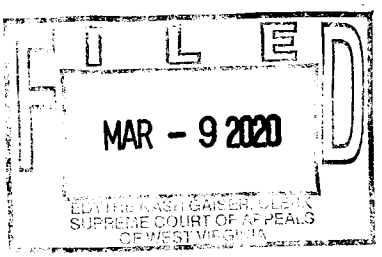
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 19-0899



Safeco Insurance Company of America
and Liberty Mutual Insurance Company,

Defendants Below, Petitioners,

v.

Joseph M. Jenkins
and Stephanie D. Jenkins,

Plaintiffs Below, Respondents.

REPLY BRIEF OF PETITIONERS

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I. INTRODUCTION

The Brief of Petitioners Safeco Insurance Company of America and Liberty Mutual Insurance Company (collectively, "Safeco") identifies why the Circuit Court erred by (1) refusing to enter judgment in Safeco's favor on Respondents' claim for punitive damages; or alternatively, (2) refusing to order a new trial on Respondents' claim for punitive damages; or alternatively, (3) refusing to reduce the punitive damages award that was sixty-times the awarded compensatory damages.

The Brief Respondents offer in response is wrong on the facts and wrong on the law. In fact, much of Respondents' Brief simply ignores the issues raised by Safeco. In just the first two pages of their Brief, Respondents discuss the dangers of distracted driving, the valor of service in Sadr City, and the financial strain that the underlying accident caused Respondents. These have absolutely nothing to do with this appeal. Respondents then discuss the alleged claim handling improprieties by Safeco, which of course cannot give rise to any viable third-party bad faith claim, not matter how much Respondents and their counsel wish otherwise.

When Respondents do finally turn to the issues in this appeal, at page 5 of their Brief, Respondents either misrepresent or whole cloth fail to cite any aspect of the record in support of their position. Rather than demonstrating that the decisions of the Circuit Court should be affirmed, these shortcomings actually reveal why those decisions must be reversed. Respondents' Brief then ends by ignoring West Virginia law regarding punitive damages.

At the end of the day, Respondents do not – and cannot – defeat the issues of appeal raised by Safeco. For the reasons herein, the sixty-times-compensatory-damages punitive damages award entered against Safeco should be either reversed in favor of judgment for Safeco; set aside in favor of a new trial; or reduced.

II. STATEMENT OF THE CASE

A. Safeco's Brief properly recites the evidence regarding the alleged conversion.

At pages 3-6, Safeco's Brief sets forth – with citation to the record – the facts in the underlying trial pertinent to the alleged conversion of Respondents' vehicle. In short:

- The accident between Mr. Jenkins and Ms. Jordan occurred on October 15, 2017. (A.R. 151.)
- Respondents' vehicle was towed to and remained at JE Hitt Garage and Body Shop ("Hitt's") in Weston, West Virginia for three months after the accident. (A.R. 151.)
- During the three months that Respondents' vehicle sat at Hitt's, Respondents never went to Hitt's to retrieve the vehicle or anything in it; they never discussed with Hitt's moving the vehicle somewhere else; they never asked to go to the vehicle to retrieve anything from it; and they never had any other interactions regarding the wrecked vehicle. (A.R. 152-54.)
- By overnight letter of January 15, 2018, Safeco extended a property damage settlement offer to Mr. Jenkins. (A.R. 508-15.)
- This letter also advised that Safeco had "set up a tow for our Copart Salvage yard to pick up the vehicle" and that Mr. Jenkins "will need to release the vehicle with Hitt Garage" before it could be picked up. (A.R. 509.)
- This letter also requested that Mr. Jenkins contact Safeco before January 18, 2018 if he wanted to retain the vehicle and advised that Safeco would stop paying storage costs at Hitt's as of January 18, 2018. (A.R. 509.)

Respondents do not dispute any of the foregoing information. Indeed, this information comes from either Mr. Jenkins' testimony or from exhibits admitted at trial.

At trial, Safeco also elicited testimony regarding the vehicle storage process between Safeco and non-parties Copart, Inc. ("Copart") and Scrap & Transport Co. ("Scrap & Tran"). Copart is a vendor of Safeco to which Safeco sometimes makes assignments to store totaled vehicles for eventual salvage sale. (A.R. 355-56.) Scrap & Tran is a Copart contractor. (A.R. 271.) Again, Respondents do not dispute these relationships.

B. Respondents' Brief either fails to cite or misrepresents the record.

While Respondents do not dispute the above evidence, Respondents do set forth several alleged "facts" which purportedly support the punitive damages in a sixty-times multiplier. These "facts" are not facts, however. They are either fabrications or misrepresentations of the record, as follows.

First, Respondents assert that one piece of evidence presented to the jury regarding conversion was that "Safeco unlawfully and knowingly removed Joe Jenkins' vehicle from his possession without his permission or consent and took it 120 miles away to their agent-CoPart-salvage lot." (Resp. Brief, p. 5.)

Respondents offer no record citation for this assertion – and they cannot offer any record citation, because it is not true. The testimony actually introduced at trial indicated that on January 18, 2018, Scrap & Tran – not Safeco – towed the wrecked vehicle from Hitt's to Copart. (A.R. 279-81.) The testimony at trial also confirmed that Scrap & Tran did this at Copart's request – not Safeco's. (A.R. 271.)

Second, Respondents assert that "Safeco was aware that it had no legal right to possess and remove Joe Jenkins' vehicle as they had not paid for it or received any consent from him and such conduct was unlawful." (Resp. Brief, pp. 5-6.)

Again, Respondents cite nothing in the record for this assertion – and again, they cannot, because the assertion is wrong. At trial, Copart's representatives testified that Safeco's adjuster told Copart that the adjuster was "unsure if customer has released the vehicle." (A.R. 308, 313, 319. Emphasis added.) This uncertainty is reflected in the contemporaneously prepared January 16, 2018 business record exhibits of Safeco and Copart, both of which were admitted at trial. (A.R. 558, 562.) Such uncertainty is obviously a far cry from the knowing awareness of unlawful conduct that Respondents' Brief suggests without citation.

Third, Respondents assert that "Safeco deliberately did not seek Joe Jenkins' permission or consent to remove his vehicle as at no time did they attempt to contact him even though they had his cell phone number since October 17, 2017 [A.R. 113-16 & 505-06] and that of his counsel, including both telephone and email information; [A.R. 507]; such failure to make contact with either Joe Jenkins or his counsel created the strong inference that the failure to do so was deliberate and intentional so that the car could be taken without any interference by Joe Jenkins as Joe Jenkins had indicated he wanted to maintain the vehicle for repair and did not want it moved [A.R. 139]." (Resp. Brief, p. 6.)

In what is becoming a theme, other than the fact that Safeco had contact information for Mr. Jenkins and his counsel, none of the foregoing is true. By overnight letter of January 15, 2018, Safeco did contact Mr. Jenkins about moving the vehicle. (A.R. 508-515.) This letter explicitly tells Mr. Jenkins that Safeco had "set up a tow for our Copart Salvage yard to pick up the vehicle" and that Mr. Jenkins "will need to release the vehicle with Hitt Garage" before it could be picked up. (A.R. 509.) Mr. Jenkins acknowledged he received this letter and offered direct-examination testimony about it, and Respondents' counsel moved its admission. (A.R. 109-112.)

Moreover, there is no evidence that Mr. Jenkins "had indicated he wanted to maintain the vehicle for repair and did not want it moved." (Resp. Brief, p. 6.) During the three months that the vehicle was at Hitt's, Respondents had no interactions regarding the vehicle at all. (A.R. 152-154.) Further, the testimony cited by Respondents in support of this assertion actually provides:

> Q: If [Safeco] had asked you to take your car, would you have agreed to it if they had paid you?
>
> A: I was still wanting to try to fix it up and use it.

(A.R. 139.) While Mr. Jenkins may have wanted to keep the vehicle to try to repair it, that internal desire falls well short of ever indicating the same to Safeco.

Fourth, Respondents assert that "instead of truthfully admitting to what they did, Safeco attempted to shift the blame for the unlawful removal of Joe Jenkins' vehicle to CoPart and Hitt's Garage; yet Safeco's evidence indicated that such was fabricated which significantly and seriously reduced Safeco's credibility; compare testimony of Aaron Ford [A.R. 173-244] and Russ Edwards [A.R. 289-298]." (Resp. Brief, p. 6.)

Respondents are wrong again. Safeco did not fail to truthfully admit what it did. Copart was a non-party in this case, but its business records and its manager confirmed at trial that prior to Copart sending Scrap & Tran to pick up Respondents' vehicle, Copart (1) called Hitt's Garage; (2) spoke to body shop manager Russ Edwards; and (3) learned from Mr. Edwards that Respondents' vehicle had been released for pickup. (A.R. 309, A.R. 562.) Copart made these records at the time of that call in January 2018 (A.R. 277) – days before the vehicle was moved, and months before this matter was in litigation.

Respondents are nevertheless arguing that Safeco is not being truthful about a conversation between Copart and Hitt's. How could Safeco lie about a call it did not participate

in? Copart documented the call at the time of the call, and Safeco was not even a party to the same. While Mr. Edwards admittedly disagreed with Copart's documentation regarding the call, Safeco cannot help but point out that Mr. Edwards could be lying to avoid liability for having wrongfully released Respondents' car for pickup. Unlike Copart, Mr. Edwards and Hitt's had no documentation of this conversation. Regardless, though, none of this he-said, she-said had anything to do with Safeco.

Fifth, Respondents offer a diatribe criticizing the computer records of Safeco and Copart, suggesting that the Safeco and Copart employees who entered these notes should have been required to testify. (Resp. Brief, pp. 6-8.)

These records are discussed above. The Court properly admitted these as business records pursuant to Rule 803(6) of the Rules of Evidence. Such business records do not require that the author testify regarding the same.

Sixth, Respondents assert that Mr. Edwards' testimony "significantly and severely eroded the credibility of Safeco and its entire case as it was clear to the jury that and the trial court that Safeco was attempting to 'pull a fast one' on the jury and the court[.]" (Resp. Brief, p. 8.)

This is wildly unsupported nonsense. At no time did the Court or the jury offer an opinion on Safeco's credibility or suggest that Safeco was "trying to pull a fast one" on anyone. All the jury did was determine that Safeco was responsible for Respondents' vehicle being moved without its consent. The histrionics otherwise in Respondents' Brief are unsupported and unsupportable.

Seventh, Respondents assert that "[s]uch incredible evidence and lack of evidence to support their position reinforced for the jury the reasonable inferences that Safeco had concocted

a plan to unlawfully convert Joe Jenkins' vehicle for several reasons: one, because they knew liability was absolutely clear and Safeco wanted to reduce their expenses for storage, which they were going to be required to pay; Safeco wanted to put pressure on the pending legal proceedings and put pressure on Joe Jenkins' to accept Safeco's demands[.]" (Resp. Brief, pp. 8-9.)

This assertion is the crescendo of Respondents' assault on the Court's ability to read the actual trial record in this case. There is no evidence that Safeco had any "plan to unlawfully convert" the vehicle. To the contrary, Safeco told Respondents in writing that Safeco was going to move the vehicle, and Safeco told Respondents in writing that Respondents would need to release the vehicle through Hitt's before the vehicle could be moved. (A.R. 509.)

Further, there were no "pending legal proceedings" which Safeco could have been pressuring. The vehicle was moved in January 2018 and Respondents did not file suit against Safeco and its insureds until March 2018. (Resp. Brief, p. 5). Safeco could not even have moved the vehicle to pressure Respondents regarding the valuation of the vehicle, given that Respondents did not respond to, let alone reject, Safeco's initial offer on the vehicle until well after the vehicle had been moved. (A.R. 155-156.)

As the foregoing indicates, every "fact" relied upon by Respondents to justify the punitive damages award in this case is absent from the trial record. There is no basis for the award, and judgment should instead be entered for Safeco on this claim.

C. While Safeco is challenging the punitive damages award, it is not challenging the conversion claim verdict; and Respondents are likewise not challenging the defense verdicts on trespass, outrage and civil conspiracy.

Safeco reminds the Court at this juncture that it is only challenging the punitive damages award, not the conversion claim verdict. Safeco acknowledges that some of the evidence at trial, if believed by the jury, supported a conversion judgment against it based on the actions of Copart

and Scrap & Tran. And Safeco has accepted the $1,000 compensatory damages verdict that went with that verdict.

At the same time, however, Safeco reminds the Court that the jury entered a defense verdict on the trespass, outrage and civil conspiracy claims against Safeco. Respondents have not appealed those decisions.

These defense verdicts are telling. If the jury believed that Safeco had concocted a plan to steal the vehicle; had worked with Copart and Scrap & Tran to accomplish that plan; and had then wrongfully deprived Respondents of the vehicle for years thereafter, there is no chance that the jury would have returned a defense verdict on these claims. But Respondents' Brief reads as if Respondents prevailing on all these counts, and that all these counts were the basis for the punitive award. This is, again, wrong. The fact that defense verdicts were entered on these claims clearly undercuts the Respondents' position that "clear and convincing" and "overwhelming" evidence exists regarding some malicious intent by Safeco in connection with Respondents' vehicle being moved.

III. ARGUMENT

A. Safeco properly moved for a directed verdict on the issue of punitive damages, such that its post-trial motions have not been waived.

Respondents assert that Safeco waived its right to seek post-trial relief regarding the punitive damages award. Respondents are wrong.

Rule 50(a) of the Rules of Civil Procedure, regarding judgments as a matter of law during trial, provides:

> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense

> that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
>
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

Civ.R. 50(a).

Admittedly, to preserve a post-trial motion for judgment as a matter of law or motion for new trial, a party must make a timely Rule 50(a) motion before the case is submitted to the jury. *McInarnay v. Hall*, 241 W.Va. 93, 98, 818 S.E.2d 919, 924 (2018). Such a timely Rule 50 motion may be made "at any time before the trial court submits the case to the jury." *Id.* "[A] party's failure to make a pre-verdict motion challenging the sufficiency of the evidence, as required by Rule 50(a), completely waives the party's right to make the same challenge to the sufficiency of the evidence after the trial under Rule 50(b)." *Id.* at 99, 925.

While Respondents accurately state the law on this issue, Respondents again fail to accurately convey the facts regarding this issue to the Court. Safeco timely moved for judgment under Rule 50(a) on Respondents' punitive damages claim. The record confirms the following motion made by Safeco's counsel:

> We move for a directed verdict on the punitive damages claim. The punitive damages liability evidence has already been presented. There will be no more evidence that goes to punitive's [*sic*]. And at this point in the trial we move for directed verdict on that. There's no evidence of malice, there's no evidence of extreme recklessness that fits for punitive damages under the statute, so, we move under Rule 50 for punitive damages, directed verdict.

(A.R. 333-334.)

After Respondents' counsel opposed the same, Safeco further explained the basis of the Motion, as follows:

> [Respondents' counsel] gave a compelling reason why a directed verdict would be inappropriate on the tort claims. That is not the motion. The motion is punitive damages. There has to be clear and convincing [evidence], the highest standard of proof of actual malice or conscious, reckless, outrageous indifference. The documents in this case speak for themselves. Safeco said we're not sure if the car can be moved or not. That's the only thing they said. That is not malicious. The document speaks for itself. All the rest of this has nothing to do with the conversion or the trespass claims. Those claims can go to the jury, the court's ruled on that. But the punitive damages claim should be directed.

(A.R. 336.)

After further argument from Respondents, the Court then denied the Motion, ruling: "Okay. I'm going to go ahead and deny the motion regarding punitive damages at this point." (A.R. 337.) Safeco's Motion was made, and the Court's decision was entered, before the close of evidence and the submission of the punitive damages liability question to the jury. (See, *e.g.*, A.R. 339 (continuation of trial); A.R. 427 (submission of punitive damages liability question to jury).)

Because Safeco timely moved for a directed verdict under Rule 50(a), Safeco did not waive its right to bring post-trial motions for either a directed verdict or a new trial.

B. The Circuit Court erred when it refused to enter judgment in Safeco's favor notwithstanding the verdict on Respondents' claim for punitive damages.

In order to award punitive damages against an insurance company, a finder of fact must conclude that the insurer acted with "actual malice," which is to say that it acted "willfully, maliciously and intentionally." Syllabus Pt. 2, *McCormick v. Allstate Ins. Co.*, 202 W.Va. 535, 505 S.E.2d 454 (1998). Further, in order to award such damages, there must be "clear and convincing evidence" to support the same. W.Va. Code §55-7-29.

As set forth above, Respondents' efforts to re-write the trial transcript notwithstanding, there was no such "clear and convincing" evidence in this case. The evidence in this case

indicates that the only things **Safeco** did in connection with Respondents' vehicle being moved were: (1) send Respondents a letter advising them in writing that Safeco had "set up a tow for our Copart Salvage yard" and that Respondents "will need to release the vehicle with Hitt Garage" before it could be picked up (A.R. 509); and (2) tell Copart in writing that Safeco was "unsure if customer has released the vehicle" (A.R. 308, 313, 319, 558, 562.) That is it.[1]

Everything else that was done in connection with Respondents' car being moved was done by either Copart, Scrap & Tran, or Hitt's. While Safeco acknowledges that it can be found liable for the mistakes of its vendor, and thus does not challenge the conversion award, such mistakes fall far short of "clear and convincing evidence" of actual malice by Safeco.

C. Alternatively, the Circuit Court erred when it refused to order a new trial on Respondents' punitive damages claim, particularly given the improper admission of claim handling evidence.

A new trial is appropriate when a verdict is against the clear weight of the evidence or constitutes a miscarriage of justice. Syl., *Morrison v. Sharma*, 200 W.Va. 192, 488 S.E.2d 467 (1997). In this instance, for the reasons discussed above and in Safeco's Brief, the finding of punitive liability in connection with the conversion claim was against the clear weight of the evidence and constitutes a miscarriage of justice.

In an effort to rebut this issue, Respondents identify copious amounts of post-"conversion" claim handling allegations against Safeco. This tack is the same one used at trial, and it is just as wrong now as it was then.

Pursuant to the West Virginia Code, "A third-party claimant's sole remedy against a person for an unfair claims settlement practice or the bad faith settlement of a claim is the filing of an administrative complaint with the Commissioner in accordance with subsection (b) of this

[1] If Respondents had other evidence of Safeco's actual malice toward Respondents, Respondents would have identified it, with proper citations to the record, instead of simply offering a series of mis-citations and misrepresentations.

section." W.Va. Code §33-11-4a(a). This statute is not ambiguous, and the obvious result of the same is a prohibition against civil damages for third-party bad faith.

In an effort to avoid the effect of this statute, Respondents note that a third-party claimant who has been the victim of discrimination can still sue under the State Human Rights Act, and they hypothesize that a claimant who is assaulted by an insurer could still bring an assault claim. (Resp. Brief, pp. 18-19.) Safeco agrees with both these assertions. And, with regard to this claim, an insurer which converts a vehicle can still be sued for conversion.

However, a third-party claimant who is pursuing a claim for discrimination, or assault, or conversion, does not suddenly have free reign to introduce alleged claim handling deficiencies which are unrelated to the discrimination, assault or conversion claim. A discrimination, assault or conversion claim cannot simply be third-party bad faith under a different name. But that is exactly what Respondents did in this case.

The claim handling actions described in this case happened after Respondents' vehicle was moved, and thus could not have any bearing on the earlier alleged conversion. For example, Safeco's adjuster told Respondents' counsel that the property damage offer previously extended was non-negotiable eight days after the vehicle was moved. (A.R. 140 and 516.) What bearing could that possibly have on the question of whether Safeco had previously converted the vehicle? None. Yet, Respondents were allowed to introduce that evidence over objection (A.R. 140-142); they were allowed to testify regarding how that statement allegedly damaged them over a standing objection (A.R. 140); and they feel it is so important to their case that they now include it in their appellate Brief (Resp. Brief, p. 4).

Mr. Jenkins was then allowed to testify over standing objection about how Safeco's subsequent claim negotiations – which again did not occur until after the vehicle was moved –

made him feel angry, frustrated and taken advantage of. (A.R. 142-148.) These alleged damages were offered without any connection to alleged damages regarding the actual conversion of the vehicle.

While Safeco acknowledges that §33-11-4a(a) is not a blanket get-out-of-jail-free card which immunizes all tortious conduct, Safeco submits that §33-11-4a(a) does preclude the introduction of bad faith claim handling evidence and damages therefrom which are unrelated to the tort at hand. To apply Respondents' analogy, if an insurance adjuster punches a third-party claimant in the face, the claimant can certainly sue for assault. But that pending assault claim does not then allow the claimant to also say that the adjuster violated the Unfair Trade Practices Act and the related insurance regulations by never responding to communications within 15 days, no matter how upsetting that non-responsiveness was to the claimant.

Quite simply, the Circuit Court erred by admitting post-"conversion" claim handling allegations and the purported damages therefrom. That error was significant enough to merit a new trial.

D. Alternatively, the Circuit Court erred when it refused to reduce the punitive damages award that was sixty-times the awarded compensatory damages.

"Punitive damages must bear a reasonable relationship to the potential of harm caused by the defendant's actions." Syl. Pt 1 (in part), *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991). "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." Syl. Pt. 15, *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992). The *TXO* decision

and the more recent *Alkire v. First Nat. Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996), identify several factors which must be reviewed regarding the amount of punitive damages awarded, which Safeco's Brief discusses. (Pet. Brief, pp. 17-20.)

Rather than undertaking a *Garnes / TXO / Alkire* analysis, Respondents advance only two arguments regarding the amount of the punitive damages award: (1) that this award and any other punitive damages award under $500,000 is permissible under W.Va. Code §55-7-29, regardless of the amount of compensatory damages (Resp. Brief, p. 21); and (2) that the $60,000 punitive damages award is not sixty-times Respondents' $1,000 compensatory damages award. (Resp. Brief, p. 23). Each of these arguments lacks merit.

1. Nothing about §55-7-29 eliminates the Garnes / TXO / Alkire requirements for a punitive damages award.

Pursuant to West Virginia's punitive damages statute, "The amount of punitive damages that may be awarded in a civil action may not exceed the greater of four times the amount of compensatory damages or $500,000, whichever is greater." W.Va. Code §55-7-29(c). According to Respondents, this means that any punitive damages award under $500,000 is appropriate, no matter the disparity between that award and the compensatory damages. Per Respondents, "[A]n award of $500,00 is authorized by the Statute, regardless of the amount awarded for compensatory damages." (Resp. Brief, p. 22.) This is not correct.

The punitive damages statute took effect June 8, 2015. W.Va. Code §55-7-29. Since the statute took effect, however, Courts have continued to analyze punitive damages awards under *Garnes*, *TXO* and *Alkire*.

In *Brozik v. Parmer*, 2017 WL 65475 (W.Va., Jan. 6, 2017), for example, trial court defendants appealed compensatory damage awards totaling $1.5 million and a punitive damages

award of $200,000. Analyzing the punitive damages award, this Court cited *Alkire* for the following principle:

> Under our punitive damage jurisprudence, it is imperative that the amount of the punitive damage award be reviewed in the first instance by the trial court by applying the model specified in Syllabus Points 3 and 4 of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), and Syllabus Point 15 of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), aff'd, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). Thereafter, and upon petition, this Court will review the amount of the punitive damage award, applying the standard specified in Syllabus Point 5 of *Garnes*.

Brozik, 2017 WL 65475 at *9. This Court then held, "[P]ursuant to *Garnes*, we decline to disturb a punitive damages award of $200,000, when accompanied by a compensatory damages award in the amount of $1.5 million." *Id.* at *10.

The continued relevance of the *Garnes* and *TXO* factors has also been recognized by this Court in *State ex rel. State Farm Mut. Auto. Ins. Co. v. Cramer*, 237 W.Va. 60, 67, 785 S.E.2d 257, 264 (2016) (Under *Garnes*, "How often the defendant engaged in similar conduct in the past is one of the factors to be considered in awarding punitive damages"); by this Court in *Richard H. v. Rachel B.*, 2019 WL 6998331, *3 (W.Va. Case No. 18-1004, Dec. 20, 2019) (citing *Garnes* for the principle that punitive damages may be appropriate in a case where nominal damages are awarded provided the punitive damages award "bear[s] a reasonable relationship to the [nominal] compensatory damages"); by the United States Bankruptcy Court for the Southern District of West Virginia in *In re Good*, 2018 WL 4836799, *4-5 (S.D.W.Va. Bky. Case No. 2:15-bk-20635) (identifying and analyzing the *Garnes* factors before awarding $50,000 in punitive damages and $33,000 in compensatory damages in an adversary proceeding); and by the United States District Court for the Southern District of West Virginia in *Knight v. Boehringer*

Ingelheim Pharmaceuticals, Inc., 323 F.Supp.3d 837, 853 (S.D.W.Va. 2018) (financial metrics are one factor to be analyzed under *Garnes*).

If West Virginia's punitive damages statute had abrogated *Garnes, TXO* and *Alkire*, none of the foregoing cases would have undertaken this analysis. In *Brozik*, for example, this Court would not have needed to refer to *Garnes* as the basis for the $200,000 punitive damages award. This Court could have instead simply held that, because $200,000 is less than $500,000, the award is permissible under §55-7-29. The Bankruptcy Court could have similarly shortened its decision in *In re Good*, as a $50,000 punitive damages is well under the $500,000 ceiling of the statute. Because these decisions undertake a *Garnes / TXO / Alkire* analysis, the "this is under $500,000 so it is fine" simplicity of Respondents' position is plainly wrong.

Jersey Subs, Inc. v. Sodexo America, LLC, 2019 WL 208882 (N.D.W.Va. Case No. 1:18-cv-191, Jan. 15, 2019) – the case Respondents rely on most heavily in their discussion of this issue – is of no consequence in this matter. In *Jersey Subs*, the District Court determined that more than $75,000 was in controversy because the plaintiffs therein sought $20,000 in compensatory damages plus punitive damages. *Id.* at *3. In doing so, the Court noted that the "minimum cap on claims for punitive damages is $500,000" – a factually correct statement. *Id.* at *3. The Court did not, however, say that any award up to $500,000 in that case would be permissible. If the plaintiffs therein were seeking $20,000 in compensatory damages, the amount in $75,000 amount in controversy limit would be exceeded if the punitive damages were three-times the compensatory damages – a multiple entirely consistent with *Garnes*, *TXO* and *Alkire*.

In fact, Safeco is aware of no Court that has ever made the blanket statement that Respondents do – that any punitive damages award is permissible, no matter the lack of relationship to the compensatory damages, so long as the punitive damages award is under

$500,000. To the contrary, several Courts – including, most importantly, this Court – continue to analyze punitive damages awards under *Garnes*, *TXO* and *Alkire*. This continued reliance on *Garnes*, *TXO* and *Alkire* confirms that punitive damages awards must comply with those precedential cases.

As explained in Safeco's Brief, the $60,000 punitive damages award to Respondents does not satisfy *TXO* and *Alkire* under a *Garnes* analysis. Respondents do not even try to argue otherwise in their Brief. Indeed, Respondents' Brief does not cite a single *TXO* / *Alkire* factor with which the award purportedly complies. Because Respondents completely ignore this aspect of Safeco's appeal, judgment in Safeco's favor on this issue is appropriate.

2. Respondents' punitive damages award is sixty-times their compensatory damages award.

Ignoring *Garnes*, *TXO* and *Alkire*, Respondents instead argue that the punitive damages award was not sixty-times the compensatory damages award. This argument requires little rebuttal. The compensatory damages award against Safeco was $1,000. (A.R. 566.) The punitive damages award against Safeco was $60,000. (A.R. 567.) $60,000 is sixty-times $1,000.

Respondents explain their position by asserting that the jury could use the compensatory damages awarded against Safeco's insureds as a basis for the punitive damages against Safeco. (Resp. Brief, pp. 23-24.) This is an assertion without support.

As *Garnes* makes clear, there must be a reasonable relationship between punitive damages against a defendant and "the potential of harm caused by the defendant's actions." Syl. Pt 1 (in part), *Garnes*, 186 W.Va. at 656 (emphasis added). Safeco is aware of no authority, and Respondents certainly cite no authority, which would permit a punitive damages award against a defendant like Safeco to be based on a compensatory damages award entered in another case, against another unrelated defendant like Safeco's insured.

For the reasons herein, if the Court is not willing to enter judgment for Safeco on the punitive damages claim, and the Court is not willing to order a new trial on the punitive damages claim, the Court should at least reduce the amount of the punitive damages award against Safeco. A sixty-times multiplier for a punitive damages award is improper under West Virginia law, and Respondents have offered no authority to the contrary.

IV. CONCLUSION

For all the foregoing reasons, and for the reasons in its Brief, Safeco respectfully requests that the Court: (1) enter judgment for Safeco on the punitive damages claim; or, in the alternative (2) order a new trial on punitive damages; or, in the alternative (3) significantly reduce the punitive damages award entered by the Circuit Court.

Respectfully submitted,

Safeco Insurance Company of America and Liberty Mutual Insurance Company

By counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March, 2020, I caused the foregoing "Reply Brief of Petitioners" to be served on counsel of record via email and U.S. Mail in a postage-paid envelope addressed to:

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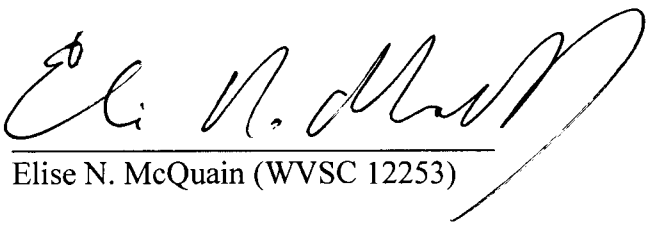

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