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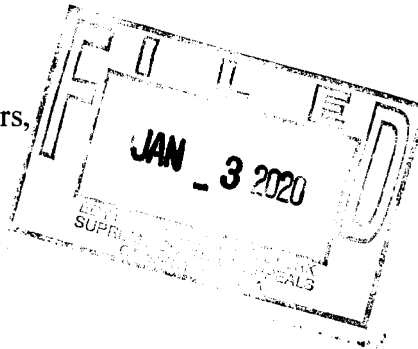
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**DOCKET NO. 19-0899**

FILE COPY

Safeco Insurance Company of America
and Liberty Mutual Insurance Company,

Defendants Below, Petitioners,




v.

Joseph M. Jenkins
and Stephanie D. Jenkins,

Plaintiffs Below, Respondents.

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**BRIEF OF PETITIONERS**

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## I. ASSIGNMENTS OF ERROR

Petitioners Safeco Insurance Company of America and Liberty Mutual Insurance Company (collectively, "Safeco") appeal the decision of the Harrison County Circuit Court on three grounds:

A. The Circuit Court erred when it refused to enter judgment in Safeco's favor notwithstanding the verdict on Respondents' claim for punitive damages, because no evidence supported an award of punitive damages and because such an award was in contravention of the applicable "clear and convincing" legal standard.

B. Alternatively, the Circuit Court erred when it refused to order a new trial on Respondents' punitive damages claim, because the verdict was against the clear weight of the evidence and was based on inadmissible claim handling evidence, such that Respondents were able to present the equivalent of a statutorily prohibited third-party insurance bad faith claim.

C. Alternatively, the Circuit Court erred when it refused to reduce a punitive damages award that was sixty-times the awarded compensatory damages, because evidence submitted by Respondents did not support such an award under the factors established by this Court and because such an award is improper under applicable law.

## II. STATEMENT OF THE CASE

### A. The Car Accident

This action arises out of an October 15, 2017 car accident between Respondent Joseph Jenkins and Safeco's insured, Tessa Ann Jordan. (A.R. 125.) In a separate trial against Ms. Jordan and her father, Respondents received a jury award for over $56,000. (A.R. 149.) That verdict against the Jordans included awards for medical damages, lost wages, annoyance and inconvenience, loss of use and loss of consortium. (A.R. 149-150.) Prior to the trial against the Jordans, Respondents had also received from Safeco almost $4,000 for the value of Respondents' vehicle. (A.R. 150.)

### B. The Claims Against Safeco

Rather than simply bringing this as a traditional car accident negligence action, however, Respondents also asserted claims against Safeco. Importantly, Safeco insured the Jordans at the time of the accident, not Respondents. (A.R. 244.)

Against Safeco, Respondents alleged that Safeco trespassed against and converted Mr. Jenkins' vehicle after the accident by having the wrecked vehicle moved from one tow yard to another without Respondents' consent. (A.R. 114.) At trial, Respondents alleged that this conduct constituted trespass; conversion; the intentional tort of outrage; and a civil conspiracy. (A.R. 421-26.) Respondents sought both compensatory and punitive damages from Safeco. (A.R. 426-30.)

### C. The Verdict

Separate from the claims against the Jordans, the claims against Safeco were tried to verdict on April 10 and 11, 2019. (A.R. 27.) The trial against Safeco was bifurcated, with the first stage involving liability and compensatory damage questions, and the second stage involving, if necessary, punitive damages. (A.R. 605.)

During the first stage of the bifurcated trial, Safeco moved for directed verdict on Respondents' claim for punitive damages. (A.R. 333-37.) The Circuit Court denied that Motion. (A.R. 337.)

After the first stage of the trial, the jury returned a verdict for Safeco on the claims of trespass, outrage, and civil conspiracy. (A.R. 565.) On the claim of conversion, however, the jury returned a verdict for Respondents. (A.R. 565.) To compensate Respondents for Safeco having converted Respondents' wrecked 2009 Chevy Aveo, the jury awarded Respondents $1,000 in compensatory damages. (A.R. 566.)

The jury also found "by clear and convincing evidence that damages suffered by [Respondents] were the result of [Safeco's] conduct that was done with actual malice toward [Respondents], or a conscious, reckless and outrageous indifference to the health, safety and welfare of others." (A.R. 566.) Having found that a punitive damages award was appropriate, and having then heard evidence that went toward the amount of the punitive damages award, the jury eventually returned a punitive damages verdict against Safeco of $60,000 – sixty times the compensatory award. (A.R. 567.)

While Safeco disagrees with the conversion verdict, Safeco has chosen not to appeal the same. Instead, Safeco appeals only the punitive damages award.

### D. Evidence Regarding The Alleged Conversion

The accident between Mr. Jenkins and Ms. Jordan occurred on October 15, 2017. (A.R. 151.) After the accident, Respondents' wrecked 2009 Chevy Aveo was taken to JE Hitt Garage and Body Shop ("Hitt's") in Weston, West Virginia. (A.R. 151.) Mr. Jenkins knew the vehicle was at Hitt's as of the evening of the accident. (A.R. 151.) Mr. Jenkins grew up in Weston and knew right away where Hitt's was. (A.R. 151.) Mr. Jenkins testified that, after the accident, he trusted Hitt's to take care of his vehicle. (A.R. 153.)

The vehicle remained at Hitt's for three months. (A.R. 151.) Within two months of the accident, though, Respondents had bought a new car to replace the wrecked one. (A.R. 153-54.) 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; and they never had any other interaction regarding the wrecked vehicle. (A.R. 152-54.) During those three months, although they knew they could have done so, Respondents also never even asked to go to the vehicle to retrieve anything from it. (A.R. 152.)

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.) Safeco requested that Mr. Jenkins contact Safeco before January 18, 2018 if he wanted to retain the vehicle. (A.R. 508.) Safeco also advised that it would stop paying storage costs at Hitt's as of January 18, 2018. (A.R. 509.)

Respondents testified that they timely received this letter, but that they did not review it immediately because Mr. Jenkins was out of town. (A.R. 155.) They also acknowledged that they did not respond to the letter and voice any objection to the proposed settlement until well after their vehicle had been moved. (A.R. 155-56.)

On January 16, 2018, after sending the offer letter to Mr. Jenkins, Safeco made an assignment to Copart, Inc. ("Copart") regarding Respondents' vehicle. (A.R. 209.) 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 & Transport Company ("Scrap & Tran") is a Copart contractor. (A.R. 271.) On January 18, 2018, Scrap & Tran towed the wrecked vehicle from Hitt's to Copart. (A.R. 279-81.) Scrap & Tran did this at Copart's request. (A.R. 271.)

Importantly, there is no dispute that Safeco's claims adjuster told Copart when she made the assignment that she was "unsure if customer has released the vehicle." (A.R. 308, 313, 319.) 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.)

Because of this uncertainty on the part of both Safeco and Copart, Copart called Hitt's to determine if the vehicle had been released to be moved to Copart. (A.R. 309.) As Copart's representative testified, and as Copart's January 17, 2018 business records confirm, Hitt's' body shop manager, Russ Edwards, told Copart that the vehicle was released for pickup. (A.R. 309, 562.) In reliance on this statement, Copart retained Scrap & Tran to retrieve the vehicle; Scrap & Tran went to Hitt's; and, with Hitt's' consent, Scrap & Tran picked up the vehicle and delivered it to Copart. (A.R. 309-10.)

Respondents assert that they did not give Safeco, Copart, Scrap & Tran or Hitt's permission for the wrecked vehicle to be moved from Hitt's to Copart. (A.R. 119.) They also assert that Hitt's was not their agent for purposes of telling Copart the vehicle had been released. (A.R. 395.)

Consistent with Copart's testimony and business records, Mr. Edwards of Hitt's admitted at trial that he did give Copart permission to move the vehicle which Hitt's had been storing for three months. (A.R. 289, 562.) But, Mr. Edwards testified that this permission was based on a conversation with Safeco in which Safeco's unidentified representative allegedly told him the vehicle had been released. (A.R. 289.) No written records from Safeco, Copart or Hitt's support this testimony, and the representatives from both Safeco and Copart disagreed with this. (A.R. 324, 387.) Instead, the records – including Safeco's memorialized uncertainty about whether the vehicle had been released, written less than 24 hours Mr. Edwards' alleged conversation – support that no such conversation occurred. (A.R. 558-62.)

Construing this contradictory testimony, the jury nevertheless determined that Safeco caused the vehicle to be moved without consent, and that Safeco was therefore liable for

conversion. (A.R. 565.) Again, while Safeco disagrees with that finding, Safeco has elected not to appeal the same.

But, Safeco believes that none of the foregoing evidence supports a finding of punitive damages. Instead, Safeco believes that judgment should have been entered in its favor as to punitive damages, and that the finding of punitive damages was based on improperly admitted evidence and argument regarding after-the-fact claim handling events.

### E. Improperly Allowed Claim Handling Argument and Evidence

Safeco submits that the jury's opinion of Safeco was tainted, and the question of punitive damages liability was adversely affected, by improperly admitted evidence regarding alleged claim handling deficiencies which did not occur until after Respondents' car was moved. This evidence, and the arguments based on the same, were at the core of Respondents' claim for punitive damages.

Safeco moved the Court in limine to exclude claim handling evidence, because the admission of such evidence was inconsistent with W.Va. Code §33-11-4a, which precludes a private cause of action by third parties for unfair claims settlement practices. (A.R. 4-10.) The Court denied this Motion, advising that the Court would consider the issue on a question-by-question basis during trial. (A.R. 23-26.) The Court further granted Safeco a standing objection to any claim handling evidence. (A.R. 45-51.)

During trial, however, Respondents immediately revealed that their case theme was that this was a case about money and power. Indeed, in the very first sentences of his opening statement, counsel asserted:

> Ladies and gentlemen, this case is about power. It's about who has control because of their wealth, or because they just have the stick. * * * In this instance, my client, Joe Jenkins, was a victim of that

> power, that stick, because he wanted something that evidently Liberty Mutual and Safeco didn't agree with.

(A.R. 70, lines 14-24.)

Over the course of Respondents' counsel's opening statement, counsel explained what that "something" was that Mr. Jenkins wanted with which Safeco did not agree: more money on his property damage claim. (A.R. 75.) Wholly separate from the trespass and conversion claims actually on trial, Respondents' counsel challenged the amount of the offer that was extended for property damage, and why Safeco would not agree to the higher amount requested from Respondents: "[I]nstead of negotiating or paying it or whatever, we're talking a thousand dollars difference, they told him that the amount they thought it was worth was non-negotiable, take it or leave it." (A.R. 101-102.)

The evidence from Mr. Jenkins bore out counsel's assertions from his opening. According to Mr. Jenkins, his beef with Safeco was that Safeco "didn't even negotiate on the price with me." (A.R. 114.) Further, over objection, Respondents introduced Exhibit 15, an email telling Mr. Jenkins that the earlier property damage offer was "non-negotiable." (*See generally* A.R. 140-45.) That email is from January 26, 2018, eight days after the vehicle was moved. (A.R. 516.) Respondents acknowledged that these negotiations did not occur until after the vehicle had been moved, because they did not even respond to Safeco's offer before the vehicle was moved. (A.R. 155-56.) While counsel for Safeco objected that this was impermissibly "dress[ing] a bad faith claim up as something else" and "using this to say Safeco acted in bad faith," not "Safeco stole the car," the Court disagreed and overruled the objection. (A.R. 140-42.)

Then, over a standing objection given by the Court, Mr. Jenkins was permitted to testify regarding how this email, and the related $1,000 property damage valuation disagreement with

Safeco, made him feel. (A.R. 142-48.) According to Mr. Jenkins, this claim handling interaction with Safeco – which, again, did not occur until after the vehicle was moved – made him feel angry, frustrated and taken advantage of. (A.R. 142-48.) Conversely, at no point did Mr. Jenkins offer any evidence as to damages suffered from the wrecked vehicle being moved from Hitt's to Copart after sitting at Hitt's for three months without any attention from Respondents.

Addressing that claim negotiation anger, frustration, and perceived victimization in closing, Respondents' counsel again advised the jury right out of the gate "that this case was about money and power." (A.R. 433.) According to counsel, "West Virginia people can't be pushed around or taken advantage of just because they don't have resources, or they don't have power." (A.R. 433.) These themes tied directly into Respondents' counsel's argument that the events after January 18, 2018 when the car was moved somehow went to the issue of Safeco's earlier intent. That is simply wrong. Subsequent events cannot be used to show that an earlier event was intentional. Yet that was the ultimate argument in the rebuttal portion of Respondents' counsel's closing:

> And then when it got down to it, they took the car and still did nothing until he went to trial last week. That tells you where the truth lies, and that's what tells you you need to do something, or else an old man like me is going to be here again sometime, only it will be somebody different. I have nothing further, Your Honor.

(A.R. 455-56.)

Quite simply, none of the evidence about claim handling or other events after the vehicle was moved, and none of the argument regarding that evidence, should have been admitted. Respondents admitted that they did not review, let alone respond to, Safeco's property damage settlement offer until after the vehicle had been moved. (A.R. 156.) Safeco could not have moved the vehicle to try to leverage a property damage settlement, because Safeco did not know

that the settlement offer it had extended was rejected until after the vehicle was moved. (A.R. 155-57.) Because Safeco did not know of Respondents' disagreement regarding the vehicle's value until after the vehicle was moved, the post-move claim handling conduct of Safeco could not have any bearing on Safeco's limited role in causing the vehicle to be moved.

Such claim handling evidence and the related argument only went to an impermissible theory of liability, analogous to impermissible third-party bad faith. Such evidence and argument was improperly admitted; was improperly allowed to counter the evidence which showed that Safeco had virtually no role in causing the car to be moved; and improperly formed the basis for the jury to find Safeco liable for punitive damages.

### F. Post-Trial Motions Practice In The Circuit Court

The Circuit Court entered its Judgment Order On Jury Verdict on May 1, 2019. (A.R. 564-68). Safeco filed three timely post-trial motions: (1) Motion For Judgment Notwithstanding The Verdict regarding Plaintiffs' Claims For Punitive Damages; (2) Motion For New Trial Regarding Punitive Damages; and (3) Motion To Reduce The Punitive Damages Award. (A.R. 569-85.)

On September 3, 2019, the Circuit Court entered two Orders which collectively denied the three post-trial Motions. (A.R. 604-25.) From those Orders, Safeco filed a timely Notice of Appeal.

## III. SUMMARY OF ARGUMENT

Safeco presents three assignments of error regarding the punitive damages verdict entered in Respondents' favor.

First, Safeco submits that judgment on the issue of punitive damages should have been entered in Safeco's favor. Safeco submits that there was no clear and convincing evidence to

support Respondents' entitlement to punitive damages, and as such, the issue should not have gone to the jury.

Second, Safeco submits in the alternative that a new trial should be conducted on Respondents' punitive damages claim. Even if some evidence did support the claim for punitive damages, the verdict was against the clear weight of the evidence. Moreover, much of the evidence introduced, and the argument made, in support of the punitive damages award was improperly based on inadmissible claim handling evidence. For third-party claimants such as Respondents, the "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 [W.Va. Code §33-11-4a(b)]." W.Va. Code §33-11-4a(a). Allowing claim handling evidence and argument to go to the jury as a basis for the punitive damages award violated §33-11-4a.

Third, Safeco submits in the alternative that the amount of the punitive damages award should be significantly reduced. The sixty-times multiplier awarded by the jury is inappropriate under the facts of this case.

## IV. STATEMENT REGARDING ORAL ARGUMENT

This case is appropriate for oral argument under Rule 20 because it involves issues of fundamental public importance regarding (1) efforts to circumvent W.Va. Code §33-11-4a; and (b) whether a sixty-times multiplier is appropriate for punitive damages.

This case is also appropriate for oral argument under Rule 19 because it involves: (1) an assignment of error in the application of settled law regarding the requisite elements of proof for punitive damages; and (2) an assignment of error claiming insufficient evidence and a result against the manifest weight of the evidence.

## V. ARGUMENT

### a. Statement of Jurisdiction and Standard of Review

#### i. This Court Has Jurisdiction over This Appeal.

Appeal to this Court is proper when the Circuit Court has entered a final judgment and the case has ended there. W.Va. Code § 58-5-1; *C & O Motors, Inc. v. W. Virginia Paving, Inc.*, 223 W.Va. 469, 473, 677 S.E.2d 905, 909 (2009)

In this case, the Circuit Court of Harrison County entered a Judgement Order On Jury Verdict regarding all claims in this action and then issued Orders denying Safeco's post-trial Motions. All claims which were pending in the Circuit Court are decided. Thus, the Circuit Court's Orders constitute a final judgment properly before this Court.

#### ii. Standard of Review

Because Assignment of Error Number One relates to the denial of Safeco's Motion for Judgment Notwithstanding the Verdict, it should be reviewed by this Court for "whether the evidence was such that a reasonable trier of fact might have reached the decision below." *Alkire v. First Nat. Bank of Parsons*, 197 W. Va. 122, 124, 475 S.E.2d 122, 124 (1996). Indeed, if in the Court's review, "the evidence is shown to be legally insufficient to sustain the verdict, it is the obligation of the appellate court to reverse the circuit court and to order judgment for the appellant." *Id.*

Assignment of Error Number Two alternatively challenges the Circuit Court's denial of Safeco's Motion for a New Trial. If the Court reaches this Assignment, the Court must review the Circuit Court's ruling "concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard." *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995). The Circuit Court's underlying factual

findings are examined under a clear-error standard, while questions of law are subject to a de novo review. *Id.*

If this Court reaches Assignment of Error No. 3, regarding the amount of the punitive damage award, the Court shall alternatively consider the same aggravating and mitigating evidence that the Circuit Court was required to consider in reviewing the punitive damages award. *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 659, 413 S.E.2d 897, 900 (1991), *holding modified by Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010).

**b. The Circuit Court erred when it refused to enter judgment in Safeco's favor notwithstanding the verdict on Respondents' claim for punitive damages, because no evidence supported an award of punitive damages and because such an award was in contravention of the applicable "clear and convincing" legal standard.**

"In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Syl. Pt. 3, *Fredeking v. Tyler*, 224 W.Va. 1, 680 S.E.2d 16 (2009), citing Syl. Pt. 5, *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983).

In order to reach a finding of punitive damages liability, however, there must be "clear and convincing evidence" to support the same. W.Va. Code §55-7-29. "Clear and convincing" evidence is "the highest possible standard of civil proof." *Heaster v. Robinson*, 2018 WL 2193244 *3 (W.Va. No. 17-0558, May 14, 2018) (citations omitted). It is "certain, plain to the understanding, and unambiguous and convincing in the sense that it is so reasonable and

persuasive as to cause [the jury] to believe it." *Id.* "It enables [the jury] to come to a clear conviction, without hesitation, of the matter asserted." *Id.*

In order to award punitive damages against an insurance company, a finder of fact must conclude by clear and convincing evidence 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). Even if a jury finds that the insurer acted with negligence, lack of judgment, incompetence or bureaucratic confusion, punitive damages are not appropriate unless the jury also finds that the injury was intentional. *Id.* at 540.

Respondents simply did not carry this burden, and the Circuit Court erred by refusing to enter judgment in Safeco's favor notwithstanding the verdict on Respondents' claim for punitive damages. Based on the evidence presented, there was no "clear and convincing" evidence of actual malice or intentional injury on which the jury could have properly awarded punitive damages against Safeco. Safeco did not move Respondents' vehicle, and Safeco did not hire the company which did. Moreover, as confirmed by the contemporaneously prepared business records of both Safeco and Copart, Safeco affirmatively told Copart that Safeco was uncertain whether Respondents had released the vehicle to be moved. These memorialized records directly contradict Mr. Edwards' non-memorialized testimony that an unidentified person at Safeco told him the vehicle had been released to be moved.

Yet, even if the jury believed Mr. Edwards' testimony and that was the basis for conversion liability, the jury imposed liability because an agent (Scrap & Tran) of Safeco's agent (Copart) mistakenly moved the vehicle without Respondents' consent, relying on consent given by someone (Hitt's) who appeared to have authority to release the vehicle but according to

Respondents did not. This dubious string of mistakes simply cannot equate to "clear and convincing" evidence of actual malice.

As a matter of law, any evidence supporting liability for conversion in this action fails to satisfy the clear and convincing standard for related punitive damages. The punitive damages verdict entered in Respondents' favor should therefore be set aside, and judgment should instead be entered as a matter of law for Safeco on Respondents' claim for punitive damages.

**c. Alternatively, the Circuit Court erred when it refused to order a new trial on Respondents' punitive damages claim, because the verdict was against the clear weight of the evidence and was based on inadmissible claim handling evidence, such that Respondents were able to present the equivalent of a statutorily prohibited third-party insurance bad faith claim.**

"A motion for a new trial is governed by a different standard than a motion for a directed verdict. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion." Syl., *Morrison v. Sharma*, 200 W.Va. 192, 488 S.E.2d 467 (1997).

**1. The punitive damages verdict was against the clear weight of the evidence.**

In this instance, for the reasons discussed above, 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. As discussed, even if Mr. Edwards' testimony is deemed to

offer some support for the award, the contemporaneously recorded business records and other testimony far outweigh the same.

This is particularly true given that so much of Respondents' case – and Respondents' subsequent request for punitive damages – focused on claim handling which occurred <u>after</u> the alleged conversion and which therefore could not have motivated the alleged conversion. Indeed, Respondents' entire case theme of "money and power" hinged on the belief that Safeco was trying to leverage a settlement by moving Respondents' wrecked car. This theory ignored the undisputed fact that Respondents did not object to Safeco's settlement offer until after the alleged conversion. Given this undisputed chronology, the settlement discussions simply could not have motivated the alleged conversion.

**2. The punitive damages award was improperly based on inadmissible claim handling evidence.**

A new trial is also appropriate based on the fact that the Court improperly permitted Respondents to introduce this prejudicial, after-the-fact claim handling evidence regarding Respondents' underlying claim against Safeco's insured.

West Virginia no longer recognizes the tort of third-party bad faith. W.Va. Code §33-11-4a. Pursuant to the Code:

> A third-party claimant may not bring a private cause of action or any other action against any person for an unfair claims settlement practice. ***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 section.*** A third-party claimant may not include allegations of unfair claims settlement practices in any underlying litigation against an insured.

W.Va. Code §33-11-4a(a). (Emphasis added.)

Prior to the trial of the claims against Safeco, the Court denied a Motion in Limine to exclude claim handling evidence. Then, over objection, the Court allowed Respondents to introduce evidence regarding post-"conversion" claim handling and negotiations. Respondents then used this after-the-fact evidence as a basis for their damages arguments.

By permitting Respondents to elicit this testimony and evidence regarding the handling of Respondents' claim, the Court allowed Respondents to argue to the jury that Safeco could be liable for, and should be punished for, the way in which Safeco handled that claim. Indeed, as discussed previously, this was the very theme of Respondents' case.

Such evidence and argument run directly contrary to W.Va. Code §33-11-4a(a). By allowing Respondents to introduce evidence regarding Safeco's handling of their claim, and to then bootstrap their argument to that evidence, the Court impermissibly allowed claim handling evidence to poison the jury's evaluation of whether clear and convincing evidence of actual malice existed regarding the conversion claim. This was clear error which necessitates a new trial on the claim for punitive damages.

**d. Alternatively, the Circuit Court erred when it refused to reduce a punitive damages award that was sixty-times the awarded compensatory damages, because evidence submitted by Respondents did not support such an award under the factors established by this Court and because such an award is improper under applicable law.**

"Punitive damages must bear a reasonable relationship to the potential of harm caused by the defendant's actions." Syl. Pt 1 (in part), *Garnes*, 186 W.Va. 656, 413 S.E.2d 897. "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).

In addition to this *TXO* standard, a trial court must review awards of punitive damages with an eye toward the following criteria:

> (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.
>
> [AND]
>
> (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.

Syl. Pt. 6, *Alkire*, 197 W.Va. 122, 475 S.E.2d 122 (referencing Syl. Pts. 3 and 4, *Garnes*, *supra.*).

On appeal, however, for ease of review, these criteria may be "grouped according to their purpose." *Perrine*, 225 W.Va. at 553, 694 S.E.2d at 886. According to this grouping, the Court should first determine whether the amount of the punitive damages award is justified by aggravating evidence including, but not limited to: (1) the reprehensibility of the defendant's conduct; (2) whether the defendant profited from the wrongful conduct; (3) the financial position of the defendant; (4) the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed; and (5) the cost of litigation to the plaintiff." *Id.*

"The court should then consider whether a reduction in the amount of the punitive damages should be permitted due to mitigating evidence including, but not limited to: (1) whether the punitive damages bear a reasonable relationship to the harm that is likely to occur and/or has occurred as a result of the defendant's conduct; (2) whether punitive damages bear a reasonable relationship to compensatory damages; (3) the cost of litigation to the defendant; (4) any criminal sanctions imposed on the defendant for his conduct; (5) any other civil actions against the same defendant based upon the same conduct; (6) relevant information that was not available to the jury because it was unduly prejudicial to the defendant; and (7) additional relevant evidence." *Id.* at 553-54.

None of the above *Garnes* factors supports an award of $60,000 in punitive damages, or 60-times the compensatory damages award. First, minimal harm actually occurred, and only

slight harm was ever likely to occur. At worst, the wrecked 2009 Chevy Aveo that Respondents had left at one body shop for three months got improperly moved to another. As the jury correctly concluded, the actual damages for that act were no more than $1,000.

Second, the alleged conversion was at worst a momentary miscommunication. Safeco made an assignment to Copart regarding the wrecked vehicle on January 16, 2018 and the wrecked vehicle was moved to Copart on January 18, 2018. All aspects of the alleged conversion thus occurred in less than 48 hours.

Importantly, while the vehicle remained at Copart after January 18, 2018, the jury reached a defense verdict on Respondents' trespass claim – a finding which confirms that the only wrong in this process was moving the vehicle, rather than keeping the vehicle for a significant period of time afterward.

There was also no evidence that Safeco attempted to cover up that the vehicle was moved. To the contrary, Safeco told Respondents it was going to make the assignment to Copart before it was moved, and Safeco told Respondents about the fact that the vehicle had been moved thereafter. Indeed, it was Safeco which alerted Respondents to the fact the vehicle had been moved, as Respondents were unaware of the same.

Third, there is no evidence that Safeco profited from having the vehicle moved from Hitt's to Copart. While Respondents alleged that Safeco was trying to leverage a better settlement of the property damage claim, Respondents also conceded that Safeco settled the property damage claim long before trial for the amount Respondents had demanded.

Fourth, a 60-times multiplier on the punitive damages award versus the compensatory award does not bear a reasonable relationship to compensatory damages. That multiplier is 1200% of the permissible outer limits ratio espoused by *TXO*.

Fifth, while Safeco admittedly has significant corporate assets, this alone does not justify an otherwise unjustifiable award.

Sixth, Respondents presented no evidence regarding any costs incurred in this litigation.

Seventh, there was no evidence that Safeco has been subjected to any criminal sanctions, and it has not been.

Eighth, there is no evidence that any other civil actions have been initiated as a result of similar conduct, or even that similar conduct occurred in connection with any other claimant or vehicle.

Ninth, and most important, analyzing *TXO*, there is no evidence of "actual intention to cause harm." Without such evidence, the maximum appropriate punitive damages award is 5-times the compensatory damages. In this case, as described above, the evidence affirmatively shows an absence of intent to harm Respondents. At most, Safeco is liable to Respondents for a series of miscommunications between the agents of Safeco and Hitt's. The only credible evidence of what Safeco itself did in connection with moving the car was that Safeco told Copart that it was unsure whether the car could be moved. That is the direct opposite of actually intending to cause Respondents harm.

An analysis performed under *Perrine* reaches the same conclusion that the punitive damages award was unjustified and that the mitigating evidence justifies a reduction of the award.

For the foregoing reasons, if the Court is unwilling to award any other relief, the punitive damages award in this case should be significantly reduced.

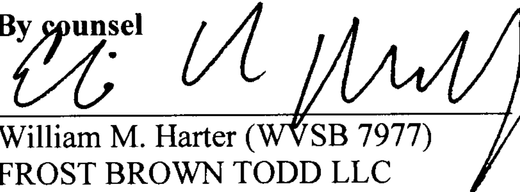
## VI. CONCLUSION

For all the foregoing reasons, Safeco respectfully requests that the Court: (1) reverse the Judgement Order On Jury Verdict entered by the Circuit Court with regard to the punitive damages award, and instead enter judgment for Safeco on that punitive damages claim; or, in the alternative (2) reverse the Judgement Order On Jury Verdict entered by the Circuit Court with regard to the punitive damages award, and instead 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 3rd day of January, 2020, I caused the foregoing "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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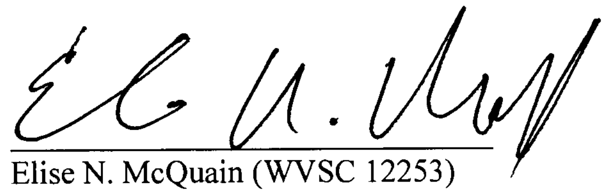

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