IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

PROGRESSIVE CASUALTY INSURANCE COMPANY,

Plaintiff-Appellant,

v.

Ct. App. No. 32,171
Dist. Ct. No. D-202-CV-2002-09124

NANCY COLLEEN VIGIL and MARTIN VIGIL,

Defendants-Appellees.

Civil Appeal from the Second Judicial District Court, County of Bernalillo
Honorable Alan Malott, District Court Judge

PLAINTIFF-APPELLANT'S BRIEF IN CHIEF

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ORAL ARGUMENT IS REQUESTED

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G) NMRA, we certify that this response complies with the type-volume limitation of Rule 12-213(F)(3). According to Microsoft Office Word 2007, the body of the Plaintiff-Appellant's Brief in Chief, as defined by Rule 12-213(F)(1), contains 10,952 words.

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INTRODUCTION

Progressive Casualty Insurance Company appeals from an insurance bad faith judgment totaling more than $13,000,000. Progressive originally obtained judgment in its favor after a ruling that it owed no coverage as a matter of law. After reversal on appeal, however, a retrial ended in a jury verdict finding not only that coverage was owed, but also that Progressive's coverage position—previously approved by the trial court—was in bad faith. The verdict included $37,000 in compensatory damages and an astonishing total of $11,700,000 in punitive damages.

The judgment should be reversed. The verdict was infected by prejudicial trial errors that left the jury with a severe misimpression of what transpired in the handling of the claim. The Court should reverse the punitive damages and a portion of the compensatory damages for the independent reason that they lack evidentiary support, and should reverse the punitive damages as excessive. Finally, the Court should reverse the $1,458,142.50 attorney fees award, which constituted improper additional punishment.

SUMMARY OF PROCEEDINGS[1]

A. Nancy Vigil, an insured under an expiring Progressive auto policy, fails to pay the required premium by Progressive's November 3 renewal date.

Nancy Vigil was insured under a Progressive automobile insurance policy expiring November 3, 2002. [Ex. 1] Vigil's monthly payments were due on the third of each month. [20 Tr. 109] On September 28, before paying her final monthly installment, Vigil called Progressive to change her coverage. [Ex. 2; 20 Tr. 32, 100-01] The customer service representative (CSR) told Vigil the change increased her premium by $59. [Ex. 2, p. 2] The CSR explained that Progressive would bill for the additional $59 and that the $397.03 installment due October 3 could be added to that bill, for a total of $456.03. [Ex. 2, p. 3] Vigil paid that amount by credit card on October 3, using an automatic phone system that indicated the $456.03 payment was due October 15. [20 Tr. 40, 101, 141, 151, 165; see also Ex. 3]

On October 9, Progressive notified Vigil that her policy would renew on November 3, 2002, provided she paid a $401.96 minimum premium by that date. [Exs. 4, G; 20 Tr. 49-50] Vigil contends that, on October 16, after receiving the October 9 notice, she called Progressive's automated system and was told the payment was not due until November 15. [20 Tr. 50, 54-55, 103] Progressive contends the

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[1] Transcript and exhibit citations to the underlying facts are from the retrial. Court exhibits, as distinguished from party exhibits, are designated "Crt.-Ex."

automated system would have told her payment was due November 3. [20 Tr. 154-57]

On October 29, Progressive sent Vigil a "Renewal Reminder" reiterating that $401.96 had to be paid by November 3 "to maintain continuous coverage." [Ex. 6] Vigil does not recall receiving the reminder; it is undisputed that she did not pay the minimum premium by November 3. [20 Tr. 26]

B. The Vigils present a claim arising from a November 4 accident, but Progressive determines coverage had lapsed.

On November 4, Vigil's son Martin was involved in an accident while driving a truck listed in the Vigils' policy. [20 Tr. 58; RP 1-2] One passenger was killed; others were seriously injured. [RP 1]

That same day, after the accident, Vigil called Progressive to "[d]ouble-check" coverage. [20 Tr. 58-60] Vigil contends Progressive told her the next payment was due November 15 and coverage had not lapsed. [20 Tr. 60, 112-13] Progressive says its automated system would have shown the policy lapsed on November 3 and the CSR would have explained the policy would not be reinstated until after payment. [20 Tr. 158-61, 216-17; 21 Tr. 20-21, 65, 93; Ex. 14, p. 18] The CSR, Martha Ash, does not recall the conversation, but it is undisputed Vigil paid the renewal amount during that November 4 call. [20 Tr. 217; 21 Tr. 216-19] A policy should have issued the

next day, but Progressive's computer system mistakenly directed the payment to "unapplied cash." [20 Tr. 204-07]

Later that day, Vigil called Progressive's claims department to report the accident. [20 Tr. 62, 113; 21 Tr. 41] Claims adjustor Veronica Cordova had trouble pulling up the policy because it appeared to have lapsed November 3. [20 Tr. 113; 21 Tr. 9-14]

The next day, November 5, Cordova called Vigil to obtain her recorded statement. [20 Tr. 66; 21 Tr. 16, 44; Exs. 8, I] Vigil told Cordova she made the payment the previous day because she had "two different policy payments" and was trying to figure out "which one" she "was supposed to do." [Exs. 8, I; 20 Tr. 66-67] She stated that her payments went month-to-month and incorrectly stated that she had made the last payment on October 15, which was why Progressive had given her a "bill" for "11/15." [20 Tr. 67-68, 114-15; 21 Tr. 44-45; Exs. 8, I] Vigil then terminated the call, indicating she was not "comfortable" proceeding. [21 Tr. 67; Exs. 8, I][2]

Cordova's notes reflected that Vigil's November 4 payment renewed the policy effective November 5 and that the accident had occurred during the lapse. [21 Tr. 15-

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[2] At trial, Vigil admitted she had not received a bill for November 15 and later testified that, by "bill," she meant Progressive told her the amount due over the phone. [20 Tr. 117-18]

16; Ex. 14, p. 20] Given Vigil's lack of cooperation and the records showing no policy in effect, Cordova sent Vigil a reservations of rights letter explaining that Progressive was investigating coverage. [20 Tr. 86; 21 Tr. 18-19; Ex. 14, p. 19]

Cordova continued gathering information, attempting to locate a recording of Vigil's November 4 call and to obtain Vigil's recorded statement. [21 Tr. 19-25] On November 11, Vigil provided a recorded statement insisting inaccurately that she had sent a check on October 15 and that she paid *again* on November 4 when told Progressive had no record of that payment.[3] [20 Tr. 76-77; 21 Tr. 26-27; Exs. 9, K] Vigil did not mention any October 16 call during which Progressive purportedly gave her a November 15 due date.[4] [Exs. 9, K]

On November 14, Vigil called Progressive to check her next payment's due date. [20 Tr. 80-81] She spoke with CSR Dan Briggs, who expressed uncertainty

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[3] At trial, Vigil conceded she never sent a check on October 15; she simply documented her October 3 telephonic payment in her check register on that date. [20 Tr. 77-80, 115]

[4] The first time Vigil mentioned her claim about the October 16 call to Progressive was in her May 2003 discovery responses. [Ex. 20; 23 Tr. 37] In those responses, Vigil also claimed that when she called on October 3, Progressive said her "policy period date" had changed to the fifteenth. [Ex. 20; 20 Tr. 33] Vigil later conceded not remembering the exact wording. [20 Tr. 33-39]

over the due date, asking, "so the next one would be due December 3rd?" [Ex. 10] Vigil responded, "Correct," and then paid by credit card. [*Id.*][5]

Three days later, Progressive generated a new declarations page for a policy period to begin November 15, the day after Vigil's payment to Briggs, and the records reflected a "lapse" effective November 3.[6] [20 Tr. 204-10; Exs. R, p. 3, S, p. 9] The November 15 date was a mistake since the policy should have issued on November 5, after the November 4 payment, as noted above. Progressive therefore manually reissued the policy, correcting the renewal date to November 5. [20 Tr. 204-10, 223-26; 21 Tr. 29-30; Exs. 14, p. 2, U, pp. 6-7; *see also* Crt.-Ex. 24 (CD 1-4-05, 1:45:13-2:03:14; 2:29:52-2:32:33; 2:39:30-2:47:27)]

Meanwhile, Cordova learned that Vigil's November 4 call had not been recorded due to a problem with Progressive's recording system. [21 Tr. 28-29; *see* 20 Tr. 174-96] She also verified that, having received the October 3 payment for the policy period ending November 3, Progressive never received the check Vigil

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[5] During trial, the Vigils suggested that Briggs's mention of a December 3 due date meant no lapse had occurred. [21 Tr. 211-12; 22 Tr. 31-34] Progressive witnesses testified the policy lapsed on November 3 but that, due to the system problem, Briggs may have been looking at the renewal quote when he suggested the December 3 date. [20 Tr. 209, 215-16; Crt.-Ex. 24 (CD, 1-4-05, 2:34:46-2:36:33; 2:39:30-2:47:27; 2:51:13-2:53:15)]

[6] Vigil previously claimed she had received the November 15 declarations page before the accident. [Ex. 20] At trial, Vigil conceded that was incorrect because the document was not prepared until November 17. [20 Tr. 29-30; *see also* 20 Tr. 205-07; 22 Tr. 112-13]

purportedly sent on October 15 to renew the policy. [21 Tr. 29] By the end of November, Cordova concluded the Vigils had no coverage for the accident because Vigil made the renewal payment on November 4 after the accident occurred. [21 Tr. 31-33]

C. Progressive seeks declaratory relief and the Vigils counterclaim.

In December 2002, Progressive sought a declaratory judgment that it owed no coverage to the Vigils. [RP 1-3] The Vigils counterclaimed for declaratory judgment, breach of contract, and related tort and statutory theories, including insurance bad faith, violation of the Unfair Insurance Practices Act (UIPA), NMSA 1978, §§ 59A-16-1 to -30, and violation of the Unfair Practices Act (UPA), NMSA 1978, §§ 57-12-1 to -26. [RP 10-20, 115-26, 862-80]

Before trial, Progressive settled two liability claims against the Vigils arising out of the accident by paying $100,000 to each claimant (the applicable policy limits) under a reservation of rights. [1 Tr. 4, 7; 10 Tr. 5] Progressive amended its complaint to seek reimbursement if the court determined Progressive owed no coverage. [RP 66-68, 340-44, 1346-49, 1480-85]

D. Progressive initially wins a ruling that it owes no coverage and a jury verdict entirely in its favor.

In 2004, the trial court concluded Progressive owed no coverage, granting Progressive partial summary judgment on that issue. [RP 798-99] The Vigils filed three unsuccessful reconsideration motions. [RP 625-35, 1215-24, 1309-13] The first two were denied by Judge Robert Thompson, who issued the original ruling; the third was denied by Judge Richard J. Knowles following Judge Thompson's retirement. [RP 801, 1303, 1358]

Progressive also moved for partial summary judgment on the Vigils' bad faith and related claims and on their remaining counterclaims. [RP 363-72, 892-901, 1305-06] The court granted summary judgment on bad faith as it applied to the failure to provide coverage but denied the motion as to the other claims. [RP 1501-03] The court also denied the Vigils' motion to dismiss and motion for summary judgment on Progressive's reimbursement claim. [RP 798-99, 1526]

In 2007, trial was held on Progressive's reimbursement claim and on the Vigils' claims for negligent misrepresentation, promissory estoppel, bad faith failure to investigate or evaluate the claim, and violation of the UIPA and UPA. [RP 1584-87] The jury awarded Progressive $200,000 in reimbursement and returned verdicts against the Vigils on all claims, effectively finding that Progressive's interactions with Vigil, scope of investigation, and other aspects of claims handling had been

reasonable, and rejecting the Vigils' claims concerning a misrepresentation or promise of coverage on October 16. [RP 1585-87, 1629-37]

E. The first appeal overturns the no-coverage ruling and remands for further proceedings.

The Vigils appealed the partial summary judgment on coverage and bad faith failure to provide coverage. [RP 1680-81] In August 2009, this Court reversed those orders but *affirmed* the jury verdicts against the Vigils on their alternative theories. [RP 1772-85] The Court vacated the reimbursement award but otherwise declined to address the reimbursement issue, concluding that it would be moot if the Vigils prevailed on coverage. [RP 1784-85]

F. The second trial results in a judgment against Progressive for over $13,000,000.

The case was remanded to Judge Alan Malott, who ruled that the policy gave Progressive no right to reimbursement of its payment on third party liability claims against the Vigils even if coverage had lapsed before the accident. [RP 1943-45]

With that claim eliminated, Progressive moved to preclude the Vigils' expert, Garth Allen, from testifying that seeking reimbursement had been "per se" bad faith. [RP 2100-08, 2155-61] During pretrial hearings, the court ruled the Vigils could not argue bad faith based on seeking reimbursement but also excluded any reference to

Progressive's payments to settle the liability claims. [17 Tr. 22-32; 18 Tr. 4-8; RP 2702] The court then found it unnecessary to rule on Progressive's motion to bar any claim that it was "per se" bad faith for Progressive to seek reimbursement. [18 Tr. 40-41]

The court also granted the Vigils' motion to exclude evidence or argument about the prior judges' coverage rulings and the verdicts at the first trial, rejecting Progressive's contention that the rulings were relevant to whether its position was in bad faith. [17 Tr. 51-59; RP 2490-91]

In addition, the court denied Progressive's motion to preclude Allen, the Vigils' expert, from testifying that it was the industry standard to provide a ten-day cancellation notice when a policy lapses. [RP 2502-08, 2654-55] Although it was undisputed that New Mexico law requires advance cancellation notice only when the policy is cancelled during the policy term, not when it expires at the end of a term, the court permitted testimony on this purported standard, rejecting Progressive's contention that Allen's testimony was without foundation. [*Id.*]

Given the appellate decision affirming the first jury's findings in favor of Progressive, the retrial was limited to coverage and bad faith failure to provide coverage. [RP 2492-94]

During trial, the parties presented conflicting expert testimony on coverage and bad faith. [21 Tr. 107-212; 22 Tr. 9-158, 170-84; 23 Tr. 21-126] As permitted by the

court's in limine ruling, Allen claimed industry standards required a ten-day cancellation notice that Progressive did not provide. [22 Tr. 42, 58, 82-92]

After the Vigils rested, the court denied Progressive's directed verdict motion on punitive and consequential damages. [23 Tr. 17-18] The court overruled Progressive's objection to the punitive damages jury instruction and refused Progressive's request to instruct the jury that, under the circumstances of a lapse, no ten-day notification period applies as a matter of law. [23 Tr. 146-47, 162; 24 Tr. 34] The court also overruled Progressive's objection to the damages instruction's reference to the policy's maximum coverage limits, including the $300,000 in liability coverage; Progressive argued the language was unfair given that Progressive had, unbeknownst to the jury, paid the liability claims. [24 Tr. 32-33]

During closing argument, the Vigils' counsel falsely told the jury that Progressive had not paid any of the "coverages they should have provided under this policy." [24 Tr. 75] Following Progressive's objection, the court instructed the jury "not to consider the actual coverages under the policy" but did nothing to remedy the false impression created by counsel's statement. [24 Tr. 76]

The jury awarded $31,000 in compensatory damages and $7,800,000 in punitive damages to Nancy Vigil and $6,000 in compensatory damages and $3,900,000 in punitive damages to Martin. [RP 2662-63] The court entered judgment including those awards as well as $35,725 in contract damages to Nancy under the

policy's collision coverage, $5,000 in contract damages to Martin under the medical payments coverage, and prejudgment interest on all compensatory damages. [RP 2825-27]

The court later denied Progressive's motion for new trial or to alter the verdict and awarded the Vigils $1,458,142.50 in attorney fees under NMSA 1978, Section 39-2-1 (1977) and $35,113.48 in costs. [RP 3084-97] This appeal followed. [RP 3099-122]

ARGUMENT

I. TRIAL COURT ERRORS INDIVIDUALLY AND CUMULATIVELY DEPRIVED PROGRESSIVE OF A FAIR TRIAL.

A. The trial court erroneously excluded prior rulings demonstrating Progressive did not act in bad faith.

"Relevant evidence is admissible" unless otherwise provided by constitution, statute, or court rules. Rule 11-402 NMRA. Evidentiary rulings are reviewed for abuse of discretion, but the de novo standard applies to legal errors underlying such rulings. *Dewitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 13, 146 N.M. 453, 212 P.3d 341.

Here, the prior judges' rulings finding no coverage as a matter of law were compelling evidence that Progressive's coverage position was not in bad faith and that it was reasonable (even if mistaken) to conclude that coverage lapsed on November 3.

[RP 278-86, 798-99, 1303, 1358] On remand, however, the trial court ruled that whether Progressive had a reasonable basis for its position "doesn't necessarily get supported by" the prior judges' rulings, which the court believed "were wrong." [17 Tr. 55; RP 2490][7]

The court's reasoning demonstrates a misapprehension of the law. As a procedural matter, evidence does not have to "*necessarily*" support a conclusion to be admissible; it is enough that it makes the conclusion somewhat more probable. Rule 11-401 NMRA. Moreover, even if the evidence would not have been admissible were coverage the sole question, it was highly pertinent to bad faith.

Substantively, an insurer acts in bad faith when it refuses to pay a claim "'for reasons which are frivolous or unfounded'" but does *not* act in bad faith "'by denying a claim for reasons which are reasonable under the terms of the policy.'" *Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, ¶ 3, 135 N.M. 106, 85 P.3d 230; *see also United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 485, 709 P.2d 649, 654 (1985) (no bad faith when there is a "legitimate reason" to question coverage); *Jackson Nat'l Life Ins. Co. v. Receconi*, 113 N.M. 403, 420, 827 P.2d 118, 135 (1992) (insurer's "refusal to pay the claim was neither frivolous nor unfounded" where the facts justified the insurer's investigation).

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[7] Progressive preserved its objection in opposing the Vigils' motion. [RP 2291-96; 17 Tr. 51-59]

A recent decision, *LensCrafters, Inc. v. Kehoe*, 2012-NMSC-020, __N.M. __, 282 P.3d 758, demonstrates that court rulings consistent with a party's position are relevant, and perhaps even conclusive, to show the party did not act in bad faith.[8] There, the Supreme Court affirmed summary judgment for LensCrafters on a malicious prosecution claim, concluding as a matter of law that LensCrafters did not act without probable cause in suing to enforce a noncompete provision in its contract—even though LensCrafters was ultimately proven *wrong* in concluding its claim was justiciable. *LensCrafters,* 2012-NMSC-020, ¶¶ 28, 33, 34. In so holding, the Court noted that this Court had *agreed* with LensCrafters on the claim's justiciability and observed that "it would be particularly ironic if we were to hold LensCrafters to a greater degree of prescience as to this Court's ultimate holding on the justiciability of its noncompete contract claim after a majority of the Court of Appeals concluded that the same claim was justiciable." *Id.* ¶ 33.

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[8] Other jurisdictions reach similar results. *See, e.g., Karen Kane Inc. v. Reliance Ins. Co.*, 202 F.3d 1180, 1190 (9th Cir. 2000) (finding no bad faith as a matter of law—even though insurer's policy interpretation was incorrect—where "the district court found in [the insurer's] favor"); *Morris v. Paul Revere Life Ins. Co.*, 135 Cal. Rptr. 2d 718, 726 (Ct. App. 2003) (finding no bad faith as a matter of law—"the fact that a court had interpreted that law in the same manner as did the insurer . . . is certainly probative of the reasonableness, if not necessarily the ultimate correctness, of its position"); *Lennar Corp. v. Transamerica Ins. Co.*, 256 P.3d 635, 641 (Ariz. Ct. App. 2011) (prior court ruling in insurer's favor may be relevant and admissible on bad faith). *See generally* Douglas G. Houser, et al., *Good Faith as a Matter of Law—An Update on the Insurance Company's "Right to be Wrong,"* 39 Tort Trial & Ins. Prac. L.J. 1045 (2004).

It is hard to imagine evidence more relevant than a dispassionate judge's independent evaluation, after weighing the known facts in light of applicable law, as to whether a party acted reasonably in filing suit (as in *LensCrafters*) or in challenging coverage (as here). Under *LensCrafters's* reasoning, the initial coverage rulings in Progressive's favor (though later overturned by this Court) strongly indicate that Progressive did not act in bad faith, and certainly that it should not be liable for punitive damages. Admission of the prior rulings would have reinforced the evidence that, at the time of its coverage analysis, Progressive could properly question Vigil's (later recanted) claim of having made an October 15 payment and that it knew nothing of Vigil's later assertion, first revealed in discovery, that an October 16 call to the automated system indicated (contrary to Progressive's records) that her renewal date would be November 15 (effectively, but implausibly, giving twelve days of premium-free coverage). The rulings thus would have strengthened Progressive's position that it had good reason to believe Vigil allowed her policy to lapse, failing to pay the renewal premium until after the accident.

Finally, the total exclusion of even the fact of the prior time-consuming proceedings gave the second jury a grossly misleading picture of events, allowing the Vigils' counsel to suggest that Progressive stonewalled for *nine years* without cause, and prompting a juror to question why "so much time passed since this accident occurred." [20 Tr. 12] Although the court instructed the jury that the delay was

neither party's fault [20 Tr. 15], the admonition was insufficient to allay the prejudice from the Vigils' counsel's statement in closing argument that the case had "been going on for nine years" and that Martin had "been stuck with this case almost a third of his life." [24 Tr. 75] Letting the jury know of the prior proceedings would have lessened the false picture of oppression painted by the Vigils' counsel, increasing the probability the jury would have found no bad faith or punitive damage liability.

For all these reasons, the court's ruling justifies a new trial.

B. The trial court's erroneous rulings on Progressive's reimbursement claim prejudiced Progressive on the issues of bad faith and punitive damages.

Review of the trial court's legal ruling on summary judgment that Progressive's policy affords no right to reimbursement on payments for noncovered claims is de novo. *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. That erroneous ruling caused the court to exclude favorable evidence of Progressive's conduct that would have demonstrated its lack of bad faith.

In the first appeal, this Court declined to address whether Progressive was entitled to recoup its $200,000 in liability payments because the issue would be moot if there was in fact coverage. [RP 1783] On remand, however, the trial court granted the Vigils' summary judgment motion on reimbursement, concluding that the absence of an express policy provision permitting reimbursement precluded the claim as a

matter of law, regardless of any coverage lapse. [RP 1943-45] Based on that ruling, the court excluded all payment evidence. [17 Tr. 22-32; 18 Tr. 4-8; RP 2702][9]

The trial court erred in believing reimbursement rights must be expressed in the policy. A majority of jurisdictions permit an insurer to seek reimbursement from an insured when the insurer settles a claim under a reservation of rights. *Travelers Prop. Cas. Co. of Am. v. Hillerich & Bradsby Co.*, 598 F.3d 257, 265-66 (6th Cir. 2010) (collecting cases). The absence of a policy provision permitting reimbursement is irrelevant. As the California Supreme Court explained in *Blue Ridge Insurance Company v. Jacobsen*, 22 P.3d 313, 321 (Cal. 2001), the reimbursement right is based on unjust enrichment principles, which create an implied-in-law contract in the insurer's favor.

This issue implicates important policy considerations. Under the rule adopted by the trial court, an insurer would be discouraged from making payments it believes it may not be legally obligated to make and from submitting the coverage issue to the courts. By contrast, allowance of reimbursement "encourages insurers to defend and settle cases for which insurance coverage is uncertain," thereby transferring "from the injured party to the insurers the risk that the insured may not be financially able to pay

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[9] Progressive preserved this issue in its opposition to the Vigils' motion, its own motion for summary judgment, and in its new trial motion. [RP 1851-65, 2333-40, 2836, 3035-41]

the injured party's damages." *Id.* at 321. That policy consideration is especially weighty in New Mexico, where the insurer's statutory duty to settle is intended to benefit *both* insureds and third-party claimants. *See Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶¶ 9-22, 135 N.M. 397, 89 P.3d 69 (third-party claimant may sue insurer directly for Insurance Code violations).

Coupled to the court's ruling on reimbursement was a ruling excluding evidence that Progressive had in fact paid the third-party claims, subject to its reservation of rights. [17 Tr. 22-32; 18 Tr. 4-14] The exclusion of this evidence drastically altered the landscape of the bad faith claim, as there is a huge difference in potential juror perception of bad faith between a flat refusal to pay claims made against the policyholder and payment of those claims under a reservation of rights, which would then be submitted for judicial resolution. Consequently, if the trial court was wrong about reimbursement, reversal is required not only as to the reimbursement claim but as to the rest of the case.

The ground given by the court for excluding the evidence of payment of claims was to avoid confusion. But in precluding Progressive from presenting a crucial piece of its story—by demonstrating affirmatively that it acted responsibly in advancing payment on the liability claims, contrary to the Vigils' caricature of Progressive as being unyielding and nonresponsive—the court, far from eliminating confusion,

drastically increased the risk that the jury would find bad faith and award punitive damages on the basis of legal and factual misconceptions.[10]

C. The trial court erred in instructing the jury on the maximum liability coverage after excluding evidence of Progressive's liability payments.

"The propriety of jury instructions denied or given involves mixed questions of law and fact that [are] review[ed] de novo." *State v. Skippings*, 2011-NMSC-021, ¶ 10, 150 N.M. 216, 258 P.3d 1008. Here, the court's error on the reimbursement claim was compounded by instructional error concerning the liability payments.

Over Progressive's objection, the court instructed the jury that, "[i]n considering an award of damages," it could consider the maximum coverage amounts, including "Bodily Injury" coverage of "Up to $300,000." [RP 2688] The instruction erroneously permitted the jury to believe that the Vigils were left wholly exposed to a $300,000 liability for nearly a decade even though it was undisputed (but unknown to

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[10] The Vigils argued that Progressive waived objection to the exclusion of the payment evidence [RP 2934], but Progressive specifically advised the court of its concern that the ruling would allow the Vigils to argue Progressive had left them "hanging out there" and "here we are ten years later and they still haven't paid." [18 Tr. 6, 8; *see also* 18 Tr. 10; RP 3035-41] Indeed, the court had placed Progressive in a no-win position because exclusion of the payment evidence was the price the court fixed for precluding the Vigils from arguing bad faith based on Progressive's seeking reimbursement—another unjustifiable ruling, as it cannot be bad faith to submit the issue of responsibility for payment to a court. The court should have granted (rather than declined to rule on) Progressive's motion on that issue. [RP 2333-40; 18 Tr. 40-41]

the jury) that Progressive had *paid* $200,000 to settle the liability claims and, as the court acknowledged [18 Tr. 17-19], did not owe the third $100,000.[11]

The court's instruction that the jury "should not include any of these coverages" in its damage awards [RP 2688] did not cure the prejudice. Instructing on maximum policy limits increased the likelihood the jury would find Progressive acted in bad faith because it implied substantial benefits were withheld. Indeed, the jury later asked the court whether it was "'expected to enter the dollar amount or "up to the limits of policy,"'" suggesting the jury believed the maximum amounts were at stake. [24 Tr. 104]

Given the court's decision to bar all mention of payments from the case, it was incumbent on the court to ensure Progressive was not prejudiced by the exclusion of this evidence. Instructing the jury on the maximum policy coverages did just the opposite.

D. The trial court erred in denying a new trial based on attorney misconduct in closing argument.

Error related to counsel's misconduct during closing argument is reviewed for abuse of discretion. *Enriquez v. Cochran*, 1998-NMCA-157, ¶ 131, 126 N.M. 196, 967 P.2d 1136. The court's "task is to determine whether [the] statements

[11] Progressive preserved this issue by objecting to the instruction. [24 Tr. 32-33]

'transgressed the grounds of professional duty' or constituted 'prejudicial misconduct in argument presented to the jury.'" *Id.* ¶ 132. The court considers "the evidence, the arguments themselves, the prejudicial effect of the argument in light of the evidence, and any limiting or cautionary instructions of the trial court." *Id.* "Most importantly, argument cannot be allowed to leave a palpably inaccurate impression with the jury." *Id.* ¶ 134.

Here, the Vigils' counsel crossed the line of permissible argument. During closing, counsel told the jury that the "case has been going on for nine years," that Martin had "been stuck in this case for almost a third of his life," and that Progressive "wouldn't even pay for the truck, *let alone all the other coverages they should have provided under this policy*." [24 Tr. 75 (emphasis added)] The statement violated the court's pretrial rulings that made clear that the Vigils could not claim they were left vulnerable by Progressive's refusal to pay liability claims—which claims *had been paid*. [18 Tr. 17, 20] Moreover, the assertion that Progressive had not paid any "coverages" over the past nine years left the false impression that Progressive had not paid *anything* under the policy, leading to an unfair finding of bad faith and a gigantic award of punitive damages.[12]

[12] Progressive preserved this issue by objecting to the statement at trial and in its new trial motion. [24 Tr. 75-76; 25 Tr. 14-15, 49-50; RP 2836, 2842, 3035-41]

The court's statement to the jury following Progressive's objection did not remedy the problem. The court merely "remind[ed]" the jurors of the damages instruction, telling them "not to consider the actual coverages under the policy." [24 Tr. 76] That did nothing to correct the gross prejudice from counsel's statement—the erroneous implication that Progressive had not paid *any* of the policy coverages. Moreover, vaguely telling the jury not to "consider the actual coverages" was in tension with the court's *express instruction* to consider the maximum coverages (even though the jury was not to award those amounts as damages). [RP 2688]

In short, the court's admonition "was insufficient to meet the false impression left by" counsel's highly damaging and false statements. *Enriquez*, 1998-NMCA-157, ¶ 136. Because counsel's statements were both "improper and prejudicial," a new trial is warranted. *Id.* ¶ 138.

E. The trial court erred in allowing the Vigils' expert to testify on insurance standards contrary to New Mexico law and in declining to instruct the jury on the proper legal requirements.

1. Evidentiary error.

An expert may testify on industry standards. [RP 1779-80] However, "opinion testimony that seeks to state a legal conclusion is inadmissible." *State v. Clifford*, 117 N.M. 508, 513, 873 P.2d 254, 259 (1994). In addition, the court must ensure the testimony "'rests on both a reliable foundation and is relevant to the task at hand so

that speculative and unfounded opinions do not reach the jury.'" *Zia Trust, Inc. v. Aragon*, 2011-NMCA-076, ¶ 14, 150 N.M. 354, 258 P.3d 1146. The ruling is reviewed for abuse of discretion, but the de novo standard applies to interpretations of law underlying that ruling. *Dewitt*, 2009-NMSC-032, ¶ 13.

Allen's testimony, based solely on conversations with persons he could not identify [RP 2505], was that industry standards require insurers to provide a ten-day cancellation notice in connection with a routine expiration [*see* RP 2502-08]. Whatever industry practice might be, New Mexico requires a ten-day notice only for cancellation for nonpayment of premiums "'during the policy term'"; it does *not* require such notice for a "lapse of coverage" due to the insured's failure to renew at the end of the policy term. *Guar. Nat'l Ins. Co. v. C de Baca*, 120 N.M. 806, 811, 907 P.2d 210, 215 (Ct. App. 1995) (interpreting NMSA 1978, § 59A-18-29(A) (1984)); *see also Molina v. Allstate Indem. Co.*, 2011-NMCA-005, ¶¶ 8, 18; 149 N.M. 180, 246 P.3d 449 (filed 2010).[13]

The court ruled that Allen could not say New Mexico law *requires* a cancellation notice in the circumstance of a lapse, but *could* describe "any insurance industry standards which may be implicated by the facts and circumstances." [RP

[13] Progressive preserved this issue in a motion in limine, for which it obtained a definitive ruling, and in its new trial motion. [RP 2502-08, 2654-55, 2833-36] *See* Rule 11-103 NMRA.

2654-55] Allen then testified that the Vigils should have had coverage past November 3 under a customary "ten-day grace period" at the end of the term supposedly granted by other carriers (a practice on which Vigil does not claim to have relied), and that Progressive's practice (which included only the renewal and reminder notices) was contrary to industry standards. [22 Tr. 15-16, 42-43, 84-87, 92] Because Allen's testimony was without foundation and conflicted with New Mexico law, and because Vigil presented no evidence she had any expectation of a ten-day grace period under the circumstances presented here, Allen's testimony was irrelevant to show coverage under an estoppel theory or otherwise, and should have been excluded. [See Ex. 20 (Vigils' discovery responses making no mention of reliance on a ten-day grace period)]

Furthermore, Allen conceded he had not reviewed the guidelines on lapses and cancellation established by the National Association of Insurance Commissioners. [22 Tr. 102-03, 178] Those standards distinguish between cancellation of a policy during a term (for which advance notice is required) and non-renewal (for which a notice is required only if the insurer declines to offer renewal). [Ex. 27, pp. 9-10; 23 Tr. 43-45] The standards confirm that Allen's testimony lacked foundation. *See Hauff v. Petterson*, 755 F. Supp. 2d 1138, 1148 (D.N.M. 2010) (disregarding, on summary judgment, Allen's opinion on industry standards where he had "no facts, studies, or data compilations to support his opinion").

Allen's testimony prejudicially conveyed the false impression that Progressive did something legally improper by not providing more notice than it did. As explained below, the court's failure to provide a clarifying instruction further compounded the prejudice.

2. Instructional error.

The propriety of denying a jury instruction is a mixed question of law and fact reviewed de novo. *Skippings*, 2011-NMSC-021, ¶ 10. A party "is entitled to instructions on its theory of the case when there is evidence to support it in the record." *Adams v. United Steelworkers of Am.*, 97 N.M. 369, 374, 640 P.2d 475, 480 (1982). In determining whether the error is reversible, a court "will accept the slightest evidence of prejudice, and all doubt will be resolved in favor of the [complaining party]." *Id.*

At Progressive's request, the court instructed the jury on the difference between a "cancellation" and a "lapse," but it refused to give the crucial last part of the proposed instruction, which would have accurately explained that, "[u]nder the circumstances of a lapse, the ten-day notification period required by Progressive's

policy and New Mexico law does not apply." [Crt.-Ex. 56 (*Guaranty National* instruction); RP 2684][14]

The trial court excluded the language on the theory it was a "legal conclusion" [23 Tr. 146]—an odd rationale, given that it was the court's job to provide the "legal conclusions" to guide the jury's deliberations. Moreover, the omitted language was a correct statement of the law under *Guaranty National*, 120 N.M. at 811, 907 P.2d at 215, and a correct interpretation of Progressive's policy. [Ex. 26, p. 39 (providing for a ten-day notice if Progressive "cancel[led] this policy")] Indeed, that precise language had been in the instructions during the first trial. [RP 1580]

The court's failure to give the requested language compounded the prejudice from Allen's testimony and made it more likely the jury would find coverage, bad faith, and punitive damages liability based on conduct that was entirely proper under New Mexico law.

[14] Progressive preserved this issue in objecting to the court's modification of the instruction. [23 Tr. 147]

II. THE JURY'S $6,000 COMPENSATORY AWARD TO MARTIN VIGIL AND BOTH PUNITIVE AWARDS SHOULD BE REVERSED FOR INSUFFICIENT EVIDENCE.

A. The evidence does not support the jury's compensatory and punitive awards in Martin's favor.

"Punitive damages may not be awarded unless there is an underlying award of compensation for damages." *Gonzales v. Surgidev Corp.*, 120 N.M. 151, 154, 899 P.2d 594, 597 (1995). A compensatory damage award will not be upheld unless it is "reasonably certain, supported by substantial evidence, and not based on speculation." *Ranchers Exploration & Dev. Corp. v. Miles*, 102 N.M. 387, 390, 696 P.2d 475, 478 (1985)[15]

Here, the court instructed the jury to limit compensatory damages to "incidental or consequential loss." [RP 2688] Because Martin did not testify on retrial, the jury heard no evidence of any such loss as to Martin.[16] Absent such evidence, and absent

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[15] Nominal damages may also support punitive damages, *Sanchez v. Clayton*, 117 N.M. 761, 767, 877 P.2d 567, 573 (1994), but the court did not instruct the jury such damages would be permissible here. *See* UJI 13-1832 NMRA.

[16] Although the court excluded evidence of Martin's alleged alcohol use and arrest in connection with the accident [RP 2698-99], Martin's decision not to take the stand avoided the risk his damages testimony would open the door to examination on those issues.

the jury having been presented with any other evidence of harm to Martin, neither the jury's $6,000 compensatory award nor its $3,900,000 punitive award can stand.[17]

B. Progressive's conduct was not "arbitrary or baseless . . . lacking any support," and thus does not support punitive damages.

To support a punitive damage award for bad faith failure to pay a claim, the insured must present evidence that the "insurer failed or refused to pay a claim for reasons that were frivolous or unfounded," which is "the equivalent of a reckless disregard for the interests of the insureds." *Sloan*, 2004-NMSC-004, ¶ 2; *see id.* ¶ 17. "'[F]rivolous or unfounded'" means "an arbitrary or baseless refusal to pay, lacking any support in the wording of the insurance policy or the circumstances surrounding the claim." *Id.* ¶ 18.

The sufficiency of evidence to support punitive damages is a question of law reviewed de novo. *Littell v. Allstate Ins. Co.*, 2008-NMCA-012, ¶ 59, 143 N.M. 506, 177 P.3d 1080 (filed 2007) (directed verdict).[18]

The prior court rulings finding no coverage demonstrate that Progressive's conduct was not even unreasonable, let alone frivolous or unfounded. *See supra* Part I.A. But even disregarding those rulings, Progressive had legitimate reasons to

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[17] Progressive preserved this issue in its new trial motion. [RP 2843-45]

[18] Progressive preserved this issue in its directed verdict motion and in its objection to the court's punitive damages jury instructions. [23 Tr. 17-18, 162; 24 Tr. 34]

question coverage based on the policy language and circumstances surrounding the claim. [21 Tr. 15-16, 32-33]

To begin with, Progressive's decision to seek a declaration from the court rather than simply deny the claim demonstrates good faith in seeking resolution of the issue. An insurer that protects its interests by seeking a declaration concerning potentially uncovered claims should not be subject to punitive damages. *See Anderson v. Dairyland Ins. Co.*, 97 N.M. 155, 158, 637 P.2d 837, 840 (1981) (although insurer's acts may have been "'entirely self-interested'" they did "'not rise to the level of being "maliciously intentional"'" so as to justify punitive damages).

Moreover, Progressive's conduct must be viewed in light of what Progressive knew at the time of the coverage determination—not based on Vigil's evolving story during litigation. First, Progressive knew Vigil's apparent dispute concerning the November 3 renewal deadline was based on Vigil's initial account of an "11/15" bill that never existed. [20 Tr. 67-69, 117-18] Second, Progressive knew it had not timely received the renewal payment by November 3 and that Vigil had called to renew the policy only after her son's accident. [21 Tr. 15-16] Third, Progressive knew nothing that substantiated Vigil's insistence during her recorded statement (later conceded by her to have been false) of having paid by check on October 15. [20 Tr. 77-80; 21 Tr. 29] Finally, during the investigation, Vigil *made no mention of the key October 16 call* on which she relied months later in litigation to argue that Progressive

purportedly granted her a November 15 due date. [20 Tr. 66-68, 76-77, 115; 21 Tr. 16-23, 26-27; Exs. 8, 9, I, K] It is thus not surprising the first jury found no bad faith in the investigation and no unfair insurance practice—a finding as to which collateral estoppel was given. [RP 2493] Even if a jury could find negligence in questioning coverage based on this state of knowledge, negligence falls far short of what is required to give rise to punitive damages liability. *See Akins v. United Steelworkers of Am. Local 187*, 2009-NMCA-051, ¶ 27, 146 N.M. 237, 208 P.3d 457.

The Vigils' counsel emphasized Progressive's failure to locate the recording of the November 4 call and criticized its "process[ing]" of the "lapse" after the claim was reported and payment made. [24 Tr. 90, 92] But none of this involved intentional conduct, let alone the kind of egregious disregard of a policyholder's rights that could support punitive damages.[19]

Finally, the Vigils' counsel emphasized Progressive's failure to provide a "cancellation" notice when the policy lapsed. [24 Tr. 91] As far as Progressive knew, however, its October 9 renewal statement provided ample notice. Moreover, as

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[19] It is undisputed the November 4 call was simply never recorded due to a problem with the recording system. [20 Tr. 61, 174-96; 21 Tr. 28-29] Inadvertent system problems also accounted for the initial November 15 dating of the policy. [20 Tr. 205-07, 209-10, 222-26; Crt.-Ex. 24 (CD 1-4-05, 1:45:13-2:03:14; 2:29:52-2:32:33; 2:39:30-2:47:27)] These matters are, in any event, immaterial as they do not affect the basis for Progressive's good faith belief that the policy had lapsed prior to Martin's accident—something Cordova had reason to believe from the beginning of her investigation of the claim. [21 Tr. 15-16; Ex. 14, pp. 19-20.]

explained above, Progressive's conduct in this regard complied with New Mexico law, which required no cancellation notice under such circumstances. *See supra* Part I.E. Consequently, due process flatly forbids imposing punishment on this basis, regardless of any supposed industry custom (of which, if it existed at all, Progressive also had no notice). *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (due process requires that a party "receive fair notice . . . of the conduct that will subject [it] to punishment"). Even if there were evidence supporting other bases for punitive liability, the possibility that the jury's verdict was based at least in part on the failure to give notice of cancellation requires, at minimum, a new trial.

In sum, even viewing the facts most favorably to plaintiffs, Progressive's conduct fell far short of anything that could support punitive damages. Progressive is entitled to judgment or a new trial on that issue.

III. THE PUNITIVE AWARDS ARE GROSSLY EXCESSIVE.

A. The excessiveness issue is subject to de novo review.

Whether punitive damages are unconstitutionally excessive is reviewed de novo. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 435-36 (2001); *Aken v. Plains Electric Generation & Transmission Coop., Inc.*, 2002-NMSC-021, ¶¶ 18-19, 132 N.M. 401, 49 P.3d 662. The United States Supreme Court has identified three "guideposts" that bear on the inquiry: "(1) the degree of

reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003); *BMW*, 517 U.S. 559, 574-75; *accord Aken*, 2002-NMSC-021, ¶ 20.[20]

B. The level of "reprehensibility" cannot support the awards.

Because conduct must be reprehensible to give rise to any punitive damages liability, only conduct that is substantially more reprehensible than that minimum level can support a large punitive award. *Cf. BMW*, 517 U.S. at 575-76, 580. Here, if the reprehensibility of Progressive's conduct crosses the reprehensibility threshold at all, it does so only barely, yet the $11,700,000 total awarded represents one of the largest punitive damage awards in New Mexico history.

Courts have identified five factors to be weighed in assessing reprehensibility: (1) whether "the harm caused was physical as opposed to economic"; (2) whether the "conduct evinced an indifference to or a reckless disregard of the health or safety of others"; (3) whether the conduct exploited plaintiff's "financial vulnerability"; (4)

[20] Progressive preserved this issue in its new trial motion. [RP 2838-43, 2845-50]

whether "the conduct involved repeated actions or was an isolated incident"; and (5) whether the plaintiff's "harm was the result of intentional malice, trickery, or deceit." *Campbell*, 538 U.S. at 419; *Grassie v. Roswell Hosp. Corp.*, 2011-NMCA-024, ¶ 50, 150 N.M. 283, 258 P.3d 1075 (filed 2010). "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Campbell*, 538 U.S. at 419.

Here, the factors show a low level of reprehensibility that cannot support the huge punitive awards.

Economic harm versus physical injury. The harm here was economic, not physical. Although Vigil testified she felt "[a]ngry, betrayed," "[s]hock[ed]," and "[f]rustrated" by Progressive's conduct [20 Tr. 129-30], the United States Supreme Court explained in *Campbell* that such distress arises "from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries." *Campbell*, 538 U.S. at 426.

Indifference to health or safety. This reprehensibility enhancer is entirely absent here.

Financial vulnerability. This factor is designed to identify conduct calculated to take advantage of a victim's financial vulnerability, which was not the case here. And although Vigil testified her credit rating suffered because she was unable to pay

off the truck totaled in the accident [20 Tr. 127-28]—something Progressive had no way of knowing at the time it questioned coverage—the truck was in her husband's name and the debt had been discharged in his business-related bankruptcy [20 Tr. 96-98, 131-32].

Moreover, Progressive's $200,000 payment to settle the liability claims ensured the Vigils suffered no vulnerability from those lawsuits. Indeed, when excluding the payment evidence, the court made clear it was not "appropriate for [the Vigils] to try to argue that they have been destroyed financially by the refusal to pay because *it's not true*." [18 Tr. 20 (emphasis added); *see also* 18 Tr. 17]

Isolated incident versus repeated actions. The conduct here was an isolated incident; the Vigils presented no evidence to suggest a pattern of misconduct.

Harm caused by "intentional malice, trickery, or deceit." This factor is entirely absent here.

In sum, the reprehensibility factors strongly indicate that only a small award of punitive damages can be justified, if indeed there was punishable conduct at all.

C. The awards are excessive by comparison to the compensatory damages.

Consistent with the second constitutional guidepost, the court instructed the jury that any award of punitive damages "must be reasonably related to the compensatory damages and injury." [RP 2689] The jury failed to follow that instruction and,

instead, took the Vigils' counsel's suggestion to base the award on Progressive's *profits*, which she represented were $3,800,000 per day. [24 Tr. 94-95] The jury's $3,900,000 award to Martin was strikingly close to that figure, and the $7,800,000 award to Nancy was over twice that amount, resulting in a ratio of 316:1 ($11,700,000/$37,000). [RP 2662-63]

Progressive's overall profits are a grossly improper basis for calculating punitive damages. That figure represents the results of extensive operations across the country, and nothing in the record suggests those operations were improper or had anything to do with this isolated instance. The use of any profit figure beyond that which reflects "profit" from the handling of the Vigils' claims would amount to punishment for lawful conduct and would consequently violate fundamental federal and state due process principles.

In ruling on Progressive's new trial motion, the court gave the ratios little consideration, seeing no constitutional "requirement" that punitive damages "may not exceed any specific multiplier of the compensatory damages." [RP 3085] While it may be true enough that the Constitution imposes no "specific" multiplier, that hardly justifies disregarding this important factor. To the contrary, as the United States Supreme Court has explained, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425 (145:1 ratio); *see also BMW*, 517 U.S. at 583 (500:1 ratio).

Significantly, the Court set a 1:1 common law limit for federal maritime cases in *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008).

New Mexico courts have also recognized that a 10:1 ratio is "on the outer edge of the range that could be considered perhaps presumptively acceptable." *Grassie*, 2011-NMCA-024, ¶ 57 (upholding ratio slightly greater than 10:1 in case of aggravated patient neglect causing death); *see also Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, ¶ 38, 140 N.M. 478, 143 P.3d 717 (suggesting punitive award might exceed a single-digit ratio where the behavior was "truly reprehensible," the compensatory award "low," and the nature of the harm "intangible").

In *Akins*, 2009-NMCA-051, ¶ 37, this Court upheld a larger 18:1 ratio. The Court acknowledged that such a ratio "might seem to enter 'into the area of constitutional impropriety,'" but found the award justified based on a low compensatory award and the "particularly reprehensible" conduct at issue, involving a union's *intentional* discrimination against an African-American union member and overt displays of racial animus. *Id.* ¶¶ 33, 37.

Akins is the exception, not the rule. Indeed, in most cases, ratios have been *less* than 10:1, even though the conduct at issue was significantly *more* reprehensible than here. *See, e.g.*:

Aken, 2002-NMSC-021, ¶¶ 21, 24 (upholding 3.5:1 ratio for retaliatory discharge claim involving trickery and deceit and reducing 10:1 ratio for intentional tort of defamation to 3:1);

Allsup's Convenience Stores, Inc. v. N. River Ins. Co., 1999-NMSC-006, ¶¶ 48-49, 127 N.M. 1, 976 P.2d 1 (filed 1998) (upholding 7.4:1 ratio in insurance bad faith context based on evidence that workers' compensation and general liability insurers knowingly failed to supervise or disclose facts concerning unacceptable claims handling of third party administrator, resulting in improper premium charges);

Muncey v. Eyeglass World, LLC, 2012-NMCA-120, ¶¶ 60, 70, 73, __N.M. __, __P.3d __ (upholding 6.6:1 ratio against an optical business based on its intentional and unauthorized copying of an optometrist's patient files and improperly reporting optometrist to a state authority);

Jolley v. Energen Res. Corp., 2008-NMCA-164, ¶¶ 36, 38, 145 N.M. 350, 198 P.3d 376 (upholding 6.76:1 ratio given that "Defendant's conduct was on the high end of the reprehensibility scale, that Decedent suffered excruciating pain, an intangible difficult to measure, that Decedent died, and that Decedent was only nineteen years old when he died");

Littell, 2008-NMCA-012, ¶¶ 1, 65-66 (upholding 3.6:1 ratio in retaliatory discharge and sexual harassment case where employer demonstrated consciousness of wrongdoing).

Allsup's, 1999-NMSC-006 was cited by the Vigils below [RP 2949-50] for the proposition that the $300,000 in available liability insurance coverage could be added to the jury's damages finding to calculate the ratio denominator. *Allsup's* said no such thing—the court merely concluded that punitive damages awarded to an insured could be evaluated against the jury's full compensatory damage award, even though that amount was offset by a verdict on the insurer's counterclaim for unpaid premiums. *Allsup's*, 1999-NMSC-006, ¶¶ 49, 53-54. Here, the jury's full compensatory award includes *only* the $31,000 and $6,000 awards [RP 2662], and the coverage figure in no way represents "harm" to the Vigils, especially as Progressive paid $200,000 in liability claims.

The only additional damages the trial court awarded were $35,725 in policy benefits for the truck and $5,000 in medical payments due under the policy. [RP 2826] Even if this Court were to include those damages in the denominator (which would be improper as the jury was not apprised of them), the resulting 151:1 ratio would still be wildly out of line.

The Vigils argued that the compensatory damages should be deemed to include attorney fees, costs, and prejudgment interest. [RP 2949] The court's order denying

the new trial makes no mention of those amounts as justifying the award [RP 3084-87], and appropriately so. Where, as here, such amounts are awarded by the court *after* the jury has rendered its punitive damage award, they cannot be considered in the ratio's denominator. *See Amerigraphics, Inc. v. Mercury Cas. Co.*, 107 Cal. Rptr. 3d 307, 329 (Ct. App. 2010) (trial court properly refused to consider attorney fees and prejudgment interest awarded after the verdict); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2004 UT 34, ¶¶ 47, 48, 98 P.3d 409 (holding, on remand from the United States Supreme Court, that costs and fees cannot be considered in ratio's denominator because the Court's opinion "forecloses consideration of a compensatory damages number other than the [amount] awarded by the jury").

The Vigils' reliance on *Willow Inn, Inc. v. Public Service Mutual Insurance Co.*, 399 F.3d 224 (3d Cir. 2005), where the court included attorney fees in the ratio's denominator, is misplaced. [RP 2949] *Willow Inn* involved a bench trial, not a jury trial, and the court specifically concluded the attorney fees were *compensatory*. *Willow Inn*, 399 F.3d at 227, 237. Here, the fees were not known to the jury and were *punitive* in nature (*see infra* Part IV.A.); if such fees are to be considered at all, they should be on the punitive side of the ratio.

The Vigils also cited *Guidance Endodontics,. LLC v. Dentsply International Inc.*, 791 F. Supp. 2d 1026 (D.N.M. 2011) [RP 2949], in which a federal district court found it was appropriate to consider the costs of legal proceedings in evaluating

punitive damages. *Guidance*, 791 F. Supp. 2d at 1044. The *Guidance* court did not explain why such costs should be considered if not known to the jury awarding punitive damages, nor did it address attorney fees under Section 39-2-1, which are punitive in nature. Moreover, to the extent the nearly $1.5 million award in costs and fees could be included in compensatory damages, the damages (as in *Guidance*) would then be "substantial," in which case the ratio should not exceed *1:1*. *Id.* at 1055; *see Campbell*, 538 U.S. at 425 ("When compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." (emphasis added)).

In addition to exceeding any constitutionally permissible ratio, the awards are excessive because they are "'so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason or justice.'" *Muncey*, 2012-NMCA-120, ¶ 70 (quoting *Aken*, 2002-NMSC-021, ¶ 23) (under the second guidepost, the award must *also* satisfy New Mexico's passion and prejudice analysis).

In denying Progressive's motion, the trial court erroneously ruled that a "specific showing"—independent of the punitive amounts themselves—was required to establish passion or prejudice. [RP 3085] In New Mexico, however, "the relationship of the punitive damage award to the offense and the amount of the compensatory damages" can be sufficient in itself to "plainly manifest[ ] passion and prejudice." *Galindo v. W. States Collection Co.*, 82 N.M. 149, 155, 477 P.2d 325, 331

(Ct. App. 1970). Indeed, because Rule 11-606(B) NMRA precludes jurors from testifying as to any matter or statement made during the course of deliberations or the juror's mental processes, the "specific showing" required by the court would often be impossible.

Moreover, as Progressive argued below [RP 2840-43], the record demonstrates that the jurors failed to follow instructions, another indicator of passion and prejudice. *Marler v. Allen*, 93 N.M. 452, 454, 601 P.2d 85, 87 (Ct. App. 1979). In particular, the jury's decision to award Martin $6,000 (a figure unsupported by any record evidence) shows the jurors disregarded the court's instruction that damages were to be based on proof, not speculation and conjecture. [RP 2840] To the extent that amount was based on the $5,000 medical payment coverage, the jury disregarded the court's instruction *not* to include such coverages in their awards. [RP 2840, 2843] In addition, the jurors' numerous questions throughout trial advocating for the Vigils suggested they had disregarded the court's admonition not to prejudge the case. [RP 2840-41; 21 Tr. 179; 22 Tr. 64-65, 68, 109, 167; 23 Tr. 60]

Finally, the record indicates a *source* of passion and prejudice: the Vigils' counsel's statements in closing that nine years had elapsed without Progressive paying anything on the policy, and her suggestion that the jury award punitive damages based on Progressive's daily profit (rather than in relation to the compensable injury). [24 Tr. 75, 94-95]

In sum, under either a ratio or passion and prejudice analysis, the punitive damage awards are grossly excessive and cannot stand.

D. The awards are excessive by comparison to civil penalties in comparable cases.

The most analogous civil penalties for the conduct at issue here arise under the UPA or the UIPA, and they are helpful in evaluating whether the punitive awards are excessive under the third guidepost, comparison of punitive damages to civil penalties in comparable cases. *Bogle v. Summit Inv. Co.*, 2005-NMCA-024, ¶ 36, 137 N.M. 80, 107 P.3d 520 (UPA penalties are a meaningful comparison for third guidepost). A party who willfully violates the UPA may be subject to treble damages, *see* § 57-12-10(B), and a party who willfully violates the UIPA may be subject to an attorney fee award, *see* § 59A-16-30. Because the punitive awards at issue here far exceed either a treble damage or attorney fee award, this guidepost further demonstrates the excessiveness of the awards.

E. Progressive's finances cannot justify an otherwise excessive award.

In denying the new trial motion, the trial court concluded, based on an erroneous legal standard, that the punitive damage awards were not "constitutionally impermissible" given Progressive's wealth. [RP 3086] The result of such an approach is to render the kind of analysis the Supreme Court has commanded totally

irrelevant, as Progressive's finances have nothing to do with the reprehensibility of its conduct, the extent of the harm inflicted, or comparable civil penalties. Indeed, the Court has specifically stated that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Campbell*, 538 U.S. at 427. Because the awards here are excessive under the three constitutional guideposts, they should be reversed for a new trial before a jury untainted by legal error, passion and prejudice. Absent that remedy, the award should be drastically reduced to a constitutionally permissible amount.

IV. THE ATTORNEY FEE AWARD OF NEARLY $1.5 MILLION SHOULD BE REVERSED

A. The attorney fee award is punitive and therefore duplicative of the punitive damage awards.

The trial court awarded the Vigils $1,458,142.50 in attorney fees, including gross receipts tax, under NMSA 1978, Section 39-2-1, which permits a fee award in a first-party coverage action "upon a finding by the court that the insurer acted unreasonably in failing to pay the claim." Attorney fees under Section 39-2-1 "punish[ ] an insurer's unwarranted recalcitrance in paying a claim" and are therefore *punitive* in nature. *Amica Mut. Ins. Co. v. Maloney*, 120 N.M. 523, 531, 903 P.2d 834, 842 (1995); *United Nuclear*, 103 N.M. at 495, 709 P.2d at 664 (Bivins, J., concurring) (statute "falls within the punitive class statutes"). Whether an insured is entitled to

both punitive damages and attorney fees under Section 39-2-1 is subject to de novo review. *Davis v. Devon Energy Corp.*, 2009-NMSC-048, ¶ 12, 147 N.M. 157, 218 P.3d 75 (legal questions reviewed de novo).

In the trial court, Progressive argued the Vigils should be required to elect between punitive attorney fees ordered by the court and punitive damages assessed by the jury.[21] In response, the Vigils cited two decisions where the recovery included both types of awards, *O'Neel v. USAA Insurance Company*, 2002-NMCA-028, 131 N.M. 630, 41 P.3d 356 and *Jessen v. National Excess Insurance Co.*, 108 N.M. 625, 776 P.2d 1244 (1989). [25 Tr. 54] In those cases, however, the courts did not address whether the awards were duplicative. "'[C]ases are not authority for propositions not considered.'" *Sloan*, 2004-NMSC-004, ¶ 12 (alteration in original).

Moreover, precedent supports a rule requiring an election between punitive damages and a statutory penalty. An attorney fee award under Section 39-2-1 is analogous to a treble damage award under Section 57-12-10(B) of the UPA, which courts recognize as "'a form of punitive damages.'" *McLelland v. United Wis. Life Ins. Co.*, 1999-NMCA-055, ¶ 10, 127 N.M. 303, 980 P.2d 86. Courts have held that "if a jury awards punitive damages under a non-UPA cause of action and a court awards non-compensatory [i.e., treble] damages under the UPA for the same conduct,

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[21] Progressive preserved this issue in its reply in support of its new trial motion. [RP 3058; 25 Tr. 53]

the plaintiff cannot recover both." *Id.* ¶ 12. "To prevent double recovery, *the plaintiff must elect between the two*." *Id.* (emphasis added).

Similar reasoning applies here. Because the court awarded fees for the same conduct for which the jury awarded punitive damages (bad faith failure to pay), the Vigils cannot recover both awards. If the punitive awards survive, the Vigils should be required to make an election.

B. The trial court erred in not segregating recoverable from nonrecoverable fees and in using a multiplier.

This Court reviews an attorney fee award for abuse of discretion but reviews "de novo whether this decision was based on a misapprehension of the law." *Atherton v. Gopin*, 2012-NMCA-023, ¶ 5, __N.M.__, 272 P.3d 700.[22]

In New Mexico, "a party is only entitled to those fees resulting from the cause of action for which there is authority to award attorney fees." *Dean v. Brizuela*, 2010-NMCA-076, ¶ 16, 148 N.M. 548, 238 P.3d 917. The party claiming fees has the burden of segregating recoverable from non-recoverable fees. *Id.* ¶ 14.

Here, the trial court awarded the Vigils virtually *all* their claimed fees—including those incurred in pursuing the tort and statutory claims they *lost* during the

[22] Progressive preserved this issue in opposing the Vigils' fee motion. [RP 2978-86; 25 Tr. 73]

first trial—without requiring the Vigils to segregate the fees recoverable under the statute from those that are not. The court reasoned that the Vigils' claims for coverage and bad faith were "inextricably intertwined" with their tort and statutory claims from the previous trial, with all claims and defenses focusing on coverage. [RP 3093]

The court's determination was based on a misapprehension of the law. As this Court held in the first appeal, the claims the Vigils lost at the first trial were "analytically distinct from . . . the Vigils' coverage claim." [RP 1783] Accordingly, even though "some facts [were] common to all the claims, it [was] still possible to separate the claims and the proofs required for each." *Jaramillo v. Gonzales,* 2002-NMCA-072, ¶ 40, 132 N.M. 459, 50 P.3d 554. The court was therefore "obligated to separate the claims and determine the amount of time spent on each." *Id.* ¶ 41; *Econ. Rentals, Inc. v. Garcia*, 112 N.M. 748, 765, 819 P.2d 1306, 1323 (1991) (court must segregate fees "when the attorney's services are rendered in pursuit of multiple objectives, some of which permit an award of fees and some of which do not"). Indeed, segregation would not have been difficult because the Vigils' counsel acknowledged that, if segregation were required, they would "go along with" Progressive's segregation. [25 Tr. 56]

The court further erred by applying a multiplier, doubling the $681,375 "lodestar" to $1,362,750. [RP 3097] As the Supreme Court explained in reversing an attorney fee award under Section 39-2-1, "the 'lodestar' method used to determine the

amount of attorney fees and the multiplier allowed by the trial court are *inappropriate in this type of case*." *United Nuclear*, 103 N.M. at 486, 709 P.2d at 655 (emphasis added). While the foregoing statement was unnecessary to the decision (because the Court found no basis for fees), the Court nevertheless expressed unequivocal disapproval of a multiplier in coverage actions.

The trial court's reliance on this Court's recent decision in *Atherton*, 2012-NMCA-023 to support a multiplier is misplaced. *Atherton* held a multiplier may be appropriate for attorney fees under the *UPA*, noting that UPA claims are enforced "on behalf of the public," and that "[i]n some cases, multipliers may be necessary to ensure that plaintiffs can enforce their rights under the UPA." *Id.* ¶¶ 8, 9. *Atherton's* reasoning does not apply to a common law coverage case such as this, especially considering Progressive did *not* violate either the UPA or the UIPA.

Finally, even if *Atherton* applied, a multiplier would still be an abuse of discretion because the court's $681,375 lodestar amount adequately compensates the Vigils for virtually all the fees claimed. [RP 3097] Accordingly, if the fee award is not reversed in its entirety, the amount should be redetermined on remand.

CONCLUSION

Progressive requests that the Court (1) reverse the judgment, including costs and attorney fees, and grant a new trial; (2) reverse both punitive damage awards and the $6,000 compensatory award to Martin Vigil for insufficient evidence; (3) reverse the punitive damage awards as excessive; (4) reverse the attorney fee award for reconsideration and/or to require an election of remedies.

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STATEMENT REGARDING ORAL ARGUMENT

Progressive requests oral argument because it believes argument may assist the Court in understanding the facts, analyzing the authorities, evaluating the arguments, and reaching a decision.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was mailed by first class postage to Janet Santillanes, Olivia Neidhart, and James T. Roach, Attorneys for Defendants-Appellees, 300 Central SW, Suite 1500, West, Albuquerque, New Mexico 87102, on this 20th day of December 2012.

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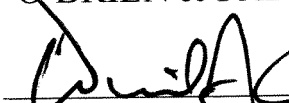

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