

12-0719



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IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

RYAN ENVIRONMENTAL, INC.

Plaintiff,

v.

Civil Action No.: 10-C-20
THOMAS A. BEDELL, Judge

**HESS OIL COMPANY, INC.,
AIG DOMESTIC CLAIMS, INC.,
Division of AIU HOLDINGS, INC.,
and COMMERCE & INDUSTRY
INSURANCE COMPANY**

Defendants.

ORDER ADDRESSING AIG POSTTRIAL MOTIONS

Pending before the Court are the following motions, which were all filed on January 24, 2012:

1. Defendants/Cross-Plaintiffs Chartis Claims, Inc.'s and Commerce & Industry Insurance Company's Motion for Judgment as a Matter of Law under Rule 50, and Memorandum in Support;
2. Defendants/Cross-Plaintiffs Chartis Claims, Inc.'s and Commerce & Industry Insurance Company's Motion for a New Trial on Punitive Damages and/or to Alter or Amend the Judgment Under Rule 59(e) with Respect to Punitive Damages, and Memorandum in Support; and
3. Defendants/Cross-Plaintiffs Chartis Claims, Inc.'s and Commerce & Industry Insurance Company's Motion for a New Trial under Rule 59(a), and Memorandum in Support.

Hess Oil Company, Inc. (“Hess”) timely filed responses to these motions on February 24, 2012. Finally, Defendants/Cross-Plaintiffs Chartis Claims, Inc. and Commerce & Industry Insurance Company (collectively, the “AIG Defendants”) filed replies to those responses on March 2, 2012.¹

The Court has examined the above submissions in the light of the record and all relevant points of law and issues the following:

RELEVANT UNDISPUTED FACTUAL AND PROCEDURAL HISTORIES

1. This litigation concerns allegations for the recovery of monies on unpaid invoices for environmental remediation work performed at Mount Storm, WV.
2. On or around April 15, 1997, Hess Oil received a “Confirmed Release Notice to Comply” from the West Virginia Department of Environmental Protection (“WVDEP”) regarding the Mount Storm worksite. Hess employed a third party, Subsurface, to investigate, and Subsurface confirmed that there was environmental contamination.
3. At that time, Hess was insured for underground storage tank (“UST”) liability by the State of West Virginia; however, it never filed a claim under that policy regarding the contamination.
4. Hess’s insurance policy with the West Virginia Insurance Fund ended at the policy’s termination date, October 1, 1997. That policy was not renewed because the State terminated its UST insurance program.
5. Through DANA Insurance and Risk Management, an insurance selling agent, Hess Oil sought a UST insurance policy from the AIG Defendants.

¹ The timetable for responses and replies fell pursuant to an agreement between the parties for an extension of time.

6. A dispute exists regarding the application(s) received by the AIG Defendants. Hess Oil claims that it submitted two applications: one dated October 15, 1997, and one dated October 30, 2007. The AIG Defendants assert that they only received the October 30 application.
7. On or around February 23, 1998, the WVDEP informed Hess Oil of an “observed changed condition” at the Mt. Storm location. This was ultimately confirmed to be the release of a petroleum product on an adjacent property. Hess did not believe that petroleum release to be its fault.
8. Hess provided notice of the potential claim to AIG. Ultimately, the AIG Defendants concluded that the 1998 petroleum release was, in fact, Hess’s responsibility and that environmental remediation was required and covered under the AIG UST policy.
9. Coverage was accepted in January 1999, and between 1999 and 2009, Commerce and Industry paid approximately \$622,000 in corrective action costs for cleanup of the Mt. Storm site.
10. In July 1999, AIG also reviewed certain expenses incurred by Hess over two years prior to the notice of claim to the AIG Defendants in January, 1999.
11. In those submissions, Hess included the 1997 independent investigation conducted by Subsurface.
12. Hess voluntarily dissolved, effective May 9, 2008.
13. On August 19, 2009, the AIG Defendants disclaimed coverage based on an alleged inaccuracy in Hess’s October 30, 1997, application and its notice of claim related to the 1998 petroleum release.

14. Plaintiff Ryan Environmental brought this action against the AIG Defendants and Hess seeking reimbursement for approximately \$252,000 in remediation and cleanup work that it performed at the Mount Storm site.
15. On June 29, 2010, Hess asserted two cross claims: a declaratory action claim that it was entitled to full coverage benefits and a claim for bad faith damages against the AIG Defendants. Hess sought both compensatory and punitive damages.
16. On September 29, 2010, the AIG Defendants filed cross-claims against Hess alleging breach of contract and negligent misrepresentation. Via cross-claim, the AIG Defendants demanded \$622,000 for the environmental remediation they supervised at the Mount Storm Location and \$260,000 as reimbursement for the AIG Defendants' settlement with Ryan Environmental.
17. In May of 2011, the AIG Defendants resolved Ryan's claim by reimbursing the disputed costs and obtaining a release from Hess.
18. On October 14, 2011, the AIG Defendants filed a motion for partial summary judgment. The Court subsequently denied that motion.
19. Relevant to the pending motions, the AIG Defendants filed several motions *in limine* with the Court, including one to exclude evidence relating to bad faith damages suffered by any person or entity other than Hess. They also moved to exclude all evidence and testimony relating to punitive damages. The Court denied these motions on December 6, 2011. On the first day of trial, the Court granted both sides a continuing objection to those issues.
20. The AIG Defendants moved and renewed their request for judgment as a matter of law on the grounds that there had allegedly been no evidence of any damages

to Hess Oil and that Hess Oil failed to show the malice required to allow the jury to consider whether punitive damages should be awarded. The Court denied these motions and, out of the presence of the jury, noted that, were it a juror, it would not find malice based on the evidence presented at trial.

21. Upon completion of the trial by jury herein, the jury awarded \$5,000,000 (five million dollars) in compensatory damages and found that the AIG Defendants had acted maliciously. The Court then moved forward to the punitive damages phase of the trial.

22. The jury subsequently found the AIG Defendants liable for \$53,000,000 (fifty-three million dollars) in punitive damages.

ANALYSIS

The AIG Defendants have submitted three motions that the Court seeks to address in this Order. It will address those motions, complete with pertinent standards and points of law, in turn:

**DEFENDANTS/CROSS-PLAINTIFFS CHARTIS CLAIMS, INC.'S AND
COMMERCE & INDUSTRY INSURANCE COMPANY'S MOTION FOR
JUDGMENT AS A MATTER OF LAW UNDER RULE 50**

Rule 50 Standard

W. V. R. Civ. P. 50(b) states that “[i]f, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is deemed to have submitted the action to the jury subject to the court’s later deciding the legal questions raised by the motion. The movant may renew the request for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment.”

“When considering ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the light most favorable to the non-moving party.” *Fredeking v. Tyler*, 224 W.Va. 1, 5 (2009).

The West Virginia Supreme Court of Appeals has articulated specific instructions for a Circuit Court to consider when deciding whether to grant judgment as a matter of law: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.” *Id.* at Syl. pt. 3, citing Syl. pt. 5, *Orr v. Crowder*, 173 W.Va. 335 (1983).

“It is not the role of the trial court to substitute its credibility judgments for those of the jury.” *Tyler*, 224 W.Va. at 6. “[E]very reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true. *Id.* That being said, if the evidence “fails to establish a *prima facie* right to recover, the court should grant the motion.” Syl. pt. 1, *Rodriguez v. Consolidation Coal Co.*, 206 W. Va. 317 (1999); Syl. Pt. 6, *Huffman v. Appalachian Power Co.*, 187 W. Va. 1 (1991).

Discussion

- i. **The jury’s finding that Hess Oil suffered damages is adequately supported by the record to allow that finding to weather a motion for judgment as a matter of law pursuant to W.V. R. Civ. P. 50.**

The AIG Defendants primarily contend that, as a corporate entity, Hess is precluded from collecting damages resulting from aggravation, annoyance, and inconvenience. Citing a Kanawha County Circuit Court case, they assert that corporations “are not natural persons who can experience such feelings.”² They reinforce this notion with persuasive common law from outside of West Virginia.

The AIG Defendants bolster their position with damaging testimony from Hess’s own former president, Mr. William Brown. Mr. Brown’s testimony reflected an admission he made when deposed: Hess oil suffered no damages. The lion’s share of Mr. Brown’s testimony related to the proposition that damages should be awarded based upon the impact to Hess’s shareholders and to their potential liability stemming from the underlying action herein. Naturally, the AIG Defendants oppose this position, stating that under West Virginia law, shareholders are legally distinct from a corporation in which they hold stock. They further argue that corporations cannot experience annoyance and inconvenience damages. Based on the foregoing, they argue that the entire \$58,000,000 verdict should be set aside and that judgment should be entered for the AIG Defendants.

In turn, Hess Oil recognizes that a corporation is generally distinct from its shareholders. However, citing W.Va. Code § 31D-14-1407(d), Hess asserts that the interests of shareholders are joined with the interests of the corporation after a corporation’s dissolution.

This Court first dealt with the issue of whether, under West Virginia law, a corporation can suffer annoyance and inconvenience damages in its “Order Denying

² *Sylvania Properties, LLC v. AIG Claim Services, Inc.*, No. 05-C-1497, slip. Op. at 6-7 (Circuit Court of Kanawha County, Oct. 17, 2008)

Chartis Claims, Inc., and Commerce and Industry Insurance Company's Motions for Partial Summary Judgment Regarding Hess Oil Company, Inc.'s Claim for Bad Faith Damages and Regarding Statute of Limitations." In that Order, the Court noted that little mandatory authority exists on the subject of a corporation's option to demand damages for annoyance and inconvenience. However, it further noted that the West Virginia Supreme Court had covered the issue before in *Hayseeds v. State Farm Fire and Casualty Company*.³ Therein, our State's Supreme Court stated that corporations could be entitled to damages resulting from aggravation, annoyance, and inconvenience. It dictated that

[i]n allowing an award for aggravation and inconvenience, we do not intend that punitive damages be awarded under another sobriquet. For example, a large corporation with an in-place, organized collective intelligence that must litigate a claim for several years may suffer substantial economic loss but little aggravation and inconvenience. On the other hand, a family of five that is required to live for four years in a trailer because an insurance company has declined to pay the fire policy on their \$200,000 house suffers little net economic loss but an enormous degree of aggravation and inconvenience.

Hayseeds v. State Farm Fire and Casualty Company, Syl. Pt. 1, 177 W. Va. 323 (W. Va. 1986).

As noted in the aforementioned Order, with its ruling in *Hayseeds*, the West Virginia Supreme Court of Appeals did not ban damages for aggravation, annoyance and inconvenience for corporate entities. Although the Supreme Court noted that such corporate entities may suffer "little aggravation and inconvenience," it did not say that these types of damages are wholly precluded. *Id.* Other West Virginia Courts have

³ *Hayseeds v. State Farm Fire and Casualty Company*, 177 W. Va. 323 (W. Va. 1986).

similarly interpreted the *Hayseeds* opinion.⁴ The AIG Defendants rely on a case from the Circuit Court of Kanawha County in opposition⁵, but it has no binding authority upon this Court.

Furthermore, in its previous Order addressing this subject, the Court noted that Mr. Brown's testimony was very damaging to Hess's case. However, as damaging as it might have been, it did not wholly preclude the jury from reasonably finding that damage had been done to Hess. Indeed, in the face of such testimony, the triers of fact found that Hess had suffered greatly for the denial of coverage that sparked this litigation.

Next, the AIG Defendants focus much of their attention on the fact that the shareholders, who were allowed to testify and tell the jury of their personal troubles regarding this litigation, were not entitled to damages and that any hardships they might have endured could not be attributed to Hess. However, W.Va. Code § 31D-14-1407(d) states that "[i]f the assets [of a corporate defendant] have been distributed in liquidation," recovery may be enforced "against a shareholder." *Id.*

Under this provision, the shareholders were subject to recovery from the AIG Defendants for AIG's cross-claims which totaled nearly \$900,000 (nine hundred thousand dollars.) The AIG Defendants implicitly acknowledged as much when they refused to stipulate that they would not pursue damages against the shareholders until trial's end.

Ultimately, a small, family-run company such as Hess Oil is just the type of company that our State's Supreme Court attempted to protect with its holding in

⁴ *Tastee Treats, Inc. v. United States Fid. & Guar. Co.*, U.S. Dist LEXIS 125499 (S.D. W. Va. Nov. 29, 2010); *Stafford EMS, Inc. v. J.B. Hunt Transp., Inc.* 2009 U.S. Dist. LEXIS 16043 (S.D. W. Va. Feb. 26, 2009)

⁵ *Sylvania Properties, LLC v. AIG Claim Services, Inc.*, No. 05-C-1497, slip op. at 6-7

Hayseeds, discussed herein. Because *Hayseeds* opened the way for Hess Oil to recover annoyance and inconvenience damages, the Court will not disturb the jury's finding that they did, in fact, suffer such damages.

- ii. **Hess afforded a sufficient basis upon which the jury could produce a finding of actual damages that would entitle Hess to punitive damages.**

The AIG Defendants next urge the Court to set aside the entire punitive damages award, \$53,000,000 (fifty-three million dollars,) on the basis that there was no evidence showing actual malice. They do so despite a specific finding by the jury that the AIG Defendants "actually knew that Hess's claim was proper" and that they "willfully, maliciously, and intentionally utilized an unfair business practice in settling or failed to settle in good faith the claim [...]. See *Trial Verdict Form*. The Court disagrees with the AIG Defendants.

A policyholder must "establish a high threshold of actual malice" to be entitled to an award of punitive damages. *McCormick v. Allstate Ins. Co.*, 202 W. Va. 535, 539 (1998). Under that standard, the policyholder must show that the insurance company "actually knew that the policyholder's claim was proper, but willfully, maliciously, and intentionally" denied the claim or utilized an unfair business practice in settling or failing to settle the claim. *Id.* at 539. The standard further requires a showing of evidence to support such a claim.

Both sides of this dispute present large bodies of evidence and trial argument to reinforce their positions as to whether Hess produced sufficient evidence to sustain a finding of actual malice. The AIG Defendants frame the issue as a simple coverage dispute, and, at worst, "insurer 'negligence, lack of judgment, incompetence, or bureaucratic confusion.'" See AIG Rule 50 Motion, p. 14.

The Court agrees with the AIG Defendants that it is indeed a high bar to establish actual malice sufficient to permit consideration of a punitive damage award. They cite several cases stating and demonstrating as much, and they explain how the instant “negligence, lack of judgment, incompetence, or bureaucratic confusion” does not rise to that high bar.

The AIG Defendants also cite the Court’s statement, made out of the presence of the jury, that it did not believe there to be actual malice in the case at bar. However, “[i]t is not the role of the trial court to substitute its credibility judgments for those of the jury.” *Tyler*, 224 W.Va. at 6. The jury made a very specific finding that fulfills the requisites of actual malice; therefore, the only decision left for the Court is to decide whether or not Hess put forth sufficient evidence to sustain that finding.

Hess did. Hess asserts that there were a plethora of practice violations committed by the AIG Defendants in their handling of the relevant claims at bar, and that these violations were compounded by the fact that coverage was pulled ten years after the cleanup had been underway. Conversely, the AIG Defendants claim that, if any mistakes were made, they were the results of negligence or bureaucratic confusion. 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.

Accordingly, the Court hereby **ORDERS** that “Defendants/Cross-Plaintiffs Chartis Claims, Inc.’s and Commerce & Industry Insurance Company’s Motion for Judgment as a Matter of Law under Rule 50” is **DENIED**.

DEFENDANTS/CROSS-PLAINTIFFS CHARTIS CLAIMS, INC.'S AND
COMMERCE & INDUSTRY INSURANCE COMPANY'S MOTION FOR A NEW
TRIAL UNDER RULE 59(a)

Rule 59(a) Standard

Rule 59(a) of the West Virginia Rules of Civil Procedure permits a new trial to be granted to all or any of the parties and on all or part of the issues in which there has been a trial by jury “for any of the reasons for which new trials heretofore have been granted in actions at law.” However, “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 Public Buidling Asbestos Litigation*, 193 W. Va. at 124, 454 S.E.2d at 418 (quoting 11 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2803 at 32-33); see also, *Morrison v. Sharma*, 200 W. Va. 192, 194, 488 S.E.2d 467, 470 (1997) (same).

“When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses.” Syl. pt. 3, *Id.* Regarding whether the verdict of a jury is supported by the evidence, “every reasonable and legitimate inference, fairly rising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true. Syl. pt. 6, *Toler v. Hager*, 205 W. Va. 468 (1999).

Discussion

As much of the basis for the Defendants' Motion for a New Trial is predicated on the same arguments contained in their "Motion for Judgment as a Matter of Law under Rule 50," the Court hereby incorporates its reasoning therein to discuss the pending motion.

The AIG Defendants put forth several grounds for a new trial pursuant to W. V. R. Civ. P. 59(a). These grounds shall be discussed in turn.

i. The verdict was not against the clear weight of the evidence.

The AIG Defendants preliminarily argue that the jury verdict in this case was against the clear weight of the evidence produced at trial. They argue that neither verdict, compensatory nor punitive, was supported by the evidence presented and that a new trial should be awarded.

As stated *infra*, both sides presented evidence regarding the nature of the underlying coverage dispute, and the jury made a reasonable decision based upon the evidence presented. At trial, evidence arose of repeated practice violations by the AIG Defendants. Documents were lost. A very long time was taken to disclaim coverage. It is not necessary for the Court to revisit all evidence against the AIG Defendants for the purposes of this motion – it is only necessary for the Court to determine whether the body of evidence submitted by Hess Oil was enough to sustain the verdict. It was. Giving every reasonable and legitimate inference to the prevailing party, the Court concludes that the verdict herein was not against the clear weight of the evidence.

ii. Evidentiary rulings in this case did not amount to a substantial injustice that would merit a new trial. No prejudicial error took place.

The AIG Defendants cite three instances of inadmissible evidence heard or admitted in Court that should result in a new trial under Rule 59(a) and West Virginia

Rules of Evidence 401 and 403. The Court begins its analysis of these assertions by noting that “[t]he 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.” Syl. pt. 1, *McDougal v. McCammon*, 193 W. Va. 229 (1995). With that in mind, the Court will now address these instances:

1. *Testimony by the former Hess shareholders as to damages*

Because of the Court’s decision regarding damages stemming from annoyance and inconvenience pursuant to *Hayseeds*, the Court concludes that there is no basis under Rules 401 or 403 to exclude such testimony.

2. *Testimony about other “Bad Faith” cases*

The Court allowed evidence about other insurance “bad faith” cases from within West Virginia pursuant to *Dodrill v. Nationwide Mut. Ins. Co.* 201 W. Va. 1 (1996) via the testimony of David Romano, Esq., and Scott Segal, Esq. The AIG Defendants allege that this admittance was both erroneous and prejudicial because 1) the testimony was irrelevant, and 2) the AIG Defendants had no chance to prepare for and rebut their testimony.

However, the evidence was relevant. *Dodrill* states that proof of a bad general business practice can be obtained from other claimants and attorneys who have dealt with such companies and its claim agents. *To wit*:

We conceive that proof of several breaches by an insurance company of W.Va. code, 33-11-4(9), would be sufficient to establish the indication of a general business practice. It is possible that multiple violations of W.Va. code, 33-11-4(9), occurring in the same claim would be sufficient, since the term “frequency” in the statute must relate not only to repetition of the same violation but to the occurrence of different violations. Proof 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 business practice in regard to claim settlement.

Id.

Here, the testimony came not from attorneys who have dealt with Chartis, but from other AIG, Inc.-related firms. The Court concludes that the relationship between the attorneys who testified and the AIG Defendants was proximate enough to permit the testimony to be admitted, or at the very least, that these attorneys were sufficiently familiar with the companies' general business practices in regards to claims settlement. Accordingly, under *Dodrill*, the testimony was relevant. The fact that the cases to which the attorneys testified were factually dissimilar does not hold sufficient weight to make the testimony irrelevant.

Furthermore, such testimony was not unduly prejudicial. The witnesses were disclosed more than a month before trial, and the Court disallowed depositions to be taken because the depositions were noticed outside of the discovery window previously established by this Court.

3. *Evidence of alleged additional cost of clean-up beyond the policy limits*

The AIG Defendants' last evidentiary objection hinges on the notion that the jury should not have been permitted to hear evidence regarding the alleged additional cost of cleanup beyond the pertinent policy's \$1,000,000 (one million dollars) policy limit.

However, evidence was elicited from AIG's environmental consultant that cleanup of the Mt. Storm site could have been completed within policy limits, but it was not, due to decisions regarding costs by the AIG Defendants. Evidence also came forth

indicating that the denial of coverage led to additional remediation costs. The AIG Defendants' expert testified otherwise, but the jury chose not to believe his testimony. Therefore, the Court concludes that the testimony regarding additional expenses was highly relevant to the amount of damages at bar.

iii. The jury instructions were fair and accurate to both parties, and no prejudicial error took place that would merit a new trial.

1. Both parties had an equal ability to review the others' proposed jury instructions.

Upon receiving a multitude of jury instructions from both parties, the Court, for the interest of judicial efficiency and for the purposes of keeping matters understandable to a lay jury, ultimately decided to have both parties present their "six best" instructions to the Court. Furthermore, at the Final Pre-Trial Conference herein, the Court told both parties that it would permit amendments to instructions at any time prior to instructing the jury. No prejudice existed towards the AIG Defendants.

2. Instructions allowing the jury to award damages "to Hess and its shareholders"

Because of the Court's decision regarding damages stemming from annoyance and inconvenience pursuant to *Hayseeds*, the Court concludes that these instructions were proper.

3. The misinterpretation instruction

The AIG Defendants also move for a new trial on the basis of an alleged inconsistency in the jury instructions regarding misrepresentation. Two instructions on misrepresentation were presented to the jury:

The law on misrepresentation:

33-6-7. Representations in applications.

All statements and descriptions in any application for an insurance policy or in negotiations therefore, by or in behalf of the insured, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealments of facts, and incorrect statements shall not prevent a recovery under the policy unless:

- (a) Fraudulent; or
- (b) Material either to acceptance of the risk, or to the hazard assumed by the insurer; or
- (c) The insurer in good faith would either not have issued the policy, or would not have issued a policy in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or otherwise.

Hess Oil's instruction on misrepresentation:

All statements and descriptions in any application for an insurance policy, by or on behalf of the insured, shall be deemed to be 'representations and not warranties. Accordingly, misrepresentations, omissions, concealments of facts, and incorrect statements, whether intentional or negligent, shall not prevent a recovery under an insurance policy unless:

- (a) Fraudulent; or
- (b) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
- (c) The insurer in good faith would either not have issued the policy, or would not have issued a policy in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or otherwise.

Misrepresentation omissions, concealments of facts, and incorrect statements on an application for insurance by an insured ***must be knowingly made with an intent to deceive the insurer*** and relate to the facts affecting the policy in order to be a legitimate basis for denial of a claim [...]

(emphasis added by court)

The AIG Defendants' instructions:

Misrepresentation under W. Va. Code § 33-6-7

The AIG Defendants contend that Hess Oil is prevented from recovering under the policy because it, or its representatives, made a misrepresentation in its application for insurance. To succeed, the AIG defendants need only prove by a preponderance of the evidence that Hess made a misrepresentation(s) in its application for insurance and those misrepresentations were material to the Chartis Defendants' acceptance of the risk, or to the hazards assumed by AIG.

A misrepresentation may result from silence or from the suppression of facts as well as from an affirmative representation.

The AIG Defendants take issue with the bolded portion of the Hess instruction above. They claim it is a misinterpretation of the law and that it could not be cured by the AIG Defendants' correct instruction, pursuant to *Dep't of Highways v. Bartlett*, 156 W. Va. 431 (1973). ("It is error to give inconsistent instructions, even though one of them embodies a correct statement of law, inasmuch as the jurors in such circumstances are left to determine which statement of law is correct and inasmuch as it is impossible for a court later to determine upon what legal principle the verdict is based.") On the other hand, Hess contends that the inaccuracy was not considered by the jury and that it certainly does not rise to the level of meriting a new trial.

"A verdict should not be disturbed based on the formulation of language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties." *Tenant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97 (1995). Furthermore, contradictory instructions must be "palpably inconsistent" to merit a new trial. *Karr v. Baltimore*, 76 W. Va. 526 (1915).

The Court does not believe this error to have had an effect on the ultimate verdict in this case. Even if the two instructions were palpably inconsistent with one another, taking the factual circumstances and ultimate disposition of the case into mind, the Court concludes that the instructions, as given, were fair to both parties.

4. *The Contract Statute of Limitations Instruction*

The AIG Defendants next assert that there was error when the Court gave Hess's instruction regarding the statute of limitations in breach of contract cases. They argue that, because they stipulated that they were no longer pursuing a breach of contract claim against Hess, this instruction was so prejudicial as to merit a new trial.

The Court disagrees. Although it was perhaps unnecessary, the instruction prejudiced the AIG Defendants in no way. For the reasons articulated directly above, the Court will not grant a new trial because of this jury instruction.

iv. The AIG Defendants were not unduly prejudice by being referred to as the "AIG Defendants."

The AIG Defendants next contend that they were unduly prejudiced by being referred to as such. They concede that the matter was within the Court's discretion. See *Hatcher v. McBride*, 221 W. Va. 5, 9 (2006).

Those Defendants had more than sufficient ties with AIG for them to be rationally and sensibly referred to as such. These ties have been undisputed. As much as the Court recognizes that the word "AIG" might carry with it negative connotations, the AIG Defendants cannot ignore their ties with AIG when appearing in Court.

The Court also disagrees with the AIG Defendants' assertion that AIG was in no way involved in this case. For several reasons listed in Hess's response to the pending motion, they were a substantial part of the case. The Court recognizes that the AIG

Defendants' argument is essentially predicated upon Rule 403 of the W. Va. Rules of Evidence; however, the Court fails to even see the need to take its analysis that far. AIG was an integral part of the underlying cause of action. That is a fact, and it is not far more prejudicial than probative. The AIG Defendants cannot avoid that.

v. Hess made no unduly inflammatory remarks in closing arguments that would merit a new trial.

The Court concludes that none of the remarks by Hess were so unduly inflammatory as to merit a new trial. While Counsel may have argued with vigor and used a degree of hyperbole, none of the remarks rose to such a level as to violate the principles announced in *Matheny v. Fairmont Gen Hosp.*, 212 W. Va. 740 (2002). ("Great latitude is allowed counsel in argument of cases, but counsel must keep within the evidence, not make statements calculated to inflame, prejudice, or mislead the jury, nor permit or encourage witnesses to make remarks which would have a tendency to inflame, prejudice, or mislead the jury.")

Accordingly, "Defendants/Cross-Plaintiffs Chartis Claims, Inc.'s and Commerce & Industry Insurance Company's Motion for a New Trial under Rule 59(a)" is hereby **DENIED.**

DEFENDANTS/CROSS-PLAINTIFFS CHARTIS CLAIMS, INC'S AND COMMERCE
& INDUSTRY INSURANCE COMPANY'S MOTION FOR A NEW TRIAL ON
PUNITIVE DAMAGES AND/OR TO ALTER OR AMEND THE JUDGMENT
UNDER RULE 59(e) WITH RESPECT TO PUNITIVE DAMAGES

Standards for a Post-trial Review of a Punitive Damages Verdict

Initial Determination

A trial court's post-trial review of a punitive damages award must include "a determination of whether the conduct of an actor toward another person entitles that person to a punitive damages award under *Mayer v. Frobe*.⁶" *Alkire v. First Nat'l Bank of Parsons*, 197 W. Va. 122 (1996). Under the *Alkire* decision, such a post-trial review must include a determination of whether an adequate basis existed for finding the Defendant's conduct satisfied *Mayer*, that is, a determination must be made as to whether the plaintiff established by a preponderance of the evidence that the Defendants' conduct was performed with gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference or civil obligations. "When it appears, from the facts in evidence, that a jury could not legally award [punitive] damages, and it also appears that a verdict included such damages, it is the duty of the trial court, upon proper motivation, to set aside the verdict[.]" Syl. pt. 5, *Cato v. Silling*, 137 W. Va. 694 (1952).

Evaluating Excessiveness

The amount of punitive damages award must "be within the constitutional boundaries set by this Court [...]" *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 553 (2010). Concerning punitive damages, there must be a "reasonable constraint on jury discretion [and] a meaningful and adequate review by the trial court. *Garnes v.*

⁶ *Mayer v. Frobe*, 40 W. Va. 246 (1895).

Fleming Landfill, Inc., 186 W. Va. 656, 667 (1991). When making a post-trial review of a punitive damage award, a trial court must “examine the amount of the award pursuant to the aggravating and mitigating criteria set out in *Garner*” and “the compensatory/punitive damage ratio established in *TXO*.⁷” Syl. pt. 6, *Perrine*, 225 W. Va. 482.

The non-exclusive aggravating factors contemplated in *Perrine* are as follows:

1. The reprehensibility of the defendant’s conduct;
2. Whether the defendant profited from the wrongful conduct;
3. The financial position of the defendant;
4. The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed; and
5. The cost of litigation to the Plaintiff.

Id. at 553.

The non-exclusive mitigating factors as contemplated in *Perrine* are as follows:

1. Whether the punitive damages bear a reasonable relationship to the harm that is likely to occur and/or has occurred as a result of the defendant’s conduct;
2. Whether punitive damages bear a reasonable relationship to compensatory damages;
3. The cost of litigation to the defendant;
4. Any criminal sanctions imposed on the defendant for his conduct;
5. Any other civil actions against the same defendant based upon the same conduct;

⁷ *TXO Production Corp. v. Alliance Resources* 187 W.Va. 457 (1992)

6. Relevant information that was not available to the jury because it was unduly prejudicial to the defendant; and
7. Additional relevant evidence.

Id. at 554.

Furthermore, a rough ratio of punitive to compensatory damages of 5:1 has been established as a guideline for the Court. *Id.* at 556 ; Syl. Pt. 15, *TXO*, 187 W. Va. 457. The limit on punitive damages may be lowered in a case where compensatory damages are very high⁸; however, “to accomplish punishment and deterrence for such a wealthy company [...], a punitive damages award must necessarily be large.” *Perrine*, 225 W. Va. at 555.

Analysis

- i. **An award of punitive damages was proper because the denial of insurance coverage was accompanied by actual malice, thus allowing a common law bad faith claim pursuant to *Hayseeds*.**

The Court begins its analysis by answering the question of whether the conduct of the AIG Defendants toward Hess Oil entitles Hess Oil to a punitive damages award under *Frobe*. The Court finds that it does and that Hess Oil should be awarded punitive damages.

Insurance claims are tortious in nature. *Wilt v. State Auto. Mut. Ins. Co.*, 203 W. Va. 165 (1998). Consequently, punitive damages may be awarded in insurance bad faith cases. *Poling v. Motorists Mut. Ins. Co.*, 192 W. Va. 46 (1994); *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W. Va. 323 (1986). As discussed earlier *infra*, as a prerequisite to the award of punitive damages, the insurer must have refused to pay on an insured’s property damage claim, and that property damage claim must be been

⁸ See *Id.*

accompanied by “actual malice” as contemplated in *McCormick v. Allstate Ins. Co.*, 197 W. Va. 415 (1996).⁹ The insured must have also substantially prevailed in the underlying contract action. *Jordache Enters., Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 204 W. Va. 465 (1998). The Court will not revisit its discussion on the jury’s finding of malice, but it will note that such a finding was made.

ii. Taken as a whole, the aggravating and mitigating factors justify the award of the punitive damages verdict.

Finding that the award of (but not necessarily the amount of) punitive damages was appropriate, the Court next moves to determine if the award of punitive damages was excessive. The Court takes great care not to substitute its fundamental judgment in place of that of the jury; however, it recognizes that a review of an award of punitive damages is a necessary and important part of the judicial process to protect the due process rights of the Defendant.

In *Perrine v. E.I. du Pont De Nemours & Co.*, 225 W. Va. 482 (2010), a case with which this Court is very familiar, our State’s Supreme Court addressed the issue of punitive damages. It mandated a three-step process for trial courts to follow in determining the excessiveness of punitive damages: 1) assess any aggravating factors, 2) assess any mitigating factors, and 3) compare the ultimate verdict with a general 5:1 ratio of compensatory to punitive damages.

1. Aggravating Factors

The non-exclusive aggravating factors contemplated in *Perrine* are as follows:

a. The reprehensibility of the defendant’s conduct

⁹ “Actual malice” means that the insurer actually knew that the insured’s claim was proper, but willfully, maliciously, and intentionally denied the claim. As this notion applies to this case, it is discussed earlier herein.

Hess asserts several instances in which the AIG Defendants allegedly behaved reprehensively, including, but not limited to: violations of industry standards, calling its insured a liar, alleging misrepresentation in the face of its own failure to investigate, putting their interests above those of the insured, and waiting ten years to disclaim coverage. The AIG Defendants counter that they never behaved reprehensively. They assert that no physical harm or suffering was endured by Hess. They contend that there was no deceit or trickery at any stage of its denial of coverage.

The Court does not find the AIG Defendants' denial of coverage almost ten years after the cleanup began to be without moral or legal flaw. The Court most certainly finds the timeliness of the denial suspect, and it sympathizes with the insured for the large time gap imposed between cleanup and subsequent denial of coverage. Furthermore, the AIG Defendants were found to have violated trade practices, which in itself could be considered reprehensible.

b. Whether the defendant profited from the wrongful conduct

The AIG Defendants would have profited from the wrongful conduct. It is common sense that its denial of coverage, an act that was found to be improper, would have saved it a substantial amount of money had Hess Oil not chosen to bring this lawsuit.

c. The financial position of the defendant

The AIG Defendants deal in enormous sums of money. Given the testimony regarding the proximity of the AIG Defendants to AIG, Inc., the Court recognizes and employs the notion that "to accomplish punishment and deterrence for such a wealthy

company [...], a punitive damages award must necessarily be large.” *Perrine*, 225 W. Va. at 555.

- d. The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed

This factor works both ways regarding punitive damages in bad faith claims. On one hand, if the insurer knows the perils of bad faith practices, it is more likely to engage in fair and equitable settlement practices. On the other hand, a Plaintiff is less likely to accept what he or she believes to be a “lowball” settlement if that Plaintiff believes that a much higher verdict can be achieved at trial. Believing that, ultimately, punitive damages of this sort do more to help the settlement process than harm it, the Court concludes that this factor favors the insured’s position, as was found in *Perrine*.

- e. The cost of litigation to the Plaintiff

The value of the Plaintiffs’ attorneys fees were in excess of \$450,000. The fact that Hess Oil did not finance this litigation does not reduce the cost necessary to prepare for trial. Pursuant to *Perrine*, the Court takes this high cost of litigation into consideration.

2. *Mitigating Factors*¹⁰

- a. Whether the punitive damages bear a reasonable relationship to the harm that is likely to occur and/or has occurred as a result of the defendant’s conduct;

The jury awarded five million dollars for compensatory damages arising from the improper denial of coverage for the Mt. Storm site; however, the Court concludes that the amount of punitive damages awarded does not bear a reasonable relationship to the actual harm wrought upon Hess Oil. Hess Oil contends that the conduct of the AIG Defendants

¹⁰ The AIG Defendants assert that only the first three mitigating factors prescribed in *Perrine* are present in this case.

“could have ruined the lives of Hess’s former shareholders.” See Response to 59(e) Motion, p. 11. It did not. The Court will not substitute its judgment for that of the jury; however, it does not believe that an award of \$53,000,000 bears a reasonable relationship to the harm that Hess Oil actually endured.

- b. Whether punitive damages bear a reasonable relationship to compensatory damages;

Five million dollars in compensatory damages were awarded in this case. Fifty-three million dollars were awarded as punitive damages. This constitutes a 10.6:1 ratio, which will be discussed further *infra*.

- c. The cost of litigation to the defendant;

Much like Hess Oil, the AIG Defendants also expended substantial resources in preparing and litigating this action. The Court takes this expenditure into account when determining to reduce the amount of punitive damages.

iii. The 10.6:1 ratio of punitive damages to compensatory damages violates the “outer limit” of a 5:1 award as prescribed in *TXO* and *Perrine*.

As Hess Oil concedes, “the outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1.” Syl. pt. 15, *TXO Production Corp*, 187 W. Va. 457 (1992), *affirmed by* 509 U.S. 443, 113 S.Ct.2711, 125 L.Ed2d 366 (1993). Hess further notes that, if the defendant has acted with “actual evil intention,” much higher ratios are not *per se* unconstitutional. *Id.*

The Court concludes that the actions of the AIG Defendants are a far cry from “actual evil intent.” “Actual malice,” which the jury found to be present in the instant

denial of coverage, is a threshold requirement for the issue of any punitive damage awards. *Hayseeds*, 177 W. Va. at 331. On the other hand, “actual evil intention” is another, much higher standard.

The facts are this: In this case, the jury found there to be an improper denial of coverage. Shareholders testified that the denial of coverage caused them much stress, both emotionally and financially. These facts fall far from the black-hearted actions contemplated in *TXO* that would cause this Court to neglect the 5:1 damage cap that has been a mainstay of West Virginia punitive damages law.

Conclusion Regarding the Excessiveness of Punitive Damages

Punitive damages have several purposes, including: 1) punishing the defendant; 2) deterring others from pursuing a similar course of conduct; 3) providing additional compensation for the egregious conduct to which the plaintiff has been subjected; 4) encouraging a plaintiff to bring an action where he or she might be discouraged by the cost of the action; 5) as a substitute for personal revenge by the injured party; and 6) encouraging good faith efforts at settlement.

Regarding 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 award a substantial amount of damages to Hess Oil; however, the Court also recognizes that the AIG Defendants’ conduct in no way approached the “actual evil intent” that would deem an award exceeding the prescribed 5:1 ratio proper. See *TXO*, 187 W. Va. 457.

Accordingly, it is hereby **ORDERED** that the award of punitive damages herein shall be reduced to \$25,000,000 (twenty-five million dollars,) thus bringing the award within the ratio mandated in *Perrine* and *TXO*.

It is further **ORDERED** that the AIG Defendants' request for a new trial on punitive damages is hereby **DENIED**.

IT IS SO ORDERED.

The Clerk of this Court is directed to provide certified copies of this Order to:

Michael J. Romano, Esq.
Law Office of Michael J. Romano
128 S. Second St.
Clarksburg, WV 26301

John H. Tinney, Esq.
John H. Tinney, Jr., Esq.
Tinney Law Firm
222 Capitol St., Suite 500
Charleston, WV 25301

James A. Varner, Esq.
Pullin, Fowler, Flanagan, Brown &
Poe, PLLC
Empire Building – 400 W. Main St.
Post Office Drawer 2040
Clarksburg, WV 26302-2040

Daniel J. Lynn, Esq.
Jackson & Campbell, P.C.
1120 20th St., N.W., South Tower
Washington, D.C. 20036

ENTER: May 1, 2012

 Thomas A. Be Dell
THOMAS A. BEDELL, Judge

STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT:

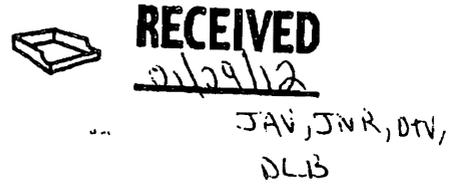
I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18th
Family Court Circuit of Harrison County, West Virginia, hereby certify the
foregoing to be a true copy of the ORDER entered in the above styled action

on the 1 day of May, 2012

IN TESTIMONY WHEREOF, I hereunto set my hand and affix

Seal of the Court this 2 day of May, 2012.

Donald L. Kopp II
Fifteenth Judicial Circuit & 18th Family Court
Circuit Clerk
Harrison County, West Virginia

**RECEIVED**
01/29/12
JAV, JWR, DTW,
DLB

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

RYAN ENVIRONMENTAL, INC.,

Plaintiff,

v.

CIVIL ACTION NO: 10-C-20
Judge Thomas A. Bedell

HESS OIL COMPANY, INC.
AIG DOMESTIC CLAIMS, INC.,
Division of AIU HOLDINGS, INC.,
and COMMERCE & INDUSTRY
INSURANCE COMPANY,

Defendants.

JUDGMENT ORDER

On the 12th day of December 2011, came the Defendant/Cross-Plaintiff, Hess Oil Company, Inc., a West Virginia corporation (hereinafter, "Hess Oil"), by counsel, Michael J. Romano, of the Law Office of Michael J. Romano, and James A. Varner, of McNeer, Highland, McMunn & Varner, L.C., its attorneys, and the Defendant/Cross-Plaintiff, AIG Domestic Claims, Inc., (n/k/a Chartis Claims, Inc.) a Division of AIU Holdings, Inc., and Commerce & Industry Insurance Company (hereinafter, collectively, "AIG"), foreign corporations, by counsel, John H. Tinney, John H. Tinney, Jr., of The Tinney Law Firm, and Daniel J. Lynn of Jackson & Campbell, their attorneys, for a trial.

The case, having matured for trial on said date, the Court conducted *voir dire*, the parties exercised peremptory challenges, and thereupon came a jury of eight (six regular jurors and two alternate jurors) composed of the following persons who were impaneled according to law and sworn to well and truly try the issues joined in this civil action and render a true verdict according to the evidence:

1. Nancy Ann Krivosky
2. Sabrina Newhouse
3. Paul Myers
4. Neil Wolfe
5. Anita Mazurik
6. Twilah Coffman
7. Susan Clise (alternate)
8. Anita Talerico (alternate)

Whereupon, the issues were tried before the Court and the jury on the 12th, 13th, 14th, 15th, 16th, 19th, and 20th days of December 2011.

Following opening statements, Hess Oil presented its case-in-chief, followed by AIG's motions for judgment as a matter of law all of which were **DENIED** by the Court. Thereafter, AIG presented its case-in-chief, followed by motions for judgment as a matter of law from both parties, all of which were **DENIED** by the Court.

The Court then reviewed proposed instructions and verdict forms to be submitted to the jury, heard the arguments and objections of parties' counsel and informed the parties' counsel of the Court's action upon such proposed instructions. The verdict forms proposed by the parties were jointly amended by the parties with the amended verdict form being submitted to the jury without objection. The parties' counsel noted their objections to the Court's rulings regarding the proposed instructions upon the record, which such objections so made are preserved in this matter.

At the conclusion of all of the evidence, and after hearing the instructions of the Court and the argument of counsel, the jury consisting of eight persons (six regular jurors and two alternate jurors) retired to their chambers to consider the verdict as to the parties to this action. The Court having inquired of all parties and noting no objection therefrom, permitted all eight jurors to

deliberate as to their verdict.¹ After some time, the jury then returned to the Court and upon their oaths, presented their verdict as follows:

VERDICT FORM

Please answer the following questions. When completed, the foreperson must sign and date the verdict form and should advise the bailiff that you have reached a verdict.

1. Do you find, by a preponderance of the evidence, that Hess Oil's claim is covered under the Commerce & Industry Insurance Company Policy?

Yes _____ **X** _____ No _____

If you answered "Yes" to Question No.1, please proceed to Question No.2. If you answered "No" to Question No.1, you have found for the AIG Defendants. Please proceed Question No. 7.

2. Do you find that the AIG Defendants violated the Unfair Claims Settlement Practices Act with such frequency as to indicate a general business practice in adjusting the claims of the Hess Oil Company and its former shareholders?

Yes _____ **X** _____ No _____

3. Do you find that the AIG Defendants violated the duty of good faith and fair dealing in adjusting the claims of the Hess Oil Company and its former shareholders?

Yes _____ **X** _____ No _____

4. Do you find by a preponderance of the evidence that the conduct of the AIG Defendants proximately caused damages to Hess Oil?

Yes _____ **X** _____ No _____

If you answered "No" to Question No.4, you are finished, as Hess Oil cannot recover damages. Please proceed to the end, have the foreperson sign and date the verdict form and inform the bailiff that you have reached your verdict.

¹ The Court concluded that all eight jurors should participate in deliberations and a unanimous verdict, ~~due to the close proximity of the completion of trial to the Christmas Holiday in order to address stated concerns of certain jurors indicating that they might not be able to remain through the punitive damage phase of the trial due to prior obligations.~~

MB
1/9/12

5. What amount of money do you find will fairly and reasonably compensate Hess Oil through its former shareholders for the way that the AIG Defendants handled their underground storage tank claim?

\$ \$5,000,000.00

6. Do you find that the AIG Defendants actually knew that Hess Oil's claim was proper and that the AIG Defendants willfully, maliciously and intentionally utilized an unfair business practice in settling, or failed to settle in good faith, the claim of the Hess Oil and its former shareholders, therefore, entitling Hess Oil to punitive damages?

Yes X No _____

If you answered "Yes" to Question No.1, you are finished. Please proceed to the end, have the foreperson sign and date the verdict form and inform the bailiff that you have reached your verdict.

7. If you answered "No" to Question No.1, what amount of money do you find will fairly and reasonably compensate AIG for damages?

\$ _____

Your verdict is complete. Have the foreperson sign and date the verdict form, and inform the bailiff that you have reached your verdict.

12/20/11
DATE

/s/ Twilah Coffman
SIGNATURE OF FOREPERSON

Following the return of the above verdict, the Court then inquired of the parties' respective counsel whether there was any objection to the form of the verdict as returned to which both parties voiced no objection in response. The Court then inquired whether any party desired to have the jury polled, to which AIG answered in the affirmative. Thereafter, the Court polled each juror and received their individual affirmation of the verdict.

The Court having previously bifurcated the issue of punitive damages, and the jury having answered in the affirmative with regard to Question No. 6 of the Verdict Form, the Court then proceeded with the punitive phase of this action. Hess Oil then presented its case-in-chief regarding

punitive damages, and AIG chose to call no witnesses in rebuttal.

At the conclusion of the evidence regarding punitive damages, and after hearing the instructions of the Court, which included the factors set forth in *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), and the argument of counsel, the jury consisting of same eight persons retired to their chambers to consider the punitive damage verdict, if any, as to this action.

After some time, the jury delivered a written inquiry to the Court stating, “[m]ay we have the instructions the judge read? /s/ Twiliah Coffman”

The Court, having read in open court of the jury’s request *verbatim*, inquired of the parties as to any position or objection regarding the same. Receiving approval of the parties to the jury’s request and noting no objection thereto, the Court provided the jury with a copy of the Court’s instructions regarding punitive damages.

After some time, the jury then returned to the Court and upon their oaths, presented their verdict as follows:

VERDICT FORM - PUNITIVE PHASE

1. We the jury assess punitive damages in the following amount:

\$ 53,000,000.00

(After you have completed Question #1, have the foreperson sign the bottom of this form and summon the Bailiff.)

12/20/11
DATE

/s/ Twiliah Coffman
SIGNATURE OF FOREPERSON

The Court than inquired whether any party desired to have the jury polled, to which both parties responded in the negative.

Therefore, be it **ADJUDGED** and **ORDERED** that the Court accepts the verdict of the jury finding coverage under the Commerce & Industry Insurance Company Policy issued to Hess Oil Company.

It is further **ADJUDGED** and **ORDERED** that a judgment be entered in favor of Defendant/Cross-Plaintiff, Hess Oil Company, Inc., against the Defendant/Cross-Plaintiff, AIG Domestic Claims, Inc., (n/k/a Chartis Claims, Inc.) a Division of AIU Holdings, Inc., and Commerce & Industry Insurance Company, jointly and severally, for compensatory, liquidated damages in the amount of Five Million Dollars (\$5,000,000.00).

Be it further **ADJUDGED** and **ORDERED** that a judgement be entered in favor of Defendant/Cross-Plaintiff, Hess Oil Company, Inc., against the Defendant/Cross-Plaintiff, AIG Domestic Claims, Inc., (n/k/a Chartis Claims, Inc.) a Division of AIU Holdings, Inc., and Commerce & Industry Insurance Company, jointly and severally, for punitive damages in the amount of Fifty Three Million Dollars (\$53,000,000.00).

It is further **ADJUDGED** and **ORDERED** that post-judgment interest on this judgment shall accrue, as determined by the W. Va. Supreme Court of Appeals pursuant to West Virginia Code §56-6-31 from the date of the verdict set forth herein.

It is further **ORDERED** that costs in this matter shall be taxed and assessed under the law of this State in favor of Defendant/Cross-Plaintiff, Hess Oil Company, Inc., and against the Defendant/Cross-Plaintiff, AIG Domestic Claims, Inc., (n/k/a Chartis Claims, Inc.) a Division of AIU Holdings, Inc., and Commerce & Industry Insurance Company, jointly and severally and any

additional taxable costs brought forth by proper motion of Hess Oil Company, Inc.

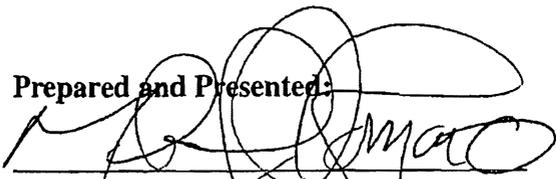
It is further **ORDERED** that any post-trial motions of either party shall be filed within ten (10) days of the entry of this Order.

The Circuit Clerk is hereby directed to send a copy of the foregoing Judgment Order to counsel of record at their addresses listed below.

ENTER January 9, 2012


JUDGE THOMAS A. BEDELL

Prepared and Presented:



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Gina M. Renzelli
W. Va. State Bar ID No. 11233
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and

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*Counsel for Defendants, AIG Domestic
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Commerce & Industry Insurance Co.*

and

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John H. Tinney, Jr.
W. Va. State Bar ID No. 6970
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304-720-3315
*Counsel for Defendants, Chartis Claims,
Inc.
(f/k/a AIG Domestic Claims, Inc.)
and Commerce & Industry Insurance*

STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18th
Family Court Circuit of Harrison County, West Virginia, hereby certify the
foregoing to be a true copy of the ORDER entered in the above styled action
on the 9th day of January, 2012.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix

Seal of the Court this 9th day of January, 2012

Donald L. Kopp II
Fifteenth Judicial Circuit & 18th Family Court
Circuit Clerk
Harrison County, West Virginia