9-3-2009

Weinstein v. Prudential Prop. & Cas. Ins. Co. Respondent's Reply Brief Dckt. 34970

IN THE SUPREME COURT OF THE STATE OF IDAHO

PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY and PRUDENTIAL GENERAL INSURANCE COMPANY and LIBERTY MUTUAL INSURANCE COMPANY and LM PROPERTY AND CASUALTY INSURANCE,

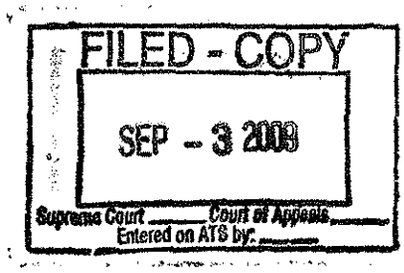
Appellants/Cross-Respondents,

vs.

LESLIE WEINSTEIN and LINDA WEINSTEIN, Husband and Wife, individually and as Guardians Ad Litem for SARAH R. WEINSTEIN, and SARAH R. WEINSTEIN, individually,

Respondents/Cross-Appellants.

Supreme Court No. 34970



CROSS-APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho,
in and for the County of Ada
Honorable Darla S. Williamson, District Judge, presiding

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INTRODUCTION

This brief, as is appropriate and required, will address only Cross-Appellants' reply to the cross-appeal issues argued in Appellants' Reply Brief. Cross-Appellants will confine their reply arguments herein specifically addressing only the cross-appeal punitive damage issues set forth on pages 29 through 40 of Appellants' Reply Brief. The Weinsteins stand by their prior arguments on all other issues not directly related to their cross-appeal as addressed herein.

ARGUMENT

On pages 29 through 40 of their Reply Brief, Appellants/Cross-Respondents ("Defendants") specifically address Respondents/Cross-Appellants' ("Weinsteins") cross-appeal. In this brief, Weinsteins will address and reply to Defendants' cross-appeal arguments in the order set forth in Defendants' Reply Brief. As background and foundation, Weinsteins ask this Court to recall the Statement of Fact and Argument in Weinsteins' initial brief to this Court.

Weinsteins take strong issue with the Defendants' ongoing efforts to lead this Court astray on the true facts of this case. Defendants' gross misstatements of the facts are nothing new, however. Defendants first used that tactic with the Weinsteins, then with the trial court in pre-trial motions, then with the jury, and again with the trial court in post-trial motions, all to no avail. To this point, nobody has bought into Defendants' spin, and this Court should not now do so. Defendants' continuing factual misrepresentations demonstrate the degree of deceit and reprehensibility these companies will engage in to serve their own financial interests at the expense of their first-party insureds who paid money to simply buy protection. The true facts cannot be brushed aside in analyzing the punitive damage issues.

Defendants' specific attack on punitive damages, the remittitur of which is subject of Weinsteins' cross-appeal, begins at page 29, and are addressed in order, as follows:

1. Weinsteins' Bad Faith Claim Indeed Accrued Before July 1, 2003.

Defendants' arguments in this section of their Reply Brief grossly misstate the facts and are perhaps the best example of the Defendants' lack of credibility across the board. Weinsteins do not, as argued by Defendants, "concede that their complaint did not allege any acts of bad faith relating to the UM coverage until after July 1, 2003." To the contrary, the initial Complaint and all amended versions asserted the Defendants' bad faith and breach of the obligation to pay policy benefits. With no basis Defendants simply assert that no UM benefits even accrued to Weinsteins until after Defendants' Med Pay benefits were used up (in this case after a long delay). However, Defendants' unilateral internal policy and practice to first exhaust Med Pay benefits before reviewing or paying undisputed UM damages (which in this case far exceeded Med Pay coverage) cannot bootstrap them into their unfounded position that no UM benefits accrued until after Med Pay benefits were exhausted.

Perhaps Defendants' most blatant misstatements of the facts are set forth on page 30 of their Reply Brief, where they assert nine (9) specific arguments that Weinsteins "cited no trial evidence," and state "unsupported contentions," or rely only on "scant evidence" showing that the UM claim arose before July 1, 2003. Defendants' very allegations are outrageous and reprehensible because the evidence is clear and undisputed. As noted in Weinsteins' initial brief, the Defendants' own claim records (Exhibits 45, 46, 52-54, 60, 64, 67, 73-75) conclusively show that Defendants themselves acknowledged full UM coverage and liability from the very outset and that all elements of a UM claim accrued long before July 1, 2003. Defendants' incredible assertions that "no evidence"

supports Weinsteins' showing that UM bad faith accrued before July 1, 2003, are preposterous and outrageous. Although the Defendants continue to assert that Weinsteins' facts are "without evidence," this Court, like the trial court and jury, cannot overlook what Defendants' own records prove. The evidence is solid on each of the nine (9) specific attacks Defendants make on page 31 of their Reply Brief, and Weinsteins ask this Court to review the clear evidence contradicting each of Defendants' nine (9) attacks, considering:

1. Defendants' insurance contract (the "Policy") is entirely silent on differentiating any timing or liability overlap of Med Pay and **UM** coverage, or indicating that **UM** coverage benefits do not accrue until after Med Pay benefits are exhausted. Exhibits 1-37.

2. Defendants' **UM** adjusters in fact opened a **UM** claim file the day after the accident, acknowledging 100% **UM** liability on the claim. Soon thereafter the **UM** claim value was reserved in excess of the combined Med Pay benefits. Thereafter and prior to July 1, 2003, those determinations were reaffirmed as the **UM** claim file was periodically reviewed. Exhibits 45, 46, 52, 53, 60 and 73.

3. Defendants' closed their Med Pay file in February 2003. At that time **UM** liability remained undisputed, and none of Weinsteins' medical expenses had been paid. Exhibits 69, 70, 71, 73, 74. The **UM** claim file remained opened from the day after the accident at least until the time suit was filed in 2004. Exhibits 45, 46, 60, 73, 75, 78, 95-96, 260, 262, 268 and 269.

4. The **UM** claim was acknowledged and valued far in excess of the Med Pay limits long before July 1, 2003, based on substantial evidence in the **UM** file that damages had accrued before July 1, 2003. Exhibits 60, 73, 75.

5. How can Defendants, with a straight face, in good conscience and in good faith, argue that there is "no evidence" that Defendants' **UM** claim department required medical authorizations from Weinstein in December 2002, in light of Exhibits 61 and 63? In fact, the **UM** claim department requested authorizations on three occasions! Exhibits 61, 63, 78-81, 94,114-116.

6. Defendants indeed completely delayed any efforts to properly investigate, evaluate or pay Weinsteins' claim. Defendants' own **UM** claim files

(Exhibits 78, 106, 262, 265, 267) show that they did not investigate or evaluate the **UM** claim file for payment of benefits until June 2004 at the earliest.

7. Prior to July 1, 2003, Defendants' records acknowledge that Sarah Weinstein had endured pain and surgery, and missed school. Exhibits 73, 75. This evidence, along with the unpaid undisputed medical bills, demonstrates that damages accrued before July 1, 2003, and that **UM** benefits for special and general damages existed before that date.

8. Medical bills had indeed accrued, and were unpaid, long before July 1, 2003. Exhibits 55-56, 57-58, 62, 64, 65, 67, 73, 75, 76. Despite those records, with no factual or legal basis Defendants specifically argue that no **UM** benefits could even accrue until all Med Pay benefits were first exhausted. That position simply ignores that there is no Policy language remotely establishing such a benefit payment sequence, and that their own **UM** file documents acknowledge **UM** liability at the outset, without regard to Med Pay coverage provisions. Further, even after receiving notice of Weinsteins' **UM** claim and then the initial medical authorization in early December 2002, Defendants failed completely in their duties to investigate the medical bills and files.

9. Defendants' **UM** adjusters were in fact aware of Weinsteins' financial hardships before July 1, 2003. In addition to mere common sense, this Court need only review Exhibits 64 and 67 to see that the Defendants had actual knowledge that their refusal to pay was causing the Weinsteins hardship.

Contrary to Defendants' ridiculous arguments on these nine (9) points, the facts in this case (largely evidenced by the Defendants' own internal documents) indeed substantiate that Weinsteins' bad faith claim under the Policy's UM coverage accrued prior to July 1, 2003. Each of Defendants' nine (9) specific arguments are nullified by the facts.

2. Defendants' Corporate Ratification.

The uncontroverted evidence shows Defendants' corporate ratification of their UM claims department's conduct in handling Weinsteins' claim. The trial court did not err in refusing to give an instruction on this issue.

No evidence at trial indicated that the Defendants' UM conduct in any way was not in full conformance with "company policy." Rather, Defendants' fundamental defense in this case was based on a company policy to pay nothing (even undisputed amounts) until the insured was finally ready to settle the entire claim.

Defendants falsely argue that the "only" evidence of corporate ratification in this case was a UM adjuster's testimony that she saw "nothing wrong with the way this claim was handled." Appellants' Reply Brief at 33. However, Defendants' own claim file shows much more. On November 11 and November 18, 2003, the UM claim supervisor in charge noted that the handling of Weinsteins' claim was "properly directed." Exhibits 95-96 and 112. When those determinations were made, that claim file included Exhibits 38-111 (most notably Exhibits 78 and 106 describing Defendants' "company policy" not to pay any UM benefits until "the end," and Exhibits 83-84 making specific false statements to Weinsteins' medical providers that all policy benefits were "exhausted").

Beyond that specific evidence, there is additional proof that Defendants' officers or directors ratified or endorsed the way this claim (and all UM claims) were handled:

> — Defendants (who have always appeared and defended as corporations) made no effort to produce any evidence or argument that this claim was either handled contrary to company policy, or that the company's UM claim policy was to process UM claims any differently; and,
>
> — Defendants (appearing and defending as corporations) have continuously asserted that the conduct of their UM department in refusing and delaying any payment until one final settlement was entirely appropriate both under the Policy and under Idaho law.

Defendants' conduct and acknowledged corporate policy of refusing to pay undisputed UM benefits until one final payment at "the end" only when its first-party insured is finally "ready" to

settle everything, is the expressed ratified and endorsed policy and practice of the corporations themselves. That policy is far beyond some simple ratification or endorsement by the officers and/or directors.

3. Defendants' Conduct Was Indeed Unconscionable.

The only rational way to characterize Defendants' conduct is oppressive, unconscionable and outrageous. Defendants' ongoing arguments attempting to justifying their conduct are unconscionable and outrageous.

The mere fact the Defendants' paid trial expert testified that Defendants "properly addressed" Weinsteins' claim does not make that a fact. The jury rightfully concluded after hearing all of the evidence (notwithstanding Defendants' expert testimony otherwise) that in fact Defendants' conduct was entirely inexcusable.

Defendants' arguments (at pages 34 and 35 of their Reply Brief) in and of themselves demonstrate the cavalier, reckless, unconscionable and outrageous treatment of Weinsteins and all Defendants' UM Idaho insureds. For example, Defendants astonishingly assert (at page 34) that Weinsteins cite "no evidence" that they made statements to Weinsteins' medical creditors that insurance benefits were "exhausted." Defendants' argument is preposterous. When Defendants made those representations Weinsteins' total Policy benefits were $250,000. Exhibits 10, 268-269. Nonetheless, after paying only $5,000 of the $250,000 benefits the Defendants intentionally stated to several of Weinsteins' medical provider creditors that Weinsteins had no more insurance for payment of the bills. Exhibits 83, 84, 111, 121. Even a cursory look at Exhibits 83, 84, 111 and 121 shows no reference or differentiation concerning "Med Pay" limits or remaining UM benefits. Instead, Defendants' statements clearly (and fraudulently) represent that the Weinsteins had no

remaining insurance to pay the bills. Now after the fact Defendants try to manufacture an unconscionable argument that those letters refer only to Med Pay benefits, but the documents are self-evident. Further, there are no records or other evidence whatsoever that after sending Exhibits 83, 84, 111 and 121 the Defendants ever attempted to either retract or clarify those benefit "exhaustion" representations or made any subsequent contact of any kind with those providers.

Another example of Defendants' outrageous arguments on the issue of their reprehensibility is in their discussion about the numerous medical authorizations Weinsteins were required to provide. Defendants' conduct and claim records conclusively show they had no intention of ever using those authorizations for any purpose other than to simply delay and falsely lead the Weinsteins to believe that the UM claim adjusters "needed" the authorizations to evaluate and pay the claim. Defendants in fact argue, at page 34 of their Reply Brief, that all three authorizations were "necessary," supposedly justifying their three separate requests over a year's time. However, despite such claimed "necessity" Defendants offer no explanation why the first and second authorizations (both prior to Mr. Bistline's involvement) were never used or even exchanged between company claim adjusters. Defendants had literally done nothing with the first and second medical authorization by the time they misled Mr. Bistline to believe they still needed an authorization a year later, yet Defendants argue that Mr. Bistline "blocked" and prevented them from securing Weinsteins' medical information (even under the third authorization provided through Bistline). The Defendants did nothing with any of the three authorizations secured. Instead, Defendants misled Weinsteins by demanding all three authorizations under a purported urgent "necessity" to use them to investigate and pay Weinsteins' claim with no intention of actually doing so.

It is also outrageous for the Defendants to still contend that their $10,000 "advance payment" plan was not oppressive, unconscionable and outrageous under the circumstances. Defendants' adjuster and supervisor acknowledged that a UM committee came up with, in their words, this "plan" but argue that it was a magnanimous "good faith" act. This Court will recall from the Weinsteins' initial brief that this "plan" first emerged just short of two years after the accident and did not come forth because of any information not already accessible to Defendants for at least the prior year. Further, this plan was hatched contemporaneous with those same UM personnel reconfirming 100% UM liability and valuing the claim as high as $150,000.

More importantly, the plan required Weinsteins to acknowledge that Defendants reserved all rights, even the right to reverse course and contest UM liability. Because the Policy provided UM benefits only for damages Weinsteins were "legally entitled to recover" from the uninsured driver, Weinsteins' agreement to Defendants reserving all defenses would preclude any recovery beyond the $10,000 "advance" if Weinsteins failed to timely file suit prior to September 1, 2004 (the statute of limitations would then legally bar any recovery against the uninsured driver). The offer thus effectively required Weinsteins to sign a release and give up rights just to finally get a small portion of their claim which Defendants acknowledged was worth some 15 times more than the amount tendered. The plan and release afforded the Defendants a new chance of buying Weinsteins' entire claim for $10,000 if the plan had worked to fruition.

The offer in no way was a "good faith gesture" to "get some money quickly to the Weinsteins." The offer came way too late, nearly two years after the accident, which under no standard was "quick." The offer was grossly less than the undisputed value of the claim, and it carried a chance to escape any further payment on the claim. Knowing at that time the disastrous

consequences the Weinsteins had already suffered from the refusals to pay any UM benefits for nearly two years, Defendants' offer was simply another tool to exert their economic strength to oppress Weinsteins. Defendants' continuing argument is shameful and ignores reality.

4. The Court Did Not Err in Allowing the Amended Complaint for Punitive Damages.

This argument was previously addressed by Weinsteins in their initial brief, and those arguments are incorporated and reiterated into this brief. Ironically, Hall v. Farmers Alliance Mut. Ins. Co., 145 Idaho 313, 179 P.3d 276 (2008) ("Hall"), which Defendants cite in their constitutional arguments, puts this issue firmly to rest. As in *Hall*, the jury in this case in fact awarded punitive damages after considering competent and substantial evidence. In such instance, the trial court's discretion to allow a claim for punitive damages becomes moot. *Hall* at 321.

5. Punitive Damages Do Not Violate Due Process.

Neither the jury's punitive damage award, nor the Court's remitted punitive damage award violates due process, and it was error for the trial court to remit the jury's punitive damage award.

a. Phillip Morris Remand.

Weinsteins do not specifically contend that the U.S. Supreme Court's withdrawing certiorari in Williams v. Phillip Morris USA, 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007) ("Phillip Morris") was a decision on the merits that the case was correctly decided below. However, the denial of certiorari is not some hollow action. Only because of a very fine procedural technicality, the Oregon Supreme Court upheld the 97:1 punitive damages ratio notwithstanding the U.S. Supreme Court's prior remand on constitutional grounds.

Although the U.S. Supreme Court did not specifically consider the constitutionally "excessive" issue in its remand to the Oregon Supreme Court, the final result was a 97:1 punitive damage award that, if the U.S. Supreme Court deemed "constitutionally excessive" merely because of that high ratio, could easily have been accepted again on appeal.

Before *Phillip Morris*, both BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) ("Gore") and *Hall* (at page 321) rejected the notion of a fine mathematical ratio in the constitutional context. Also, significant is the specific language of State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1533 (2003) ("Campbell") which in fact did not impose a strict single-digit ratio in all cases; *Campbell* stated only that, "in practice few awards exceeding a single digit ratio . . . to a significant degree will satisfy due process." *Campbell* at 425. The key here is that a single-digit ratio in most cases may be the limit. That "single-digit" language is a stated guideline, but not a steadfast rule to control all cases.

This Court's rulings in Myers v. Workmen's Auto. Ins. Co., 140 Idaho 495, 95 P.3d 977 (2004) ("Workmen's") and *Hall* are entirely consistent with *Campbell*, *Gore* and *Phillip Morris*. In cases like *Workmen's* and this case where the *Gore* "guideposts" are well supported, a high damage punitive damage award ratio is not constitutionally excessive; a lower ratio is appropriate when the guideposts are weak or partially non-existent. (See further discussion in the next section.)

Weinsteins acknowledge that the *Phillip Morris* dismissal of certiorari does not establish that a 97:1 ratio is constitutional, but if in fact such a high ratio is excessive per se, the U.S. Supreme Court could easily have retained certiorari in *Phillip Morris* and so ruled.

b. Hall v. Farmers Alliance Mut. Ins. Co.

and

c. Myers v. Workmen's Auto. Ins. Co.

Defendants criticize Weinsteins for not extensively discussing the details of *Hall* and instead focusing on *Workmen's*. There is good reason for Weinsteins' focus, primarily based on the similar conduct and reprehensibility of *Workmen's* and these Defendants, as further discussed below. Both *Hall* and *Workmen's* set forth comprehensive discussions of the constitutional issues relating to punitive damages. In *Hall*, this Court limited the punitive damage ratio to 4:1, but *Workmen's* it affirmed stand a ratio of 408:1. The insurers' comparative reprehensibility in *Hall* and *Workmen's* was significant, and in *Hall* only one of the (*Gore*) constitutional "guideposts" supported the award. Therefore, the final punitive damage ratios are much different in *Hall* and *Workmen's*.

Defendants' reprehensibility in this case admittedly falls between the degrees of reprehensibility of the *Hall* and *Workmen's* insurers, but is much closer to that of *Workmen's*. No matter how hard Defendants try to twist the truth, the facts and reprehensibility of the insurance company in *Hall* was nowhere near the degree of these Defendants or the insurer in *Workmen's*. In *Hall*, the court specifically determined that the insurance company's delay tactics although "inconsiderate, and perhaps even exploitive" were not "particularly egregious." *Hall* at 323. In this case, the Defendants' conduct was much more parallel to the despicable conduct of *Workmen's*.

Defendants argue at page 36 of their Reply Brief that proof of the insurer's bad faith in *Hall* was "far stronger than what Plaintiffs present here." In exercising its free review on this constitutional issue (State v. Hedges, 143 Idaho 884, 886, 154 P.3d 1074, 1076 (2007), Hall v. Farmers Alliance Mut. Ins. Co., *supra*, 320) this Court will see numerous key facts and determine

that the insurer's reprehensibility here exceeded that of the *Hall* insurer many times over, and in fact closely parallels *Workmen's* bad faith. Specific examples of the facts show:

1. In *Hall*, the insured's damages related to real estate rather than their personal health and safety as in this case (in *Workmen's* the damages were only economic).

2. In *Hall*, the insurance company began paying benefits about two weeks after the loss, only one day after investigating and ascertaining the initial extent of damages. However, in this case no policy benefits were paid until a small prescription bill seven months after the accident (Exhibit 72), followed by a few more almost a year after the accident (Exhibit 72). In *Workmen's*, the delay was even longer.

3. The plaintiffs in *Hall* received a (second) substantial partial payment of an undisputed damage amount less than two months after their loss; in this case Weinsteins had to wait nearly a year for a mere $5,000 payment of undisputed benefits even though by then Defendants valued their claim at $25,000 (Exhibits 72, 73). Likewise, in *Workmen's* undisputed benefits were delayed and refused.

4. The *Hall* insurer in fact investigated the property damage (actually commencing the evaluation of their insured's claim four days after the loss) and then paid the initial undisputed claim amount (without any conditions or required release) less than sixty days after the loss; here, the Defendants did nothing to ever meaningfully investigate Weinsteins' UM claim for nearly two years after the accident (Exhibit 262), and eventually the unconditionally paid only a little more than half ($80,000) of their acknowledged $150,000 claim value nearly two and a half years after the accident (only after being sued). Exhibits 283-284, 267. In *Workmen's*, there likewise was no timely investigation or payment.

5. In *Hall*, the insurer hired an independent engineering company and an independent adjuster to reinspect the home and reevaluate soon after the insurer first alleged additional damage; here, the Defendants did nothing to investigate or evaluate the claim, even completely disregarding the medical authorizations they had demanded and received from the Weinsteins. Likewise, in *Workmen's* the insurer ignored and failed to investigate and evaluate the insured's claim.

6. In *Hall*, the insurer's and insured's opinions of the claim value differed but insured (*Hall*) then refused to further deal with the insurer. The insurance company then successfully sued *Hall* to participate in the resolution process

specifically prescribed by the policy; in this case the Defendants sat back and simply refused the Weinsteins' repeated demands for payment of the undisputed medical bills simply because of their company policy not to pay undisputed amounts in advance of one final settlement. In *Workmen's* the insurer also refused to address the insured's demands or pay any undisputed amounts.

7. In *Hall*, upon proceeding through the prescribed resolution process when its independent appraiser valued the loss in excess of policy limits, the insurance company promptly tendered its policy limits. In this case, even though Defendants (a) never disputed any of the Weinsteins' medical bills, (b) knew that the Weinsteins' damages were significant, and (c) valued Weinsteins' claim as high as $150,000, Defendants never tendered UM payment of any undisputed amounts without conditions until after they were sued. Even then, these Defendants took six more months to finally pay only about half the amount they acknowledged the claim was worth (Exhibits 283-284). Likewise, in *Workmen's* no policy benefits were tendered before litigation forced the insurer to pay.

8. The *Hall* case was tried only on an alleged breach of contract and corresponding implied covenant of good faith (the trial court dismissed plaintiffs' claims under the specific tort of bad faith); here, the jury specifically found that Defendants committed the intentional tort of bad faith, which the trial court upheld on post-trial motions.

To summarize the above differences in reprehensibility factors, in *Hall* the insurer acted with only minor "inconsiderate" delays investigating and evaluating its insured's loss. That insurer also paid initial undisputed amounts, promptly proceeded with a valuation resolution process when the parties could not agree, and then tendered the undisputed amount (full policy limits) soon after its independent appraiser evaluated the claim as part of the resolution process. As specifically noted in *Hall*, the insureds were "simply injured to the extent that they did not quickly receive the whole of their insurance coverage." *Hall* at 323 (emphasis added). Like *Workmen's*, the opposite occurred in this case—the Defendants simply stonewalled and refused to pay any amounts, even though liability for payment of the Weinsteins' medical expenses and damages were undisputed. The Defendants

consciously and intentionally refused to undertake any payment investigation or evaluation of Weinsteins' claim and did nothing to actually pay any UM benefits until after they were sued nearly two years after the loss. Defendant's conduct was a repeated reckless disregard for Weinsteins' health and safety and financial vulnerability, imposed by deceit, and represented the highest degree of reprehensibility under *Gore*, *Hall* and *Campbell*.

Despite all those facts, Defendants continue to wear their rose-colored glasses and blinders, arguing that the insurer's bad faith in *Hall* was "far stronger than what Plaintiffs present here." Exercising its free review, this Court can only conclude that the facts conclusively show that the Defendants' conduct in this case was indeed many times more reprehensible than the insurer's conduct in *Hall*, and much more like the *Workmen's* insurer.

Far from establishing any precedent for a reduction of the ratio in this case to 4:1 or less as argued by Defendants, the Court's finding in *Hall* that the insurance delay tactics "were not 'particularly egregious' in this case" (emphasis added) clearly demonstrates a recognition and affirmation of the most important constitutional "guidepost" of reprehensibility established in *Gore*. That same language in *Hall* implicitly recognizes that the ratio may exceed the 4:1 rate upheld in *Workmen's* where conduct is highly egregious. Significantly, *Hall* did not indicate that the 408:1 ratio in *Workmen's* was constitutionally excessive.

In addition to the strength of the reprehensibility "guidepost" in *Workmen's* and this case as compared to *Hall*, this Court must also note that the second *Gore* "reasonable relationship to harm likely to result" "guidepost" was non-existent in *Hall*. The insured's damage in *Hall* was recognized as purely economic and easily quantifiable, simply based on the cost of repairing the physical damage to the property. Although Weinsteins' initial damages for their medical expenses were only

economic and easily ascertainable, their ensuing physical and emotional damages from Defendants' bad faith conduct were hard to define and the monetary value of their non-economic harm was difficult to quantify. As the court noted in both *Workmen's* and *Hall*, the *Gore* case established that a higher punitive damage ratio is justified for the type of injuries the Weinsteins suffered. *Hall* at 321; *Workmen's* at 509, 510. Both *Workmen's* and *Hall* also recognized and reiterated *Gore's* ruling that there is no constitutional line "marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award." *Hall* at 321; *Workmen's* by its result.

Returning to the Defendants' reprehensibility in this case, the harm suffered by the Weinsteins was physical, affecting their health and safety. Their harm was the direct result of the Defendants' intentional indifference and reckless disregard for Weinsteins' mental health and well-being, knowing full well that Weinsteins were financially vulnerable. Also unlike in *Hall*, the insurance companies' conduct in this case and *Workmen's* were repeated intentional actions over a long period of time, involving intentional trickery and deceit.

Because of the degree of reprehensibility (the first and most important *Gore* "guidepost") and the reasonable relationship between the punitive damages and the harm resulting to the Weinsteins (the second *Gore* "guidepost") the jury's punitive damage award in this case is not constitutionally excessive. It follows, then, that the remitted amount is not excessive. This second "guidepost" was not supported in either *Hall* or *Workmen's*.

As discussed in Weinsteins' initial brief, here and in *Workmen's* the civil penalty third *Gore* "guidepost" was fully supported by the insurers' conscious decisions to disregard the law which imposed specific penalties. Notably, in *Hall* this Court determined that neither the second

("reasonable relationship") nor third ("comparison to civil or criminal penalties") guideposts were met, and that even the first ("reprehensibility") guidepost was weak. The Court stated:

> Because only one of the guideposts partially supports the conclusion that the punitive damages award was consistent with the Due Process Clause . . . this Court confirms the district court's decision to remit the award to a 4:1 ratio. While the "most important" guidepost lends some support to Hall's position, the Hall's support for the other two guideposts is nowhere close to being sufficient to meet the constitutional due process requirements.

Hall at 323 (emphasis added).

Thus the 4:1 ratio in *Hall* was upheld based on only one, decidedly weak *Gore* guidepost. In *Workmen's* only two of the three *Gore* guideposts supported the award. Here, all three guideposts provide a solid foundation for the jury's award not being constitutionally excessive. There was no basis for the remittitur, and thus it was error. Thus the remitted amount of punitive damages is also constitutionally valid and in no case should be further reduced.

Hall and *Workmen's* are both extremely relevant to this case in stating the law and providing excellent analyses of the constitutional punitive damage issues, but because of the extremely different facts of *Hall* compared to this case and *Workmen's*, *Hall* is not an appropriate precedent to either uphold the trial court's remittitur of the jury's punitive damages or further reduce the trial court's remitted 9:1 ratio. More appropriately, the court's decision in *Workmen's* is a more realistic comparison and is a sound basis for upholding the jury's award and reversing the remitted punitive damages in this case, even though the compensatory damages awarded in *Workmen's* were a small amount.

CONCLUSION

It was error for the trial court to have remitted the jury's punitive damage award, but even if this Court finds no such error the punitive damages should not be further reduced.

RESPECTFULLY SUBMITTED This 3rd day of September, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September, 2009, I caused to be served two (2) true and correct copies of the foregoing *Cross-Appellants' Reply Brief* as follows:

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