IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1992 Term

No. 20281

TXO PRODUCTION CORP., A DELAWARE CORPORATION
LICENSED TO DO BUSINESS IN WEST VIRGINIA,
Appellant

v.

ALLIANCE RESOURCES CORP., A TEXAS CORPORATION
LICENSED TO DO BUSINESS IN WEST VIRGINIA; TUG FORK
LAND COMPANY, A WEST VIRGINIA CORPORATION; GEORGE KING,
AN INDIVIDUAL; AND GROVER C. GOODE, AN INDIVIDUAL,
Appellees

Appeal from the Circuit Court of McDowell County
Honorable Booker T. Stephens, Judge
Civil Action No. 85-C-550

AFFIRMED

Submitted: March 10, 1992
Filed: May 14, 1992

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JUSTICE NEELY delivered the Opinion of the Court.

McHugh, C. J., and Miller, J., concur and reserve the right to file concurring opinions.

SYLLABUS BY THE COURT

1. "The common law of England, so far as it is not repugnant to the principles of the constitution of this state, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be, altered by the Legislature of this state." W. Va. Code, 2-1-1 [1923].

2. Slander of title is actionable under West Virginia common law.

3. The elements of slander of title are:
1. publication of
2.a false statement
3.derogatory to plaintiff's title
4. with malice
5.causing special damages
6.as a result of diminished value in the eyes of third parties.

4. A tenant in possession under a lease is estopped to deny the title of his landlord.

5. "In determining whether the verdict of a jury is supported by the evidence, every 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." Syllabus Point 3 of Walker v. Monongahela Power Company, 147 W. Va. 825, 131 S.E.2d 736 (1963).

6. Attorneys' fees incurred in removing spurious clouds from a title qualify as special damages in an action for slander of title.

7. Admission of extrinsic acts evidence under Rule 404(b) of the West Virginia Rules of Evidence [1985] may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.

8. Protection against unfair prejudice from evidence admitted under Rule 404(b) of the West Virginia Rules of Evidence [1985] is provided by: (1) the requirement of Rule 404(b) that the evidence be offered for a proper purpose; (2) the relevancy requirement of Rule 402 - as enforced through Rule 104(b); (3) the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice; and, (4) Rule 105, which provides that the trial court shall, upon request,

instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.

9. "'Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' State v. Louk, 171 W. Va. 639, 301 S.E.2d 596, 599 (1983)." Syllabus Point 2, State v. Peyatt, 173 W. Va. 317, 315 S.E.2d 574 (1983).

10. "Rules 402 and 403 of the West Virginia Rules of Evidence [1985] direct the trial judge to admit relevant evidence, but to exclude evidence whose probative value is substantially outweighed by the danger of unfair prejudice to the defendant." Syllabus Point 4, Gable v. The Kroger Co., ___ W. Va. ___, 410 S.E.2d 701 (1991).

11. "The language of Rule 804(b)(5) of the West Virginia Rules of Evidence and its counterpart in Rule 803(24) requires that five general factors must be met in order for hearsay evidence to be admissible under the rules. First and most important is the trustworthiness of the statement, which must be equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule. Second, the statement must be offered to prove a material fact. Third, the statement must be shown to be more probative on the issue for which it is offered than any other evidence the proponent can

reasonably procure. Fourth, admissions of the statement must comport with the general purpose of the rules of evidence and the interest of justice. Fifth, adequate notice of the statement must be afforded the other party to provide that party a fair opportunity to meet the evidence." Syllabus Point 5, State v. Smith, 178 W. Va. 104, 358 S.E.2d 188 (1987).

12. Petitions for review of punitive damages awarded before 5 December 1991 should address each and every factor set forth in syllabus points 3 and 4 of Garnes v. Fleming Landfill, ___ W. Va. ___, 413 S.E.2d 897 (1991) with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage.

13. "When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into

account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant."

Syllabus Point 3, Garnes v. Fleming Landfill, ___ W. Va. ___, 413 S.E.2d 897 (1991).

14. "When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:

(1) The costs of the litigation;

(2) Any criminal sanctions imposed on the defendant for his conduct;

(3) Any other civil actions against the same defendant, based on the same conduct; and

(4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury." Syllabus Point 4, Garnes v. Fleming Landfill, ___ W. Va. ___, 413 S.E.2d 897 (1991).

15. 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. However, when the defendant has acted with actual evil intention, much higher ratios are not per se unconstitutional.

Neely, J.:

In this case, TXO Production Corporation, a subsidiary of USX, knowingly and intentionally brought a frivolous declaratory judgment action against the appellees to clear a purported cloud on title. TXO's real intent, however, was to reduce the royalty payments under a 1,002.74 acre oil and gas lease. Appellees counterclaimed alleging that TXO's actions were a slander of appellees' title. TXO now appeals the verdict against it for $19,000 in compensatory damages and $10,000,000 in punitive damages assigning three primary errors: (1) no cause of action for slander of title exists in West Virginia, and even if it does, the appellees did not prove the essential elements of slander of title at trial; (2) the circuit court erred in admitting testimony of lawyers involved in suits against TXO in other states to show plan, knowledge and intent in contravention of the West Virginia Rules of Evidence; and (3) the award of punitive damages in this case is a violation of due process as enunciated in Haslip v. Pacific Mutual Life Ins. Co., ___ U. S. ___ (1991) and Garnes v. Fleming Landfill, ___ W. Va. ___, 413 S.E.2d 897 (1991). We find no reversible error in the lower court's conduct of the trial and, because appellant and its agents and servants failed to conduct themselves as gentlemen, we decline to enter a remittitur. Thus, we affirm.

I.

This case centers in the oil and gas development rights to 1,002.74 acres in McDowell County known as the "Blevins Tract." Tug Fork Land Company manages the Blevins Tract. In 1984, Tug Fork leased the oil and gas development rights to George King, doing business as Georgia Fuels. Mr. King in turn assigned his lease to Alliance Resources Corporation, reserving an overriding royalty interest to Georgia Fuels.

In late 1984, TXO became interested in the oil and gas in the Blevins Tract and approached Brian Robinson, the president and chairman of the board of Alliance Resources, about purchasing Alliance's rights in the Blevins Tract. Mr. Robinson declined to sell Alliance's interest outright but did propose a joint venture in which TXO would pay 75 percent of the drilling costs and Alliance Resources would pay 25 percent. Under this arrangement, Tug Fork would receive a 12.5 percent royalty, Georgia Fuels would receive a 6.25 percent royalty, and Alliance Resources would receive a 1 percent royalty, for a total royalty burden of 19.75 percent. TXO and Alliance would then share an 80.25 percent working interest. TXO rejected this proposal.

Only a few months later, in February, 1985, however, TXO approached Mr. Robinson with a much better offer. TXO offered to

pay all of the drilling costs, pay 22 percent in royalties, and pay Alliance $20 per acre for its interest in the Blevins Tract. Mr. Robinson accepted what he considered to be such a "phenomenal offer."[1]

[1]The pertinent parts of the 2 April 1985 agreement state:

> The interest in said leases assigned Assignee hereunder shall be subject to such interest's proportionate part of the royalty interest as provided for in said leases and to the terms, conditions and provisions set forth therein. Such interest shall also be subject to such interest's proportionate part of all overriding royalties, production payments and any other payments and agreements of record.
>
> This Assignment is further made expressly subject to the following:
>
> (1)Assignor reserves unto itself, its successors and assigns, an overriding royalty interest equal to the difference between existing lease burdens and twenty-two percent (22%) of all of the oil, gas and other liquid or gaseous hydrocarbons produced and saved from or attributable to said leases during the terms thereof; provided, however, that the overriding royalty interest herein reserved shall be proportionately reduced if any of said leases do not cover a full mineral interest and/or this Assignment does not convey full leasehold rights in any of said leases. The overriding royalty interest reserved hereby shall bear its proportionate part of all production, severance or other similar taxes.
>
> (2)Assignor hereby warrants title to the extent that in the event of conducting title examination of the assigned acreage, Assignee's examining attorney determines that title has failed to all or any part of the assigned acreage, Assignor will reimburse to Assignee the consideration paid to it for any such lands to which title is determined to have failed.

TXO then retained the Ripley law firm of Skeen and Skeen to examine the title to the Blevins Tract. According to the title report prepared by the Skeens, there was a problem with a 1958 deed from Tug Fork to Leo J. Signaigo, Jr.[2] TXO's agent, Duncan Wood, then contacted Mr. Signaigo who told him that the 1958 deed did not include the transfer from Tug Fork to Mr. Signaigo of rights to the oil and gas. Nevertheless, shortly thereafter Mr. Wood approached Mr. Signaigo with a pre-printed affidavit for Mr. Signaigo to sign. The affidavit falsely stated that Mr. Signaigo could not say whether the oil and gas rights were included in the 1958 deed. The complete contents of the tendered affidavit are as follows:

> My name is Leo J. Signaigo, Jr. and I am involved in the coal business. On September 2nd, 1958, I purchased the coal and other minerals under certain tracts of real estate from Tug Fork Land Company. A copy of this deed is attached hereto and incorporated herein for all purposes. However, there was no specific agreement on the part of myself or Tug Fork Land Company as to whether or not the oil and gas would be reserved by Tug Fork Land Company in the attached deed, other than in the Pocahontas No. 3 and No. 4 coal seams. Therefore, I did not know whether or not the oil and gas was included in the conveyance to me and as a consequence, after I purchased this mineral property, I was assessed for 1,002.74 acres, mineral or timber, Hensley Creek. In the event Tug Fork Land Company would claim that we had a specific agreement that the oil and gas was not to be conveyed under any of the properties, I could not agree with such conclusions as there was not such a specific agreement. Further affiant saith not. (Emphasis added.)

[2]Mr. Signaigo later conveyed his interest in the coal rights to Pocahontas Empire (now doing business as Hawley Coal Mining Corporation), which in turn conveyed its interest to Virginia Crews Coal Company.

Because the affidavit was false, Mr. Signaigo refused to sign it.

The pertinent parts of the 1958 Signaigo deed state:

> 1. That for and in consideration of the sum of One ($1.00) Dollar, cash in hand paid, and other good and valuable considerations not herein set forth, the receipt and sufficiency of all of which is hereby acknowledged, the said party of the first part does hereby bargain, sell, grant and convey unto the said party of the second part, with covenants of special warranty of title, all the coal and other minerals and mineral substances in, on and underlying the following tracts or parcels of land, situate in Browns Creek District, McDowell County, West Virginia, together with the mining rights and privileges hereinafter set forth, but subject to the exceptions, reservations, stipulations and agreements hereinafter set forth, to-wit:
>
> [A description of the Blevins tract is included here.]
>
> * * *
>
> 6. It is understood and agreed that there is excepted and reserved to the party of the first part, its successors, assigns and lessees, the right to mine and remove all of said No. 3 and No. 4 Pocahontas seams of coal, together with the right to bore for and remove all the oil and gas underlying said tracts, such rights, however, to be used in common with the party of the second part and so as to interfere as little as possible with the mining operations of the party of the second part.

Although the deed does not demonstrate the most artful drafting, it does clearly reserve all of the oil and gas under the Blevins Tract to Tug Fork Land Company.[3] To make it perfectly clear why this Court

[3]According to Theodore M. Streit, Director, Oil and Gas Division of Environmental Protection, West Virginia Department of Commerce,

so unequivocally finds that the deed was unambiguous, we include the entire deed as Appendix A.

Having decided that there was either a real or a contrived problem with title to the oil and gas, and still without having brought the potential problem to the attention of any of the appellees, TXO paid $6,000 to Virginia Crews (see note 2, supra) in exchange for a quitclaim deed that was recorded 11 July 1985. TXO told none of the appellees about any possible defect in title until after it had recorded its quitclaim deed.

After recording its quitclaim deed, TXO held a meeting on 14 or 15 August 1985 (the date is inconsistent in the record), attended by several of its employees, the title lawyer Mr. Larry Skeen, and Mr. Brian Robinson. The parties disagree about what occurred at this meeting. Mr. Robinson testified that during this meeting, Mr. Skeen very aggressively explained to him why the lease by Alliance Resources was not valid under West Virginia law. Mr. Robinson also testified that TXO asked for concessions and that TXO threatened to file suit

(..continued)
Labor and Environmental Resources, a deed for the oil and gas underlying the Pocahontas 3 and 4 seams of coal would have been ridiculous in 1958. Gas wells are drilled much deeper than coal seams, and while modern gas recovery technology does, on occasion, lead producers to recover the methane imbedded in specific seams of coal, that would never have been done in 1958. Thus, any reading of the reservation clause which would imply that the grantor reserved only the oil and gas within the Pocahontas 3 and 4 seams of coal would have been ridiculous and contrary to all custom and usage at the time the deed was executed.

if the appellees did not make concessions on the royalties. On the other hand, Mr. Skeen testified that, although "[he did not] remember what all we went over," he did not tell Mr. Robinson that Alliance didn't have title. Mr. Wood, a TXO landman, testified that TXO did not ask for any concessions on royalties at this meeting.

In the case before us no one disputes that before beginning to drill, any reasonable businessman would want to clear up any clouds on the title to the oil and gas rights, no matter how small. Therefore, we understand that before investing hundreds of thousands of dollars in an exploratory well on the Blevins Tract, TXO would have wanted to fork out $6,000 for an insurance policy against litigation in the form of a quitclaim deed. However, instead of clearing the title directly by making the grantee of the quitclaim Tug Fork or approaching the appellees to discuss the title problem, TXO attempted to use the purported cloud as leverage for increasing its interest in the oil and gas rights.

Shortly after the 14 or 15 August meeting, on 23 August 1985, TXO filed its action for a declaratory judgment to quiet title. The appellees counterclaimed alleging slander of title. The circuit court then bifurcated the issues for trial. In the declaratory judgment action, the circuit court found the terms of the 1958 deed from Tug Fork to Mr. Signaigo to be clear and unambiguous and held that title to the oil and gas was vested in Tug Fork as leased to

Alliance Resources through George King. On the counterclaim, a jury awarded appellees $19,000 in compensatory damages and $10,000,000 in punitive damages.

II.

A.

TXO argues that there is no action for slander of title in West Virginia. Although there is no West Virginia case on record directly recognizing an action for slander of title, the West Virginia Constitution, Article VIII, Section 13, provides:

> Except as otherwise provided in this article, such parts of the common law, and of the laws of this State as are in force on the effective date of this article and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the legislature.

Also, W. Va. Code, 2-1-1 [1923] provides:

> The common law of England, so far as it is not repugnant to the principles of the constitution of this state, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be, altered by the Legislature of this state.

Interpreting these provisions, we stated in Syllabus Point 2 of Morningstar v. Black & Decker Mfg. Co., 162 W. Va. 857, 253 S.E.2d 666 (1979):

Article VIII, Section 13 of the West Virginia Constitution and W. Va. Code, 2-1-1, were not intended to operate as a bar to this Court's evolution of common law principles, including its historic power to alter or amend the common law.

Although we recognized the ability of this Court to alter and amend the common law in Morningstar, we certainly did not imply that the common law was in any way abrogated as it stood. Quite to the contrary, the West Virginia Constitution commands that we recognize the English common law as of 1863.[4] Recognizing this fact, we now look to the common law.

Slander of title long has been recognized as a common law cause of action. Indeed, the slander of title cause of action was especially important 400 years ago when many transfers of land were oral transfers (i.e., feoffment with livery of seisin), and when, the Domesday Book notwithstanding, land records were much less complete than they are today. In the 32nd and 33rd years of Elizabeth I (c. 1591), the Queen's Bench found for the plaintiff on a claim of slander of title in Gerrard against Dickenson, 78 Eng. Rep. 452. Although 400 years old, Gerrard has some similarities to the case before us. The defendant claimed that she had a lease on the land of the plaintiff, which she did not have. The defendant offered several objections, but the court found for the plaintiff.

[4]The common law in effect in West Virginia is traditional English common law, as amended by the Virginia legislature prior to 1863 and as amended by the West Virginia legislature.

Later, in the 5th year of James I (c. 1608) the King's Bench also found for a plaintiff on a slander of title claim in Earl of Northumberland against Byrt, 79 Eng. Rep. 143. In Byrt, the defendant falsely said that the previous owner of the land in question had made a lease of it before his death. The defendant also claimed that the lease had then been conveyed to him. The court found this actionable as slander of title and held for the plaintiff. Examining these cases, it is clear that an action for slander of title has been a part of English common law for at least 400 years.

The one possible defense for TXO that these cases raise, however, is that "if a man claim estates [as his own], although they be false he shall not be punished." See Pennyman against Rabanks, 78 Eng. Rep. 668 (c. 1596). TXO maintained strenuously at oral argument that only allegations that title is held by a third party are actionable and that a person cannot slander title by asserting title in himself. Originally, falsely claiming title for oneself was not actionable as slander of title. However, at least by the end of the 16th century, the English courts had begun to do away with the distinction between claiming title in oneself and alleging the superior title of another. As discussed supra, unrecorded conveyances were much more important 400 years ago and the courts, therefore, sought to protect those who asserted unrecorded conveyances to themselves. In Pennyman, for example, the court stated:

> This was agreed by all the Court, that no action lay against one for saying, that he himself had title or estate in lands, &c. although it were false.

> But here the words in the declaration, as they are spoken, being in the third person, be not intendable of himself, but of some other, and import a slander to the plaintiff's title; and then his justification afterwards shall not take away that action which before was given to the plaintiff for the slandering of his title.--Wherefore rule was given that judgment should be entered for the plaintiff, unless other matter was shewn upon the third day of the next term.[5]

A distinction between claiming title in oneself and claiming title in another arises for a logical reason. Although we want to discourage people from slandering the title of others, we do not want to discourage people from making legitimate (though possibly weak) claims of their own. Therefore, we also distinguish between cases in which the claimant legitimately raises questions of title in himself and cases in which the claimant raises his own claim without any reasonable grounds. Although the courts of the 16th and 17th centuries had not yet clearly enunciated this distinction, they did follow it. The courts circumvented the general rule whenever the defendant had not acted in good faith. Consider Gerrard, supra, in which the defendant falsely claimed a lease on land as her own. Notwithstanding the defendants' objection that she could not slander title by claiming it in herself, the court found for the plaintiff because the defendant relied on a deed that she knew had been forged.

[5]First stating the rule and then neatly side-stepping it, the Court of Common Pleas demonstrates that judicial double talk was not pioneered in the 20th century.

When, therefore, a defendant knows that his claim is false, he cannot rely on the defense of claiming title in himself.

Because of the West Virginia Constitution's incorporation of the common law of England, we find that an action for slander of title could always be brought in West Virginia.[6] We also find that claiming title in oneself without any reasonable basis can give rise to a claim for slander of title.

B.

The Restatement (Second) of the Law of Torts (1977) provides the guidelines that modern courts generally follow in identifying the elements of slander of title. Restatement (Second) of the Law of Torts § 623A (1977) provides:

> One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if
>
> (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and
>
> (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.

Restatement (Second) of the Law of Torts § 624 (1977) provides:

[6]The Fourth Circuit Court of Appeals has also determined that slander of title is a recognized cause of action in Virginia. See Lomah Elect. Targetry v. ATA Tr. Aids Aust. Pty., 828 F.2d 1021 (4th Cir. 1987).

> The rules on liability for the publication of an injurious falsehood stated in § 623A apply to the publication of a false statement disparaging another's property rights in land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary harm to the other through the conduct of third persons in respect to the other's interests in the property.

From the Restatement, we can deduce the elements of slander of title:

1. publication of
2. a false statement
3. derogatory to plaintiff's title
4. with malice
5. causing special damages
6. as a result of diminished value in the eyes of third parties.

See also W. P. Keeton, Prosser and Keeton on Torts (5th ed. 1984 at § 128); Williams v. Burns, 540 F.Supp. 1243 (D.Colo. 1982). Although perhaps more neatly set out, these are the same elements required at least as far back as Gerrard in 1591.

C.

The jury found that by recording a quitclaim deed which it knew to be frivolous, TXO satisfied the requirements for slander of title. TXO argues that recording a quitclaim deed cannot be construed as the publication of a frivolous statement with the intent to prevent others from dealing with the claimant as required for an

action for slander of title. We disagree. Recording a quitclaim deed that one knows to be frivolous is no different from saying to a potential purchaser - "I don't think you should buy that land. You know there is a cloud on the title because of Mr. Signaigo's old deed." Therefore, we agree with the Supreme Court of Montana which stated in a slander of title action in Jumping Rainbow Ranch v. Conklin, 538 P.2d 1027, ____ (Mont. 1975):

> [T]he action of [the defendant] in filing his quitclaim deed was such as to warrant the necessary showing of malice to entitle plaintiff to punitive damages.

As a general rule, courts have found that wrongfully recording an unfounded claim to the property of another is actionable as slander of title. See, e.g., Annotation, "Recording of Instrument Purporting to Affect Title as Slander of Title," 39 A.L.R.2d 840, and cases cited therein. This is so provided that the other elements for slander of title, namely malice and special damages, are present.

Even if (unlikely as this may be) the circuit court had found that there was a legitimate cloud on the title because of the deed to Mr. Signaigo, TXO (as an expert in all aspects of land law) undoubtedly knew that a tenant in possession under a lease is estopped from denying the title of his landlord. See Trial transcript at 614 (testimony of TXO's agent, Duncan Wood, confirming, in a general way, that he was aware at the time that such a rule existed.) As we said in Voss v. King, 33 W. Va. 236, 239, 10 S.E. 402, ___ (1889):

> [A] tenant in possession under a lease is not permitted to dispute the title of his landlord. This as

> a general principle of law is well settled both in England and in this country.

Although it has been a number of years since we have addressed the issue, the well-settled general rule is still that:

> [D]uring the existence of the relation of landlord and tenant, the tenant is estopped to deny his landlord's title. 49 Am. Jur.2d Landlord and Tenant § 109 (1970).

If, however, an honest mistake had arisen and TXO had mistakenly taken the quitclaim deed from Virginia Crews in its name instead of Tug Fork's name (but had not filed a suit against the appellees to challenge the title of TXO's own landlord while still in possession and claiming under the lease), the counterclaim for slander of title would never have arisen. Certainly, a jury would not have found malice in TXO's actions.

At trial, and again on appeal, TXO argued that there was no malice in its actions, and that the filing of the false quitclaim deed was the result of a good faith mistake. However, after the testimony about TXO's efforts to reduce royalty payments and much testimony about previous similar bad acts by TXO (see, Section III, infra), the jury found the requisite malice. The testimony regarding the August meeting is conflicting, and when we examine conflicting testimony, we look to Syllabus Point 3 of Walker v. Monongahela Power Company, 147 W. Va. 825, 131 S.E.2d 736 (1963), where we stated:

> In determining whether the verdict of a jury is supported by the evidence, every 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.

Furthermore, TXO's employee, Duncan Wood, testified that TXO never made a request to Alliance for simple reimbursement of the expenses in acquiring the quitclaim deed. See Trial transcript at 618. This leads to the logical inference that TXO's real intent was to negotiate substantially lower royalties with appellees, thus reducing the market value of the appellees' interest in the lease in the eyes of any prospective third party purchasers. Therefore, we take Mr. Robinson's version of these events as accurate.

Not only do the details of the August meeting as related by Mr. Robinson suggest malice on the part of TXO, but the facts of Mr. Woods' dealings with Mr. Signaigo also show unsavory and malicious practices by TXO. When examined in the light most favorable to the appellees, the evidence clearly shows that TXO intentionally and maliciously recorded a quitclaim deed that it knew to be without any basis in fact because Mr. Signaigo explicitly told TXO that he had not bought the oil and gas on the Blevins Tract in 1958. Furthermore, the record shows that this was not an isolated incident on TXO's part -- a mere excess of zeal by poorly supervised, low level employees -- but rather part of a pattern and practice by TXO to defraud and coerce those in positions of unequal bargaining power vis à vis TXO's superior legal firepower.

TXO argues that the $19,000 in attorneys' fees incurred by the appellees in defending against TXO's suit to remove the cloud from appellees' title are not special damages. Ordinarily, attorneys' fees are not considered damages. However, slander of title is a special case. The appellees spent $19,000 responding to TXO's declaratory judgment action that the appellees would not have spent if TXO had not filed the false quitclaim deed **and then sued the appellees in an attempt to steal their land.** We follow the clear majority rule in holding that attorneys' fees incurred in removing spurious clouds from a title qualify as special damages in an action for slander of title. See, e.g., Rayl v. Shull Enterprises, Inc., 700 P.2d 567 (Idaho 1984); Summa Corp. v. Greenspun, 655 P.2d 513 (Nev. 1982); Paulson v. Kustom Enterprises, Inc., 157 Mont. 188, 483 P.2d 700 (1971); Dowse v. Doris Trust Co., 116 Utah 106, 208 P.2d 956 (1949); Chesbro v. Powers, 78 Mich. 472, 44 N.W. 290 (1889); Den-Gar Enterprises v. Romero, 94 New Mexico 425, 611 P.2d 1119 (Ct. App. 1980), cert. denied, 94 New Mexico 628, 614 P.2d 545 (1980). See also Restatement (Second) of the Law of Torts, § 633 (1977).[7]

[7]Section 633 states:

(1) The pecuniary loss for which a publisher of injurious falsehood is subject to liability is restricted to

(a) the pecuniary loss that results directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value caused by disparagement, and

(b) the expense of measures reasonably necessary to counteract the publication, including

III.

A.

TXO's second group of assignments of error involve the introduction, as part of appellees' case in chief, of certain testimony about prior bad acts perpetrated by TXO. One of TXO's defenses at trial was good faith or the lack of malice. The appellees introduced testimony by four lawyers, under Rule 404(b) of the West Virginia Rules of Evidence [1985], to help establish a lack of good faith by TXO. TXO claims that the introduction of this evidence was a violation of Rules 404(b), 402, 403 and 802 of the West Virginia Rules of Evidence [1985].

The testimony at issue are the videotaped depositions of R. H. Madden, III, a Ruston, Louisiana lawyer; Clarence Bufford Harrison, Jr., a Richardson, Texas lawyer; James P. Pruitt, a lawyer from Dallas and, Allan DeVore, a lawyer from Oklahoma City. The

(..continued)

> litigation to remove the doubt cast upon vendibility or value by disparagement.

(2) This pecuniary loss may be established by

(a) proof of the conduct of specific persons, or

(b) proof that the loss has resulted from the conduct of a number of persons whom it is impossible to identify. (Emphasis added.)

circuit court thoroughly examined each of these depositions before trial and excluded some parts of the testimony to which TXO had objected.

Mr. Madden testified about litigation that he initiated against TXO for his client Carrie Calloway. Ms. Calloway is an elderly, functionally illiterate woman who lives in Louisiana. Her son contacted Mr. Madden because he believed that TXO was taking gas from his mother's land without paying her for it. Near the end of February, 1988, Mr. Madden contacted John Wright in TXO's Shreveport office and informed him that he was representing Ms. Calloway. Mr. Madden testified that on 4 March 1988, David McDonald and Kevin Treadway, representatives of TXO, came to Ms. Calloway's house to discuss her interest in the gas TXO had been producing. Ms. Calloway told the TXO representatives that they should contact Mr. Madden. However, the TXO representatives told Ms.Calloway that neither she nor they needed to talk to Mr. Madden, and that all she needed to do was sign some papers or else her neighbors could not continue to receive their royalty payments. Not wanting to prevent her neighbors from receiving money that was rightfully theirs, Ms. Calloway signed the tendered document. Ms. Calloway could not read this document and the TXO representatives did not leave her a copy of it. Ms. Calloway told Mr. Madden that the gentlemen were at her house about 1:00 p.m. on 4 March 1988. At 2:21 p.m. that same day, a lease (which

was the tendered document) was filed in the local clerk of court's office. Subsequently, TXO settled the case favorably to Ms. Calloway.

Mr. Harrison testified about some wells in Texas in which he owned an interest. He testified that TXO had been producing from his wells for almost a year without paying him any royalties. He stated:

> They had given us a list of excuses a mile long of why they hadn't paid. One of them was we don't know if the title's good to the tract. Well, our tract was where the well was located and that title was cured before the well was drilled.
>
> Well, they gave us excuse after excuse after excuse. When we got the bill we figured they owed us 150 or $200,000. And our part of the frack job was about $50,000, so we figured since they owed us more than we owed them we weren't going to pay them.
>
> Never forget one day my partner, I was in his office, and he was registered agent for the company and a lawyer from TXO called and said we are going to sue you for that $50,000. And he said, well, good. And the comment from the lawyer on the other end of the phone was, you don't seem too upset. And he said, well, you're going to look awful silly suing us for 50,000 when you owe us 200,000. The lawyer then got a little bit upset about that and decided to go ahead and pay.

Trial transcript at 265 (Emphasis added.)

Mr. Harrison also testified that, in another case, TXO under-reported the gas it had produced from a well, and therefore failed to pay the royalties it should have paid.

Mr. Pruitt, an oil and gas lawyer, testified about litigation he had instituted (personally and on behalf of clients) against TXO in 1984. After investigating the situation, Mr. Pruitt discovered that TXO had been paying minimal shut-in royalties to him and others, when in fact, TXO had been producing out of his well and other wells.[8] Shortly after the lawsuit was filed, Mr. Pruitt testified, TXO settled the case.

Mr. DeVore testified about some ongoing litigation in Oklahoma. He had examined depositions, discovery requests, interrogatories and other documents in the office of the county clerk where the litigation was taking place. He explained that there was a tract of land on which TXO wanted to drill. Under Oklahoma law, there was a procedure through which any owner of land within a tract could gain drilling rights. TXO initiated this procedure, although it did not own any of the land. In essence, TXO sent a letter to a group of landowners saying TXO was going to drill a well and individual landowners could either get in on it or not. However, TXO had no right to drill without the landowners' permission, and no right to send this letter. Through this questionable tactic, TXO was able to acquire an interest from one of the existing owners, and by acquiring this interest through fraud and misrepresentation, go on to drill the well it had threatened to drill.

[8]In many oil and gas contracts, the producer (in this case, TXO) agrees to pay a minimum royalty to the landowner even when the well is not producing. These are called shut-in royalties.

Mr. DeVore also testified about a pending case, Freede v. Texas Oil and Gas Corp. and TXO Production Corp. From the court documents available to him (or to any other member of the public), Mr. DeVore testified that he thought "that TXO had violated the rights of Dr. Freede and hundreds or thousands of other people across the nation, as a result of this willful, wanton action." Trial transcript at 315. He also explained the details of the then-pending lawsuit by Dr. Freede. After the trial of appellees' case here in West Virginia, however, an Oklahoma jury found for TXO in the case brought by Dr. Freede.

B.

TXO argues that all of the testimony discussed in subsection A above should have been excluded under Rule 404(b) of the West Virginia Rules of Evidence [1985]. Rule 404(b) of the West Virginia Rules of Evidence [1985] provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In Huddleston v. U. S., 485 U. S. 681 (1988), the U. S. Supreme Court discussed the admission of "other acts" evidence under

Rule 404(b) of the Fed. R. Evid. The Court held that "other acts" evidence need not be proved by a preponderance of the evidence before it can be submitted to the jury. The Court stated:

> "[S]uch evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act."

Id. at 685.

The Court also stated:

> "Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct." Id. (Emphasis added.)

The Court held that the first inquiry a trial court must make is whether the proffered evidence is probative of a material issue other than character. The Court also found that protection against unfair prejudice emanates from four sources:

> [F]irst, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402 - as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice . . . and fourth, from Fed. R. of Evid. 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted . . . .

Id. at 691-92.

We find the U. S. Supreme Court's reasoning in Huddleston persuasive and we here use its analysis to examine the admission of the other acts evidence in the case before us. Examining the first requirement, the testimony was offered in this case to prove malice, which is a necessary element in an action for slander of title. TXO strenuously maintained at trial that no matter how the facts appeared in this case, it had simply made a good faith mistake. The appellees offered their evidence of other evil acts to disprove TXO's good faith defense and to show that this case was but part of a pattern and practice of deception and chiseling by TXO.

For the second requirement, we look to Rules 401 and 402 of the West Virginia Rules of Evidence [1985]. Rule 401 of the West Virginia Rules of Evidence [1985] provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402 of the West Virginia Rules of Evidence [1985] provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of West Virginia, these rules, or other rules adopted by the Supreme Court of Appeals. Evidence which is not relevant is not admissible.

The proffered evidence was clearly relevant to the issue of malice. Furthermore, as we stated in Syllabus Point 2 of State v. Peyatt, 173 W. Va. 317, 315 S.E.2d 574 (1983):

> "'Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' State v. Louk, [171 W. Va. 623], 301 S.E.2d 596, 599 (1983)."

For the third requirement, we look to Rule 403 of the West Virginia Rule of Evidence [1985] which states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

And we recently stated in Gable v. The Kroger Co., ___ W. Va. ___, ___, 410 S.E.2d 701, 705 (1991):

> Rules 402 and 403 of the West Virginia Rules of Evidence [1985] direct the trial judge to admit relevant evidence, but to exclude any evidence the probative value of which is substantially outweighed by the danger of unfair prejudice to the defendant. Such decisions are left to the sound discretion of the trial judge . . . .

In this case, we find that the trial judge was correct in holding that any unfair prejudice to TXO did not substantially outweigh the probative value of the testimony.

Fourth, TXO did not request a limiting instruction regarding the other acts testimony. Therefore, we find this other acts evidence

was appropriately admitted under Rule 404(b) of the West Virginia Rules of Evidence [1985].

TXO makes particular note of the testimony by Mr. DeVore about the Freede case from Oklahoma because that case was subsequently won by TXO.[9] The fact that a jury found for TXO in Freede does not mean that any of the particular facts to which Mr. DeVore testified is untrue. More importantly, TXO had an opportunity to cross-examine Mr. DeVore, and also had an opportunity to put on testimony of its own to contradict Mr. DeVore. Furthermore, we find that, given the weight of the other testimony, any error in admitting Mr. DeVore's testimony about the Freede case was harmless.

C.

More problematic than TXO's vociferous objections to admission of all of this testimony under Rule 404, is that particular parts of this testimony were based on hearsay. West Virginia Rule of Evidence 801(c) provides:

> (c) Hearsay.--"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

West Virginia Rule of Evidence 802 provides:

> Hearsay is not admissible except as provided by these rules.

[9]Well, even a blind hog finds an acorn now and again.

Apparently, at the deposition, appellees' attorney offered this testimony believing it to be protected by the hearsay exception codified in Rule 803(6) of the West Virginia Rules of Evidence [1985].

Rule 803(6) of the West Virginia Rules of Evidence provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Most jurisdictions have held that this exception is applicable only when the hearsay declarant is under a business duty to provide the information. See, e.g., United States v. Bortnovsky, 879 F.2d 30 (2nd Cir. 1989); Ramrattan v. Burger King Corp., 656 F.Supp. (D. Md. 1987); White Indus., Inc. v. Cessna Aircraft Co., 611 F.Supp. 1049 (W.D. Mo. 1985); and City of Cleveland v. Cleveland Elec. Illuminating Co., 538 F.Supp. 1257 (N.D. Ohio 1980). In the case before us, the out-of-court declarants were not under a business duty to provide the information. However, we need not decide the admissibility of the testimony under the business records exception

because the testimony is admissible under Rule 803(24) of the West Virginia Rules of Evidence [1985].

The purpose of excluding hearsay testimony at trial is to prevent unreliable information from reaching the jury. Because not all statements that are hearsay as defined by Rule 801(c) of the West Virginia Rules of Evidence [1985] are unreliable, we have incorporated a number of specific traditional common law hearsay exceptions (such as the business records exception) into Rules 803 and 804 of the West Virginia Rules of Evidence [1985]. Rules 803(24) and 804(b)(5) also provide "catch-all" exceptions to cover other reliable hearsay statements.

Rule 803(24) of the West Virginia Rules of Evidence [1985] provides:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Interpreting Rule 804 (b)(5) of the West Virginia Rules of Evidence [1985], the counterpart to Rule 803(24) of the West Virginia Rules of Evidence [1985], in Syllabus Point 5 of State v. Smith, 178 W. Va. 104, 358 S.E.2d 188 (1987), we stated:

> The language of Rule 804(b)(5) of the West Virginia Rules of Evidence and its counterpart in Rule 803(24) requires that five general factors must be met in order for hearsay evidence to be admissible under the rules. First and most important is the trustworthiness of the statement, which must be equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule. Second, the statement must be offered to prove a material fact. Third, the statement must be shown to be more probative on the issue for which it is offered than any other evidence the proponent can reasonably procure. Fourth, admissions of the statement must comport with the general purpose of the rules of evidence and the interest of justice. Fifth, adequate notice of the statement must be afforded the other party to provide that party a fair opportunity to meet the evidence.

As we stated in Smith, our major concern with any evidence admitted under this exception is its reliability. We find the hearsay statements within the testimony of the four lawyers both credible and reliable. The hearsay statements were made about specific people, places, and events -- all of which TXO controlled the evidence to controvert, if the witnesses' statements were not true. For instance, Mr. Madden testified about a specific day and time on which specific TXO employees went to visit Ms. Calloway and how TXO committed specific acts. TXO could have called its own employees, and Ms. Calloway for

that matter, to disprove the statements, but it chose not to do so.

Second, as we explained above, this evidence is clearly probative of the material issue of whether TXO acted with malice.

Third, because of the concise manner in which the evidence was presented, because of the ease with which any untrue testimony could have been impeached, and because of the difficulty of appellees' obtaining any other evidence on this material issue, we find that these statements were more probative than any other evidence that the appellees could have reasonably procured.

Fourth, the admission of these statements comports with the general purpose of the West Virginia Rules of Evidence [1985] and the interests of justice.

Fifth, TXO clearly had more than adequate notice that these statements were going to be offered at trial. The hearsay statements were not offered live, but in previously prepared videotaped depositions. TXO was represented by its lawyer at each of these videotaped sessions. If there were any evidence available to rebut the statements made by these four witnesses, TXO had more than an ample and fair opportunity to provide that evidence. Thus, to the extent that appellees attempted to show the jury where TXO's victims'

bodies were buried, each body allegedly buried was meticulously marked by time of death and tombstone location well in advance of trial.

Therefore, we find that the trial court did not abuse its discretion in admitting the "other acts" evidence under Rule 404(b) of the West Virginia Rules of Evidence [1985], and that the hearsay statements within this testimony were admissible under Rule 803(24) of the West Virginia Rules of Evidence [1985].

IV.

TXO finally asks that we set aside the punitive damages award. The first issue that we must consider in this regard is the applicability of Garnes v. Fleming Landfill, ___ W. Va. ___, 413 S.E.2d 897 (1991) to those cases still on appeal that were decided before we handed down our decision in Garnes. TXO would have us remand this case for a new trial on the punitive damages issue because all of the technical requirements set forth in syllabus points 3 and 4 of Garnes were not met. To adopt such an approach to Garnes would unnecessarily send far too many cases back for retrial. We will, however, be especially diligent in our review of any punitive damages awards entered before Garnes was decided. We adopt this flexible approach to Garnes because we have already held that petitions for review of punitive damages awarded before 5 December 1991 must:

> "Address each and every factor set forth in syllabus points 3 and 4 of [Garnes] with particularity, summarizing the evidence presented to the jury

on the subject or to the trial court at the post-judgment review stage."

Syllabus point 5, Garnes v. Fleming Landfill, ___W. Va.___, 413 S.E.2d 897 (1991).

In Syllabus Point 3 of Garnes, we stated:

> When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:
>
> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.
>
> (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.
>
> (4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant.

In Syllabus Point 4 of Garnes, we stated:

> When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:
>
> (1) The costs of the litigation;
>
> (2) Any criminal sanctions imposed on the defendant for his conduct;
>
> (3) Any other civil actions against the same defendant, based on the same conduct; and
>
> (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.
>
> Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuit pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury.

We set out these guidelines to provide both procedural and substantive due process to defendants against whom punitive damages are awarded in accordance with the U. S. Supreme Court's directive in Haslip, supra. Just as we recognized in Garnes that there can be no mathematical bright line relationship between punitive damages

and compensatory damages, we cannot simply examine these nine criteria seriatim, awarding a certain number of points to each. The Garnes factors are interactive and must be considered as a whole when reviewing punitive damages awards.

Originally, punitive damages were awarded only to deter malicious and mean-spirited conduct. However, the punitive damages definition of malice has grown to include not only mean-spirited conduct, but also extremely negligent conduct that is likely to cause serious harm.[10] Generally, then, we can distinguish between the "really mean" punitive damages defendant, and the "really stupid" punitive damages defendant. We want to discourage both forms of unpleasant conduct, but not necessarily with the same level of punitive damages.

Although there is no mechanical mathematical formula to use in all punitive damages cases, we think it appropriate here to offer some broad, general guidelines concerning whether punitive damages bear a reasonable relationship to actual damages.

[10]Even if Ford Motor Company had not intentionally left gas tanks in the wrong position on its Pinto automobile, we would still want to allow high levels of punitive damages against Ford in order to encourage Ford to make reasonable efforts to insure that bureaucratic bungling and red tape would not lead to the deaths of consumers. See, Grimshaw v. Ford Motor Co., 119 Cal. App.3d, 174 Cal. Rptr. 348 (1981).

We have examined all of the punitive damages opinions issued since Haslip was decided in an attempt to find some pattern in what courts find reasonable. Generally, the cases fall into three categories: (1) really stupid defendants; (2) really mean defendants; and, (3) really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm.[11]

By really stupid defendants, we signify those defendants who have not harmed victims intentionally, but have harmed them as a result of extreme carelessness -- in most cases caused by a foul-up in the middle of some corporate bureaucracy that has pushed some victim into a red-tape limbo. Consider, for example, Principal Financial Group v. Thomas, 585 So.2d 816 (Ala. 1991), cert. denied ___ U.S. ___ (1991), in which an insurance company spent tens of thousands of dollars at trial and on appeal to defend its failure to pay $1,000 to a mother who had lost her child. The insurance company claimed that the child was not really a dependent of the mother. Outraged at the insurance company's conduct, the jury awarded not only $1,000 in compensatory damages, but also $750,000 in punitive damages. The

[11]See our tables of cases in Appendix B. Although it is sometimes difficult to distinguish between the mean cases and the stupid cases just by reading the appellate opinion, we have given it our best efforts. For example, if we tried to place the Thomas case, discussed infra, into a category, we could have called it a mean case or we could have said that it was only the worst case of bureaucratic bungling in history.

Supreme Court of Alabama (whose review procedure was endorsed by the U.S. Supreme Court in Haslip, supra) upheld the verdict.

As we discussed in Garnes, one of the reasons we allow punitive damages in these "stupid" cases is to give individual plaintiffs a sword with which to fight well-armored, bureaucratic defendants. In a world with only smaller, closely held businesses, we would not need punitive damages for this type of case. Once Joe, the owner of Joe's Automobile Company, realizes that there is a foul up in his business that is causing problems for his customers, he has plenty of incentive to correct it. However, compensatory damages do not always provide sufficient incentive for the middle managers who make these types of decisions for a major automobile company with hundreds of thousands of employees and agents. As we noted in discussing claims against insurance companies in Hayseeds, Inc. v. State Farm Fire & Cas., 177 W. Va. 323, 352 S.E.2d 73 (1986):

> Unfortunately, in the business of claims settlement we do not have simply two parties--the company that wishes to pay the lowest legitimate amount of money and the policyholder who wants maximum benefits under the policy. Between these two profit-maximizing, rational players, there is an entire corporate bureaucracy composed of agents, administrators, corporate counsel, and local litigating lawyers. This bureaucracy is neither inherently good nor inherently evil, and it performs a necessary function in the insurance industry. Nonetheless, the claims settlement bureaucracy is subject to the same dynamics as every other bureaucracy known to man: its natural tendency is to maximize upward mobility for middle management members of the bureaucracy and to augment the work that the bureaucracy is responsible for doing. In government, this phenomenon is often referred to as "turf

> protection." The extent to which pernicious dynamics prevail in any particular company's claims bureaucracy differs from company to company and from office to office within the same company. However, a policyholder who runs into an intransigent or unreasonable claims settlement bureaucracy is destined to be sorely put upon.

The threat of litigation is good news to the middle management employees who make many of the day-to-day decisions for large corporations. (Litigation causes work which increases middle management job security.) The possibility of punitive damages, however, increases the possibility of a higher payout. The higher the potential payout, then, the further up the corporate hierarchy the decision is passed. A reasonable level of punitive damages therefore increases the likelihood that settlement decisions will be made by upper management employees who own stock in the company or who at least feel a higher level of fiduciary duty to the stockholders.

By really mean defendants, we signify those defendants who intentionally commit acts they know to be harmful. For example, in Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377 (5th Cir. 1991), which we discussed in Garnes, the defendant insurance company failed to pay Ms. Eichenseer's obviously legitimate claim. Ms. Eichenseer was subjected to numerous "misinterpretations" of her claim as well as the "loss" of her medical records. Furthermore, the insurance company made no effort to pay Ms. Eichenseer's claim until after she

filed her lawsuit. The Fifth Circuit then upheld punitive damages 500 times the compensatory damages.

We cannot say that our examination of post-Haslip cases has led us to a crystal clear bright line rule. Not surprisingly, some courts have been less willing than this Court in Garnes to take seriously the U. S. Supreme Court's guidance. We do find a pattern, however, of what we believe are reasonable verdicts under the Haslip and Garnes standards.

In cases in which the defendant falls into the really stupid category, and compensatory damages are neither negligible nor very large (see our discussion of those terms in Hayseeds, supra) we hold that the outer limit of punitive damages is roughly five to one.

This is not necessarily the case, however, when compensatory damages are minimal. In cases such as Hospital Authority of Gwinnett County v. Jones, 409 S.E.2d 501 (Ga. 1991), in which the potential for harm from the defendant's conduct was tremendous, but the actual compensatory damages were negligible, punitive damages in a ratio much greater than five to one were entirely appropriate.[12]

[12]Concomitantly, if the compensatory damages are very high then punitive damages even in the ratio of 5:1 might be excessive. See, e.g., Mason v. Texaco, Inc., 948 F.2d 1546 (10th Cir. 1991) (compensatory damages of $9.025 million; punitive damages remitted to $12.5 million from $25 million).

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

Accordingly, we find that in cases where the defendant has intentionally committed mean-spirited and harmful acts (especially when the provable compensatory damages are small, but the potential of harm is great), even punitive damages 500 times greater than compensatory damages are not per se unconstitutional under Haslip and Garnes. The appropriateness of such awards depends on what it reasonably takes to attract the defendant's attention because, as we said in Garnes, an award that might be unreasonable if awarded against Jeff's Neighborhood Hot Dog Stand could be quite reasonable if awarded for the same conduct against McDonald's. See Garnes at ___, 413 S.E.2d at 910.

In applying the Garnes "reasonable relationship" test to the case before us, we look to: (1) the potential harm that TXO's

actions could have caused; (2) the maliciousness of TXO's actions; and (3) the penalty necessary to discourage TXO from undertaking such endeavors in the future. The type of fraudulent action intentionally undertaken by TXO in this case could potentially cause millions of dollars in damages to other victims. As for the reprehensibility of TXO's conduct, we can say no more than we have already said, and we believe the jury's verdict says more than we could say in an opinion twice this length. Just as important, an award of this magnitude is necessary to discourage TXO from continuing its pattern and practice of fraud, trickery and deceit.

TXO also argues that the jury were allowed to consider irrelevant financial information under the fifth criterion from Syllabus Point 3 of Garnes. By interrogatory, appellees attempted to find out about the finances of TXO Production Corp.[13] Because the

[13]Appellees 4th Set of Interrogatories Nos. 5, 6 and 7, along with TXO's answers are as follows:

5. State the name and address of the stockholders of TXO Production Corp.

ANSWER: Texas Oil & Gas Corp. - owns 100% of outstanding stock.

1700 Pacific Avenue
First City Center
Dallas, Texas 75201

6. Since 1980 to present has TXO Production Corp. filed a separate corporate tax return?

ANSWER: No.

appellees were unable to obtain information about the worth of TXO Production Corp. from TXO, the appellees provided their own expert to testify about the worth of the TXO Division of USX. Using public

(..continued)

7. Since 1980 have the profits and/or losses of TXO Production Corp. been subsumed in or as a part of income tax returns of another corporation?

ANSWER: Not sure of term "subsumed". Dictionary definition would not appear to apply. If by term it is meant made part of or incorporated into parent company, the answer is yes.

If so,

(A) State the name and address of any corporation in which the profits and/or losses of TXO Production Corp. were subsumed, and the year or years in which each such corporate entity has subsumed the profits and/or losses of TXO Production Corp.

ANSWER: 1980-86 - Texas Oil & Gas Corp.
1986-Present - USX Corporation
600 Grant Street
Pittsburgh, PA
15230

(B) Defendant requests plaintiff produce copies of each of the above tax returns since 1980 in which the profits and/or losses of TXO Production Corp. have been incorporated and attach the same with your answers hereto.

ANSWER: Objection. The returns are too large and burdensome to copy and include. Moreover, they also combine the income and losses of a number of other companies (subsidiaries), but are not broken down on the returns by subsidiary and TXO's profit or loss could therefore not be determined by a review of such returns. Nothing short of a full audit at extreme expense could answer interrogatory which TXO is not prepared to do at its own cost.

financial statements for USX, the expert testified that the net worth of the TXO Division of USX was between $2.2 billion and $2.5 billion. TXO argues that because the TXO division is "comprised of at least 15 corporate entities in addition to TXO Production Corp." (Appellant Brief at 37), the introduction of this testimony was unfairly prejudicial.

First, TXO was not forthcoming during discovery with information about the worth of TXO Production Corporation, nor did TXO offer such evidence at trial. Furthermore, even lingering on this point obscures the more important issue. The worth of the TXO Division of USX, and the worth of USX for that matter, is relevant. If we did not allow trial judges in their sound discretion to admit evidence of the worth of parent corporations, corporations could escape liability simply by incorporating separate departments as a number of undercapitalized subsidiaries. It is the management of USX that must ultimately make the decision that its employees will not engage in malicious and nefarious business activities, and, therefore, it is the pocketbook of USX that the jury verdict must reach.[14] Consequently, we find that the punitive damages awarded in this case were not so unreasonable as to demonstrate such passion and prejudice that a new trial is warranted.

[14]When pressed at oral argument, TXO's counsel admitted that USX has the power to: 1) elect the Board of Directors, 2) appoint all officers through the Board, and 3) generally control the operations of TXO Production Corp. Indeed, it is undisputed that at the end of the chain of related companies, TXO has but one stockholder, to-wit USX.

V.

The jury in this case correctly found willful and deliberate injury. Accordingly, the judgment of the Circuit Court of McDowell County is affirmed.

Affirmed.