,124 F.3d 508 (3rd Cir.(N.J.)1997)(holding mere change in the corporate name which alters neither the risk nor liability will not defeat coverage under the named insured doctrine).

The substantial assets were transferred to Hess' former shareholders. Those assets, while held by Hess, were protected by the AIG insurance that provided coverage for the cleanup of Mt. Storm, which was continuing and transferred to Hess' shareholders at liquidation. Accordingly, when AIG, in bad faith, disclaimed coverage after Hess dissolved, the injuries caused by such conduct were to Hess through its former shareholders. No other conclusion can be reached unless this Court gives insurers, like AIG, *carte blanche*, to treat an insured contrary to the law and to the detriment of the very persons who paid premiums for protection from liability. A new trial simply is not justified.

5. AIG WAIVED ANY OBJECTION TO CHALLENGE THE DAMAGES AWARDED BY FAILING TO OBJECT TO THE GENERAL VERDICT FORM.

AIG did not object to the general verdict form on damages and cannot now speculate on what evidence influenced the jury's award, so long as evidence was properly introduced supporting the award. The failure to object constitutes waiver. This Court has addressed the issue of a party's failure to object to a general verdict form only to complain of the content of the verdict on appeal. In *Gerver v. Benavides*, 207 W.Va. 228, 235, 530 S.E.2d 701, 708 (1999), this Court held:

> This Court has held on several occasions that when a litigant seeks to make procedural distinctions between "special" damages and "general" damages, that litigant bears the burden of insuring that the circuit court distinguishes between types of damages in the jury's verdict form. *See, e.g., Grove v. Myers,* 181 W.Va. 342, 382 S.E.2d 536 (1989). In Syl. Pt. 7 of *Miller v. Monongahela Power Co.*, 184 W.Va. 663, 403 S.E.2d 406 (1991), we made clear that "when the defendant fails to submit a special jury interrogatory asking the jury to set forth special or liquidated damages, this Court's attention to such errors is entirely a matter of grace[.]"

Id.(citations and quotations in original). In *Gerver*, the defendant objected to jury's special damages verdict which exceeded the statutory cap on non-economic damages. *Id.* This Court found waiver due to the defendant's failure to object to the trial court's instruction because it was impossible to determine whether the jury awarded non-economic damages in its general verdict. *Id.* AIG helped create the general verdict form on damages, and its only objection did not address a potential award of non-economic damages within the general verdict, but only the inclusion of the former shareholders.[18] Here, as in *Gerver*, AIG can now only speculate as to the content of the jury's compensatory damage award. Evidence was introduced as to compensatory damages sustained by Hess, unrelated to the damages sustained by Hess' former shareholders. Accordingly, waiver by AIG renders the jury's general damage verdict unassailable and a new trial not warranted.

6. AIG'S EVIDENCE THAT HESS DID NOT SUFFER ANY DAMAGES FROM ITS BAD FAITH CONDUCT WAS SQUARELY REJECTED BY THE JURY.

AIG was permitted to argue that Hess was the only entity that could suffer damages from its bad faith conduct and, because Hess was a dissolved corporation, Hess could sustain no damages. *(Tr. A12:1723-1724, 1733-1735).* As this Court has stated:

> Where the evidence is conflicting and the case is fairly tried under proper instructions the jury verdict will not be set aside unless it is plainly contrary to the weight of evidence or is without any evidence to support it.

King v. Ferguson, 198 W.Va. 307, 312, 480 S.E.2d 516, 521 (1996). AIG provides no grounds to disturb either the jury's finding or the trial court's denial of AIG's motion for new trial.

II. THE TRIAL COURT DID NOT COMMIT OTHER ERROR REQUIRING A NEW TRIAL.

A. THE TRIAL COURT'S PROCEDURE FOR SUBMITTING AND GIVING JURY INSTRUCTIONS WAS PROPER AND CUSTOMARY.

West Virginia law requires that jury instructions be reduced to writing and submitted to the other party. W. Va. Code § 56-6-19. During trial, Hess chose to revise its jury instructions which were hand-delivered to the Court and opposing counsel.[19] *(A3:2760).* However, subsequently, the

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[18] AIG's objection consisted of the following comment before the jury retired:

> MR. TINNEY: Your Honor, no objection as to the exhibits. I cannot remember if I made an objection as to the verdict form, but if I have not, I would renew our objection to the extent that the pertinent parts of the verdict form reflect the individual shareholders and their ability to - attempt to get damages through a dissolved corporation. That's been set forth multiple times. *(Tr. A12:1748-1756).*

[19] In its submission, Hess advised that it withdrew instructions 1-10 and 13, while reserving 40-42. In order to avoid confusion, the numbers remained the same, leading to the improper conclusion that Hess

trial court instructed the parties to provide their "six best" instructions which both parties did, again, serving the same by hand. *(A4:2754).* At the same time, the Court advised that it would give its general charge, including expert witnesses and burdens of proof. *(Tr. A12:1658).* The parties and the trial judge spent the evening hours of 12/19/11 working through those instructions and the verdict form. *(Tr. A12:1646, 1649-1650, 1658-1659, 1663).*

AIG had ample time to review all of the instructions - both the revised instructions and the "best six" requested by the Court. AIG had a plethora of lawyers present and, in fact, Christopher Ferragamo (who did not participate in the trial) provided its objections. *(Tr. A12:1750-1756)* The Court had advised the parties that it would permit amendments to instructions at any time prior to instructing the jury. *(Tr. A10:21: A4:3222).* Equal treatment means no prejudice. AIG claims support from *State v. Lindsey*, 160 W.Va. 284, 233 S.E.2d 734 (1977). In *Lindsey,* the trial court orally instructed the jury of the three possible verdicts that could be returned, despite the fact that no party had offered such an instruction. *Id.* at 286, 233 S.E.2d at 736. The error in *Lindsey* was an oral instruction that neither party had the opportunity to review. *Id.*

While parties were not permitted to place objections on the record until after the jury retired, in counsel's experience, that is the customary procedure of most trial courts, and was the same for both parties. The trial court advised the parties of its plan to proceed in that manner without objection by AIG. *(Tr. A12:1661).* The trial court made available the charge and instructions, permitting objections on the record.[20] *(Tr. A12:1749).* There was no error to warrant a new trial.[21]

There was no "trial by ambush" as AIG claims, nor has there been the required showing of prejudice to AIG. *McDougal,* at 336-337, 455 S.E.2d at 795-96. AIG's final complaint is the trial

submitted 56 instructions. *(A3:2760).*

[20] AIG complains that it was not provided a set of Court's instructions until weeks after trial. *(AIG's Brief, p.20, n.9)* To the contrary, the trial court provided the instructions to the parties the morning before being read to the jury. *(Tr. A12:1662).* Another misstatement by AIG.

[21] AIG also cites to *State v. Cutlip*, 131 W.Va. 141, 46 S.E.2d 454 (1948) in support of its position. It should be noted that *Cutlip*, like *Lindsey, supra*, addressed the giving of oral instructions to the jury, without written submissions, which did not happen in this case.

court's limitation of six instructions per side, which it asserts was a breach of duty. *AIG's Brief, p. 21.* However, *State v. Jett*, 220 W.Va. 289, 647 S.E.2d 725 (2007) held::

> Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, as long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

Id. (citing Syl. Pt. 4, *State v. Guthrie,* 194 W.Va. 657, 461 S.E.2d 163 (1995)). Furthermore, "[a]s a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion." *Jett, supra,* (citing *State v. Hinkle,* 200 W.Va. 280, 489 S.E.2d 257 (1996)).

Seeking reversal, AIG's reliance upon this Court's holding in *Arnoldt v. Ashland Oil, Inc.* 186 W.Va. 394, 412 S.E.2d 795 (1991) is misplaced. In *Arnoldt*, the trial court failed to give an instruction on a six-part balancing test to determine a private nuisance - the plaintiffs' claim. Here, however, the trial court gave six substantive instructions on AIG's theory of the case. *(A3:2857; Tr. A12:1669-1680).* The omitted instructions of which AIG complains relate to damages, estoppel and the definition of misrepresentation. The trial court gave AIG's misrepresentation jury instruction *(A3:2857)* and two additional AIG instructions on this same issue, including the Insurance Policy Exclusion instruction which stated, "to succeed, Hess must prove . . . (2) it made full and complete disclosure of such pollution conditions on each renewal application for storage tank pollution liability insurance with AIG" *(A3:2854)* and Condition Precedent instruction which reads, in part,

> The AIG Defendants contend that Plaintiff Hess Oil is not entitled to coverage for the corrective action costs incurred at the Mt. Storm Site because truthful representation in the policy application is a condition precedent to coverage under the policy and Hess Oil was not truthful.. . . if you find that Hess Oil was not truthful in its representations in its application(s) for coverage, then Hess is not entitled to coverage under the policy.

(A3:2855) AIG's omitted damages instruction on speculation was covered by the court's charge.[22]

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[22] Within the charge the trial court instructed, "your verdict should not be the result of sympathy, or sentiment, but should be based exclusively on the evidence and the law as laid down in these instructions. . . ." *(A3:2840, p. 2865).*

AIG complains about the trial court's failure to give an instruction "making it clear that damages were to be awarded for damages Hess actually suffered." *AIG's Brief, p. 21*. However, AIG's instruction on Unfair Claims Settlement Practices was read to the jury and stated that AIG's conduct with respect to Hess' "claim actually caused injury to Hess . . ." *(A3:2851)*. Regarding estoppel, that issue was not even a part of AIG's theory of the case, but that of Hess', as noted in Hess' opposition to AIG's motion for summary judgment on coverage. *(A3:2422)*. Most important, AIG fails to show any prejudice by the trial court's jury instructions or procedure. The trial court permitted equal review and opportunity to object to the instructions which, taken as a whole, were fair to both parties. Neither of these alleged flaws warrant a new trial, nor render the verdict "inherently unreliable."[23]

B. THE TRIAL COURT'S INSTRUCTIONS DO NOT WARRANT A NEW TRIAL.

AIG seeks a new trial based upon alleged error within specific instructions. The bulk of the argument addresses an alleged inconsistency in the misrepresentation instructions. At the outset, AIG failed to appeal the jury's finding of insurance coverage, thus, mooting any challenge to the misrepresentation instructions. Such a finding could have been made on alternative theories introduced by Hess, such as waiver and/or estoppel, or statute of limitations.

This Court has opined that "[a] verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties." *Tennant,* at 116, 459 S.E.2d at 394. Moreover, "[o]n appeal, the question of whether a jury has been properly instructed is to be determined not upon consideration of a single paragraph, sentence, phrase, or word, but upon the charge as a whole." *Id.* (citing *Michael ex rel Estate of Michael v. Sabado*, 192 W.Va. 585, 453 S.E.2d 419 (1994)). So long as the jury was instructed properly, "a mere ineptness of phraseology does not necessarily vitiate any one instruction." Syl. Pt. 3, *Karr v. Baltimore & O.R. Co.,* 76 W.Va. 526, 86 S.E. 43 (1915).

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[23] AIG's final argument in this section is a vague reference to the cumulative error doctrine, citing *Tennant, AIG's Brief, p. 22*. Failing to find cumulative error in *Tennant,* this Court noted that the doctrine should be used sparingly. *Id.* at 118, 459 S.E.2d at 395.

Although mooted by AIG's failure to appeal the jury's coverage determination, Hess addresses its complaint about the misrepresentation instruction submitted by Hess. *AIG's Brief, p. 23*. First, it is undisputed that the trial court presented AIG's misrepresentation instruction to the jury. *AIG's Brief, p. 23*. Both AIG and Hess' instructions as a whole were an accurate recitation of misrepresentation. Misrepresentation, by Hess, of any kind or nature, was not an issue even remotely considered by the jury, rendering the two instructions immaterial. Had the jury found Hess made any misrepresentation, the verdict would not have been what it was - a blistering indictment of AIG's conjured "discovery dispute" and general business practices.

The complained-of Hess instruction references subsection (a) of the statute regarding fraudulent conduct which is intent based. Addressing an analogous issue, this Court has held:

> We agree that the above jury instruction has the potential for confusing the jury by its somewhat convoluted nature and that it slightly misstated the standard of care language of *W. Va. Code, 55-7B-3*. However, in this case, we find the granting of a new trial was inappropriate because the plaintiffs were not prejudiced by the instruction. Other instructions describe the appropriate standard of care without using the word "average," and in combination with the instruction in question should have eliminated any question the jury might have had about the proper standard of care.

Tennant at 117, 459 S.E.2d at 394. The parties' instructions were supported by the evidence and, as a whole, sufficiently instructed the jury. Syl. Pt. 4, *State v. Guthrie,* 194 W.Va. 657, 461 S.E.2d 163 (1995). One sentence in a lengthy charge cannot serve as a basis for a new trial. *Foster v. Sakhai,* 210 W.Va. 716, 727-28, 559 S.E.2d 53, 64-65 (2001)(holding that substitution of the word "may" for "must" did not warrant a new trial as it did not create grave doubt about the effect). The trial court concluded that the alleged error had no effect on the verdict, and the instructions were fair. *Id.*; *see also A4:3225.* As in *Tennant,* a new trial is unwarranted as AIG was not prejudiced.

C. TESTIMONY REGARDING COSTS TO COMPLETE THE REMEDIATION ABANDONED BY AIG WAS PROPER.

AIG next complains about testimony as to the cost to complete the remediation, despite the fact that it had control of the remediation and botched it with a "band-aid" approach. *AIG's Brief, p. 26.* This Court has held that decisions regarding the admission and exclusion of evidence are within the province of the trial court, are not to be reversed absent an abuse of discretion, and are entitled to substantial deference. *McDougal* at 235, 455 S.E.2d at 794. During the trial, Lawrence Rine, an environmental expert, testified to the costs to complete the remediation. *(Tr. A12:1348-49).*

In support of their claim of error, AIG asserts that no evidence was presented to establish that Hess, through its former shareholders, would be responsible to complete the remediation as no assets were distributed to them at dissolution. *AIG's Brief, p. 26.* AIG's argument is confusing and wrong. The trial court required Hess' former shareholders to provide information to AIG regarding the *pro rata* distributed shares and undistributed shares at the time of dissolution of the company which was produced. *(Tr. A11:39-40).* AIG elicited limited testimony from Hess' former shareholders about distributed assets, however, missed the mark during cross-examination. AIG's counsel asked Bill Brown about the distribution of assets in 2006, and in response, Bill Brown testified that not all the assets were distributed at that time. *(Tr. A11:472).* Upon further inquiry, Brown testified that the assets of Hess were sold in 2006, but Hess did not file its dissolution papers until all of its audits were out of the way and the remaining assets of Hess dispensed. It was after that was completed that Hess dissolved in 2008. *(Tr. A11:473).* AIG's counsel then inquired as to whether there were any undistributed assets of Hess by 05/08/08 to which Brown responded that he did not recall any, *(Tr. A11:474),* however, never again inquired as to assets distributed at liquidation in 2006.

AIG's summation that there were no assets distributed to the Browns is simply incorrect, however, its cross-examination reveals a lack of understanding as to how exposure is created under West Virginia Code § 31D-14-1407.[24] Thus, despite AIG's belief, Hess' distributed substantial assets to its former shareholders, exposing those individuals to the cost for completion of the remediation at Mt. Storm, accordingly, rendering the same relevant to damages and not prejudicial.

Trial testimony established that AIG exercised a provision of the policy and assumed control of the remediation at the Mt. Storm Site in 1999. *(Tr. A11:613,655 Schmidt;12:1286-1287,1317*

[24] *See, §I., supra.*

Anderson). Al Anderson, a principal of Ryan, testified that the remediation under AIG's control could have been completed within the Hess policy limits, but was not, due to issues of getting paid by AIG. *(Tr. A12:1288-1289).* Hess' expert, Rine, testified that AIG did the remediation as cheaply as possible, resulting in unnecessary, additional costs. *(Tr. A12:1335).* Testimony also established that AIG's wrongful disclaimer of coverage in August 2009 and abandonment of the remediation resulted in additional, avoidable costs. *(Tr. A12:1345-1346 Rine).* This "band-aid" approach to the cleanup, done to "low ball" resolution of the claim actually exacerbated the damages.

As stated in *Hayseeds Inc. v. State Farm Fire & Casualty Co,* an insurer has a duty to settle with its insured on a claim for which the insured was legally entitled to recover. 177 W.Va. 323, 352 S.E.2d 73 (1986). Thereafter, if the insured is required to sue and substantially prevails, the insurer is liable for the verdict and for attorney fees and incidental damages, including net economic loss and damages for aggravation and inconvenience. *Id. Hayseeds* addressed the consequences of failing to pay the policy limits, whether the insurer contested the claim in good faith or in bad faith, noting that to impose upon the insured the cost of compelling its insurer to honor its contractual obligation is to effectively deny him the benefit of his bargain. *Id.* at 329, 352 S.E.2d at 79-80. Thus, Hess is entitled to all *Hayseeds* losses, including completion of the remediation.

Excess judgments were addressed by this Court in *Shamblin.* In *Shamblin,* this Court held that a failure to settle within policy limits where there exists the opportunity to release the insured from personal liability constitutes *prima facie* bad faith, with the insurer responsible for the excess. *Id.* at 595, 396 S.E.2d at 776; *See also, Marshall v. Saseen,* 192 W.Va. 94, 450 S.E.2d 791 (1994). The costs to complete remediation were the result of AIG placing its interests (money) above those of their insured. Thus, costs to complete remediation are legitimate damages. AIG erroneously states that Hess failed to present evidence regarding any demand to settle or that Hess was liable for the costs to complete remediation beyond the policy limits. At the inception of the litigation, Hess demanded the full benefits available under the policy until the remediation was completed or the limits exhausted. *(A1:44)*. Rine testified that AIG could have completed the remediation within Hess' policy limits had it done so properly *(Tr. A12:1337)*. Thus, AIG failed to resolve the claim within limits. Hess was entitled to present the cost to complete that remediation.

Shamblin further provides that it is the insurer's burden to prove by clear and convincing evidence that it attempted in good faith to negotiate a settlement, that any failure to enter into a settlement where the opportunity to do so existed was based on reasonable and substantial grounds, and that it accorded the interests of the insured at least as great a respect as its own. *Shamblin* at 595, 396 S.E.2d at 776. AIG failed to introduce any evidence to meet this burden, nor can it. The evidence did not create an extralegal windfall as argued, but rather, established economic losses facing Hess and its former shareholders. Accordingly, the ruling of the trial court should be affirmed.

D. THE TRIAL COURT UNIFORMLY APPLIED THE DISCOVERY RULES RENDERING AIG VICTIMS OF ITS OWN CONDUCT.

The fourth alleged trial court error must be disregarded, as pertinent Orders establish that the rulings of the trial court were premised upon the conduct of AIG. It is without question that the trial court established a Scheduling Order imposing a discovery deadline. *(A1:70)*. It is further without question that the parties, by agreement, amended the Scheduling Order as it related to the completion of discovery. *(A3:2506, p. 2510)*. This agreement was to conduct discovery until a reasonable time prior to trial, but not beyond 14-days prior to trial. *Id.*

AIG is correct that the trial court granted its motion to exclude witnesses not disclosed during discovery. (*A3:2567-2568)*. Contrary to AIG's argument, the Order granting the motion lacked any reference to witnesses "who have knowledge regarding AIG's past general business practices." *Id.* As noted, Messrs. Romano and Segal were disclosed on 11/04/11,within the agreed upon extended discovery period. At the time of Hess' supplemental disclosure, the deposition of Bill Brown had not yet been taken. *(A2:1585)*. As Hess' supplemental disclosure was submitted prior to the close of discovery, AIG's motion was inapplicable to these Hess witnesses.

Regarding the alleged inability to depose the witnesses, AIG initially chose not to depose the witnesses, and inexplicably, noticed the depositions on dates the week before trial. The trial court properly barred the same based upon the untimeliness of the notices.[25] *(A3:2589-2591)*. Hess was unable to initially disclose the "business practice" witnesses earlier as a result of AIG's refusal to disclose other bad faith cases as requested in discovery. AIG did not make the disclosure until 10/24/11. *(A3:2506-2511)*. AIG was found to be **in contempt** on this issue.[26] *(A3:2628-2634)*. The trial court held that the referenced discovery disputes were not substantially justified, violated traditional notions of a free flowing discovery process and that, "[o]ften, it [AIG] has manufactured disputes where there should have been none." *Id. at p. 2633*.

Hess did not ignore the order on the motion *in limine* and the trial court was not required to reverse its decision thereon. AIG apparently had some confusion relative to whom the motion *in limine* on undisclosed witnessed applied. Hess' counsel advised the court during the exchange that the motion *in limine* ruling did not apply to these witnesses. Without arguing that it did, but merely noting that the court granted the motion, the trial court stated it would reverse its decision and permit the witnesses to testify.[27] *(Tr. A12:1179)*. After the testimony of Romano, but prior to the testimony of Segal, this issue was cleared up by the trial court and counsel. *(Tr. A12:1177-1179, 1243-1244)*.

Hess' counsel specifically advised the court that he went back and looked at the order and that the motion *in limine* did not extend to disclosed witnesses, but rather to undisclosed witnesses, noting that the witnesses had been disclosed with no need to reverse its order. In response to inquiry from the trial court, AIG's counsel merely stated, "I believe the written record as it was filed is

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[25] AIG did not notice the deposition of the witnesses at issue until 11/23/11, with the depositions scheduled to begin 12/01/11, with the balance to be conducted each sequential day up to and including the Thursday before trial. *A3:2506-2511*.

[26] AIG, when ordered to provide case numbers for lawsuits arising from alleged bad faith violations, responded by providing a three-page list of case numbers without any further identification. In rendering its ruling the trial court commented, "the Court was under the impression that the AIG Defendants would be reasonable enough to provide supplemental information in accordance with the obvious needs and policy of the request." *A3 at p. 2632*.

[27] A trial court is vested with the exclusive authority to determine when and to what extent an *in limine* order is to be modified. *Tennant,* at 113, 459 S.E.2d at 390.

sufficient to preserve the issue that I preserved on the record." *(Tr. A12:1243)*. Thereafter, Hess, without objection from AIG, presented Segal as its next witness. *(Tr. A12:1244-1245)*.

AIG next complains of a trial by ambush in that it was not permitted to depose these witnesses or otherwise prepare for their testimony. Examining AIG's dilatory conduct, the trial court did not permit the depositions of Messrs. Romano or Segal, but AIG did contact the witnesses prior to trial. In addition, it was AIG's own conduct that resulted in the order. The trial court acted well within its discretion in dealing with AIG's discovery abuses. Thus, the trial court's rulings regarding the testimony of Messrs. Romano and Segal were warranted and should not be disturbed on appeal.

III. THE JURY'S ORIGINAL PUNITIVE DAMAGE AWARD COMPORTED WITH THE LAW AND SHOULD BE REINSTATED, AND AIG'S REQUEST FOR A FURTHER REDUCTION DENIED.

The jury's punitive damage award of $53 million was reduced by over 50 percent to $25 million following post-trial motions, in large part, on the *TXO* punitive-to-compensatory ratio cap as interpreted by the trial court. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993)(citations omitted). *(A4:3207)*. AIG now seeks further reduce the jury's punitive damage award, despite: (1) a jury finding of "actual malice" by AIG, which is entitled to significant deference by this Court; (2) the original punitive-to-compensatory damage award did not exceed any *per se* black letter West Virginia or federal punitive-to-compensatory damage ratios and the reduced award falls within long-established punitive-to-compensatory ratios; and, (3) the trial court's reduction of the punitive damage award negates AIG's contention that it is entitled to a further reduction in the award in consideration of the egregious conduct of AIG. For the reasons stated herein, AIG's request for further reduction of the punitive award must be denied.[28]

A. THE RECORD CONTAINS OVERWHELMING EVIDENCE OF ACTUAL MALICE TO SUPPORT THE JURY'S IMPOSITION OF PUNITIVE DAMAGES AGAINST AIG.

In a common law and statutory first-party bad faith claims, the insured must establish "actual

[28] For a full discussion of the propriety of the jury's punitive damage award, *see Brief on Behalf of Petitioner, Hess Oil Company, Inc., in Support of its Petition for Appeal, Hess v. AIG*, No. 12-0719, *("Hess Appeal, p. __")* incorporated herein by reference.

malice" by the insurer in the handling of the claim to warrant punitive damages. *McCormick v. Allstate Ins. Co.*, 202 W.Va. 535, 539-40, 505 S.E.2d 454, 458-59 (1998). "Actual malice" means that the insurer knew that the claim was proper, but willfully, maliciously and intentionally utilized an unfair settlement practice in handling the claim. *Id.* AIG asks this Court to ignore extensive evidence demonstrating "actual malice" by AIG toward Hess. AIG's brief omits undisputed evidence proving a conjured "coverage dispute." *AIG's Brief, p. 29.* Indeed, AIG's only support of a lack of malice actually confirms its egregious conduct. *AIG's Brief, pp. 29-30.* AIG's "bona fide" coverage dispute involved pulling coverage in 2009, *a full decade* after accepting coverage, and all evidence relied upon in 2009 was available in 1999 confirming AIG's actual motives in 2009.

On 08/19/09, well after Hess had been liquidated, dissolved and its former shareholders retired, AIG disclaimed coverage based upon an alleged inaccuracy in Hess' 10/30/97 application, claiming the 1998 Release was known to Hess in 1997. As discussed above Hess, by completing two applications in October 1997, clearly disclosed prior "leaks" to AIG - twice.[29]

The following undisputed facts evidence malicious conduct of AIG based on its employees' admissions to double digit violations of the UTPA. Prior to the 2009 disclaimer, AIG's employees admitted that they failed to ask Hess what it knew about the relationship between 1997 Notice and the 1998 Release *(Tr. A11:694 Schmidt; A11:966 Perez);* failed to obtain critical DEP documents for more than 12 years *(Tr. A11:666-667, 669 Schmidt)*; failed to obtain the Tank Closure Report confirming the cleanup of the minor overflow/overspill prompting 1997 Notice *(Tr. A11:959 Perez)*; never informed Hess or its former shareholders that critical documents were missing, including the "prior application" referenced in the 1997 renewal application[30] *(Tr. A11:927 Perez)*; and failed to interview DEP inspectors. This collectively constituted a serious failure to conduct a reasonable

[29] AIG mistakenly contends that in 2009, AIG-DC discovered through its investigation that Hess had received a notice of a spill at Mt. Storm in 1997 and subsequently denied the existence of any claims for cleanup or response action. Hess fully and candidly responded that there was a history of leaks and/or releases at the facility. *(A1:95)*

[30] AIG employee Stephen Lokos testified that he knew from conversations with Perez that nobody at AIG ever reviewed the "prior application" to see what was on it. *(Tr. A11:841).*

investigation.[31] *(Tr. A11:841 Lokos).*

The jury heard that AIG provided no training whatsoever for adjustors or environmental consultants, leaving it to "on-the-job training," without any claims adjusting standards or procedures. *(Tr. A11:799 Lokos).* AIG did not perform any review of their claims adjustment conduct. *(Tr. A11:615 Schmidt).* The AIG environmental employees, even though employed by AIG to assist with claims, performed only the specific tasks requested by the claims adjustor. *(Tr. A11:618-619 Schmidt).* AIG, by committing such acts, "sanctioned" a claim process dedicated to profits as opposed to a fair and evenhanded claim process.

AIG asserted claims against its own insured seeking recoupment of a decade of expenditures for the cleanup based solely on a conjured misrepresentation. *(A1:403-407).* Establishing that AIG reneged on a promise to pay Ryan for $252,000 in preauthorized cleanup fees to Ryan showed that AIG knowingly caused its insured to be sued. This evidence allowed the jury to conclude that AIG's goal was to avoid all coverage and the costs of its mismanagement of the cleanup by demanding that Hess repay approximately $882,000. The jury correctly concluded that AIG's denial was wrong and malicious. The entire $53 million verdict was consistent with the <u>actual</u> facts presented.

B. THE JURY'S PUNITIVE DAMAGE AWARD, AS REDUCED, COMPLIES WITH THE CONSTITUTION AND THE COMMON LAW AS MULTIPLE "AGGRAVATING FACTORS" WARRANTED A SIGNIFICANT PUNITIVE DAMAGE AWARD.

In its order resolving post-trial motions, the trial court correctly noted that the evidence for each of the "aggravating factors" noted in *Perrine v. E. I. duPont de Nemours & Co.* and *Garnes*, supported the imposition of a significant punitive damage award.[32] 225 W. Va. 482, 553, 694 S.E.2d 815, 886 (2010). Under the first factor, the trial court correctly found the denial of coverage after 10 years to be legally flawed and the timing of the denial of coverage "suspect."*(A4:3231).* Under the second aggravating factor, the trial court held "[t]he AIG Defendants would have profited from

[31] These actions cannot be viewed in a vacuum. These failures resulted in Hess being sued by a third-party (Ryan) resulting in its shareholders facing significant financial exposure for remaining remediation costs, Ryan's claims, and AIG's attempt to recoup a decade of remediation costs.

[32] For discussion of the overwhelming evidence of aggravating factors, *see, Hess Appeal*, pp. 25-29.

the wrongful conduct" during a financial upheaval for companies seeking cost containment. *(A4:3231); (Tr. A12:1777-1778 Selby; Tr. A11:706 Schmidt).* Under the third aggravating factor, the trial court analyzed the financial position of AIG. Due to the "enormous sums of money" in which AIG deals, the trial court correctly recognized that "to accomplish punishment and deterrence [. . .], a punitive damage award must necessarily be large." *(A4:3232)*; *Perrine* at 555, 694 S.E.2d at 888. Thus, AIG's status as the world's largest insurance company warranted punitive damages significant enough to deter future bad faith conduct. *See also, Hess Appeal, p. 26* (noting the enormity of AIG's operations ($683 billion in assets) and resources ($114 billion in net worth)).

The fourth factor in the analysis of the jury's punitive damage award is closely intertwined with the third, namely that a large punitive award will discourage AIG from repeating the same conduct.[33] It will encourage AIG to conform to West Virginia law which would require appropriate claim investigation, claim file documentation, training of adjustors and evaluation of adjustors claim handing conduct. The trial court, while attempting to balance the competing interests of punitive damages to encourage fair and reasonable settlements, found that this factor favored Hess' position, as was found in *Perrine*. *(A4:3232).* AIG argues that imposition of the current punitive damage award ($25 million) or the jury's punitive damage award ($53 million) would actually discourage settlement of claims. Hess was denied this choice because it was sued as a result of AIG's malicious conduct, then sued by AIG itself. Analyzing the final factor, the trial court took the "high" cost of litigation into consideration, *(A4:3232)* because it was exclusively the result of AIG's conduct. *(A1:33).* AIG ignores that Hess and its former shareholders had no choice but to defend their interests from Ryan's and AIG's lawsuits seeking $882,000 and respond to AIG's bad faith conduct. *Hess Appeal, pp. 27-28.* When viewed through the prism of the jury's vantage point, with unrefuted evidence of the malicious, bad faith conduct of AIG, there was ample justification for the jury's full

[33] Such conduct provides undisputed evidence of at least 11 individual violations of West Virginia Unfair Trade Practices Act, W.Va. Code § 33-11-1, *et seq.* and W.Va. C.S.R. § 114-14-1, *et seq.*

punitive award and no support for further reduction in the award.[34] *(A4:3231).*

1. THE $25 MILLION PUNITIVE DAMAGE AWARD DOES NOT VIOLATE *TXO.*

AIG's primary argument in support of reduction in the punitive damage award is that the $5 million compensatory award contains a punitive component increasing the compensatory-to-punitive damage ratio above the 10.6:1 ratio awarded by the jury. In *Boyd v. Goffoli*, 216 W.Va. 552, 608 S.E.2d 169 (2004), this Court responded to a similar argument stating punitive damages can be awarded even if damages for emotional distress, annoyance, aggravation or inconvenience are also awarded. *Boyd* at 566, 608 S.E.2d at 183; *Tudor v. Charleston Area Med. Ctr. Inc.*, 203 W.Va. 111, 506 S.E.2d 554 (1997); *Vandevender v. Sheetz, Inc.*, 200 W.Va. 591, 490 S.E.2d 678 (1997).[35]

During trial, Lawrence Rine testified that the cost to complete the remediation abandoned by AIG ranged from $561,475 to $878,475. *(Tr. A12:1349).* Hess also incurred over $450,000 in legal fees and costs. AIG sued its own insured, seeking reimbursement of costs paid to remediate Mt. Storm and the amount it paid to resolve the claims of Ryan totaling $882,000, knowing full well that Hess had dissolved and that Hess' former shareholders would be solely responsible for any verdict.[36] *(A1:403-407).* The malicious nature of AIG is clear. *(Tr. A12:1404-1405; A3:2838).*

2. AIG'S MITIGATING FACTORS ANALYSIS DOES NOT SUPPORT FURTHER REDUCTION OF THE JURY'S PUNITIVE DAMAGE VERDICT.

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[34] Ample evidence of the financial vulnerability of the Hess shareholders existed - a $882,000 potential liability that AIG sought to recover until the day before jury deliberations began. *See, Boyd* at 564, 608 S.E.2d at 181. AIG labeled the Hess' former shareholders liars. AIG claims a lack of reprehensibility evidenced by its payment of $622,000 in site cleanup costs between 1999 and 2009. *AIG Brief, p. 32.* However, this, too, is a red-herring, as AIG demanded the $622,000 from Hess' former shareholders, and its conduct was reprehensible under any analysis of the evidence presented at trial.

[35] AIG cites *Perrine* and Syl. Pt. 14 from *Tudor* for the proposition that awards for compensatory damages for emotional distress contain a "punitive element." *See, AIG Brief,* at p. 34-35. AIG again misstates the law, as Syllabus 14 of *Tudor* states only that intentional infliction of emotional distress can be considered duplicative of punitive damage awards - a claim never asserted here.

[36] AIG argues that Hess and its former shareholders would not have been responsible for the attorneys' fees incurred in this case, if they had not been successful. This Court has long recognized that an insured incurs attorneys' fees even if on contingency. *Hayseeds* at Syl. Pt 1, 352 S.E.2d.. AIG ignores evidence of $30,000 in hourly fees paid by Hess and, had Hess not retained counsel, Hess' former shareholders faced financial ruin.

AIG misapplies the applicable standards, evidence, and settled law concerning mitigating factors in support of further reduction in the jury's punitive damage award. *AIG Brief, pp. 35-36.* Initially, AIG only argued that three (3) of the mitigating factors announced in *Perrine* were applicable to this case conceding that no support for mitigation under the other factors. *(A4:3223-33).* Before this Court, AIG baldly asserts that three factors cited in post-trial briefing in favor of mitigation was found by the trial court to "weigh[] against a large punitive judgment in this case." *AIG Brief, p. 36.* This is inaccurate and misstates the trial court's ruling, which held:

> [R]egarding the pending motion, the Court concludes that the aggravating factors in this case outweigh the mitigating factors and that *a high award of punitive damages is proper*. The Court believes the only way to fulfill the purposes of punitive damages against Defendants with such financial prowess as the ones herein is to make [the] award a *substantial amount* of damages to Hess Oil . . .

(A4:3234)(emphasis added). AIG further misstates the legal standard through its unsupported contention that the trial court did not first reduce the award to achieve compliance with the West Virginia Constitution and subsequently address potential mitigation. *AIG Brief, p. 36.* The actual *Perrine* "road map" noted that the trial court must make sure that punitive damage awards comply with constitutional guidelines.[37] *Perrine* at 557, 694 S.E.2d at 890. AIG seeks to impose a discretionary recommendation (review of awards that comply with constitutional ratios) as a mandatory requirement. The trial court found that the punitive-to-compensatory ratio cap and the "mitigating" evidence warranted reduction of the punitive damage award. The trial court was not required to conduct a second, duplicative analysis of "mitigating" factors to further reduce an award.

The trial court did consider the scant mitigating evidence proffered by AIG and found that the reduced punitive award ratio was appropriate because "the aggravating factors in this case outweigh the mitigating factors and that *a high award of punitive damages is proper*." *(A4:3234).* AIG, seeking to further reduce the jury's punitive damage award, asks this Court to violate Hess' right to

[37] This Court further held that awards that comply with the constitutional guidelines of *TXO may* be reduced by the trial court based on mitigating circumstances. *Id.* at 557-558, 694 S.E.2d at 890 (internal citations omitted).

a jury trial. Article VIII, § 13 of the West Virginia Constitution permits the legislature to enact statutes that abrogate the common law, including the power to set reasonable limits on damages in civil causes of action. *McDonald v. City Hosp., Inc.*, 227 W.Va. 707, 715, 715 S.E.2d 405, 413 (2011). However, there is no legislative directive limits punitive damage awards, meaning that common law controls whether the punitive damage award should be reinstated in full, maintained, or reduced. West Virginia Const. Art. III, § XIII. While Hess respectfully disagrees with basis and rationale of the trial court's reduction in the award, any further reduction in the award, would impinge on Hess' constitutionally-guaranteed rights pursuant to W. Va. Const. Art. III, § XIII.

Although Hess, through its former shareholders, faced tremendous potential financial losses as a result of AIG's conduct, AIG fails to even acknowledge this component of the damage equation, noting that the damages suffered by the Hess shareholders are "irrelevant."[38] *AIG Brief, p. 36.* Finally, AIG generically asserts that it has borne significant litigation costs including the instant appeal. *Id.* AIG posits that these costs have had a deterrent effect on it, even though in the same breath claiming that the enormous costs sustained by Hess' shareholders are "irrelevant." Throughout post-trial motions and in the instant appeal, AIG has never offered evidence or even made a proffer of its costs incurred. This argument should be disregarded on this basis alone. Briefly, AIG's reliance on pertinent civil penalties under W. Va. Code § 33-11-6(a) is simply wrong. As this Court in *Perrine* noted civil penalties, raised as a mitigating factor were not a "proper measuring tool" to evaluate a punitive damage award. *Perrine* at 562, 694 S.E.2d at 895.

C. THE JUDGMENT BELOW DOES NOT VIOLATE THE FEDERAL CONSTITUTION.

AIG desperately misstates that " . . . federal law imposes a more stringent limit on punitive damages than does West Virginia jurisprudence, and the award in this case exceeds that cap." *AIG Brief, p. 37.* To the contrary, the U.S. Supreme Court has held that "[w]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that

[38] Those damages could have financially ruined the Hess shareholders. This cold-hearted disregard for its own insureds demonstrates the absolute necessity of a large punitive damage award.

compares actual and potential damages to the punitive award." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003)(internal citations omitted).

The *Campbell* court rejected the chance to establish a "bright-line" punitive-compensatory damage ratio while stating that single digit multipliers are likely to comport with due process while still achieving the goal of deterrence and retribution, than awards with ratios of 500:1 or 145:1. *Campbell* at 425 (citing *BMW of N. Am. v. Gore,* 517 U.S. 559, 581-82 (1996)(internal citations omitted). Based on the holding in *Campbell,* a single digit multiplier (9:1) for punitive to compensatory damages is facially valid and constitutional. Even awards in excess of the 9:1 ratio are not *per se* unconstitutional.[39] Accordingly, federal courts have enacted a less restrictive analysis.

AIG also directed the Court's attention to the three guideposts announced in *Gore*, and reiterated in *Campbell,* for evaluation of punitive damage awards under *Federal Due Process* principles. This analysis simply is inappropriate.[40]

1. AIG'S CONTENTION THAT THE PUNITIVE DAMAGE AWARD IS BASED ON "STRANGERS TO THE LITIGATION" MISAPPLIES THE LAW.

AIG's attempt to superimpose the facts of *Phillip Morris USA v. Williams,* 549 U.S. 346 (2007)(internal citations omitted) to the instant dispute demonstrates AIG's desire to avoid the well-deserved punitive award. In *Williams*, the jury was found to have impermissibly based its punitive damage award on the damage inflicted on other unnamed, unidentified cigarette smokers, not parties to the litigation. There is no unnamed class of individuals here that AIG allegedly harmed, for which the jury's punitive damage award was based. It is not disputed that testimony by the Hess former shareholders was necessary and required as they were the only ones put at risk by AIG's conduct. Hess' Answer gave notice that Hess' former shareholders were directly affected by AIG's egregious conduct. *(A1:46-49*).

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[39] *See Hess Appeal, pp. 36-38.*

[40] Under our jurisprudence, this Court likely need not undertake an analysis of the *Gore* factors. This Court previously noted that "*Gore* guideposts 'are merely reiterations of factors previously-adopted by both this Court and the United States Supreme Court[,] [and] . . . does not depart from existing law regarding punitive damages." *Boyd,* at 565, 608 S.E.2d 182 (citing *Sheetz* at 605, 490 S.E.2d at 692).

The punitive-to-compensatory ratio imposed by the jury in *Williams* constituted a ratio of approximately 100:1. ($79.5 million to approximately $821,000.00). *Id.* at 351. Here, the jury's punitive-to-compensatory award constituted a 10.6:1 ratio. The trial court further reduced the award to a 5:1 ratio ($25 million to $5 million). Consequently, the concerns faced in *Williams* with respect to the high ratios of punitive damages compared to the compensatory award are not present here.

AIG's contention that the testimony of Segal and Romano as to other claims permitted the jury to adjudicate the merits of other parties' hypothetical claims is easily dismissed as, in all instances, the claims were handled by AIG-DC, at opposite from unnamed, unspecified class of cigarette smokers which the *Williams* court found impermissible. It is well settled that general business practices can be established by proof of other violations "from other claimants and attorneys who have dealt with such company and its claims agents." *Jenkins* at 610, 280 S.E.2d at 260.

AIG also asks this Court to ignore its lack of objection to the testimony concerning the finances of AIG during the punitive phase. *(Tr. A12:1770-1801).* This Court has long established that objections not properly made are waived. Syl. Pt. 17, *State v. Thomas,* 157 W. Va. 640, 203 S.E.2d 445 (1974). It is inescapable that AIG waived any claim of improper evidence presented during the punitive phase. *(Tr. A12:1771-1784).* Importantly, AIG chose to forego presentation of any evidence of the net worth of C&I or AIG-DC. *(Tr. A12:1770-1801).* Instead, AIG elicited testimony demonstrating that AIG, as the parent company, had effective control over its subsidiaries, including C&I and AIG-DC, and elicited additional testimony about AIG's financial condition demonstrating the relevance of its wealth. *Id. at 1790-1793.* AIG even inquired from Hess' witness whether C&I was financially dependent on AIG. *Id. at 1799.* The wealth, as presented, was relevant and properly considered by the jury in reaching a punitive damage award.

Substantively, the information concerning AIG's wealth was appropriate for the jury to consider as AIG was no "stranger to the litigation" as AIG claims. To the contrary, AIG-DC adjusts claims just for AIG related subsidiaries and has no other business. AIG-DC relies solely upon the

AIG conglomerate for its existence. Its conduct, therefore, has to be the conduct of the entire entity. AIG cannot simply disavow the critical role of AIG-DC.[41]

Respectfully, for these reasons, AIG's invitation to further reduce the jury's punitive judgment award should be declined with no support in law or fact and for the same reasons to the extent that AIG's brief can be read to seek a new trial or judgment as a matter of law should be denied.

CONCLUSION

For the reasons set for above, the Respondent, Hess Oil Company, Inc., requests that this Honorable Court grant deference to the trial court and allow the judgment of the trial court on post-trial motions to stand, except as to reduction of the punitive damage award. The punitive damages award as set forth by the jury, and reduced by the trial court, should be reinstated.

Respectfully submitted this
19th day of October, 2012.

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[41] AIG has made multiple unsupported representations concerning the introduction of the wealth of AIG. For instance, AIG asserts that "[a]n 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 parties here." *AIG Brief, p. 39-40.* AIG never presented the wealth of Chartis or C&I individually, nor was there a single shred of evidence presented that Chartis or C&I are incapable of payment of the jury's punitive damage award. AIG seeks to impute error through its failure to properly offer any objection or evidence in support of its current position on appeal. This Court should decline to entertain AIG's late-discovered objections to its wealth.

CERTIFICATE OF SERVICE

This is to certify that on the 19th day of October, 2012, the undersigned counsel served the foregoing "***RESPONSE OF HESS OIL COMPANY, INC. IN OPPOSITION TO PETITION FOR APPEAL FILED BY AIG DOMESTIC CLAIMS, n/k/a AIG CLAIMS, INC., and COMMERCE AND INDUSTRY INSURANCE COMPANY***" upon counsel of record by placing true copies thereof in the United States Mail, postage prepaid, in envelopes addressed as follows:

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