# IN THE COURT OF APPEALS
# FOR THE STATE OF NEW MEXICO



PROGRESSIVE CASUALTY
INSURANCE COMPANY,

Plaintiff-Counter Defendant/Appellant,

v.

Court of Appeals No. 2012-32171
District Court No. CV-2002-09124

NANCY COLLEEN VIGIL and MARTIN VIGIL,

Defendants-Counterclaimants/Appellees.

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## ANSWER BRIEF
## OF APPELLEES VIGIL

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**Second Judicial District Court**
**County of Bernalillo**
**The Honorable Alan Malott**

***Appellees Request Oral Argument***

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## Statement of Compliance

Appellees certify the body of this Answer Brief contains 10,954 words and complies with Rule 12-213F(3). The word count information was obtained from our WordPerfect software contained in WordPerfect Office 5X.

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**Summary of Proceedings**

This is an insurance coverage and bad faith case arising from a November 4, 2002, accident. Progressive sued its insureds Nancy Colleen Vigil and her stepson Martin Vigil (hereinafter "Vigils"), requesting declaration of no coverage. (RP1) Vigils counterclaimed, requesting declaration of $355,000 coverage and asserting bad faith claims. (RP10, 1509) During litigation, Progressive settled two claims against Progressive and Vigils for $200,000 then sued Vigils for $200,000. (RP1480)

The original trial Judge, Robert Thompson, granted summary judgment to Progressive on coverage. (RP798) The case went to trial on remaining alternative claims with the jury instructed Vigils did not have coverage. The jury returned a $200,000 verdict for Progressive against Vigils. (RP1629) Vigils appealed.

This Court reversed summary judgment on coverage, finding there were disputed factual questions, and set aside the verdict. This Court remanded for new trial on coverage and bad faith failure to provide coverage. *Progressive v. Vigil* *1, 2009 WL 6567550 (N.M.App. RP1772).

The Jury at the new trial decided there was coverage and Progressive acted in bad faith in failing to provide coverage. The Jury also awarded compensatory and punitive damages to Vigils. (RP2662) Judge Malott inserted contract damages owed based on the Jury's declaration of coverage. Judge Malott denied Progressive's Motion for New Trial or to reduce damages awarded, finding evidence supported the Verdict. Judge

Malott entered Final Judgment based on the Jury's Verdict and awarded Vigils' attorneys fees. (RP2825, 3084, 3092) This appeal by Progressive followed. (RP3123)

**Summary of Facts Relevant to Issues Presented for Review**

In 2009, since Vigils were appealing from summary judgment against them, this Court viewed all facts and reasonable inferences in the light most favorable to Vigils. *Progressive v. Vigil, supra* *1.

Now that Vigils prevailed at trial on the merits, evidence is viewed in the light most favorable to the Jury's verdict, all conflicts in evidence are resolved, and all reasonable inferences drawn, in Vigils' favor.

Applying that review standard, evidence and inferences at the new trial show:

Vigils had an insurance Policy with Progressive since 2000, covering multiple vehicles. (Ex. 20 [1]; V.21,TR-110; V.22,TR-84) Vigils paid Progressive monthly premiums totalling $5,000 annually. (V.23,TR-111) On November 4, 2002, at 1:30 a.m., Martin was involved in an accident. (V.20,TR-58; V.23,TR-101) When Colleen called Progressive the day of the accident, Progressive assured her she had coverage and her next premium was not due until November 15th. (V.20,TR-60,87-8,112; V.22,TR-26,27,136; V.23,TR-119) *See* 2009 Opinion where this Court stated:

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[1] Trial Court's admitted Exhibits listed at RP2704-2713.

> "Nancy[2/] Vigil called Progressive to report the accident and to seek assurance that their Policy remained in effect. The customer service representatives with whom she spoke reiterated that the next premium was not due until November 15, 2002. The representative also confirmed that there has been no lapse in coverage." *Progressive v. Vigil, supra.**2.[3/]

Vigils' insurance coverage with Progressive was in full force and effect when the accident happened. (V.21,TR-174,192; V.22,TR-14,17,38,54-56)

Shortly before this accident, Progressive told Vigil her monthly premium was due October 15th. (Ex. 20, V.20,TR-33,101,151; V.22,TR-21) When Vigil added a vehicle to her Policy a month before the accident, Progressive changed her due date from the 3rd to the 15th of the month. (Ex. C, E; V.20,TR28-29,37,101,151,165) All premiums were timely paid by Vigils to conform with the new premium due date set by Progressive. (V.20,TR-101,105-6,116) Progressive confirmed that new date to Vigil several times before the accident – by phone, mailed billing statement, and automated phone system. (Ex. E; V.20,TR-28-29,54-6,111)

Progressive mailed Vigil her regular monthly bill showing her premium was due October 15th. (Ex. E; V.20,TR-28,102; V.21,TR-170; V.22,TR-72) Vigil timely paid the premium due October 15th. (Ex. R p. 3; V.22,TR-181) **By paying that premium, Vigil had paid in advance for coverage through November 15th.** (Ex. S, p.1,4; Ex. T, time

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[2/] Nancy Colleen Vigil also goes by her middle name, as transcript indicates.

[3/] Progressive records all calls from policyholders but did not record the phone call from Vigil to Customer Service Representative (CSR) Martha Ash the morning of this accident. (Ex. S p. 5-6; Ex. W; V.20,TR-169,174-177)

line; V.20,TR-29,39,56,102; V.21,TR-137-8,166,192-3; V.22,TR-77; V.23,TR-105) Vigils' timely payment of the monthly premium due October 15th meant Vigils' Policy was in effect through November 15th and their coverage could not end before November 15th. (Ex. 20; V.21,TR-174; V.22,TR-15-16)

Progressive's past pattern and practice was that payment of a monthly premium bought policyholders coverage for 30 days after the premium due date. (V.20,TR-47,102; V.21,TR-139; V.22,TR-16,77; Humphrey depo. p.18, 1.5-13)[4/] That was also Vigils' understanding. (V.20,TR-66,102) As this Court viewed it previously, "[t]hroughout her years as a Progressive customer, the payment of a monthly premium by its due date had resulted in the continuation of coverage for the next full month." *Progressive v. Vigil, supra* *3. "[T]his relationship between payment and coverage would comport with historical and industry practices." *Progressive v. Vigil, supra* *3. (*See* V.20,TR-37,47,102; V.21,TR-141; Humphrey depo. p. 18 l.5-13)

Two weeks before the accident, "[o]n October 16, Nancy Vigil called to inquire about the billing statements . . . [and] Progressive's automated system indicated that the next premium was not due until November 15, 2002." *Progressive v. Vigil, supra* *1. (V.20,TR-28,54-6,103; V.22,TR-23-24) Progressive's representatives and automated telephone system told Vigil, and gave her cause to believe, her next payment was not due

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[4/] Videotape deposition of Jackie Humphrey, analyst in Progressive's Policy Service Department, is Court's Exhibit 24, admitted RP2712, played during trial V.23,TR-10. Deposition pages cited herein were in evidence.

until November 15 and her coverage extended to November 15th, the due date of her next payment. (V.20,TR-28,33-4,80-81,87-8,103; V.21,TR-141)

Given the surrounding facts and circumstances – including phone calls, bill due October 15th, history of coverage for thirty days after due dates, Policy language, grace periods, etc. – Vigils had a reasonable expectation of coverage through November 15th. (V.20,TR-31,39,56,86,99; V.21,TR-135,137,165,167; V.22,TR-54-55,134; V.23,TR-98)

Vigil always had, and always intended to have, insurance. (V.20,TR-99,104) She was a diligent, reasonable, consumer who checked when her premiums were due, got her premiums paid and maintained continuous coverage. (V.23,TR-79) In the weeks before the accident, Vigil called Progressive three times – to add a vehicle, pay her October premium and confirm when her November premium was due. (V.20,TR-104,164; V.23,TR-79)

Vigils' Policy did not lapse or expire on November 3, 2002. (V.21,TR-166,173-4,193; V.22,TR-56,179) Progressive's computer system did not automatically lapse Vigils' Policy on November 3rd because the Policy was in effect and Vigils did not owe any money. (Humphrey depo. p. 38, l.17-p. 41, l.11) Progressive data CSR Martha Ash looked at on November 4th and CSR Daniel Briggs looked at on November 14th showed Vigils' Policy had *not* lapsed before this accident and that Vigils had coverage continuously, without interruption. (Ex. L; Ex. S p. 6; V.21,TR-172-3,212,220,230-33; V.22,TR-32,34,179; V.24,TR-96; Humphrey depo. p.125, l.20-p.126, l.22)

In Progressive's system, "unapplied funds" are payments by insureds that are not due yet. (V.21,TR-223) On November 4th, Vigil made an early payment of the premium due November 15th. Progressive's system automatically put that payment into "unapplied funds" because Vigils' Policy was in effect and her premium was not due yet. (Ex. KK p.3; V.21,TR-223; V.22,TR-14,28-29)

Consistent with what Progressive told Vigil before the accident, Progressive sent Vigil insurance cards and declaration page showing the November 15th date. (Ex. N, O, P, Q, S p.7; V.21,TR-137,209; V.22,TR-37,136; V.23,TR-119)

The evidence at the new trial showed **"[a]fter the accident, Progressive changed its position with respect to coverage."** *Progressive v. Vigil, supra* *2. (V.22,TR-36,39) The claims adjustor's notes showed there were "no gaps in coverage". (Ex. X, p.3; V.21,TR-60,63) Nevertheless, about two weeks after the accident, when loss severity was assessed, Progressive's Claims Department decided the premium due date should be the 3rd of the month, manipulated Progressive's computer records to falsely show coverage lapsed 90 minutes before the accident, and refused coverage under the Policy.[5/] (V.22,TR-36-39)

Progressive altered its records to leave Vigils without coverage for one day – the day of this loss. (V.21,TR-142) Almost two weeks *after* the accident, Progressive "processed" a retroactive lapse of Vigils' Policy and made the lapse effective the day

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[5/] Progressive's position was Vigil had until midnight to pay her premium; the accident happened at 1:30 a.m. (V.23,TR-101)

before the accident. (Ex. R p.3; S p.8-9; V.20,TR-226,230; V.22,TR-36; V.23,TR-107; Humphrey depo. p.86, l.24-p.87, l.13) Progressive employees testified Progressive does not "process" policy lapses. They could not explain what it meant that Progressive "processed" a lapse of Vigils' Policy because that is not something Progressive does or even can do. (Humphrey depo. p.39, l.16-p.40, l.5) Progressive never processed a lapse of any other insured's policy. (Humphrey depo. p.40, l.16-25)

When Vigil talked to Claims soon after this accident, she told them she paid month to month; that she had paid the premium due October 15th; that her next premium was not due until November 15th. (Ex. I, K; Ex. X p.9; V.21,TR-17,26) Progressive's Claims Department did not look into anything Vigil told them. (V.21,TR-165; V.22,TR-62,182; V.23,TR-107) It was the Claims Department, not Policy Services, which triggered the retroactive lapse of Vigils' Policy. (Ex. U p.6-7; X p.33; V.22,TR-55)

Progressive informed Vigils, in writing and by past practice, coverage would not be terminated for any alleged late payment without 10 days advance notice.[6/] (Ex. B; V.22,TR-58,71,82) Progressive gave no such notice here. (V.22,TR-57)

Progressive's failure to provide coverage was unreasonable, contrary to insurance industry standards and in bad faith. (V.22,TR-14,57,72)

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[6/] Since Vigils' premium was not due until November 15th and she paid early, the 10 day notice/grace period did not need to come into play.

In its 2009 Opinion, this Court noted "[t]hese principles suggest that the policy should be construed to uphold the Vigils' expectation of continuous coverage through November 15, 2002..." *Progressive v. Vigil, supra*,*4. Because of factual disputes, this Court remanded for a new trial on coverage and bad faith failure to provide coverage. After six days trial, the Jury returned its verdict declaring Vigils have insurance for the accident, that Progressive acted in bad faith in failing to provide coverage, and awarding compensatory and punitive damages.

## I. Throughout its Brief, Progressive Violates Appellate Review Rules

Rule 12-213A(3), (4) provide that challenges to sufficiency of evidence are deemed waived unless Appellant sets out the substance of evidence bearing upon issues and identifies with particularity the facts Appellant claims are unsupported by substantial evidence. Progressive should be deemed to have waived its Points I, II and III by its failure to set out the substance of evidence or identify facts Progressive alleges are unsupported by substantial evidence.

This Court recently reiterated rules for reviewing sufficiency of evidence:

> "The evidence is viewed in a light most favorable to the prevailing party, disregarding evidence and inferences to the contrary... The appellate court resolves all conflicts in the evidence in favor of the decision below."

*Muncey v. Eyeglass World*, 2012–NMCA–120, {21}, 289 P.3d 1255, *cert. denied* ___ N.M. ___; *Clay v. Ferrellgas,* 118 N.M. 266, 267, 881 P.2d 11 (1994).

Progressive's rendition of facts falls far short of meeting appellate review standards. Instead, from the first sentence of its Brief and continuing throughout, Progressive's statement of facts violates New Mexico law in many ways. Progressive reargues facts, misstates and ignores important evidence supporting the Verdict. Progressive then builds its appellate arguments on its false rendition of evidence.

Progressive's arguments amount to no more than a request that this Court reweigh evidence and view it in a light contrary to the Jury's decision. "That would be improper under our standard of review." *Dydek v. USAA*, 2012–NMCA–088 {38}, 288 P.3d 872. It was the Jury's exclusive province to judge credibility, determine weight to be given testimony, draw inferences, resolve factual conflicts, and reach ultimate fact conclusions. (RP2617, 2693-2695)

Progressive leaves out crucial facts relevant to issues it raises on appeal. Reading Progressive's Brief, you would not know many important facts, including:

a. Progressive mailed Vigil a bill showing her premium was due October 15th. (Ex. E; V.20,TR-23,116)

b. By paying a monthly premium, insureds pay in advance for coverage for the next 30 days after the premium due date. (V.20,TR-29; V.21,TR-192; V.22,TR-16)

c. When an insured's premium payment goes into "unapplied funds" (as Vigils' November 4th payment did), that means payment is not due yet. (V.21,TR-223; V.22,TR-28)

d. Progressive had never processed a lapse of any other insured's policy. (Humphrey depo. p.40, l.16 - p.41, l.11)

Progressive has a pervasive pattern throughout its Brief of making inaccurate or misleading statements or citing only facts favorable to Progressive, improperly resolving factual conflicts contrary to the decision below. Here are examples:

1. Progressive's misstatement: "Nancy Vigil was insured under a Progressive automobile insurance policy expiring November 3, 2002." (BIC p.2)

   Fact: Vigils' Policy was not expiring November 3, 2002. Vigils' payment of the premium due October 15th extended her Policy to November 15th. (V.22,TR-54-56,77,93)[7/]

2. Progressive's misstatement: "Vigil's monthly payments were due on the third of each month." (BIC p.2)

   Fact: Vigils' monthly payments were due on the 15th in the two months important here – October and November, 2002; Vigil timely paid those premiums. (Ex. E, T; V.22,TR-16; V.23,TR-69,74,79)

3. Progressive's improper statement: "Progressive contends the automated system would have told her payment was due November 3." (BIC p.2-3)

   Fact: The automated system told Vigil payment was due November 15th. (V.20,TR-28,56,103) Progressive's "contentions" contrary to the Verdict are disregarded.

4. Progressive's misstatement: "it is undisputed that she did not pay the minimum premium by November 3." (BIC p.3)

   Fact: That was not "undisputed". There was no premium due November 3rd. (Ex. E, T; V.22,TR-16; V.23,TR-69,74,79)

5. Progressive's misstatement: "it is undisputed Vigil paid the renewal amount during that November 4 call." (BIC p.3)

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[7/] *See* additional transcript references, pages 2-7 of this Answer Brief.

Fact: That was not "undisputed". Vigil timely paid the premium due October 15th so she had continuous coverage through November 15th. (V.20,TR-81,114; V.21,TR-137-9;165-7)

6. Progressive's misstatement: "Progressive's computer system mistakenly directed the payment to 'unapplied cash.'" (BIC p.4)

Fact: Progressive's computer system correctly directed the November 4th payment to "unapplied cash" because payment was not due until November 15th. (Ex. KK; V.21,TR-223; V.22,TR-28-9)

7. Progressive's misstatement: "Given Vigil's lack of cooperation and the records showing no policy in effect . . ." (BIC p.5)

Facts: Vigil cooperated. (Ex. K p.6; V.20,TR-113) Progressive's records showed Vigils' Policy was in effect. (Ex. E, R p.3; V.20,TR-64; V.21,TR-212,230,233; V.22,TR-32-4,179)

8. Progressive's misleading statement: Vigil insisted "inaccurately that she had sent a check on October 15 . . ." (BIC p.5)

Fact: Vigil paid the premium due October 15th. She paid early, on October 3rd, by credit card. (V.20,TR-88; V.22,TR-131,181-2)

9. Progressive's misstatement: "she paid *again* on November 4 when told Progressive had no record of that payment." (BIC p.5) (italics in original)

Facts: On November 4th, CSR Ash told Vigil she had coverage and her next premium was due November 15th. Vigil paid that November 15th premium early, on November 4th. (Ex. K, p.4; V.20,TR-81,112; V.21,TR-199)

Progressive *did* have a record of Vigils' payment of the premium due October 15th. (Ex. D; R p.3)

10. Progressive's misstatement: ". . . the records reflected a 'lapse' effective November 3." (BIC p.6)

Fact: Before Progressive tampered with its records to show a lapse retroactive to November 3, its records showed Vigils' Policy was in effect continuously. (Ex. R p.3, S; V.21,TR-173-4)

11. Progressive's misstatements: "... Progressive generated a new declarations page for a Policy period to begin November 15." "The November 15 date was a mistake since the policy should have issued on November 5 . . ." (BIC p.6)

Fact: Progressive's system correctly generated a new declarations page with the November 15th date. Before the accident, Progressive changed the Policy date to the 15th and told Vigil her premiums were due October 15th and November 15th. (Ex. E, N, O, P; V.21,TR-209; V.22,TR-37; V.23,TR-119)

12. Progressive's misstatement: "Progressive therefore manually reissued the policy, correcting the renewal date to November 5." (BIC p.6)

Fact: Progressive did not "correct" Vigils' Policy. Progressive tampered with its records to falsely show Vigils' Policy lapsed for one day, November 4, the day of this accident. (V.20,TR-226,230; V.22,TR-36-9; V.23,TR-107-8)

13. Progressive's misstatement: The Claims Adjustor verified Progressive had "received the October 3 payment for the policy period ending November 3 . . ." (BIC p.6)

Fact: The Policy period did not end November 3. Payment Vigil made on October 3rd was not due until October 15th. Payment of that premium extended her policy period through November 15th. (V.22,TR-15-6)

14. Progressive's misleading statement: "Progressive never received the check Vigil purportedly sent on October 15 to renew the policy." (BIC p.6-7)

Fact: Vigil paid the premium due October 15th, by credit card on October 3rd, to renew her Policy. (V.22,TR-181) Progressive received and posted that payment. (Ex. R p.3)

15. Progressive's misstatement: Progressive's claims adjustor "concluded the Vigils had no coverage for the accident because Vigil made the renewal payment on November 4 after the accident occurred."

Fact: Vigils had coverage for the accident. Vigil timely paid the premium due October 15th. (V.22,TR-14-5) Progressive's failure to provide that coverage was bad faith. (Jury's Verdict; V.22,TR-14)

Progressive's statements about the first trial are also extremely misleading. (BIC p.8-9) The Jury at the first trial was instructed, erroneously, "the Progressive Policy provided no coverage". *Progressive v. Vigil, supra* *5. The new trial is not bound by the error-based first trial. This Court was "unpersuaded" by Progressive's conclusions about the meaning of the first trial. *Ibid.*

## II. Trial Court Conducted a Fair Trial on Coverage and Bad Faith Failure to Provide Coverage, as Mandated by this Court

This Court remanded for new trial on two issues: coverage and bad faith failure to provide coverage. The District Court held a fair trial on those issues.

### A. Rulings of the First District Judge, Which this Court Reversed, Were Not Evidence and Were Properly Excluded

This Court held in 2009 that the issue of coverage "should have gone to the jury." *Progressive v. Vigil, supra*, *4. Judge Garcia, with Judges Fry and Vigil concurring, concluded:

> "[W]e reverse the award of partial summary judgment with respect to the Vigils' claim to enforce the contract of the insurance and the related claim of bad faith for failure to provide insurance coverage."

This Court's Opinion and Mandate, reversing Judge Thompson's decision, constituted the law of this case for the new trial. *State ex rel King v. UU Bar Ranch,* 2009–NMSC–010, {22} 145 N.M. 769, 205 P.3d 816. Admitting the reversed ruling would violate this Court's Mandate. "New trial" means "the case stands as if never tried." *Rhein v. ADT Automotive*, 1996–NMSC–066, 122 N.M. 646, 650, 930 P.2d 783.

In the first appeal, this Court looked at facts and law and determined there was sufficient evidence for a Jury to find coverage and find Progressive acted in bad faith. Progressive argues the District Court on remand erred by not admitting Judge Thompson's erroneous ruling. Progressive contends that reversed ruling is evidence it did not act in bad faith. However, the evidence relevant to bad faith is what Progressive knew and did in November-December 2002 when it decided not to provide coverage. The erroneous ruling made long after Progressive chose not to provide coverage is irrelevant.

A reversed summary judgment on coverage is not admissible as evidence insurer had a reasonable basis for denying coverage. *Eott Energy v. Certain Underwriter's,* 59 F.Supp.2d 1072, 1080 (D. Mont. 1999).

Judge Thompson's ruling meant regardless of *facts* showing Progressive's bad faith, he found a *legal issue* of policy interpretation which he mistakenly said required a ruling of no coverage. This Court reversed, holding Judge Thompson was wrong on the legal issue. This Court held there were *factual issues* to be decided by a Jury at a new trial upon which coverage and bad faith would be determined. Judge Thompson's erroneous ruling is irrelevant to factual issues the Jury needed to decide at a new trial.

*Lennar v. Transamerica Insurance,* 227 Ariz. 238, 256 P.3d 635 (2011), cited by Progressive, does not apply. *Lennar* involved legal interpretation of policy language. How Courts interpret policy language may be relevant on legal issues of policy

interpretation. Here, though, the issue on remand is not legal interpretation of policy language.

Progressive relies heavily on *Lenscrafters v. Kehoe*, 2012–NMSC–020, 282 P.3d 758, arguing *Lenscrafters* demonstrates court rulings consistent with a party's position are relevant, even conclusive, to show party did not act in bad faith. (BIC p.14) *Lenscrafters* does not say that. *Lenscrafters* is inapplicable. It is not a bad faith case; it does not address admissibility or relevance of reversed rulings.

The *Lenscrafters* language Progressive relies on is one sentence which simply notes, in the context of abuse of process, it would be "ironic" to find the claim was filed without probable cause when the Court found the claim justiciable. That comment does not support Progressive's argument.

The reversed ruling is not evidence Progressive acted reasonably. The prior District Court Judge's ruling, and this Court's Opinion reversing that erroneous ruling, were not evidence for the Jury on whether Progressive was in bad faith in 2002 when it refused coverage. Judge Thompson's erroneous ruling was properly excluded.

### B. Progressive Did Not Preserve Alleged Error about Exclusion of Evidence of its Settlements.

Progressive argues the District Court erred in excluding evidence about Progressive's settling two claims against Progressive and Vigils for $200,000. That argument runs throughout Progressive's Brief, including its punitives argument. Judge Malott's Order on Progressive's reimbursement claim and his evidentiary ruling were

correct. (Order RP1943-5, ¶3-8, 11; Vigils' Briefs RP1813, 1900) Furthermore, since the Jury found coverage, Progressive's reimbursement claim is moot. *See Progressive v. Vigil, supra*, *6.

In its Brief, Progressive does not (and cannot) point this Court to where, in the record, Progressive invoked a ruling requesting admission of this evidence. To preserve an issue for review, Appellant must have fairly invoked a ruling of the trial court. *Estate of Vigil v. Vigil*, 2012–NMCA–121 {18}, ___ P.3d ___, *cert. denied* ___ N.M. ___; Rule 12-216A. Progressive did not offer, and never asked the trial Court to admit, the evidence. To the contrary, Progressive's position was the evidence should be *excluded.*

Initially *Vigils'* position was the evidence should be admitted because it shows Progressive knew there is coverage and acted in bad faith in suing Vigils for $200,000; Progressive did not agree. (V.17,TR-23-26,28) Vigils eventually agreed with Progressive the evidence should be excluded. (V.18,TR-13-16)

On appeal, Progressive takes a completely different position about this evidence than it took before or during trial. This Court reviews the case litigated below, "not the case that is fleshed out for the first time on appeal"; a party cannot argue for "an approach untethered to the record . . ." *Eker Brothers v. Rehders*, 2011-NMCA-092 {20}, 150 N.M. 542, 263 P.3d 319. A party cannot explain, on appeal, "what it failed or chose not to explain in the district court." *Muncey, supra* {31}. *See also Grassie v.*

*Roswell Hospital*, 2011-NMCA-024 {37}, 150 N.M. 283, 258 P.3d 1075, cert. denied 264 P.3d 129 (2011).

"[C]ounsel's failure to timely object to the district court's ruling precludes review by this Court." *Estate of Vigil, supra*, {19}. There Judge Vanzi set out colloquy between counsel and trial Judge demonstrating that although counsel stated his position, he made no objection or legal argument when the trial Court held otherwise.

During colloquy here between counsel and trial Court, Progressive failed to object to exclusion of settlements evidence and made no legal argument for admitting it. To the contrary, Progressive's position at the 8/16/11 Motions hearing and 9/21/11 Pretrial Conference was the evidence should be *excluded*:

| | |
|---|---|
| **"The Court:** | **[A]s a procedural matter, are you agreeing that to an extent the reimbursement issue comes in?** |
| **Mr. O'Brien:** | **No. Why would it? I don't understand why it would."** (V. 17,TR-30) |
| "Mr. O'Brien: | Why did the money even come in? I mean, either there is coverage or not. And if there is coverage, then we owe property damages and we owe the Med-Pay. But this 300,000 it is – there's not a – |
| The Court: | Yeah, I'm kind of concerned about ordering – in other words, there is coverage or not without getting into specific amounts other than the truck and medical bills. |
| Mr. O'Brien: | Right. |
| The Court: | And I am inclined to agree with Mr. O'Brien . . ." (V.18,TR-18) |
| "Mr. O'Brien: | Judge, I think we are on the right track, though I think we limit the way they don't even have to know all they have to know is there was an accident, period. |

The Court: And I think we are all in agreement on that. We are not going to get into how horrible this collision was.

Mr. O'Brien: That's right. . ." (V.18,TR-23)[8/]

It is insufficient for attorneys to make vague statements about potential trial concerns. *Estate of Vigil, supra.*

Post trial, Progressive made an untenable argument that its $200,000 settlements should have come into evidence but Progressive suing Vigils for $200,000 should stay out of evidence.

Before and during trial, though, Progressive wanted its $200,000 settlements kept out, *with good reason.* Progressive faced a tactical decision. Was it better for Progressive if evidence of its $200,000 settlements was admitted or excluded? Progressive speculates now maybe the Jury would have returned lower punitive damage awards if they knew Progressive settled two claims. On the other hand, if that evidence were admitted, Progressive would have faced serious adverse consequences. Progressive settling two claims for Policy limits shows Progressive knew Vigils had coverage. If that evidence were admitted, any hope Progressive had of winning on coverage would vanish.

The evidence would inform the Jury the accident was serious which Progressive did not want them to know. The Jury would learn Progressive sued Vigils for $200,000. Progressive settling with third parties to protect itself and then suing its own insureds for $200,000 adds more fuel to the fire of Progressive's outrageous conduct. Damages may

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[8/] *See also* V.17,TR-53; V.18,TR-18 to 24, 40 l.19.

have been higher if the Jury knew Progressive sued Vigils and had only done that to one other policyholder in the United States. (V.17,TR-62)

Progressive made a tactical decision it was better for Progressive if its settlements were excluded. After the fact, though, Progressive tries to say it preserved this claimed error when it did not.

### C. Jury Instruction Containing Policy Limits, Which Were in Evidence, Was Appropriate

The first issue the Jury had to decide was whether Vigils had coverage. Progressive argues it was error to include Policy limits in a Jury Instruction. (BIC p.20) The limits set out in the Instruction are the correct limits, as Exhibits Progressive put into evidence show. (Exhibits 4, 5, 7, 12, 25 admitted at RP2709) The Jury was aware of the limits, including $300,000 Bodily Injury coverage. Jury Instruction No. 23 set out Policy limits and advised the Jury, *if* you find coverage, these are the limits and the "Court will determine what is due under the policy provisions." (RP2688) The Jury Instruction was proper.

Furthermore, when jury instructions were being settled, Progressive agreed Policy limits could be included in that Instruction. (*See* V.23,TR-157, l.4; *also* discussions at V.18,TR-33, l.12-18; V.24,TR-29)

### D. Comments Progressive Complains about Were Proper

*Progressive's* counsel told the Jury twice that Progressive did not pay the claim.[9/] During opening, Progressive's attorney said:

> ". . . **Progressive** didn't deny the claim. It **hasn't paid the claim.**" (V.19,TR-165, bold added)

During direct examination of Cleary, Progressive's attorney stated:

> "**I fully acknowledge that they didn't pay the claim**, but they didn't deny it either." (V.21,TR-146, bold added.)

The Jury needed to decide whether Progressive acted in bad faith in failing to *provide* coverage. That is how this Court stated the issue in 2009. In closing, Vigils' counsel used the same language used by this Court. The Jury was properly instructed (without objection by Progressive) that Vigils claimed Progressive failed to provide coverage. (RP2666) Progressive also approved the reference, in the Verdict form, to "Progressive's non-payment." (V.24,TR-41, l.25 to 42, l.2; RP2662, Question 2) Progressive itself, in closing, said the Jury needed to decide "[d]id Progressive act in bad faith in not providing coverage?" (V.24,TR-70)

In response to Progressive's objection during closing, the trial Court instructed the Jury again the Court would insert actual Policy coverages, if any, after trial. (V.24,TR-76) The trial Court had instructed that arguments of counsel are not evidence.

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[9/] Progressive's statements it did not pay are consistent with Progressive's Jury argument that insurers cannot pay if there is no coverage. (V.19,TR-167; V.24,TR-72)

(V.19,TR-149,155; RP2697) The trial Court determined that its instructions were sufficient to cure any claimed prejudice resulting from counsel's statement. *Jolley v. Energen Resources Corp.*, 2008–NMCA–164 {25}, 145 N.M. 350, 198 P.3d 376. In making that determination, the trial Court did not abuse its discretion. *Ibid.*

Progressive complains Vigils' counsel noted the litigation lasted 9 years. (BIC p.21) Yet during his opening, his direct examination of Colleen, and his closing, Progressive's attorney said "nine years later . . ." and ". . . it's taken nine years . . ." (V.19,TR-168; V.20,TR-98; V.24,TR-71)

Progressive did not provide coverage it should have provided. As this Court's 2009 Opinion, the Jury Instructions and Progressive's own comments show, Progressive's failure to provide coverage was a main issue at trial. There was no "false impression" created; argument by Vigils' counsel in closing, that it was bad faith for Progressive to fail to provide coverage, was fair comment, in conformity with this Court's 2009 Opinion and Mandate.[10/]

### E. Garth Allen's Testimony and Jury Instruction about Notice Are Consistent with New Mexico Law

The 10 day notice issue is moot since Vigils' premium, which was not due until November 15th, was paid early. As far as Prof. Allen, in its 2009 Opinion this Court held his expert testimony about industry standards and practices is admissible

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[10/] Progressive misstates the comment somewhat. Compare BIC p.11 to V.24,TR-75, l.15-16.

"notwithstanding Progressive's protests." *Progressive v. Vigil, supra*, *3. Progressive had full opportunity to cross-examine Prof. Allen and object to his testimony.

The Policy Progressive wrote requires Progressive to give 10 days advance notice before lapsing coverage. (*See* Judge Bustamante's 2007 Notice, p.3; RP1729[11]; *also* Ex. B; V.22,TR-58) "[W]hen interpreting insurance policies, as a matter of public policy, ambiguities are generally construed in favor of the insured and against the insurer." *Progressive v. Vigil, supra* *4.

Progressive misstates Prof. Allen's testimony (BIC P.23-24), then argues such testimony should have been excluded. Prof. Allen properly testified Vigils' Policy did not lapse and Progressive's Policy language, FAQs, late fee agreements, internal late fee rule, and past pattern and practice required Progressive to give 10 days advance notice before a policy was cancelled or lapsed for any alleged late payment. (Trial Exs. B, Z, AA and BB; V.20,TR-105; V.21,TR-58; V.22,TR-42-43,58,71,82,106)[12] Prof. Allen's testimony is in accord with New Mexico law and Judge Bustamante's reasoned analysis.

In addition, Progressive put on extensive evidence about 10 day notice requirements *before* Prof. Allen testified. On direct examination by Progressive, witness

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[11] In his 2007 Notice Proposed Summary Disposition, Judge Bustamante proposed summary reversal of the summary judgment and jury verdict in favor of Progressive. The case was then placed on the general calendar. Judge Bustamante's Notice is not controlling but is cited for his analysis of issues Progressive raises in this appeal.

[12] Vigils' Response opposing Progressive's Motion concerning Prof. Allen is at RP2601.

Cleary testified under industry standards Progressive's Policy was "continuous until cancelled", insurers give 10 days advance notice on policy renewals, and Progressive's Policy language required such notice. (V.21,TR-110,124)

Progressive's expert Buelow testified another insurer sends notices 10 days before renewal premiums are due. (V.23,TR-88) Progressive itself sent Vigils such notice before their November 2001 renewal premium. (Ex. HH; V.23,TR-88)

The trial Court properly refused Progressive's proposed instruction on lapse/ cancellation. There was extensive evidence that Progressive's Policy, practice and procedure required it to give 10 days notice here. The effect of Progressive's requested instruction would be 1) to instruct the Jury, as a matter of law, Progressive did not need to give 10 days notice even though its Policy, practice and procedure requires such notice and 2) require the Jury to ignore all the evidence that the notice requirement applied. Progressive's requested Instruction would have improperly removed disputed factual issues from the Jury.

The trial Court rejected the incorrect legal conclusion in Progressive's proffered instruction:

> "I think that ultimate conclusion that . . ., if there was a lapse, there's no ten-day notice. That, I think, was going too far, and that's why I pulled it out. (V.22,TR-203-206).

*See Hinger v. Parker & Parsley Petroleum*, 120 N.M. 430, 443-4, 902 P.2d 1033 (CA 1995), *cert. den.* 120 N.M. 213.

Progressive argues it is "undisputed" under New Mexico law that 10 days notice is not required before lapsing a policy. (BIC p.10-11). That is incorrect under the evidence here. Insurers must comply with policies they write. (V.22,TR-154; V.23,TR-69). Policies can provide better protection than minimum requirements. Progressive's Policy language treats lapse and cancellation the same and requires 10 days advance notice before coverage is terminated, whether by lapse or cancellation. *See* Judge Bustamante's analysis of Progressive's Policy language concerning 10 days notice. (RP1731-33) (Ex. B; V.21,TR-182-3; V.22,TR-58)

Both Prof. Allen's testimony and the Jury Instruction about notice were proper and consistent with New Mexico law.

### III. Substantial Evidence Supports Jury's Awards to Martin

Progressive denied insurance coverage to Martin Vigil. That was the crux of harm and potential harm to Martin from Progressive's misconduct. As a result of the Jury's decision, Martin has $300,000 liability coverage and $5,000 med pay for this accident. That $305,000 coverage, and everything that goes with that coverage, is compensatory in nature. Progressive complains about $6,000 compensatory damages the Jury awarded to Martin. There is substantial evidence to support that $6,000 award. More importantly, though, Progressive misses the forest for the trees. The total potential harm to Martin includes $305,000 coverage, $6,000 additional compensatory damages, $1.458 million attorney fees and $35,113 costs.

The Jury properly awarded damages to Martin and Colleen, apart from contract damages, for consequential and emotional distress damages, as well as punitive damages. A fundamental function of the Jury is to determine damages. *Allsup's v. North River Ins.*, 1999-NMSC-006 {16}, 127 N.M. 1, 976 P.2d 1.

Although Progressive initially objected to instructing the Jury on emotional distress (Supp.V.2TR44 l.6), Progressive later agreed that instructing on damages for Vigils' emotional distress was appropriate. (*See* V.23,TR-161, l.21) Progressive's later position was the jury instruction should only allow " . . . damages for emotional distress or harm to credit, because that's the only two items of damage that were presented in the evidence." (V.24,TR-33, l.24 to TR-34, l.6)

Trial Exhibit LL reiterated the object of insurance: Progressive insurance allows insureds "to enjoy the peace of mind of having a strong, stable company behind you." "In the unfortunate event of a claim or loss. . ." Progressive promised Vigils, "we are here for you." Those are "some important benefits of 'being Progressive.'" (Ex. LL) As Progressive expert Buelow testified, "[w]ith insurance, what you do is you buy the peace of mind and other assets by laying off your risk". (V.23,TR-112)

Peace of mind being the aim, what else results from failure to provide coverage but mental anguish? People buy insurance so they will not have to stand alone, facing financial ruin, in the "unfortunate event" of a loss. (V.20,TR-99) When it failed to

provide coverage, Progressive knew Martin and Colleen would not have financial security or peace of mind their Progressive insurance should provide. (V.23,TR-68)

When Progressive took Vigils' peace of mind away, what was left? Shock. Anxiety. Worry about the future. "[I]nsurance bad faith, and the emotional distress it causes, is more akin to a physical assault than a pure economic tort." *Merrick v. Paul Revere Life Insurance*, 594 F.Supp.2d 1168, 1185 (D. Nev. 2008).

There was substantial evidence to support the additional $6,000 damages awarded, including that Martin was in an accident and needed the liability coverage his family's Progressive Policy promised to provide. (Ex. B; V.23,TR-95) Progressive sent Vigils upsetting certified letters questioning coverage and charging Colleen with failure to cooperate. (Ex. X p.17; V.21,TR-24,49) Martin was injured and had medical bills; his parents' truck, which he was driving, was totaled. Progressive refused to pay. (V.20,TR-126-129)

Colleen was crying as she talked to Progressive. (Ex. K) Anyone in the Courtroom when Colleen testified felt the stress, angst and emotion in her voice, impossible to capture by words on a transcript. (V.20,TR-129-30; V.22,TR-29) Colleen and Martin were greatly distressed by how their own insurance company treated them. (V.20,TR-96,98,126-131) Vigils experienced nervousness, anxiety and worry because of Progressive's conduct. Progressive failed to provide coverage which Martin and Colleen needed, ignored everything their insured said, accused Colleen of lying and

committing insurance fraud and sued Martin and Colleen. (V.20,TR-126-129) Martin needed Progressive's help and protection. Progressive turned its back on him.

The Jury's declaration of $300,000 liability coverage and $5,000 med-pay coverage for Martin, as well as the $6,000 additional compensatory damages, punitive damages, and attorney fees and costs set by the Court, are supported by substantial evidence.

## IV. Substantial Evidence Supports Jury's Punitive Damage Awards. Those Punitives are Appropriate to Punish and Deter Progressive.

This Court decided, in 2009, there was sufficient evidence for bad faith failure to provide coverage to go to the Jury at the new trial. As the Supreme Court said of insurer in *Jessen v. National Excess Insurance*, 108 N.M. 625, 628, 776 P.2d 1244 (1989), "[i]nsofar as [insurer] argues it acted reasonably, it attempts to have this Court reweigh matters decided by the jury, and this we decline to do." The same is true of Progressive.

In reviewing Constitutional reasonableness of punitive damage awards:

> "Any doubt in the mind of the appellate court concerning the question of what appropriate damages may be in the abstract, or owing to the coldness of the record, should be resolved in favor of the jury verdict."

*Muncey, supra*, {62}; *Grassie, supra*, {48}.

"The term 'punitive damages' implies punishment." *Mathias v. Accor*, 347 F.3d 672, 676 (7th Cir. 2003). The punitive damages the Jury awarded must be large enough to do the job, to punish and deter. (RP2689) *Chavarria v. Fleetwood*, 2006-NMSC-046 {37}, 140 N.M. 478, 143 P.3d 717. To be effective punishment, punitive damages must

be high enough, in relation to wrongdoer's assets, to hurt. *Marriott v. Williams*, 152 Cal. 705, 93 P.875 (1908).

The rule in New Mexico, as elsewhere, is that:

> "When all is said and done, a punitive damage award will stand unless it clearly appears that the amount of the award exceeds the outer boundary of the universe of sums reasonably necessary to punish and deter the defendant's conduct."

*Madeja v. MPB*, 821 A.2d 1034, 149 N.H. 371,386 (2003) quoting *Zimmerman v. Direct Federal Credit Union*, 262 F.3d 70, 81 (1st Cir. 2001). This Court in *Jolley, supra*, affirmed "the jury's judgment that punitive damages of $13,000,000 are appropriate to achieve the dual goals of punishment and deterrence in this case."

Punitive damages awarded here serve an important policy objective. Punitives are an important means of deterring other insurers from assessing severity of loss and then looking for ways to deny coverage.

In analyzing punitive damages, Juries must make "a moral determination" of whether conduct "should be punished, and whether such punishment would serve to deter similar conduct in the future." *Akins v. United Steel Workers,* 2010-NMSC-031 {33}, 148 N.M. 442, 237 P.3d 744. The Jury exercised its community judgment regarding the value of Progressive's wrongful act. *See Weidler v. Big J,* 1998-NMCA-021, 124 N.M. 591, 604, 953 P.2d 1089.

Furthermore, there is not (and could not be) any claim Progressive cannot satisfy the Judgment or that punitives are disproportionate to Progressive's wealth. *See Weidler*, 124 N.M. at 604.

There are procedural safeguards in place to prevent juries from punishing a wrongdoer based on bias, rather than on evidence. First, the Jury was instructed on its duty to decide the case based on evidence. (RP2668, 2670) They were also properly instructed they "may" award punitives if they found Progressive acted in reckless disregard for Vigils' interests; exercised dishonest judgment; acted maliciously, willfully or wantonly. (RP2689) Progressive fails to show why the Jury could not find such conduct.

Another procedural safeguard is the trial Court. Judge Malott considered and denied Progressive's post-trial Motion to reduce the punitives, finding the Jury's Verdict is supported by substantial evidence. (RP3084) As this Court reaffirmed in *Littell v. Allstate*, 2008-NMCA-012 {54}, 143 N.M. 506, 177 P.3d 1080:

> "The jury's verdict is presumed to be correct. When a [district] court denies a motion for a remittitur, we defer to the trial court's judgment. *Ennis v. K-Mart Corp.*, 2001-NMCA-068, ¶27, 131 N.M. 32, 33 P.3d 32."

One reason Appellate Courts defer to trial Courts on damages is that the trial Court "is in the unique position to observe the witnesses and their demeanor as well as the jurors' attitude during trial." *Coates v. Wal-Mart Stores*, 1999–NMSC–013, 127 N.M. 47, {49}, 976 P.2d 999.

> "When the jury makes a determination and the trial court approves, the amount awarded in dollars stands in the strongest position known in the law."

*Ennis, supra* {27}.[13/]

Vigils had a Constitutional right to have the Jury decide the case, including punitives. Courts have long held juries have broad discretion in determining punitive damage amounts. "This Court will rarely disturb a punitive damages award." *Weidler, supra* {45}.

When we consider Progressive's egregious misconduct and punitives' goals of punishment and deterrence, the Jury's $11.7 million punitive damage award is appropriate and Constitutional.

### A. Progressive Fails to Set Out Substance of Evidence Bearing on Punitive Damages

Progressive makes a sufficiency of evidence argument against punitives. (BIC p.28,31) A party challenging sufficiency of evidence to support punitive damages must "set out the substance of the evidence bearing on the proposition argued as required under our rules and case law." *Muncey, supra*, {61} citing Rule 12-213 and *Martinez v. Southwest Landfills*, 115 N.M. 181, 848 P.2d 1108 (CA 1993). Judge Sutin, with Judge Bustamante concurring, noted:

> ". . . the appellate court will not consider an insufficiency of evidence argument without presentation of the evidence as a whole or based only on facts which tend to support the argument."

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[13/] The challenge in *Ennis* was to compensatory damages, not punitives.

*Muncey* {61}. *See also Maloof v. San Juan County*, 114 N.M. 755, 759-60, 845 P.2d 849 (CA 1992). This Court "will not reweigh the evidence and substitute [its] judgment for that of the jury." *Littell, supra* {58}; *Dydek, supra* {41}.

In *Martinez*, 115 N.M. at 185, this Court pointed out appellants' duty to set out unfavorable evidence with a "high degree of forthrightness", concluding appellant waived his right of review by failing to comply with Rule 12-213.

Contrary to our Rules and case law, Progressive gives a very deficient rendition of evidence. Progressive sets out only facts and inferences which tend to support its position, then asks this Court to override the Jury. This Court could reject Progressive's punitive damages arguments out of hand for Progressive's clear failure to comply with Rule 12-213(A)(4). *See Grassie, supra*, {52}.

### B. Progressive's Reprehensible Conduct Justifies Punitives Awarded

When a wrongdoer like Progressive challenges punitive damages, Courts look at whether the amount awarded is too high to punish and deter. In reviewing Constitutional reasonableness of punitive damages set by this Jury, the reprehensibility of Progressive's conduct is the most important guidepost. *Muncey, supra* {62}. The worse the misconduct, the higher the punitive damages appropriate to punish it. "In evaluating this factor, we compare the damages to the enormity of Defendant's wrong *apart* from the actual injury sustained." *Jolley, supra* {32}, italics in original.

In reviewing punitive damages, appellate Courts "resolve all disputed facts and indulge all reasonable inferences in favor of the judgment." *Chavarria, supra* {23}; *Coates,* 127 N.M. at 57. The evidence here established a high degree of reprehensibility. Progressive relies, at length in its Brief, on evidence which is contrary to the Verdict. Appellate Courts ignore such conflicting evidence. *Hinger, supra*, 120 N.M. at 435.

The evidence shows Vigils' Progressive Policy was in full force and effect on November 4th, the day of the accident, and continued in force until November 15th when Progressive took the unprecedented step of intentionally tampering with its own records to retroactively make Vigils' Policy lapse for one day – the day of this accident.[14/]

Progressive confirmed to Vigil she had coverage for the accident and her Policy had not lapsed. Then when it learned the loss severity, Progressive changed its coverage position and said Vigils' Policy lapsed 90 minutes before the loss. As Progressive witnesses testified, lapses are automatic – no one has to "process" a lapse. (V.20,TR-170; Humphrey depo. p.38, l.17 to p.41, l.8) The fact Progressive "processed" a lapse of Vigils' Policy shows Progressive was doing something very wrong. Progressive has millions of policies. Progressive had never processed a lapse of any other insured's policy. (Humphrey depo. p.40, l.16-p.41, l.11)

Progressive's Claims Department urgently needed to listen to its tape of the November 4th phone call before it could decide coverage. (Ex. X p.13, 20-22; V.21,TR-

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[14/] Please see pages 2-12 above for additional transcript references for Point IV B.

86) Yet when it could not locate that tape, Progressive just disregarded what Vigil said she was told in that call. (V.22,TR-142) To compound that misconduct, Progressive made a false claims record about that call. (Compare Ex. JJ to V.20,TR-230; V.21,TR-217-9)

Even though its records and CSRs showed Vigils' Policy was in force, Progressive refused to provide coverage and made convoluted excuses for everything in its systems showing coverage. Progressive did not give Vigils any notice before its surprise termination of their coverage. (V.22,TR-57) Progressive then sued Martin and Colleen.

Progressive broke its promises and left Vigils to fend for themselves. Progressive took a series of deliberate actions showing concerted efforts by this insurer to avoid paying claims Progressive should pay. Progressive's conduct was designed to achieve financially beneficial results for itself. Misconduct engaged in for financial gain is "highly culpable deserving greater punishment." *Merrick, supra*, at 1185.

There is also greater reprehensibility when misconduct is hard to discover because the wrongdoer may get away with it. Progressive's misconduct, including changing its internal records, was difficult to discover.

Progressive's conduct evinced indifference to, and reckless disregard for, its Policyholders. It is reprehensible for insurers to put their own interests first. *Sloan v. State Farm*, 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230; *Dydek, supra*, {30,34}. Yet time after time, Progressive put its own interests ahead of Vigils' interests. This case

involved a series of bad faith acts by Progressive which deprived Vigils of the peace of mind and financial security their insurance should have provided. *See Chavarria, supra*, {37}.

Punitive damage awards are upheld when substantial evidence exists to support the punitive damages awarded. *Muncey, supra* {21, 48}. There should be no doubt this Jury had before it substantial evidence Progressive was deserving of censure. *See Allsups, supra*, {48}.

As the Court found of Allstate in *Littell, supra,* {58}, Progressive "has failed to meet its burden of establishing 'that the verdict was infected with passion, prejudice, partiality, sympathy, undue influence, or some corrupt cause or motive," quoting *Ennis, supra*, ¶27. This Court "will not reweigh the evidence and substitute [its] judgment for that of the jury." *Littell, supra*, {58}.

The Jury here had to decide: How loudly do we have to speak to get Progressive's attention? What are we going to do to punish and deter such reprehensible conduct by an insurance company? After hearing the evidence and judging credibility, the Jury decided $11.7 million was the appropriate amount to punish Progressive for its highly reprehensible, egregious, shocking misconduct and deter Progressive and other insurers. This Jury's decision on punitives resulted from their careful analysis of evidence, not from any improper motive.

Progressive argues "the harm here was economic, not physical." (BIC p.33) Courts have rejected that argument by insurers in bad faith cases. Wrongfully denying insurance coverage causes harm that is not purely economic. Insurance contracts are unique. Insurance is purchased to provide peace of mind. (V.23,TR-112) As Utah's Supreme Court recognized on remand in *Campbell*:

> "[M]isconduct which occurs in the insurance sector of the economic realm is likely to cause injury more closely akin to physical assault or trauma than to mere economic loss. When an insurer callously betrays the insured's expectation of peace of mind, as State Farm did to the Campbells, its conduct is substantially more reprehensible . . ."

*Campbell v. State Farm*, 98 P.3d 409, 415 (Utah 2004), *cert. denied* 543 U.S. 874, 125 S.Ct. 114 (U.S. 2004). "[T]he tort of insurance bad faith goes beyond a mere economic offense because it deprives the insured of the bargained for consideration, peace of mind." *Merrick, supra* at 1186.

Vigils were financially vulnerable. They bought insurance to protect their financial assets and safeguard their financial futures. (V.23,TR-95) Vigils' need for insurance coverage Progressive owed was pressing. Vigils are people of modest means who could not pay medical bills or vehicle loan without insurance proceeds. (Ex. S p.9-10; V.20,TR-108,129)

Progressive argues the truck was in Gilbert Vigil's name and the loan was discharged in his bankruptcy so Colleen did not suffer from Progressive's refusal to pay property damage. (BIC p.34) The evidence actually showed Colleen had to sign the

loan. She is now solely responsible for that $38,190 loan. Ford Motor Credit Company demanded payment from her. Her credit has been damaged. She cannot get financing because Progressive would not pay property damage. (V.20,TR-96-98,126-131)

Progressive argues Vigils suffered no financial vulnerability because Progressive settled two liability claims. (BIC p.34) What Progressive leaves out is Progressive sued, and had a Judgment against, Vigils for over $200,000.

Progressive argues any misconduct was an "isolated" incident, not a "pattern". (BIC p.34) When Progressive lapses insureds' policies, Progressive deliberately keeps the lapse hidden from policyholders. (V.20,TR-78,105; Humphrey depo. p.63, l.20-23) Thousands of Progressive insureds are, according to Progressive, unknowingly driving without insurance, putting innocent people at risk and putting insureds in financial peril. Progressive's corporate practices of secret rules and mailing critical reminders too late are misconduct affecting thousands of policyholders. (V.22,TR-24-5)

Progressive harmed Vigils by intentional malice, trickery or deceit. Progressive confirmed to Vigils they had coverage for the November 4th loss. Then, seeing it would have to pay over $350,000, Progressive intentionally changed its own records to make Vigils' coverage disappear for one day – November 4, 2002. It is difficult to see how insurance bad faith can get much worse.

### C. When Looking at Ratios Between Harm and Punitives, All Harm, Including Attorney Fees, Is Considered.

The second guidepost is "the disparity between the harm (or potential harm) suffered by the Plaintiff and the punitive damages award." *Muncey, supra* {62}. Progressive focuses on ratios as if that is determinative. It is not. The ratio between harm and punitives is only one factor Courts consider. *Chavarria, supra*, {36}. In discussing ratios, "we have to consider why punitives are awarded in the first place." *Mathias, supra,* 347 F.3d at 676.

The harm and potential harm to Vigils includes $340,725 coverage, $37,000 additional compensatory damages, costs, attorneys fees and prejudgment interest. When those harms are considered, the total harm/potential harm to Vigils exceeds $1.9 million. *See* p.39 below. The ratio between punitives awarded and total potential harm is 6:1.

The majority rule is that attorney fees are included on the compensatory side of the ratio. Statutory attorney fees are allowed to encourage attorneys to accept insurance bad faith cases. Such fees are compensatory in nature. Likewise, prejudgment interest compensates for delay in receiving insurance proceeds.

In *Blount v. Stroud*, 915 N.E.2d 925, 943 (Ill. App. 2009), the Court stated:

> ". . . the majority of the courts across the country that have considered this issue have agreed that an award of attorney fees should be taken into account as part of the compensatory damages factor in the Gore analysis."[15/]

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15/ "See, e.g., Willow Inn, Inc. v. Public Service Mutual Insurance Co., 399 F.3d 224, 236-37 (3rd Cir. 2005); Continental Trend Resources, Inc. v. OXY USA, Inc., 101 F.3d 634, 642 (10th Cir. 1996); Walker v. Farmers Insurance Exchange, 153 Cal.App.4th 965, 63 Rptr.3d 507, n. 8 (2007); Girdner v. Rose, 213 S.W.3d 438, 449 (Tex.App. 2006) . . ."

"The economic cost of the litigation is a relevant consideration to factor into the side of the ratio that quantifies the amount necessary to make the plaintiff whole. . . We therefore take the attorney fee award into account as part of the 'actual harm' suffered by Blount." 915 N.E. 2d at 943-945.

Last year, Washington's Supreme Court held attorney fees should be included with compensatory damages when calculating ratios:

> "The compensatory nature of attorney fees does not change because the attorney fees are awarded posttrial rather than with the jury's compensatory damages award. Courts in other jurisdictions include attorney fees as part of the compensatory damages award for punitive damages ratio comparison purposes."

*Clausen v. Icicle Seafoods*, 174 Wash.2d 70, 272 P.3d 827, ¶36 (2012). *Clausen* concluded, "[i]t was proper for trial court to include attorney fees as part of the compensatory damages award when calculating the punitive damages ratio." *Action Marine v. Cont'l Carbon*, 481 F.3d 1302, 1321 (11th Cir. 2007) is in accord.

New Mexico's Federal Court also found it appropriate to include "legal costs in addition to the compensatory damages when evaluating whether the punitive damages award was excessive. . . The costs of litigation in order to vindicate rights is an appropriate element to consider in justifying a punitive damages award." *Guidance Endodontics v. Dentsply Intern*, 791 F.Supp.2d 1026, 1044 (D.N.M. 2011). *See also Merrick, supra*, p. 1181.

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*Blount, supra*, 915 N.E.2d 943-4.

In *Willow Inn, supra*, an insurance bad faith case, the Court awarded $2,000 contract damages, plus costs, attorney fees, and $150,000 punitive damages. Insurer argued $150,000 punitive damages was excessive when compared to only $2,000 compensatory damages. The Third Circuit rejected that comparison and"[f]actored the award of attorney fees and costs under the statute into the compensatory side of the Gore ratio and upheld the amount of punitive damages awarded in the case." *Blount, supra*, 915 N.E.2d at 944.

The wealth and resources of a wrongdoer also enter into the analysis. Progressive mounted an extremely aggressive action against its insureds, making litigating against it very costly. *Mathias, supra,* 347 F.3d at 677.

In *Allsup's, supra*, {49, 53}, the Supreme Court held that even though net damages, after offsets, were small, that does not refute the fact substantial damages existed. Progressive itself advised the Jury if they found coverage, the Judge would determine specific contract amounts which Progressive owed Vigils. As Progressive's attorney said during closing, the "Judge will determine what is owed under the policy" and attorneys fees, interest, and the value of the truck "will be handled by the Judge." (V.24,TR-69)

In analyzing ratios, all of the following potential harm to Vigils should be included:

| | | |
|---|---|---|
| 1. | Declaration of liability coverage | $ 300,000.00 |
| 2. | Contract damages of $40,725 ($35,725 for truck + $5,000 for Martin's medical bills) with prejudgment interest at 15% for 9 years | $ 95,703.75 |
| 3. | Additional $37,000 compensatory damages with 10% prejudgment interest for 9 years | $ 70,300.00 |
| 4. | Costs awarded to Vigils | $ 35,113.48 |
| 5. | Attorney fees awarded | $ 1,458,142.50 |
| | Harm/potential harm to Vigils | $ 1,959,259.73 |

Substantial damages existed here. When all potential harm is considered, the ratio between punitive damages and harm is 6:1.

Given the goals of punitives, substantial punitives may be appropriate even in cases of low compensatory damages. *Chavarria, supra*, {38} noted:

> "the United States Supreme Court has discussed the need for a flexible approach, especially in situations involving egregious behavior, low compensatory damage awards, injuries that are difficult to detect, or non-economic harm that is not easily converted into a dollar value. *Campbell*, 538 U.S. at 425, 123 S.Ct. 1513; *BMW*, 517 U.S. at 582, 116 S.Ct. 1589."

In *BMW v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), the United States Supreme Court held "conduct resulting in relatively small compensatory damages awards could logically result in a high ratio of punitive damages where there is a particularly egregious act." *Allsups, supra* {49}; *Mathias, supra,* 347 F.3d 677. When "injury is difficult to quantify, the disparity in the ratio can be larger" than ten to one. *Weidler v. Big J, supra*, 124 N.M. 604. When conduct is on the high end of the

reprehensibility scale, as here, a "single-digit multiplier does not form an appropriate limitation upon a punitive damage award". *See Jolley, supra* {36, 38}.

In recent pronouncements on punitive damages, our Supreme Court upheld an 18 to 1 ratio between punitive and compensatory damages. *Akins, supra*, {8,35}. This Court found a ratio of over 10 to 1 was "not so large as to raise concerns of constitutional dimension." *Grassie, supra*, {37}. In *Allsup's, supra*, our "Supreme Court affirmed a ratio of 7.4 to 1 in an insurance bad faith context involving improper premiums charges." *Grassie, supra*, {57}. In *Madeja, supra*, punitive damages were 35 times compensatory damages. The Tenth Circuit approved punitive damages 59 times compensatory damages in *Deters v. Equifax*, 202 F.3d 1262, 1266 (10th Cir. 2000).

The evidence presented supports the Jury awards of $11.7 million punitive damages to punish Progressive and deter it and other insurers. The Jury's punitive damage awards are Constitutional, appropriate and supported by substantial evidence.

### D. Comparable Civil Penalties

"[W]e find this comparison unhelpful in determining the reasonableness of the punitive damages award . . ." *Jolley v. Energen, supra* {39}.

### E. In Setting Punitive Damages, Jury Could Consider Progressive's Profits

Trial Exhibit PP[16/] includes Progressive Annual Statements and Report containing Progressive's assets, revenues, net income, etc. Progressive's only objection to

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16/ Ex. PP admitted at V.20,TR-16.

admission of Exhibit PP was its general objection punitives should not be allowed. (V.19,TR-15; Progressive's general objection to the punitive Instruction is at V.24,TR-162 l.7)

Progressive did not object specifically to admission of its profits and did not preserve this alleged error. "Fairness underlies the rule of preservation of error." *Hinger, supra*, 120 N.M. 430. *If* Progressive had objected at trial to the Jury considering Progressive's profits, it would have been simple to discuss punitives based on Progressive's gross income or assets instead.

Progressive's financial statements were relevant and admissible. The Jury was entitled to consider Progressive's wealth and pecuniary ability in fixing the amount of punitive damages. *Aragon v. General Electric Credit*, 89 N.M. 723, 726, 557 P.2d 572 (CA 1976), *cert denied*, 90 N.M. 7, 558 P.2d 619.

Substantial punitives are needed to get the attention of corporations Progressive's size. To change wrongful conduct and "get word to the boardroom", a Jury has to "affect the bottom line before a corporation reacts". Counsel's argument, *Jolley v. Energen, supra* {13}.

The Jury determined appropriate amounts to punish Progressive and deter Progressive and other insurers, setting punitives for Colleen of less than 3 days

Progressive's profits and one day profits for Martin. Ex. PP.[17] As the trial Court noted in denying Progressive's Motion to reduce punitives, given the evidence that Progressive has billions of dollars in assets, with daily net income of millions, the Jury's award "is not excessive nor constitutionally impermissible." (RP3086)

## V. Trial Court Set Attorneys Fees Appropriately

In setting attorneys fees, District Courts have "discretion to use either the percentage of recovery method or the lodestar method." *Atherton v. Gopin*, 2012–NMCA–023, 272 P.3d 700.

"An award based on a lodestar may be increased by a multiplier if the lower court finds that a greater fee is more reasonable after the court considers the risk factor and the results obtained," *Atherton*, quoting *In re New Mexico Indirect Purchasers Microsoft*, 2007-NMCA-007, ¶34, 140 N.M. 879, 149 P.3d 976.

In *Microsoft, supra*, {9} this Court held that considering risks attorneys took, a "multiplier of three was an appropriate enhancement of the lodestar." Vigils' counsel have worked 10 years without payment. The multiplier of two the District Court applied was appropriate enhancement of the lodestar.

Attorney fees go on the *compensatory* side of the ratio, not the *punitive* side. *Blount, supra.* Illinois' bad faith statute, like New Mexico's, "provided for awards of

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[17] To keep punitives in perspective, Progressive made $30 million profits over the 8 day course of trial.

punitive damages against the insurer and separately provided for assessment of costs and attorney fees against the insurer." *Blount, supra*, 915 N.E.2d at 944. Statutory attorney fees and punitives serve different purposes:

> "the goal of the statute was to place the insured plaintiffs in the same economic position they would have occupied had the insurer performed as promised; thus, the attorney fees and costs were additional damages... The purpose of the separate award of punitive damages, in contrast, was to punish the insurer for giving primacy to its own self-interest over the interest of the insured." *Ibid.*

In *O'Neel v. USAA*, 2002–NMCA–028, 131 N.M. 630, 635, 41 P.3d 356, *cert. denied*, 131 N.M. 737, 42 P.3d 842, this Court held the jury's decision that insurer acted in bad faith supported punitive damages *and* a later separate award, by the Court, of fees. Punitives and attorney fees serve different purposes and are not duplicative.

NMSA §39-2-1, which gives District Courts authority to award attorney fees, encompasses all claims here. Vigils submitted extensive evidence showing their attorneys' work. RP2892-2910.[18/] Fee testimony of attorney Steve Vogel is at V.25,TR-60-72. Based on that evidence, the trial Court found all claims were "inextricably intertwined . . . so that it is impossible to accurately differentiate or specifically assign each individual attorney action or service to one particular cause of action or claim" (RP3093 ¶ 9), concluding:

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[18/] Progressive, below, did not specifically object to $529,575.10 of hourly fees requested. (RP3008)

> "Ultimately, all claims made, and defenses asserted, by the Vigils throughout this litigation focused upon determining [whether] coverage under their policy with Progressive was in force on November 4, 2002, and that Progressive had acted improperly in refusing to pay the claims arising from that collision; here, the Vigils clearly prevailed." (RP3093 ¶10)

*Economy Rentals, v. Garcia,* 112 N.M. 748, 765, 819 P.2d 1306 (1991); *Fort Knox Self Storage v. Western Technologies*, 2006-NMCA-096, 140 N.M. 233, 142 P.3d 1.

All legal work was necessary because of Progressive's unreasonable failure to pay. *See* Santillanes Affidavit (RP2911-2915 ¶9, 10, 19; RP3078-9) and Judge Malott's Orders on Costs (RP3089 ¶5) and Attorneys Fees (RP3092 ¶10). NMSA §39-2-1 gave the District Court statutory authority to award fees for all work Vigils' counsel did.

**Conclusion**

This Court could reject Progressive's appeal because of Progressive's failure to set out the substance of the evidence as required by Rule 12-213. Progressive also failed to preserve many of the legal challenges it now asserts on appeal.

Vigils respectfully request that the Jury's Verdict, the Final Judgment and Order Awarding Attorneys Fees be affirmed in their entirety.

Vigils' counsel will submit their request for attorney fees, at the appropriate time, for appellate work.

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## Request for Oral Argument

Appellees Nancy Colleen Vigil and Martin Vigil respectfully request oral argument. Oral argument would be helpful to a resolution of the issues here because of the number and variety of issues raised by Progressive in this appeal and the extensive, detailed, evidence presented by Vigils at the new trial relevant to those issues.

## Certificate of Service

I hereby certify that on February 13, 2013, I mailed copies of this Answer Brief to the following attorneys for Plaintiff-Appellant Progressive Casualty Insurance Company:

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