IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

PROGRESSIVE CASUALTY INSURANCE COMPANY,

Plaintiff-Appellant,

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

v.

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 REPLY BRIEF

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ORAL ARGUMENT IS REQUESTED

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STATEMENT OF COMPLIANCE (Rule 12-213(G) NMRA)

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 Reply Brief, as defined by Rule 12-213(F)(1), contains 4,387 words.

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INTRODUCTION

Progressive's brief-in-chief demonstrated the judgment should not stand. Nothing in the answer brief changes that conclusion.

ARGUMENT

I. THE VIGILS' WAIVER ARGUMENT IS MERITLESS.

Progressive challenged the sufficiency of the evidence concerning (1) the jury's $6,000 consequential damage award to Martin; and (2) the punitive damage awards. Contrary to the Vigils' contention [*see* AB:8-12, 30], Progressive complied with Rule 12-213(A) NMRA and the standard of review for both issues. [BIC:2-7, 27-31] The Vigils dispute the *legal significance* of certain facts and quibble with the wording, but fail entirely to show inaccuracy in the recounted facts.

Most of the Vigils' objections concern whether coverage was in force on November 4. [*See* AB:9-12][1] Progressive did not challenge the sufficiency of the

[1] For example, the Vigils complain about statements referencing the November 3 renewal date [*see* AB:10-12 (nos. 1-6, 9, 13)], but that *was* the policy's scheduled expiration date; Progressive acknowledges the jury found coverage based on disputed evidence whether the date was *extended*. The Vigils also object to statements casting Vigil in a bad light, such as her mistake in telling Progressive she paid her premium by "check" in October [AB:11-12 (nos. 8-9, 14)], but the relevant facts are undisputed. As for the evidence on Martin's claim, he did not testify, so there was no evidence to summarize concerning the $6,000 award. [BIC:27]

evidence on *that point*—it challenged the sufficiency of the evidence to find the requisite mental state to support *punitive damages*. Thus, the relevant evidence includes what Vigil did and did not tell Progressive's adjuster, leading to the adjuster's *belief* that the policy had actually lapsed when it was scheduled to expire. [*See* BIC:3-7, 28-31] The *facts* concerning Progressive's explanations for its conduct and its belief regarding the lapse date [AB:10-12 (nos. 3, 6, 7, 10-12, 15)] are stated accurately.

The Vigils also overlook that Progressive raised issues other than just evidentiary sufficiency.[2] Progressive raised legal errors [BIC:12-26], requiring the Court to "[e]xamin[e] the whole record"—not just the evidence in the Vigils' favor—to evaluate prejudice. *State v. Benally*, 2001-NMSC-033, ¶ 16, 131 N.M. 258, 34 P.3d 1134; *see also Gonzales v. Sansoy*, 103 N.M. 127, 132, 703 P.2d 904, 909 (App. 1984) (evidentiary error prejudicial where evidence "does not point so strongly and overwhelmingly in favor of plaintiff that reasonable jurors could not arrive at a contrary result; rather, reasonable and fair-minded jurors could reach different conclusions"). Moreover, the Court reviews *de novo* the constitutionality of punitive damage awards [BIC:31-43], a point the Vigils do not dispute.

The Court should reject the Vigils' waiver argument.

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[2] The Vigils contend Progressive waived "Points I, II and III" [AB:8], but the sufficiency arguments were raised only in *Part II* [BIC:27-31].

II. TRIAL COURT ERRORS DEPRIVED PROGRESSIVE OF A FAIR TRIAL.

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

The Vigils erroneously contend that admitting the prior favorable coverage rulings would have violated this Court's "mandate." [AB:13-14] In fact, this Court never addressed what evidence would be inadmissible on retrial.

The Vigils dismiss *LensCrafters, Inc. v. Kehoe*, 2012-NMSC-020, __N.M.__, 282 P.3d 758 as a case involving malpractice rather than bad faith. [AB:15] That is a distinction without a difference. *LensCrafters* shows that prior court rulings consistent with a party's position (even if mistaken) may be relevant on the issue of reasonableness—the key issue here. [BIC:14-15]

Lennar Corp. v. Transamerica Insurance Co., 256 P.3d 635 (Ariz. App. 2011) is persuasive. There, the court held that although an initial summary judgment ruling in the insurer's favor did not conclusively establish reasonableness, it was nevertheless relevant and admissible on that issue. *Id.* at 640-41. The Vigils dismiss *Lennar* as involving "legal interpretation of policy language" [AB:14], but the present case *also* involves legal interpretation of policy language—whether Progressive reasonably interpreted its policy to conclude coverage had lapsed.

The Vigils rely on *Eott Energy Operating Ltd. Partnership v. Certain Underwriters at Lloyd's of London*, 59 F. Supp. 2d 1072 (D. Mont. 1999), in which a

Montana district court found a prior ruling inadmissible because, in Montana, reasonableness may not be decided as a "matter of law." *Id.* at 1080. That is not the case in New Mexico. *See United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 485, 709 P.2d 649, 654-55 (1985). Moreover, even if a court may not decide reasonableness as a matter of law, that should not preclude the jury from considering a prior court ruling for its bearing on a *factual* determination of reasonableness. Regardless, *Eott* does not trump the analysis in *LensCrafters*, under which Progressive should prevail.

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

The Vigils do not defend the court's ruling barring Progressive's reimbursement claim. Instead, they claim the issue is "moot" because the jury found coverage. [AB:16] The Vigils studiously ignore that if the court had *not* precluded the claim, the jury would have learned of Progressive's $200,000 payment to settle the liability claims—which would almost certainly have had a huge effect on the jurors' perception of Progressive's conduct. [BIC:16-19]

The Vigils say Progressive did not specifically object to excluding the payment evidence. [AB:15-17] However, Progressive vigorously opposed the ruling on its reimbursement claim, which was the whole basis of the court's decision to preclude the evidence. [BIC:9-10, 16-19]

Furthermore, the Vigils incorrectly argue Progressive "wanted" the payments excluded. [AB:17-18] While Progressive agreed that its *claim for reimbursement* (once precluded by the court) should not be used to argue *bad faith*, and that the Vigils could not argue potential harm based on the third $100,000 in liability coverage, Progressive never sought to exclude *the fact of its payments*. [17 Tr. 30, 53; 18 Tr. 18-25] The record makes clear that this was the *court's* decision and that Progressive's concerns were rejected.[3] [18 Tr. 3-5]

Finally, Progressive specifically advised the court that the ruling would allow the Vigils to argue misleadingly that Progressive had left them "hanging out there" and "here we are ten years later and they still haven't paid." [18 Tr. 5-6, 8; *see also* 18 Tr. 10] That concern proved prescient: despite the court threatening a "mistrial" if anyone mentioned the payments [18 Tr. 40-41], opposing counsel falsely told the jury Progressive had not paid the property or medical coverage, "let alone *all the other coverages they should have provided under this policy*." [24 Tr. 75 (emphasis added)] This flagrant misconduct, to which Progressive promptly objected and which did not produce an adequate curative response, not only demonstrates the prejudicial effect of the court's ruling, but provides independent grounds for reversal. [BIC:20-22]

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[3] "MR. O'BRIEN: You're saying that the jury will not be allowed to know that Progressive paid—settled those claims for $100,000 each?

THE COURT: I don't think it's relevant to the issues of whether there was coverage. No, I think that's part of the reimbursement claim. No." [18 Tr. 5-6]

C. The trial court erroneously instructed the jury on liability coverage after excluding evidence of Progressive's liability payments.

The Vigils note that the policy limits in the jury instruction that Progressive challenges on appeal were in evidence. [AB:19] The problem, however, is that the instruction improperly advised the jury it could consider those limits "[i]n considering an award of damages" even though—unbeknownst to the jury—Progressive had paid $200,000 in coverage. [RP 2688; BIC:19-20]

The Vigils also say "Progressive agreed Policy limits could be included in that Instruction." [AB:19] But they rely on preliminary discussions before the court had settled on the language it would use. [18 Tr. 33; 23 Tr. 157] Progressive interposed a timely objection at the jury instruction conference, so the court was well aware of Progressive's position, but gave the instruction anyway. [24 Tr. 29, 32-33]

D. The trial court erroneously denied a new trial based on attorney misconduct in closing argument.

As noted above, opposing counsel falsely told the jury that Progressive wouldn't pay for *any* of the coverages *"they should have provided under this policy."* [24 Tr. 75 (emphasis added)] The Vigils contend this statement was appropriate because *Progressive's* counsel noted that Progressive had not "paid" the claim, and did not object to references in the instructions and verdict form about "non-payment." [AB:20] However, those references concerned only property damage and medical

bills—the only unpaid claims in evidence under the court's ruling. Opposing counsel's reference to "all the other coverages" along with the instruction (over Progressive's objection) about the liability policy limits being relevant to the damages calculation, falsely represented that Progressive owed but did not pay $300,000 in liability coverage. [BIC:22]

The Vigils defend their counsel's misleading reference to "nine years" of litigation by emphasizing that Progressive's counsel also mentioned "nine years." [AB:21] But opposing counsel did *more* than just reference nine years: she violated the court's earlier instruction [*see* 20 Tr. 15] by implying the delay was injurious and was *Progressive's fault*. [*See* 24 Tr. 75 (the "case has been going on for nine years"; Martin has "been stuck in this case for almost a third of his life" without Progressive providing coverage)] Progressive was not allowed to explain the truth about the prior rulings and the Vigils' appeal to counteract that suggestion.

The court's narrow instruction that the jury should not consider "'actual coverages'" did not address—and therefore did not cure—the false impression created by counsel's statements. [BIC:22] Accordingly, fairness requires a new trial.

E. The trial court erred in allowing the Vigils' expert to testify on insurance standards and in declining instruction on the proper legal requirements.

The Vigils do not challenge Progressive's interpretation of *Guaranty National Insurance Co. v. C de Baca*, 120 N.M. 806, 811, 907 P.2d 210, 215 (App. 1995),

holding that a ten-day notice is *not* required for a lapse. Nor do they address Progressive's contention that their expert, Allen, lacked foundation for positing an "industry standard" to provide such a notice. Instead, the Vigils contend Allen's testimony was proper—and that the court properly rejected Progressive's instruction accurately reflecting New Mexico law on lapses—because they say Progressive's *own* policy and practices required a ten-day notice for a lapse. [AB:22]

The record contradicts this assertion. Progressive's policy, consistent with New Mexico law, required a ten-day notice only if Progressive "cancel[led] this policy" for nonpayment of premium; it did not (contrary to Allen's opinion) require notice at the end of each policy period, when policies automatically expire upon nonpayment. [Ex. 26, p. 39] The Vigils' reliance on the Court's 2007 *proposed* summary disposition [RP 1729] is misplaced as the Court's analysis was tentative and *not* adopted in the final decision. *See State v. Gonzales*, 110 N.M. 218, 227, 794 P.2d 361, 370 (App. 1990).[4]

Finally, Allen's testimony concerning notice of lapse, even if it were legally sound, would be relevant only if Vigil said she was aware of and reasonably expected

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[4] Exhibit Z, a notice describing policy cancellations, was provided only with *installment* bills; not with policy-end optional renewals. [20 Tr. 219; 21 Tr. 95-96; 23 Tr. 51] The one instance in which Progressive sent a cancellation notice before the renewal term was when Vigil made a partial (but insufficient) premium payment, indicating her intent to renew the policy. [21 Tr. 103; Ex. HH]

coverage based on a ten-day grace period. Vigil makes no such claim. [*See* AB:21] Allen thus should not have been allowed to misinform the jury by suggesting Progressive acted improperly by failing to provide a ten-day grace period, when the jury had no way of knowing such notice was not required.[5]

III. 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 awards in Martin's favor.

The damage evidence the Vigils cite relates only to *Nancy*; the evidence does not remotely support the jury's $6,000 award to Martin. [*See* AB:26-27] Though Nancy vaguely refers to Martin's unspecified *medical bills* [20 Tr. 129], such bills were not to be included in the jury's award [RP 2688]. No evidence exists that Martin experienced distress, much less distress caused by Progressive. Indeed, had Martin chosen to testify, Progressive would have shown through cross-examination that any emotional distress he experienced was caused by other factors, such as his role in causing the fatal accident underlying this case.

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[5] The Vigils emphasize that Progressive presented other evidence concerning the ten-day notice [AB:22], but Progressive did so as a *defensive* matter only *after* the court denied its in limine motion.

To justify Martin's punitive award, the Vigils rely on the full policy limits (even though most of that was paid by Progressive years ago), attorney fees, prejudgment interest, and costs. [AB:37, 40] However, as those amounts were not awarded by the jury (and the latter three amounts were not even known to them) [*see* RP 2688-89], they could not support the jury's punitive award. Progressive should be awarded judgment as to the $6,000 compensatory award and the punitive award to Martin or, at a minimum, a new trial.

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

All the evidence about what Progressive's claims personnel actually believed about the state of the Vigils' coverage shows they acted from the outset of their investigation on the understanding that the policy had lapsed. [21 Tr. 12-16; Ex. 14, pp. 19-20; BIC:29-30] The Vigils illogically contend the jury could infer that Progressive "tamper[ed]" with its records two weeks after the apparent lapse to "retroactively make Vigils' Policy lapse for one day." [AB:32] But having strong reason to believe a lapse had occurred, Progressive had no reason for such pointless "tampering." The only reasonable finding, then, is to accept the direct evidence that the "processing" of the lapse in Progressive's records occurred because of a system error that allocated the November 4 payment to "unapplied cash" when it should have triggered a new policy effective November 5. [BIC:3-6, 30 n.19]

The evidence on which the Vigils rely simply reflects that a "lapse" is "something that's done automatically in Progressive's computer system," and that employee Jacque Humphrey (trying to decipher what happened after the fact) had not heard of processing a lapse after a loss—all of which is consistent with Progressive's position that a system error occurred. [20 Tr. 170; Dep. JH 38:17-41:11; *see also* Dep. JH 80:7-83:9, 86:5-87:13, 87:19-91:14, 91:21-95:4, 115:8-117:3, 121:16-22, 122:7-123:6][6] No evidence exists of improper motive.

Nor is it true that Progressive "just disregarded what Vigil said she was told in [the November 4] call" or made a "false claims record about that call." [AB:33] Policy services told adjuster Cordova that Vigil had been informed during that call that the policy had lapsed and would be effective November 5; Cordova did not discover until later that no one checked with customer representative Ash, who did not remember the call. [21 Tr. 20-21, 65, 217-19] At trial, Cordova explained that policy services told her what Ash "would have done under their procedures." [21 Tr. 93]

Finally, notwithstanding the Vigils' assertion that the policy was terminated without "notice" [22 Tr. 57], the evidence shows that Progressive believed it had provided proper notice through its October 9 renewal notice and its October 29 reminder notice. [Exs. 5, 6]

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[6] Progressive previously cited the Humphrey Deposition excerpts as Crt-Ex. 24. [*See* BIC:6 & n.5, 30 n.19]

In sum, no evidence shows that Progressive's claim denial was arbitrary or baseless or lacking support.[7] Indeed, the unreasonable inferences the Vigils propose amount to rank speculation that ignores Progressive's entirely plausible explanations for its conduct and affords no basis for a reasonable jury to find punishable misconduct.

IV. THE PUNITIVE AWARDS ARE GROSSLY EXCESSIVE.

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

The Vigils' effort to characterize Progressive's conduct as particularly "reprehensible" is wholly unpersuasive.

Economic harm versus physical injury. The Vigils say "[c]ourts have rejected" the argument that harm in bad faith cases is economic, not physical. [AB:35] However, the United States Supreme Court expressly held that such harm arises "from a transaction in the economic realm, *not from some physical assault or trauma; there were no physical injuries*." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003) (emphasis added). Indeed, the Court went on to hold that damages for emotional distress already contain a punitive component and are therefore grounds for reducing a punitive award. *Id.* The single excerpt the Vigils cite from the lower

[7] To find otherwise is to suggest that the presumptively objective trial judge who found no coverage on these facts was similarly "arbitrary."

court decision on remand, *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2004 UT 34, ¶ 28, 98 P.3d 409, suggesting that emotional injury may be "akin" to a physical assault, cannot override the Supreme Court's pronouncement. *See also Walker v. Farmers Ins. Exch.*, 63 Cal. Rptr. 3d 507, 513 (App. 2007) (insureds in bad faith case did not suffer "physical harm"); *Leyshon v. Diehl Controls N. Am., Inc.*, 946 N.E.2d 864, 882 (Ill. App. 2010) ("While emotional distress has been considered in determining reprehensibility, this factor does not strongly favor the plaintiff.").

Moreover, in *Campbell*, the insurer not only declined to settle liability claims despite the near certain probability of a judgment in excess of policy limits, it told the insureds "to place a 'for sale' sign on their house." 2004 UT 34, ¶ 29. Here, in contrast, Progressive settled the claims, thereby *protecting* the Vigils from an excess judgment.

Indifference to health or safety. The Vigils do not contend this factor is present here.

Financial vulnerability. The Vigils say Nancy's credit rating suffered when she did not pay off the loan for the truck, but they do not deny that the debt was discharged in her husband's personal bankruptcy, nor do they cite any evidence Progressive knew of any credit problems at the time it sought declaratory relief. [AB:36] Progressive neither knew of, nor took advantage of, any financial vulnerability.

Isolated incident versus repeated actions. The Vigils contend that when Progressive lapses policies, it "deliberately keeps the lapse hidden from policyholders." [*Id.*] Nonsense. The insured has notice of the policy's expiration date from day one, and if payment is made late, the policy reinstates the following day. As the insurer does not know if and when the insured will renew, the insurer cannot give notice of a lapse before it occurs. Regardless, the record is devoid of evidence that any other insured has been harmed by failure to give "notice" of a "lapse," rendering this reprehensibility factor entirely absent.

Harm caused by "intentional malice, trickery, or deceit." The Vigils contend "Progressive intentionally changed its own records to make Vigils' coverage disappear for one day." [*Id.*] The record reflects otherwise: *from the outset*, Cordova could not find any policy in force; the later record changes had no bearing on her decision to question coverage. *See supra* Part III.B.

In sum, the Vigils utterly fail to demonstrate that Progressive's conduct justifies anything close to $11,700,000 in punitive damages.

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

The Vigils contend that, for the purpose of analyzing the ratio of punitive to compensatory damages, the denominator should be inflated to include the maximum policy coverage, costs, attorney fees, and prejudgment interest—a total of over

$1,900,000—resulting in a still greatly excessive 6:1 ratio. [AB:37] But once the errors in the Vigils' arguments are stripped away, the ratio is in excess of 300:1 [BIC:35]—a ratio the Vigils make no pretense of defending.

First, the Vigils' "harm" obviously does not include the $200,000 that Progressive *paid*, nor does it include the additional $100,000 in liability coverage that was not at issue in the case.

Second, the ratio should exclude costs, attorney fees, and prejudgment interest the jury never considered. *See Amerigraphics, Inc. v. Mercury Cas. Co.*, 107 Cal. Rptr. 3d 307, 329 (App. 2010) (trial court properly refused to consider attorney fees and prejudgment interest awarded after the verdict); *Campbell*, 2004 UT 34, ¶¶ 47-48 (costs and fees cannot be considered in ratio's denominator because the Supreme Court's opinion "forecloses consideration of a compensatory damages number other than the [amount] awarded by the jury"). The Vigils cite authority (none from New Mexico state court) suggesting post-trial attorney fee awards may be included on the compensatory side of the ratio [AB:37-39], but that defeats the constitutional requirement that the jury must evaluate a reasonable relationship between the harm and the punitive damages. Moreover, none of the Vigils' cases addressed a fee award under the statute at issue here, NMSA 1978, Section 39-2-1 (1977), which is *punitive* in nature. [BIC:43-45]

Furthermore, were the Vigils correct in their denominator calculation, then the damages would be "substantial" and the ratio should not exceed 1:1. *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)). [BIC:40] A ratio of 6:1 should be reserved for cases of egregious conduct and harm not adequately captured by the compensatory award. *Cf. Jolley v. Energen Res. Corp.*, 2008-NMCA-164, ¶ 38, 145 N.M. 350, 198 P.3d 376 (6.76:1 for wrongful death).

Finally, the cases the Vigils cite in which the courts approved higher ratios—several of which pre-date *Campbell* [AB:40-41]—involved conduct far more egregious and pervasive than the one-time claim-handling problem involved here and compensatory awards *lower* than $1,900,000. Thus, even accepting an inflated denominator, those cases do not support a 6:1 ratio in a case such as this.[8]

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[8] *See Weidler v. Big J Enters., Inc.*, 1998-NMCA-021, ¶¶ 47-48, 124 N.M. 591, 953 P.2d 1089 (pattern of threatening employees for raising safety concerns; $500,000 punitive award representing 8:1 ratio; *pre-Campbell*); *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) (knowing failure to supervise pervasive claims mishandling; $540,000 compensatory damages; 7.4:1 ratio; pre-*Campbell*); *Akins v. United Steelworkers of Am. Local 187*, 2009-NMCA-051, ¶¶ 33, 37, 146 N.M. 237, 208 P.3d 457 ("particularly reprehensible" racial discrimination; $1,661.60 compensatory damages; 18:1 ratio); *Grassie v. Roswell Hosp. Corp.*, 2011-NMCA-024, ¶ 57, 150 N.M. 283, 258 P.3d 1075 (filed 2010) (aggravated patient neglect causing death; $993,465 compensatory damages; 10:1 ratio); *Madeja v. MPB Corp.*, 821 A.2d 1034, 1050-51 (N.H. 2003) (sexual harassment/retaliation case involving defendant's reckless (continued...)

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

The Vigils understandably seek to evade this crucial guidepost by calling it unhelpful [AB:41], but they do not dispute that the awards at issue here far exceed a treble damage award under the UPA or an attorney fee award under the UIPA, nor do they explain why such penalties are not a highly meaningful benchmark for this case.

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

Contrary to the Vigils' contention [AB:41-43], Progressive did not argue it was error to *admit evidence* of Progressive's wealth. The error would be in using its wealth—which represents in large part resources available to satisfy policyholder claims—to "justify an otherwise unconstitutional punitive damages award." *Campbell*, 538 U.S. at 427. Nothing in the Vigils' brief refutes that constitutional principle.

(...continued)
indifference; $300,000 punitive award representing 35:1 ratio for sexual harassment; 5:1 ratio for retaliation); *Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1273 (10th Cir. 2000) (sexual harassment case involving defendant's reckless indifference; $5,000 compensatory award; 59:1 ratio; pre-*Campbell*).

V. THE ATTORNEY FEE AWARD SHOULD BE REVERSED.

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

The Vigils do not address the New Mexico authority [*see* BIC:43] demonstrating that an attorney fee award under Section 39-2-1 is punitive in nature. Their reliance on out-of-state authority, *Blount v. Stroud*, 915 N.E.2d 925 (Ill. App. 2009), is misplaced. [AB:44] *Blount* addressed fees under 42 U.S.C. § 1988, which the court expressly found to be "remedial," *not* "punitive," in nature. 915 N.E.2d at 944.

The Vigils also cite *O'Neel v. USAA Insurance Co.*, 2002-NMCA-028, 131 N.M. 630, 41 P.3d 356, but neither *O'Neel* nor any other New Mexico case addresses the legal point Progressive raises here. [BIC:44]

In sum, the Vigils present no justification for permitting a punitive attorney fee award of $1,458,142.50 in addition to punitive damage awards totaling $11,700,000. If punitive damages are allowed to stand, the court should require the Vigils to elect between the two remedies and should, in any event, exercise its discretion under Section 39-2-1 to reject the request for appellate fees, as the existing awards are more than adequate to compensate the Vigils for any harm.

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

The Vigils contend the trial court properly awarded them all their claimed attorney fees because the court found all claims inextricably intertwined. [AB:43-44] However, that finding was an abuse of discretion because the court easily could have segregated at least those fees incurred in the first trial that the Vigils' *lost*, especially considering this Court's prior statements that those claims were "'analytically distinct.'" [BIC:46][9]

Moreover, the Vigils do not address *United Nuclear*, which acknowledged a multiplier may be appropriate for "civil rights cases and class action suits," but found the method "inappropriate" for coverage actions such as this. 103 N.M. at 486, 709 P.2d at 655.

The Vigils' reliance on *Atherton v. Gopin*, 2012-NMCA-023, ¶ 5, __N.M.__, 272 P.3d 700, is misplaced as that case concerned a multiplier for *UPA claims* enforced *on behalf of the public. Id.* ¶¶ 8, 9. Any reliance on *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, 127 N.M. 654, 986 P.2d 450 is similarly misplaced, as that case involved *a class action*, for which a multiplier would be appropriate under *United Nuclear*.

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[9] The Vigils contend Progressive did not challenge $529,575.10 in fees but that number does not account for Progressive's correction on the record. [25 Tr. 73]

In sum, nothing justifies an award of nearly $1.5 million in attorney fees.

CONCLUSION

This court should grant relief as requested in Progressive's brief-in-chief and, even if it otherwise affirms, reject the Vigils' request for appellate fees.

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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 5th day of March 2013.

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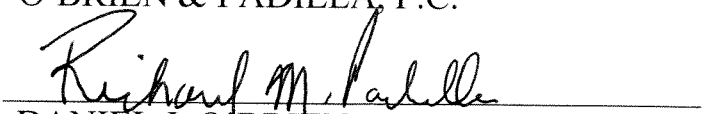

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