BEFORE THE IOWA SUPREME COURT

No. 18-0809

TOBY THORNTON,

Appellee/Cross-Appellant,

vs.

AMERICAN INTERSTATE
INSURANCE COMPANY,

Appellant/Cross-Appellee.

APPEAL FROM THE DISTRICT COURT
OF POTTAWATTAMIE COUNTY
HON. JAMES HECKERMAN

APPELLANT'S FINAL BRIEF

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TABLE OF CONTENTS

Page

STATEMENT OF THE ISSUES 9

ROUTING STATEMENT 12

STATEMENT OF THE CASE 13

STATEMENT OF THE FACTS 14

ARGUMENT 31

I. THE DISTRICT COURT ERRED IN FAILING TO GRANT JUDGMENT NOTWITHSTANDING THE VERDICT OR REMITTITUR AND CONDITIONAL NEW TRIAL WITH RESPECT TO COMPENSATORY DAMAGES. 31

A. *Standard of Review and Preservation of Error.* 31

B. *The District Court Erred by Failing to Grant JNOV or Remittitur With Respect to Loss of Use of Money Damages.* 33

1. Judicial Estoppel, Collateral Estoppel, and Undisputed Facts Require JNOV or Remittitur of the Lost Investment Income Award. 34

2. Judgment Notwithstanding the Verdict or Remittitur Is Also Appropriate for Lost Home Equity Damages. 42

C. *The Evidence Is Insufficient to Support the Physical Pain and Suffering and Loss of Mind and Body Awards.* 44

D. *The District Court Should Have Remitted Most of the Consequential Damages Award of $52,000.* 48

E. *Summary.* 51

II. THE DISTRICT COURT ERRED BY FAILING TO GRANT REMITTITUR AND CONDITIONAL NEW TRIAL WITH RESPECT TO THE PUNITIVE DAMAGE AWARD, WHICH VIOLATES STATE AND FEDERAL DUE PROCESS. 52

A. Standard of Review and Preservation of Error. 52

B. The Punitive Damage Award of $6.75 Million Is Excessive Under State and Federal Due Process and Should Be Remitted. 53

1. American Interstate's Conduct Was Not Reprehensible. 56

2. The Ratio of Punitive to Compensatory Damages Weighs Overwhelmingly In Favor of Remittitur. 62

3. The Level of Civil Penalties Authorized in Comparable Cases Reinforces the Excessiveness of the Punitive Damage Award. 68

III. IN LIGHT OF THE POSSIBLE THIRD TRIAL, THIS COURT SHOULD PROVIDE DIRECTION TO THE DISTRICT COURT REGARDING THE IMPERMISSIBILITY OF ATTORNEY SIEMS SERVING AS TRIAL COUNSEL AND THE LOSS OF MIND AND BODY JURY INSTRUCTION 69

CONCLUSION 75

REQUEST FOR ORAL ARGUMENT 76

PROOF OF SERVICE 77

CERTIFICATE OF COMPLIANCE 78

TABLE OF AUTHORITIES

Page

CASES

155 N. High, Ltd. v. Cincinnati Ins. Co.,
650 N.E.2d 869 (Ohio 1995) 70

Adeniyi-Jones v. State Farm Mut. Auto. Ins. Co.,
Civ. Action No. 14-7101, 2016 WL 3551486
(E.D. Pa. June 30, 2016) 70

AMCO Mut. Ins. Co. v. Lamphere,
541 N.W.2d 910 (Iowa Ct. App. 1995) 45, 47

Amerigraphics, Inc. v. Mercury Cas. Co.,
107 Cal. Rptr. 3d 307 (Cal. Ct. App. 2010) 54

Arellano v. Primerica Life Ins. Co.,
332 P.3d 597 (Ariz. Ct. App. 2014) 54, 64

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 53, 68

Boylan v. Am. Motorists Ins. Co.,
489 N.W.2d 742 (Iowa 1992) 45

Brant v. Bockholt,
532 N.W.2d 801 (Iowa 1995) 75

Bryant v. Parr,
872 N.W.2d 366 (Iowa 2015) 48

Buhmeyer v. Case New Holland, Inc.,
446 F. Supp. 2d 1035 (S.D. Iowa 2006) 55, 63, 65, 68

Calvert v. Am. Family Ins. Grp.,
No. 04-1074, 2006 WL 126635
(Iowa Ct. App. Jan. 19, 2006) 45, 47

Cawthorn v. Cath. Health Initiatives Iowa Corp.,
743 N.W.2d 525 (Iowa 2007) 69

Ceimo v. Gen. Am. Life Ins. Co.,
No. 2:00-CV-1386 FJM, 2003 WL 25481095 (D. Ariz. Sept. 17, 2003), *aff'd* 137 F. App'x 968 (9th Cir. 2005) 64

Cooper Indus. v. Leatherman Tool Grp., Inc.,
532 U.S. 424 (2001) 52, 53

Dameron v. Neumann Bros., Inc.,
339 N.W.2d 160 (Iowa 1983) 34, 37

Data Documents, Inc. v. Pottawattamie Cty.,
604 N.W.2d 611 (Iowa 2000) 43

Doe v. Cent. Iowa Health Sys.,
766 N.W.2d 787 (Iowa 2009) 31, 32

Dolan v. Aid Ins. Co.,
431 N.W.2d 790 (Iowa 1988) 45

Goddard v. Farmers Ins. Co. of Or.,
179 P.3d 645 (Or. 2008) 55, 59, 63, 64

Gov't Emps. Ins. Co. v. Gonzalez,
403 P.3d 1153 (Alaska 2017) 66, 67

Hall v. Farmers All. Mut. Ins. Co.,
179 P.3d 276 (Idaho 2008) 49, 55, 63, 65

Jasper v. H. Nizam, Inc.,
764 N.W.2d 751 (Iowa 2009) 31, 32, 51

Jurinko v. Med. Protective Co.,
305 F. App'x 13 (3d Cir. 2008) 55

Kennedy v. Supreme Forest Prods.,
295 F. Supp. 3d 113 (D. Conn. 2017) 67

Kimble v. Land Concepts, Inc.,
845 N.W.2d 395 (Wis. 2014) 55

Korfman v. Kemper Nat'l Ins. Co.,
685 N.Y.S.2d 282 (N.Y. App. Div. 1999) 70

Leavey v. Unum Provident Corp.,
295 F. App'x 255 (9th Cir. 2008) 54

Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.,
579 N.W.2d 823 (Iowa 1998) 33

Nardelli v. Metro. Grp. Prop. & Cas. Ins. Co.,
277 P.3d 789 (Ariz. Ct. App. 2012) 54, 64

Nelson v. Hartford Ins. Co. of the Midw.,
No. CV 11-162-M-DWM, 2012 WL 761965
(D. Mont. Mar. 8, 2012) 70

NevadaCare, Inc. v. Dep't of Human Servs.,
783 N.W.2d 459 (Iowa 2010) 33

Nickerson v. Stonebridge,
371 P.3d 242 (Cal. 2016) 54

Orkin Exterminating Co. v. Burnett,
160 N.W.2d 427 (Iowa 1968) 43

Poage v. Crane Co.,
523 S.W.3d 496 (Mo. Ct. App. 2017) 66

Renze Hybrids, Inc. v. Shell Oil Co.,
418 N.W.2d 634 (Iowa 1988) 37, 51

Rodda v. Vermeer Mfg.,
734 N.W.2d 480 (Iowa 2007) 44

Roling v. Daily,
596 N.W.2d 72 (Iowa 1999) 32

Saint Joseph Healthcare, Inc. v. Thomas,
487 S.W.2d 864 (Ky. 2016) 66, 67

Schlitz v. Teledirect Int'l, Inc.,
524 N.W.2d 671 (Iowa Ct. App. 1994) 43, 44

Shannon v. Hearity,
487 N.W.2d 690 (Iowa Ct. App. 1992) 43

Soults Farms, Inc. v. Schafer,
797 N.W.2d 92 (Iowa 2011) 33

Spencer v. Annett Holdings, Inc.,
757 F.3d 790 (8th Cir. 2014) 39

Spencer v. Annett Holdings, Inc.,
905 F. Supp. 2d 953 (S.D. Iowa 2012),
aff'd 757 F.3d 790 (8th Cir. 2014) 45, 47

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003)..... 52, 53, 54, 55, 59, 60, 61, 62, 63, 65, 66, 67, 68

State v. Vanover,
559 N.W.2d 618 (Iowa 1997) 75

Thornton v. Am. Interstate Ins. Co.,
897 N.W.2d 445 (Iowa 2017) 25, 29, 30, 44, 50, 51

United Fire & Cas. Co. v. Shelly Funeral Home, Inc.,
642 N.W.2d 648 (Iowa 2002) 36

Van Sickle Constr. Co. v. Wachovia Commercial Mortg., Inc.,
783 N.W.2d 684 (Iowa 2010) 52

Vennerberg Farms, Inc. v. IGF Ins. Co.,
405 N.W.2d 810 (Iowa 1987) 35

Walker v. Farmers Ins. Exch.,
63 Cal. Rptr. 3d 507 (Cal. Ct. App. 2007)..... 55

Watson v. Lewis,
272 N.W.2d 459 (Iowa 1978) 31

Weigel v. Farmers Ins. Co.,
158 S.W.3d 147 (Ark. 2004) 70

Wilson v. Liberty Mut. Grp.,
666 N.W.2d 163 (Iowa 2003) 35, 36, 38

Winnebago Indus. v. Haverly,
727 N.W.2d 567 (Iowa 2006) 36, 39

Wolf v. Wolf,
690 N.W.2d 887 (Iowa 2005) 52

WSH Props., L.L.C. v. Daniels,
761 N.W.2d 45 (Iowa 2008) 41

STATUTES

Iowa Code § 85.45 14

Iowa Code § 85.47 41

Iowa Code § 86.13 68

Iowa Code § 668A.1(1)(a) 52

OTHER AUTHORITIES

Fourteenth Amendment 53

Iowa R. App. P. 6.1101(2)(f) 12

Iowa R. Civ. P. 1.1003 ..... 31, 32

Iowa R. Civ. P. 1.1004 32

Iowa R. Civ. P. 1.1004 and 1010 31

Iowa R. Civ. P. 1.1010(2) 32, 52

Iowa R. Prof. Conduct 32:3.7 74

STATEMENT OF THE ISSUES

I. DID THE DISTRICT COURT ERR IN FAILING TO GRANT JUDGMENT NOTWITHSTANDING THE VERDICT AND/OR REMITTITUR WITH RESPECT TO COMPENSATORY DAMAGES THAT DID NOT RESULT FROM BAD FAITH, WERE BASED ON THEORIES THAT CONTRADICTED PLAINTIFF'S SUCCESSFUL POSITIONS IN PRIOR PROCEEDINGS, AND OTHERWISE WERE UNSUPPORTED BY SUBSTANTIAL EVIDENCE?

Iowa R. Civ. P. 1.1003
Iowa R. Civ. P. 1.1004 and 1010
Jasper v. H. Nizam, Inc., 764 N.W.2d 751 (Iowa 2009)
Watson v. Lewis, 272 N.W.2d 459 (Iowa 1978)
Doe v. Cent. Iowa Health Sys., 766 N.W.2d 787 (Iowa 2009)
Roling v. Daily, 596 N.W.2d 72 (Iowa 1999)
Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc., 579 N.W.2d 823 (Iowa 1998)
NevadaCare, Inc. v. Dep't of Human Servs., 783 N.W.2d 459 (Iowa 2010)
Soults Farms, Inc. v. Schafer, 797 N.W.2d 92 (Iowa 2011)
Dameron v. Neumann Bros., Inc., 339 N.W.2d 160 (Iowa 1983)
Wilson v. Liberty Mut. Grp., 666 N.W.2d 163 (Iowa 2003)
Vennerberg Farms, Inc. v. IGF Ins. Co., 405 N.W.2d 810 (Iowa 1987)
Winnebago Indus. v. Haverly, 727 N.W.2d 567 (Iowa 2006)
United Fire & Cas. Co. v. Shelly Funeral Home, Inc., 642 N.W.2d 648 (Iowa 2002)
Renze Hybrids, Inc. v. Shell Oil Co., 418 N.W.2d 634 (Iowa 1988)
Spencer v. Annett Holdings, Inc., 757 F.3d 790 (8th Cir. 2014)
WSH Props., L.L.C. v. Daniels, 761 N.W.2d 45 (Iowa 2008)
Shannon v. Hearity, 487 N.W.2d 690 (Iowa Ct. App. 1992)
Orkin Exterminating Co. v. Burnett, 160 N.W.2d 427 (Iowa 1968)
Data Documents, Inc. v. Pottawattamie Cty., 604 N.W.2d 611 (Iowa 2000)
Schlitz v. Teledirect Int'l, Inc., 524 N.W.2d 671 (Iowa Ct. App. 1994)
Thornton v. Am. Interstate Ins. Co., 897 N.W.2d 445 (Iowa 2017)
Rodda v. Vermeer Mfg., 734 N.W.2d 480 (Iowa 2007)
Dolan v. Aid Ins. Co., 431 N.W.2d 790 (Iowa 1988)
Boylan v. Am. Motorists Ins. Co., 489 N.W.2d 742 (Iowa 1992)
Calvert v. Am. Family Ins. Grp., No. 04-1074, 2006 WL 126635 (Iowa Ct. App. Jan. 19, 2006)

AMCO Mut. Ins. Co. v. Lamphere, 541 N.W.2d 910 (Iowa Ct. App. 1995)
Spencer v. Annett Holdings, Inc., 905 F. Supp. 2d 953 (S.D. Iowa 2012), *aff'd* 757 F.3d 790 (8th Cir. 2014)

II. DID THE DISTRICT COURT ERR IN FAILING TO REMIT THE JURY'S SUBSTANTIAL PUNITIVE DAMAGE AWARD UNDER THE STATE AND FEDERAL DUE PROCESS CLAUSES DESPITE OVERWHELMING PRECEDENT DEMONSTRATING THE AWARD IS EXCESSIVE?

Wolf v. Wolf, 690 N.W.2d 887 (Iowa 2005)
State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408 (2003)
Cooper Indus. v. Leatherman Tool Grp., Inc., 532 U.S. 424 (2001)
Van Sickle Const. Co. v. Wachovia Commercial Mortg., Inc., 783 N.W.2d 684 (Iowa 2010)
Iowa Code § 668A.1(1)(a)
BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996)
Arellano v. Primerica Life Ins. Co., 332 P.3d 597 (Ariz. Ct. App. 2014)
Nardelli v. Metro. Grp. Prop. & Cas. Ins. Co., 277 P.3d 789 (Ariz. Ct. App. 2012)
Leavey v. Unum Provident Corp., 295 F. App'x 255 (9th Cir. 2008)
Amerigraphics, Inc. v. Mercury Cas. Co., 107 Cal. Rptr. 3d 307 (Cal. Ct. App. 2010)
Nickerson v. Stonebridge, 371 P.3d 242 (Cal. 2016)
Walker v. Farmers Ins. Exch., 63 Cal. Rptr. 3d 507 (Cal. Ct. App. 2007)
Hall v. Farmers All. Mut. Ins. Co., 179 P.3d 276 (Idaho 2008)
Buhmeyer v. Case New Holland, Inc., 446 F. Supp. 2d 1035 (S.D. Iowa 2006)
Goddard v. Farmers Ins. Co. of Or., 179 P.3d 645 (Or. 2008)
Jurinko v. Med. Protective Co., 305 F. App'x 13 (3d Cir. 2008)
Kimble v. Land Concepts, Inc., 845 N.W.2d 395 (Wis. 2014)
Ceimo v. Gen. Am. Life Ins. Co., No. 2:00-CV-1386 FJM, 2003 WL 25481095 (D. Ariz. Sept. 17, 2003), *aff'd* 137 F. App'x 968 (9th Cir. 2005)
Poage v. Crane Co., 523 S.W.3d 496 (Mo. Ct. App. 2017)
Gov't Emps. Ins. Co. v. Gonzalez, 403 P.3d 1153 (Alaska 2017)
Saint Joseph Healthcare, Inc. v. Thomas, 487 S.W.2d 864 (Ky. 2016)
Kennedy v. Supreme Forest Prods., 295 F. Supp. 3d 113 (D. Conn. 2017)
Iowa Code § 86.13

III. IN THE EVENT THE CASE IS TRIED A THIRD TIME, SHOULD THE DISTRICT COURT DISQUALIFY ATTORNEY SIEMS FROM SERVING AS TRIAL COUNSEL IN LIGHT OF HIS SUBSTANTIAL INVOLVEMENT IN THE UNDERLYING FACTS AND PREVENT THE JURY FROM AWARDING LOSS OF MIND AND BODY DAMAGES?

Cawthorn v. Cath. Health Initiatives Iowa Corp.,
743 N.W.2d 525 (Iowa 2007)
Weigel v. Farmers Ins. Co., 158 S.W.3d 147 (Ark. 2004)
Nelson v. Hartford Ins. Co. of the Midw., No. CV 11-162-M-DWM,
2012 WL 761965 (D. Mont. Mar. 8, 2012)
Adeniyi-Jones v. State Farm Mut. Auto. Ins. Co.,
Civ. Action No. 14-7101,
2016 WL 3551486 (E.D. Pa. June 30, 2016)
Korfman v. Kemper Nat'l Ins. Co., 685 N.Y.S.2d 282 (N.Y. App. Div. 1999)
155 N. High, Ltd. v. Cincinnati Ins. Co., 650 N.E.2d 869 (Ohio 1995)
Brant v. Bockholt, 532 N.W.2d 801 (Iowa 1995)
State v. Vanover, 559 N.W.2d 618, 629-34 (Iowa 1997)

ROUTING STATEMENT

This case is appropriate for Supreme Court retention in light of substantial questions of enunciating or changing legal principles regarding federal due process limits on punitive damage awards, a subject this Court does not appear to have addressed in more than ten years. *See* Iowa R. App. P. 6.1101(2)(f).

STATEMENT OF THE CASE

In December 2013, Plaintiff-Appellee Toby Thornton ("Thornton") brought claims against Defendant–Appellant American Interstate Insurance Company ("American Interstate") for bad faith in connection with its handling of Thornton's workers' compensation claim. In early 2015, the district court concluded American Interstate acted in bad faith as a matter of law and granted partial summary judgment for Thornton on both counts of his petition. The issue of damages was tried in February 2015 to jury, which awarded compensatory and punitive damages. This Court reversed and remanded for new trial, holding the district court should have granted summary judgment for American Interstate, not Thornton, on one of the bad faith counts. The Court affirmed the district court's entry of summary judgment on the other count and remanded for new trial.

The second trial occurred in February 2018. The jury awarded $382,000 in compensatory damages and $6,750,000 in punitive damages. American Interstate filed post-trial motions for judgment notwithstanding the verdict, remittitur/conditional new trial, and new trial. The district court denied the motions, adopting wholesale the proposed order submitted by Thornton. American Interstate timely appealed.

STATEMENT OF THE FACTS

I. June 2009-February 2012: Thornton's Accident and American Interstate's Response.

On June 25, 2009, Thornton was severely injured in a single-vehicle accident near Monona, Iowa, while working as a truck driver. (App.-I 542, 547-549.) Thornton was taken to a hospital in Dubuque, then life-flighted to Iowa City, where numerous surgeries were performed. (App-I 559, 563.) As a result of the accident, Thornton was paralyzed from the nipples down, with no use of his legs and limited use of his arms and hands. (App-I 937, 972.)

American Interstate was the workers' compensation insurer for Thornton's employer. American Interstate's claims manager, Luann Miller, made telephone contact with Thornton's family the day after the accident and visited the family in the hospital one day later to describe the benefits Thornton would receive and answer questions. (App-II 673-675.) American Interstate promptly began providing weekly wage replacement checks to Thornton's family, with the first check dated July 2, 2009. (App-I 689, 1047-1048.) Payments continued each week thereafter until the partial commutation of Thornton's benefits in May 2014.[1] (App-I 689, 1047-1048.)

[1] Partial commutation is a statutory mechanism in which a claimant's future weekly benefits are paid in a single lump sum. Iowa Code § 85.45.

American Interstate also immediately began paying for all Thornton's medical expenses and has continued to do so to the present day. (App-I 689, 702, 1050-1051, 1162.)

Thornton was transferred to St. Luke's Hospital in Cedar Rapids in August 2009. (App-II 690.) There, he participated in intensive in-patient rehabilitation and showed signs of functional improvement. (App-II 690-699.) Thornton was released from St. Luke's on October 5, 2009, to live with his in-laws. (App-I 667.) American Interstate arranged and paid for all accommodations necessary to allow Thornton to leave the hospital, including a ramp, bed, wheelchair, van, bathroom modifications, and many other items of durable medical equipment. (App-I 667-668, 1069-1070.) Thornton often provided positive feedback to American Interstate. (*E.g.*, App-II 716, 756, 768.)

In early 2010, Thornton and his wife, Tara, began exploring permanent living arrangements. (App-I 583; App-II 732.) American Interstate assisted by sending Miller for an in-person meeting with Thornton in June 2010. (App-I 673; App-II 740.) In July 2010, however, Thornton and Tara separated. (App-II 743.) Thornton called American Interstate for help the day they separated, and Miller promptly went into action to ensure Thornton had everything he needed to live independently, including a home

health aide. (App-I 675; App-II 743, 746-749.) In subsequent months, Miller further helped improve Thornton's independence, including making arrangements for him to take a driving test and scheduling and paying for modifications to his van to allow self-driving. (App-I 675-676; App-II 749-750, 755-756, 759.)

By early 2011, Thornton had improved his strength substantially and was able to cook, care for his children, drive, and otherwise live independently for 21 hours of every day. (App-I 588-589, 678-679; App-II 744, 759-760.) Thornton is capable of doing more than others with the same spinal cord injury, who are amazed by how well he functions. (App-I 671.) Thornton shares custody of his children with Tara and, since the separation in mid-2010, has them at least 50% of the time, "[i]f not more." (App-I 595, 678-679.)

Notwithstanding his substantial improvements in independence and functionality, Thornton had challenges in his personal life. In November 2010, his mother died. (App-I 600, 680-681.) In February 2011, Tara violated their informal custody-sharing agreement by taking the kids away for a weekend. (App-I 679-680.) Thornton became despondent and overdosed on pain medication. (App-I 679-680, 2054-2067, 2085-2110.) Thornton does not blame American Interstate for the overdose, nor does he

recall telling American Interstate about it. (App-I 680, 688.) Thornton's primary care physician, Dr. Rogge, did not mention the overdose in his office notes or stop prescribing pain pills. (App-I 627, 1110-1111; App-II 292-345.)

Thornton went to therapy for approximately six months after the overdose. (App-I 602-603.) Therapy ended in August 2011 because Thornton did not need it any more, as he had "worked through issues and developed positive self-focus." (App-I 603, 2110.). Thornton has not seen mental health professionals since August 2011 because "I'm fine. I don't need no help." (App-I 603.) Thornton's mental health is much better now than in 2011. (App-I 683.)

Thornton is not scared of challenges or trying new things; he finds such things beneficial to his mental health. (App-I 683-684.) In fact, he was encouraged by his therapist in 2011 to challenge himself, set goals, and consider potential employment opportunities. (App-I 684-685, 2105.) For example, he went on a five-hour trip that year by himself to visit his brother. (App-I 684.) He told his therapist he believed his main purpose in life was to raise his children well, enjoy his friends, and potentially reenter the work force. (App-I 685, 2101.)

Thornton informed American Interstate in 2011 that he did not want to discuss settlement of his workers' compensation claim until his divorce was finalized. (App-I 608, 688-689.) He and Tara had agreed to split their assets 50/50 in the divorce, and he did not want a workers' compensation settlement to be part of those assets. (App-I 689.) American Interstate honored his request while also continuing to pay weekly indemnity benefits and cover all medical expenses. (App-I 689.) The divorce became final in December 2011, and American Interstate learned about it the following month. (App-I 688; App-II 772.)

II. February 2012-October 2012: Settlement Discussions and Mediation.

Miller and a financial advisor traveled to Thornton's hometown in February 2012 to discuss settlement with him. (App-I 607, 690.) Thornton chose not to have an attorney at the meeting because he no longer wanted the services of the attorney his ex-wife hired. (App-I 690-691.) American Interstate also did not have an attorney and confirmed in advance Thornton did not wish to be represented. (App-I 690; App-II 771, 773.)

During the meeting, Thornton was shown two settlement proposals, Proposal A and Proposal B. (App-I 614; App-II 665-670.) Miller told Thornton these were illustrations, and they could be adjusted to fit his needs. (App-I 299-300, 691.) Each proposal offered Thornton weekly, tax-free

indemnity benefits in the full permanent and total disability amount for life. (App-I 1122; App-II 665-670.) American Interstate also proposed to fund medical set-aside accounts for Thornton's future medical needs, with expected benefits totaling more than $4.2 million even though Thornton's future expenses were only expected to be approximately $2.1 million. (App-I 1136-1137, 1146; App-II 665-670; App-III 81.) American Interstate also would provide at least $100,000 in cash to Thornton to use as he saw fit. (App-II 665-670.) Thornton understood the proposals were merely illustrations and thanked Miller and the financial advisor for coming. (App-I 300, 691.) The settlement American Interstate was prepared to enter with Thornton was the largest Miller had encountered in approximately 30 years as a claims manager. (App-I 283-284; App-II 795.)

Shortly after the meeting, Thornton hired Tiernan Siems as counsel. (App-I 613, 692.) On March 6, 2012, Siems sent a letter to American Interstate disclosing his representation and asking that all communications be directed to him. (App-I 692; App-III 146.) Prior to this letter, Thornton was in regular contact with Miller and got along well with her. (App-I 670.) Whenever he needed something, Miller did a good job of helping him, including in emergency situations. (App-I 674-675.)

Although Siems argued at trial that Thornton urgently needed commutation of his weekly benefits in 2012 and 2013, it took more than two-and-one-half months from the date of his letter to American Interstate in early March 2012 for Siems to file a petition in the workers' compensation commission seeking a declaration that Thornton was permanently and totally disabled. (App-I 693-694.) Siems objected at trial on foundation grounds when Thornton was asked why this delay occurred. (App-I 693.) Thornton did not recall why the delay occurred but said it did not bother him. (App-I 694-695.) Siems also was slow to respond to American Interstate's repeated attempts in mid-2012 to discuss settlement and mediation despite his client's "eager[ness] to settle his claim." (App-I 1586-1587; App-II 774.)

Mediation finally occurred in October 2012 in Omaha. (App-I 695.) American Interstate's final offer was a lump sum of $800,000 plus the funding of a Medicare Set-Aside Account ("MSA") and Custodial Medical Account ("CMA"). (App-II 663.) The MSA would cover medical needs that otherwise would be covered by Medicare; if the MSA for some reason ran out of money, Medicare would cover the expenses. (App-I 1125, 1154-1155.) Thornton would not under any circumstances have to pay out-of-pocket for Medicare-eligible items. (App-I 1154-1155, 1592.) The CMA was designed to cover non-Medicare medical needs. (App-I 1125-1126.)

Thornton did not have a good understanding for how the MSA and CMA worked. (App-I 697.)

Thornton's final demand at mediation was a lump sum of $1,160,000 plus the funding of the MSA and CMA. (App-I 1147.) There was no scenario in which Thornton would receive a lump sum of $1,160,000 even if his workers' compensation case proceeded through hearings and he was successful at every stage. (App-I 1147.) Instead, he received a lump sum of approximately $753,000. (App-I 697, 1347-1348.) No witness explained why Thornton demanded $400,000 more in a lump sum than he could ever hope to obtain through litigation. (*See, e.g.*, App-I 697, 1147, 1353, 1590-1591.)

III. Litigation Regarding the Extent of Thornton's Disability.

Mediation was unsuccessful, so American Interstate began in late 2012 to investigate potential defenses to the PTD petition. (App-I 1527.) There have been other situations in Iowa in which a person with a similar spinal cord injury to Thornton's was determined to be less than permanently and totally disabled. (App-I 1358-1361, 1588.) Others with similar spinal cord injuries are amazed by how well Thornton functions. (App-I 671.) American Interstate's outside counsel, Cory Abbas, was comfortable

denying the allegation that Thornton was permanently and totally disabled pending further investigation. (App-I 1587-1588.)

The amount of time available to investigate was limited, however, because American Interstate agreed to an accelerated schedule in the workers' compensation proceeding that resulted in the case being heard in March 2013 – approximately 10 months after it was filed. (App-I 1597-1598.) American Interstate later agreed to waive post-hearing briefing, further accelerating the resolution of the case. (App-I 1618-1619.)

American Interstate's investigation included an independent medical examination of Thornton in late January 2013 and his deposition in early February 2013. (App-I 698-699, 2048-2053.) During the deposition, Thornton expressed interest in finding employment if his physical limitations could be accommodated. (App-I 700.) Based on this testimony, among other information, vocational rehabilitation expert Phil Davis issued a report stating Thornton might be capable of competitive employment and should pursue vocational rehabilitation opportunities. (App-II 62-65.)

In early 2013, Abbas and Siems exchanged numerous emails regarding the merits of Thornton's PTD petition, Davis's expert report, and other matters. (*See* App-II 39-47, 49-51, 58-59, 67-74, 104, 109-110, 111-112; App-Supp 69-71.) These emails, which were admitted over American

Interstate's objection (App-I 183, ¶¶ 32-33), were the subject of considerable attention at trial and involved statements from Siems on numerous issues of disputed fact (*see*, *e.g.*, App-I 1561-1562).

On March 11, 2013, Abbas sent an email to American Interstate expressing his belief that the Deputy Workers' Compensation Commissioner would find Thornton permanently and totally disabled and recommending the company stipulate to that conclusion. (App-I 1815-1816.) Shortly thereafter, Abbas and several American Interstate representatives participated in a conference call to decide what to do. (App-I 1537; App-II 817.) The participants decided to proceed to hearing because they were concerned Thornton was not being made aware of American Interstate's efforts to assist him with vocational rehabilitation services. (App-I 1538; App-II 817-818.) In addition, in the face of accusations from Siems, American Interstate wanted the Deputy Commissioner to know about the substantial benefits the company had provided to Thornton since 2009. (App-I 1538; App-II 817-818.)

The PTD hearing occurred on March 28, 2013. (App-I 1615.) The hearing lasted only one hour, and Thornton was the only witness. (App-I 1615-1617.) American Interstate did not dispute Thornton's entitlement to medical care for the remainder of his life and did not argue that Thornton

was capable of full-time employment (or anything close to it). (App-I 1539-1540.) The company instead merely argued that Thornton had limited residual earning capacity and was slightly less than 100% disabled. (App-I 1540-1541.) For his part, Thornton reiterated his interest in trying to find work, stating he would "love to try" any job opportunity that might exist. (App-I 701.) Siems stipulated prior to the hearing that Thornton's weekly wage rate was calculated correctly. (App-I 147-148.)

In late May 2013, the Deputy Commissioner issued a ruling finding Thornton permanently and totally disabled. (App-II 52-57.) American Interstate could have appealed the ruling, but instead merely moved to reconsider due to a factual error regarding whether Thornton was offered vocational rehabilitation services. (App-I 1444-1445, 1542-1544.) The motion to reconsider was granted, although the finding of permanent and totally disability was unchanged. (App-I 1544-1545; App-II 105-106.)

IV. Litigation Regarding Partial Commutation of Thornton's Benefits.

On May 29, 2013, Thornton filed a petition for partial commutation of his workers' compensation benefits. (App-I 1252.) The partial commutation proceeding took about one year to litigate, and was resolved in Thornton's favor in May 2014. (App-II 160-166.) American Interstate promptly paid the partial commutation in the approximate amount of $753,000. (App-I

633, 1146.) As a matter of law, American Interstate did not act in bad faith in connection with the partial commutation proceeding. *Thornton v. Am. Interstate Ins. Co.*, 897 N.W.2d 445, 470 (Iowa 2017).

To obtain partial commutation, Thornton had to satisfy the Deputy Commissioner that payment of benefits in a lump sum was in his best interests. *Id.* at 468. He did so by representing that he had a conservative investment plan that would protect the corpus of the trust. (App-I 633-634, 706-707.) The plan involved investing the lump sum in a non-stock-market-based mutual fund with AMP Wealth Management. (App-II 114, 117, 118.) His financial advisor provided several reports reflecting Thornton's intention to invest in this fund, including a report describing its performance dating to Thornton's accident in June 2009. (Id.) Thornton and his advisors agreed the lump sum should **not** be invested in a market-based fund like the S&P 500, as this would be too risky. (App-I 707, 757.) Thornton reiterated his intention to invest in the AMP Wealth Management fund in sworn testimony in March 2014 and subsequent briefing to the Workers' Compensation Commission:

> Mr. Thornton testified concerning his investment plans for the funds if a partial commutation were awarded . . . The reports of Brad Kingsbury provide a detailed and reasonable plan for the investment of Mr. Thornton's partial commutation proceeds . . . [T]he arrangement Mr. Thornton has entered into with his financial advisor [Kingsbury] and his brother make the financial

> set up of Mr. Thornton's funds as secure as a trust without having to incur the expense of establishing a trust . . . Mr. Thornton has shown to this Court that he has a reasonable plan for the investment of the funds . . . A partial commutation is in Claimant's best interest, the benefits of his investment plan clearly outweigh any perceived detriment and accordingly a partial commutation must be awarded.

(App-Supp. 62, 63, 65, 67) The Deputy Commissioner relied on Thornton's testimony in awarding partial commutation. (App-II 162.)

In contrast to Thornton's representations to the Deputy Commissioner, his counsel argued for the first time on retrial in this bad faith case that the jury should award damages based on what Thornton would have earned by investing his lump sum entirely in the S&P 500. (App-I 1795-1797). The district court denied American Interstate's pre- and post-trial motions seeking to preclude or remit an award of damages based on a previously-undisclosed theory that contradicted Thornton's prior representations. (App-I 181-182, ¶ 23, 184, ¶¶ 34-35, 224-225.)

Thornton was preapproved to purchase a home in Monona, Iowa, in January 2014 for the price of $125,000, subject to receiving partial commutation. (App-I 638-639; App-II 129.) He said the home sold before he received the commutation. (App-I 643.) The home was desirable to Thornton because it was a three-bedroom, single-story, ranch-style home. (App-I 639-640.) He has chosen, however, not to purchase or even look for

a home since receiving his lump sum in mid-2014 even though at least eight other single-story, ranch-style homes with three or more bedrooms have been available in Monona for $125,000 or less. (App-I 640, 642, 709-710; App-III 480-481.) Thornton's expert made no attempt at trial to quantify any loss he might have suffered as a result of his inability to purchase the home in 2014; instead, his attorney successfully urged the jury to award damages based on Thornton's monthly rent payments of $750 per month. (App-I 1663, 1797-1798.)

V. Replacement of Thornton's Wheelchair.

In early July 2014, Thornton's treating physician, Dr. Rogge, prescribed him a new power wheelchair. (App-I 2045-2047.) Thornton testified that he sent the prescription to Siems. (App-I 650-651.) Siems never mentioned the wheelchair to American Interstate until September 29, 2014. (App-I 1462-1463; App-II 401-403; App-III 429-430.) In unsworn statements from counsel table, Siems insisted he did not know about the prescription until sometime after September 10, 2014. (App-I 663, 1257-1258.)

Regardless of when Siems received the prescription, it is undisputed Dr. Rogge failed to prepare certain paperwork necessary for Thornton to be measured for his new wheelchair until, at the earliest, sometime in August

2014. (App-III 114-115.) Thornton did not visit the occupational therapist for a mobility evaluation until September 17, 2014. (App-I 654; App-III 116-120.)[2] Dr. Rogge prepared a Durable Medical Equipment ("DME") Order for the wheelchair on September 22, 2014. (App-III 122.) The wheelchair could not be built until the mobility evaluation occured and DME Order was prepared. (App-I 663, 1260, 1491-1492.)

Siems emailed the DME Order to Abbas on September 29, 2014; in turn, Abbas immediately forwarded the email to American Interstate Claims Manager Jami Rodgers, who immediately submitted the order to the vendor. (App-I 1497-1498; App-III 429-431.) On October 10, 2014, the vendor requested authorization for the wheelchair, which Rodgers provided via email within two hours. (App-III 143-145.) Thornton "really didn't understand how [the process for obtaining the wheelchair] worked." (App-I 665.) Items like wheelchairs and vans take longer to build for him because of his size. (App-I 669-670.)

On October 12, 2014, Thornton suffered bursitis or cellulitis in his elbow. (App-I 1466-1467.) He ended up being hospitalized for two days.

[2] Thornton is generally self-sufficient when it comes to medical care, including with respect to his wheelchair. (App-I 650, 678; App-III 116-120.)

(App-I 1466-1467.) Dr. Rogge thought the original wheelchair may have contributed to the problem and said he "hope[d]" a new wheelchair would be better. (App-I 254.) Thornton received the new wheelchair a few weeks after his hospitalization but has suffered two additional episodes of bursitis since then. (App-I 665-666, 1508-1509.)

VI. Bad Faith Litigation.

Thornton filed this bad faith case in December 2013, asserting American Interstate acted in bad faith when it: (1) refused to stipulate that he was permanently and totally disabled; and (2) defended his claim for partial commutation of his benefits. *Thornton*, 897 N.W.2d at 457-58. The district court granted partial summary judgment in Thornton's favor on both counts, concluding American Interstate lacked a reasonably objective basis for either decision. *Id.* In February 2015, the matter was tried to jury, which awarded $284,000 in compensatory damages and $25 million in punitive damages. *Id.* at 451. This Court reversed and remanded for new trial, holding as a matter of law American Interstate did not act in bad faith in contesting partial commutation. *Id.* This Court affirmed the holding that American Interstate acted in bad faith in handling the PTD litigation and remanded for new trial. *Id.* at 476. The Court explained: "Much of Thornton's $284,000 compensatory damage award was directly attributable to the delay in the

commutation award, including $14,000 in loss-of-use of money damages, $27,000 in loss of home equity, and part of the $118,000 in consequential damages for attorney fees incurred in the commutation proceedings." *Id.* at 470.

Retrial occurred in February 2018. Although this Court contemplated a lower compensatory damage award on retrial, the jury awarded Thornton $382,000 in compensatory damages, consisting of: Consequential damages (Attorney's Fees): $52,000; Loss of use of money: $150,000; Loss of mind and body: $100,000; Physical pain and suffering: $40,000; Mental pain and suffering: $40,000. The jury also awarded $6,750,000 in punitive damages. American Interstate filed timely post-trial motions for judgment notwithstanding the verdict or, in the alternative, remittitur and conditional new trial. Following a very short hearing, the district court denied the post-trial motions in an Order adopted wholesale from a proposed order submitted by Thornton's counsel. (App-I 198-209, 210-222.) This appeal followed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO GRANT JUDGMENT NOTWITHSTANDING THE VERDICT OR REMITTITUR AND CONDITIONAL NEW TRIAL WITH RESPECT TO COMPENSATORY DAMAGES.

A. Standard of Review and Preservation of Error.

American Interstate preserved error by moving in the district court for judgment notwithstanding the verdict or, in the alternative, remittitur and conditional new trial with respect to each category of compensatory damages. There is some uncertainty in this Court's precedent regarding whether a post-trial motion relating solely to damages should seek judgment notwithstanding the verdict pursuant to Iowa R. Civ. P. 1.1003 or conditional new trial pursuant to Iowa R. Civ. P. 1.1004 and 1010 (or both). *See, e.g., Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 768-69 (Iowa 2009) (addressing arguments relating to damages under Rules 1.1004 and 1.1010); *Watson v. Lewis*, 272 N.W.2d 459, 465-66 (Iowa 1978) (addressing arguments relating to damages under then-existing rule governing motions for judgment notwithstanding the verdict). In an abundance of caution, American Interstate therefore appeals the denial of both motions.

A motion for judgment notwithstanding the verdict should be granted if there is not substantial evidence to support the elements of the plaintiff's claim. *Doe v. Cent. Iowa Health Sys.*, 766 N.W.2d 787, 790 (Iowa 2009).

The Court must "review the evidence in the light most favorable to the nonmoving party." *Id.* "Evidence is substantial when reasonable minds would accept the evidence as adequate to reach the same findings." *Id.*

A motion for new trial should be granted pursuant to Iowa R. Civ. P. 1.1004 if, *inter alia*, the "verdict, report or decision is not sustained by sufficient evidence, or is contrary to law," in the event of "[e]rrors of law occurring in the proceedings, or mistakes of fact by the court . . . [or] [o]n any ground stated in rule 1.1003, the motion specifying the defect or cause giving rise thereto." A new trial may be ordered even if the Court concludes a motion for judgment notwithstanding the verdict should be denied. *See Roling v. Daily*, 596 N.W.2d 72, 76 (Iowa 1999).

If the Court determines the case was properly submitted to the jury but damages are not supported by the evidence, the Court "may order a remittitur as a condition to avoiding a new trial." *Jasper*, 764 N.W.2d at 777. "Generally, this standard means the award should be reduced to the maximum amount proved under the record." *Id.* (internal punctuation omitted). Iowa R. Civ. P. 1.1010(2) requires an appellate court to give the nonmoving party the opportunity to avoid a new trial by agreeing to a reduction in damages within 30 days after procedendo is issued. The Court also has the authority to dispense with the conditional new trial and simply

direct entry of judgment in the lower amount. *Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 835 (Iowa 1998).

The district court's ruling denying the motion for judgment notwithstanding the verdict or remittitur and conditional new trial was adopted wholesale from the proposed order submitted by Thornton. This Court therefore "must scrutinize the record more carefully when conducting [its] appellate review." *NevadaCare, Inc. v. Dep't of Human Servs.*, 783 N.W.2d 459, 465 (Iowa 2010); *see also Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 97 (Iowa 2011).

B. The District Court Erred by Failing to Grant JNOV or Remittitur With Respect to Loss of Use of Money Damages.

The jury awarded Thornton $150,000 in lost use of money damages, comprised of the following: (i) $114,000 in lost investment income from the delay in Thornton receiving his partial commutation; and (ii) $36,000 in lost home equity from his alleged inability to purchase a home.[3] Neither the law

[3] Thornton's counsel asked the jury to award $114,000 in lost investment income and $45,000 in lost home equity, for a total of $159,000. (App-I 1798-1799.) The jury's award of $150,000 essentially accepted this request except that it corrected a math error on the lost home equity issue. Counsel asked for "five years" of rent payments of $750 per month (i.e., $9,000 per year) even though only four years had passed since Thornton allegedly lost the opportunity to purchase a house.

nor facts permits this award – which was substantially higher than the $41,000 awarded in the original trial in February 2015 – to stand.

1. Judicial Estoppel, Collateral Estoppel, and Undisputed Facts Require JNOV or Remittitur of the Lost Investment Income Award.

The district court should have vacated or remitted Thornton's lost investment income award for several reasons, both legal and factual. First, as a matter of law, judicial estoppel precludes the award because Thornton took a position in the retrial of the bad faith case that was inconsistent with the position he successfully urged in the underlying partial commutation proceeding.

To obtain partial commutation, Thornton had to establish, among other things, the "reasonableness of [his] plans for using the lump sum proceeds." *Dameron v. Neumann Bros., Inc.*, 339 N.W.2d 160, 164 (Iowa 1983). He satisfied this burden by unequivocally representing to the Deputy Commissioner that he intended to invest his lump sum in a non-stock-market-based fund called the AMP Wealth Management fund (sometimes referred to colloquially as the "Dentist's Fund"). (App-I 633-634, 705-707; App-II 114, 117, 118.) The Deputy Commissioner accepted Thornton's position in awarding partial commutation. (App-II 162) ("I find that there is minimal risk that claimant's funds will be significantly depleted through his

stated investment plan. He has demonstrated a conservative investment approach and is not likely to lose a significant portion of the commuted funds in the conservative approach he testified he intends to pursue.")

In the bad faith retrial, Thornton changed positions and argued the jury should award loss of investment damages based on how his lump sum would have performed in the market-based S&P 500. Thornton's newfound position flies in the face of the judicial estoppel doctrine, which "prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding." *Wilson v. Liberty Mut. Grp.*, 666 N.W.2d 163, 166 (Iowa 2003) (quoting *Vennerberg Farms, Inc. v. IGF Ins. Co.*, 405 N.W.2d 810, 814 (Iowa 1987)). Having convinced the Deputy Commissioner he intended to invest the money in the AMP Wealth Management fund, it would violate "the integrity of the judicial process" to allow Thornton to argue to the jury that he intended to invest it in the S&P 500. *See id.* (judicial estoppel "prevent[s] deliberately inconsistent – and potentially misleading – assertions from being successfully urged in succeeding tribunals").

This Court has held on at least two occasions that judicial estoppel precludes a party from taking one position in a workers' compensation proceeding and a different position on the same issue in a later case in the

district court. *See Winnebago Indus. v. Haverly*, 727 N.W.2d 567, 573-75 (Iowa 2006) (employer who admitted liability for claimant's injury in alternate medical care proceeding was judicially estopped from later denying liability in district court proceeding); *Wilson*, 666 N.W.2d at 166-67 (estoppel prevented injured worker from bringing bad faith claim against insurer after having agreed in the Workers' Compensation Commission there was bona fide dispute as to the merits of his claim). *Haverly* and *Wilson* squarely apply and require judgment notwithstanding the verdict or remittitur of Thornton's lost investment income award.

The doctrine of collateral estoppel yields the same result. Collateral estoppel, or issue preclusion, prevents relitigation of an issue if:

> (1) the issue determined in the prior action is identical to the present issue; (2) the issue was raised and litigated in the prior action; (3) the issue was material and relevant to the disposition in the prior action; and (4) the determination made of the issue in the prior action was necessary and essential to the resulting judgment.

United Fire & Cas. Co. v. Shelly Funeral Home, Inc., 642 N.W.2d 648, 655 (Iowa 2002) (internal quotation omitted). Thornton's intended use of the lump sum was a litigated issue in both the workers' compensation proceeding and this bad faith case. The issue was clearly material and relevant to the disposition of the partial commutation petition (indeed, Thornton argued it at length in his briefing in that proceeding), and the

Deputy Commissioner's determination of the issue was necessary and essential to the resulting judgment, as he could not have granted Thornton's partial commutation petition without believing Thornton intended to invest the lump sum conservatively. *See Dameron*, 339 N.W.2d at 164. Collateral estoppel therefore provides an alternative legal basis for vacating the lost investment income award through judgment notwithstanding the verdict or remittitur.

Judgment notwithstanding the verdict or remittitur is also appropriate as a matter of fact. Not only did Thornton represent to the Deputy Commissioner that he intended to invest in the AMP Wealth Management fund, Thornton in fact invested in that fund when he received the lump sum in May 2014. He cannot now recover damages on the basis of some other hypothetical investment. *See Renze Hybrids, Inc. v. Shell Oil Co.*, 418 N.W.2d 634, 638-39 (Iowa 1988) (reversing jury award based on "theoretical deprivation of interest" theory relating to hypothetical interest payments on borrowed funds because there was "no evidence here that such money was borrowed").[4]

[4] In *Renze*, this Court remanded for entry of judgment in the reduced amount and without ordering conditional new trial. *Id.* at 638-39, 642. American Interstate urges the Court to exercise its discretion to do the same here.

The district court concluded – in a ruling adopted entirely from Thornton's proposed order and thus subject to heightened scrutiny – that judicial and collateral estoppel did not apply because "evidence was presented that Mr. Thornton would have been more risky with *a higher lump sum*, i.e., the lump sum he would have been provided had he received his lump sum earlier and not suffered attorney's fees as a result of American Interstate's bad faith conduct." (App-I 212 (emphasis in original).) This conclusion fails, first, because the relevant issue for judicial estoppel is whether there is inconsistency between the prior and current positions. *See*, *e.g.*, *Wilson*, 666 N.W.2d at 167. The answer here is clearly "yes," notwithstanding hypothetical arguments about what Thornton might have done in other circumstances.

Second, and similarly, Thornton provided no evidence the Deputy Commissioner would have approved the partial commutation had Thornton intended to invest in the S&P 500. The ruling instead overwhelmingly indicates the opposite. (App-II 162 (mentioning Thornton's "conservative" investment approach twice as justification for awarding partial commutation).) Thornton's claim that he would have invested the money in a riskier way therefore calls into doubt whether he would have received partial commutation in the first place – which is exactly the point. "Under

judicial estoppel, this [changing of positions for convenience] ordinarily cannot be permitted." *Haverly*, 727 N.W.2d at 575.

Third, Thornton did not offer expert testimony on the S&P 500 measure of damages in the first bad faith trial in February 2015 even though he was well aware by then of the impact of delay and attorney's fees on the size of the lump sum. It was only in the second bad faith trial – when this Court's ruling in the earlier appeal narrowed the timeframe for which he could claim lost investment damages to, at most, a 12-month period in which the AMP Wealth Management fund failed to grow – that Thornton began asserting the S&P 500 theory. Dissatisfaction with the consequences of an appellate ruling is not a valid reason to assert an inconsistent position. *See Spencer v. Annett Holdings, Inc.*, 757 F.3d 790, 797-98 (8th Cir. 2014).

Fourth, and finally, Thornton's argument that he would have invested the lump sum in the S&P 500 had he received it earlier and avoided certain attorney's fees is unsupported by the record. In 2013 and 2014, Thornton's counsel asked the investment advisor in correspondence submitted to the Workers' Compensation Commission whether the AMP Wealth Management fund "is [] the same recommendation you would have made for Toby if he had some figure to invest approximating $700,000 in the timeframe immediately after his accident." (App-II 121.) The advisor

responded in the affirmative and twice provided information for how the fund would have performed dating back to Thornton's injury in June 2009. (Id.; App-II 114, 117, 118.) It is disingenuous for Thornton now to argue he might have done something else with the money. Indeed, Thornton continued to admit in this bad faith trial that he "couldn't take the risk of the stock market crashing." (App-I 707.) His brother Tim, who assisted him with financial matters, agreed the S&P 500 was not an appropriate investment vehicle and said the plan was always to invest in the AMP Wealth Management fund. (App-I 757-758.) Similarly, in filings as early as November 2012, Thornton's counsel said the lump sum would be invested in "interest bearing stocks and bonds" – not the S&P 500. (App-II 78.) The district court should not have sustained a damage award based on an investment strategy Thornton never intended to employ.

In arguing the S&P 500 was the appropriate benchmark for lost investment income, Thornton relies entirely on the following testimony from his brother Tim: "Q. . . . They questioned you a little bit, too, about the conservative investment that . . . you had recommended for Toby. Had Toby received a larger lump sum at an earlier point in time, would [he] have been able to be a bit little (sic.) more risky with his investment? A. Yes, that's correct." (App-I 762.) Neither Tim nor any other witness ever testified that

the "bit . . . more risky" strategy would have involved investing the entire lump sum in the S&P 500; indeed, Tim disavowed the S&P 500 as an investment vehicle just moments earlier. Nor, again, did Thornton offer any evidence the Deputy Commissioner would have approved a "more risky" strategy. Moreover, the attorney's fees that allegedly reduced the amount of money Thornton had to invest were incurred primarily from settlement discussions and other non-bad faith conduct prior to October 25, 2012 or during the partial commutation litigation. There is no basis in the record to support Thornton's claim that American Interstate's conduct somehow justifies his inconsistent positions.

The Court instead should either grant judgment notwithstanding the verdict or remittitur to American Interstate on lost investment damages in their entirety or, in the alternative, remit the award to $9,079 – which was the amount of loss American Interstate's expert estimated based on a one-year delay according to the actual performance of the AMP Wealth Management fund. (App-I 1693.)[5] *See WSH Props., L.L.C. v. Daniels*, 761

[5] The AMP Wealth Management fund did not actually grow during the one-year period; instead, the $9,079 figure results from the fact that partial commutation involves the conversion of a claimant's remaining weekly benefits into a single lump sum. *See* Iowa Code § 85.47; App-III 457-462. Every weekly payment the insurer makes reduces the amount of *remaining* payments and thus reduces the size of the lump sum if and when partial commutation is awarded.

N.W.2d 45, 52 (Iowa 2008) (ordering remittitur where jury used the wrong standard to measure damages).

2. Judgment Notwithstanding the Verdict or Remittitur Is Also Appropriate for Lost Home Equity Damages.

The evidence is similarly insufficient to support the lost home equity portion – $36,000 – of the lost use of money award. Thornton's expert made no attempt to quantify the home equity Thornton allegedly lost. (App-I 1663 ("Q. Fair enough. All right. In terms of benefits of home ownership, you did not undertake to calculate the actual amount of home equity that Mr. Thornton would have right now if he had purchased a home in 2014, did you? A. That is correct.").) Instead, his counsel urged the jury to award the equivalent of "$750 for rent for five years. 12 months. Do the math. $45,000 that's been flushed down the drain, okay . . . I'm going to ask you to award $45,000 for the house." (App-I 1797-1798.)[6]

Undisputed facts show $750 per month does *not* represent Thornton's lost home equity. Any mortgage payment in that amount instead would have gone largely toward interest, taxes, and homeowners' insurance – none of which build equity. (App-I 747-749.) In addition, repair, maintenance, and

[6] As noted above, Thornton's counsel incorrectly asked the jury to award damages for "five years" even though only four years had passed since the lost opportunity to purchase the home. The jury corrected the error.

upkeep costs would need to be deducted from any calculation of lost equity, and a market assessment would be required to determine whether the home appreciated/depreciated in value. The district court should have granted judgment notwithstanding the verdict or remitted the lost use of money award by $36,000 to reflect Thornton's failure to prove such damages to any reasonable degree of certainty. *See, e.g.*, *Shannon v. Hearity*, 487 N.W.2d 690, 693 (Iowa Ct. App. 1992) (affirming directed verdict for defendants where plaintiffs' expert "did not consider [] historical costs" or "take into account the cost of repairs, gas, fuel, oil, utilities, insurance, real estate taxes, labor, and machine hire").

Shannon reflects Iowa courts' consistent recognition that damages cannot be recovered unless "there is proof of a reasonable basis from which the amount can be inferred or approximated." *Orkin Exterminating Co. v. Burnett*, 160 N.W.2d 427, 430 (Iowa 1968); *see also Data Documents, Inc. v. Pottawattamie Cty.*, 604 N.W.2d 611, 617 (Iowa 2000) (plaintiff failed to establish damages where it "presented no evidence concerning the market price . . ., any profits it made or would have made from the contract, or any expenses it saved as a result of the [defendant's] alleged breach"); *Schlitz v. Teledirect Int'l, Inc.*, 524 N.W.2d 671, 674-75 (Iowa Ct. App. 1994) (affirming directed verdict for defendant based on failure to provide

damages with reasonable certainty). Like the plaintiff in *Schlitz*, Thornton failed to satisfy his burden; instead, his damages estimate was "basically speculative in nature." 524 N.W.2d at 675. The district court erred in failing to follow this precedent. Reversal is appropriate.

C. The Evidence Is Insufficient to Support the Physical Pain and Suffering and Loss of Mind and Body Awards.

The jury's award of physical pain and suffering and loss of mind and body damages revolved solely around the alleged delay in Thornton obtaining a replacement wheelchair, which allegedly caused bursitis in Thornton's elbow in mid-October 2014. The district court should have granted judgment notwithstanding the verdict or remittitur on these awards because Thornton presented insufficient evidence that American Interstate caused any delay, much less that it did so in bad faith.

An insurer is liable for bad faith only when the evidence shows: "(1) that the insurer had no reasonable basis for denying benefits under the policy and, (2) the insurer knew, or had reason to know, that its denial was without basis." *Thornton*, 897 N.W.2d at 461-62 (quotations omitted). The first element is objective; the second is subjective. *Rodda v. Vermeer Mfg.*, 734 N.W.2d 480, 483 (Iowa 2007). A "denial" may occur when an insurer "unreasonably . . . delays delivery of necessary medical equipment." *Thornton*, 897 N.W.2d at 465. However, the insurer must knowingly or

recklessly disregard its obligations. *See Dolan v. Aid Ins. Co.*, 431 N.W.2d 790, 794 (Iowa 1988); *see also Boylan v. Am. Motorists Ins. Co.*, 489 N.W.2d 742, 744 (Iowa 1992) (mere negligence is insufficient).

If an insurer does not receive information necessary to address a claim, it has not acted unreasonably. *See Calvert v. Am. Family Ins. Grp.*, No. 04-1074, 2006 WL 126635, at *3-5 (Iowa Ct. App. Jan. 19, 2006) (no bad-faith delay where insurer was not informed of injury or given records until months after accident). Similarly, a delay that is not attributable to the insurer is not "unreasonable." *See AMCO Mut. Ins. Co. v. Lamphere*, 541 N.W.2d 910, 914 (Iowa Ct. App. 1995) (plaintiff caused delay); *Spencer v. Annett Holdings, Inc.*, 905 F. Supp. 2d 953, 973-74 (S.D. Iowa 2012), *aff'd* 757 F.3d 790 (8th Cir. 2014) (no bad faith if third party causes delay). Moreover, even when delay is unreasonable, the plaintiff must prove the insurer knew or should have known its actions were causing such delay. *See Spencer*, 905 F. Supp. 2d at 973-74.

Thornton's replacement wheelchair argument basically boils down to two facts: Dr. Rogge wrote a prescription on July 1, 2014, and Thornton did not receive the wheelchair until November 2014. Thornton failed to prove, however, that the intervening delay was caused by American Interstate; instead, the undisputed evidence established it was caused by others.

American Interstate cannot authorize or approve a replacement wheelchair until it receives a Durable Medical Equipment ("DME") Order from the claimant's medical provider. The DME Order, in turn, is prepared through the combined efforts of the treating physician, occupational therapist, and injured worker. Here, Dr. Rogge delayed completing necessary paperwork for the replacement wheelchair until at least August 2014, and Thornton did not meet with the occupational therapist for a mobility evaluation until September 17, 2014. American Interstate did nothing to cause these delays, as the company had no role in preparing Dr. Rogge's paperwork or making arrangements for Thornton's medical appointments. Instead, American Interstate's responsibilities began when it received the DME Order from Siems on September 29, 2014. (App-III 429-431 (Rodgers email to Abbas: "Thank you for sending [the DME Order and documents from Siems,] Cory. I had not received it yet.").) American Interstate promptly passed the DME Order on to the appropriate vendor. (Id.) Eleven days later, when the vendor completed *its* work and submitted a request for approval, American Interstate responded in one hour and forty-one minutes to provide unqualified approval for the request. (App-III 143-145 ("This is authorized.").) Nothing in this sequence of events was unreasonable or should give rise to bad faith liability.

The record shows Thornton could (and did) make arrangements for the new wheelchair without American Interstate's involvement. Thornton is generally independent with his care (App-I 1259, 1491-1492), did not need to ask for approval from American Interstate prior to the mobility evaluation (App-I 664, 1497; App-III 116-120), and even independently arranged for repairs to his *old* wheelchair without American Interstate's involvement (App-I 1259; App-III 139-140). It is further undisputed that the wheelchair vendor had already received Rogge's DME Order by September 29, 2014, and was in contact with Thornton's attorney without American Interstate's involvement. (App-I 1498; App-III 429-430.) Simply put, American Interstate has "no control over when Dr. Rogge makes [a] referral" or "when Mr. Thornton goes to get measured," nor does it "get in the middle of medical arrangements and medical activities between Mr. Thornton and his doctor." (App-I 1491-1492.)

In these circumstances, there is no basis for concluding American Interstate acted in bad faith or caused delay in the replacement of Thornton's wheelchair. *See Lamphere*, 541 N.W.2d at 914 (delay caused by insured's own actions "provide[s] an objectively reasonable basis for [delay]"); *Spencer*, 905 F. Supp. 2d at 974 (objectively reasonable basis existed where delay was attributable to third-party bill reviewer); *see also Calvert*, 2006

WL 126635 at *1-4 (insured's and her attorney's failure to notify insurer provided reasonable basis for delay). The Court should have granted judgment notwithstanding the verdict or remittitur with respect to the $40,000 physical pain and suffering award and $100,000 loss of mind and body award, both of which arose solely from the wheelchair issue.[7]

D. The District Court Should Have Remitted Most of the Consequential Damages Award of $52,000.

The district court next erred in failing to remit the award of consequential damages – i.e., attorney's fees – incurred as a result of American Interstate's bad faith. Undisputed facts show Thornton incurred the following attorney's fees:

- July 2009-February 2012: $8,200 in fees to Dubuque law firm O'Connor & Thomas for work unrelated to any PTD petition;
- February 1, 2012–May 21, 2012: $1,515.38 in fees to Erickson Sederstrom relating to preparation of PTD petition;
- May 21, 2012–October 25, 2012: $14,470.00 in fees to Erickson Sederstrom relating to settlement discussions and mediation;
- October 25, 2012–March 11, 2013 (the date of Abbas' email): $15,010.00 in fees to Erickson Sederstrom relating to PTD litigation;

[7] The Court should not order retrial if it accepts American Interstate's position on the replacement wheelchair, as the physical pain and suffering and lost mind and body awards are distinct from the other categories of damage. *See Bryant v. Parr*, 872 N.W.2d 366, 380-82 (Iowa 2015).

- March 11, 2013–end of PTD litigation: $2,135.00 in fees to Erickson Sederstrom relating to the PTD hearing and related matters;

- July 1, 2014–November 18, 2014: $4,230 in fees to Erickson Sederstrom relating to the replacement wheelchair;

- September 10, 2014: $5,433.66 in fees and costs to Erickson Sederstrom associated with Jami Rodgers' deposition in the bad faith case;

- February 2012–January 2018: $1,307.42 in unspecified costs incurred in connection with Thornton's file;

- **Total: $52,301.46**

(*See* App-I 613-614; App-II 446-448.) The district court should have remitted the consequential damages award because the jury erroneously awarded *all* fees and costs Thornton incurred (rounded down to the nearest thousand) and not merely those proximately caused by American Interstate's bad faith. The award should be reduced to $17,145.

First, the Court should remit the $23,185.38 in fees incurred by Thornton prior to October 25, 2012. The $8,200 in fees to O'Connor & Thomas, for example, were incurred before Thornton even filed a PTD petition and thus could not have been "caused by" American Interstate's bad faith in handling that petition. Similarly, the $15,985.38 in fees to Erickson Sederstrom through October 25, 2012, were incurred primarily in connection

with settlement discussions and mediation. Litigation of the PTD petition did not begin in earnest until after mediation failed. This Court has already concluded American Interstate did not act in bad faith in settlement negotiations prior to and during mediation. *See Thornton*, 897 N.W.2d at 467 ("All parties, including insurers, are entitled to engage in settlement negotiations . . . American Interstate's bad faith was in contesting Thornton's PTD status, not in offering structured settlement proposals."). The district court should have given effect to this Court's ruling by reducing the consequential damages award to exclude fees incurred prior to October 25, 2012.

Second, the Court should remit the $9,663.66 in fees and costs incurred between July and November 2014, including those associated with Jami Rodgers' September 2014 deposition. (App-II 447-448.) Rodgers' deposition was taken for this bad faith case and not because of the replacement wheelchair or any other issue in the Workers' Compensation Commission. (App-I 1257-1258.) The fees and costs incurred by Thornton during this period therefore were not "caused by" alleged bad faith and are not recoverable. Instead, Thornton's request for those fees is a backdoor attempt to circumvent this Court's earlier ruling that he is not entitled to recover fees incurred during this bad faith case. *See Thornton*, 897 N.W.2d

at 475. Similarly, for reasons explained above, American Interstate did not act in bad faith with respect to the replacement wheelchair, and thus any fees incurred during Thornton's unnecessary motion practice in the Workers' Compensation Commission should be remitted. *See id.*

When these reductions are taken into account, the "maximum amount [of consequential damages] proved under the record" is the $17,145 in fees Thornton incurred in litigating his PTD status after mediation failed. *Jasper*, 764 N.W.2d at 777. The Court should remand for entry of judgment or order remittitur and conditional new trial in this amount.

E. Summary.

In sum, this Court should order judgment notwithstanding the verdict and/or remittitur of $324,855 of the jury's compensatory damage award (including a reduction of $114,000 in loss of investment income, $36,000 in lost home equity, $100,000 in loss of mind and body, $40,000 in physical pain and suffering, and $34,855 in consequential damages) or in some lesser amount commensurate with the Court's ruling on each item of compensatory damages addressed above. This Court should direct the district court to enter judgment in the reduced amount of $57,145 (or whatever alternative amount the Court deems appropriate), *see Renze*, 418 N.W.2d at 638-39, or,

alternatively, order a conditional new trial that can be avoided if Thornton accepts the reduced award. *See* Iowa R. Civ. P. 1.1010(2).

II. THE DISTRICT COURT ERRED BY FAILING TO GRANT REMITTITUR AND CONDITIONAL NEW TRIAL WITH RESPECT TO THE PUNITIVE DAMAGE AWARD, WHICH VIOLATES STATE AND FEDERAL DUE PROCESS.

A. Standard of Review and Preservation of Error.

This Court reviews an award of punitive damages for correction of errors at law. *Wolf v. Wolf*, 690 N.W.2d 887, 893 (Iowa 2005). However, the excessiveness of a punitive damages award is reviewed *de novo*. *Id.* at 894 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003)). "Exacting appellate review ensures that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'" *Campbell*, 538 U.S. at 418 (quoting *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436 (2001)). The party seeking punitive damages must prove by "clear, convincing, and satisfactory evidence" that the defendant engaged in willful and wanton conduct. *Van Sickle Constr. Co. v. Wachovia Commercial Mortg., Inc.*, 783 N.W.2d 684, 689 (Iowa 2010) (citing Iowa Code § 668A.1(1)(a)).

American Interstate preserved error on this issue by moving for remittitur and conditional new trial in post-trial motions.

B. *The Punitive Damage Award of $6.75 Million Is Excessive Under State and Federal Due Process and Should Be Remitted.*

Compensatory and punitive damages awards serve different purposes. *Cooper*, 532 U.S. at 432. Compensatory damages are designed to redress loss, whereas punitive damages are meant for deterrence and retribution. *Id.* It is therefore "well established that there are procedural and substantive constitutional limitations on [punitive damage] awards. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *Campbell*, 538 U.S. at 416 (internal citations omitted). To ensure a punitive damage award complies with due process, courts must consider three guideposts: (1) reprehensibility of the defendant's misconduct; (2) disparity between actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages award and the civil or criminal penalties authorized or imposed in comparable cases. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996).

In *Campbell*, a watershed case on punitive damages, the Supreme Court recognized that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425. In fact, "an award of more than four times the amount of compensatory damages might be close to the line of constitutional

impropriety." *Id.* "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* Here, the punitive damage award of $6.75 million was nearly **18** times greater than the substantial compensatory damage award of $382,000 (which, for reasons set forth above, is itself far too large).

American Interstate is unable to locate a single post-*Campbell* insurance bad faith case anywhere in the nation involving substantial compensatory damages in which a court upheld a ratio of punitive to compensatory damages at or near 18:1. By contrast, the insurance bad faith cases rejecting such a large ratio and remitting to a 1:1 or single-digit ratio are almost too numerous to list. *See, e.g.*, *Arellano v. Primerica Life Ins. Co.*, 332 P.3d 597, 605-06 (Ariz. Ct. App. 2014) (remitting $1.1 million punitive damage award to $328,000, from a 13:1 ratio to 4:1); *Nardelli v. Metro. Grp. Prop. & Cas. Ins. Co.*, 277 P.3d 789, 806-09 (Ariz. Ct. App. 2012) (remitting $55 million punitive damage award to $155,000, reducing a 355:1 ratio to 1:1); *Leavey v. Unum Provident Corp.*, 295 F. App'x 255, 258-59 (9th Cir. 2008) (affirming remittitur of $15 million to $3 million, reducing a 7.5:1 ratio to 1.5:1); *Amerigraphics, Inc. v. Mercury Cas. Co.*, 107 Cal. Rptr. 3d 307 (Cal. Ct. App. 2010) (remitting $3 million award to

$500,000, reducing a 23:1 ratio to 4:1) *overruled on other grounds by Nickerson v. Stonebridge*, 371 P.3d 242 (Cal. 2016); *Walker v. Farmers Ins. Exch.*, 63 Cal. Rptr. 3d 507, 512-13 (Cal. Ct. App. 2007) (affirming remittitur of $8.3 million award to $1.5 million, reducing a 5.5:1 ratio to 1:1); *Hall v. Farmers All. Mut. Ins. Co.*, 179 P.3d 276, 286-87 (Idaho 2008) (remitting $660,000 award to $74,600, reducing a 35:1 ratio to 4:1); *Buhmeyer v. Case New Holland, Inc.*, 446 F. Supp. 2d 1035, 1047-50 (S.D. Iowa 2006) (remitting $275,000 award to $40,000, reducing a 28:1 ratio to 4:1); *Goddard v. Farmers Ins. Co. of Or.*, 179 P.3d 645, 667-71 (Or. 2008) (remitting $20.7 million award to $5.12 million, reducing 16:1 ratio to 4:1); *Jurinko v. Med. Protective Co.*, 305 F. App'x 13 (3d Cir. 2008) (remitting $6.25 million award to $2 million, reducing 3:1 ratio to 1:1); *Kimble v. Land Concepts, Inc.*, 845 N.W.2d 395, 404-09 (Wis. 2014) (remitting $1 million award to $210,000, reducing 14:1 ratio to 3:1).

In the face of this overwhelming body of law, a court would have to find American Interstate's conduct so much worse than every other reported insurance bad faith case that it would justify a ratio well in excess of the "outermost limit of the due process guarantee." *Campbell*, 538 U.S. at 425. The evidence comes nowhere close to satisfying this standard. Instead, careful analysis of the three guideposts demonstrates, at most, this case falls

within the heartland of insurance bad faith cases in which a punitive to compensatory ratio at or near 1:1 is the constitutional limit.

1. American Interstate's Conduct Was Not Reprehensible.

American Interstate's witnesses acknowledged at trial the company erred in deciding to proceed to hearing on the extent of Thornton's disability rather than stipulating to permanent and total disability. Undisputed facts showed, however, American Interstate made this decision because the company was: (a) confused by the unwillingness of Thornton's counsel to engage in meaningful settlement discussions even though Thornton was being offered what American Interstate genuinely believed were greater benefits than he could obtain through litigation; (b) concerned Thornton was not being informed of the vocational rehabilitation opportunities communicated to his counsel; and (c) concerned the Deputy Workers' Compensation Commissioner was not aware of the benefits that had been and were being provided to Thornton. (App-I 1159-1160; App-II 817.) These reasons are not legally sufficient to justify American Interstate's conduct under the bad faith standard, but they demonstrate the company was not acting reprehensibly.

To this day, evidence supports American Interstate's belief that its settlement offers were better than what Thornton obtained by proceeding to

hearing. The company offered more in lump sum cash, for example, than Thornton could have received through litigation, and was prepared to fund medical set-aside accounts at levels that would provide more than $4.2 million in future medical benefits even though Thornton's expected future medical expenses were only approximately $2.1 million. (App-I 1136, 1146, 1347-1348; App-II 665-670; App-III 81.) American Interstate further offered to allow Thornton to keep the residual from the Medicare Set-Aside Account (an outcome he could not possibly obtain through litigation) and would have obtained approval from the Center for Medicare & Medicaid Services before finalizing any such settlement, thus ensuring Thornton would never have to pay out-of-pocket on Medicare-eligible expenses even if that account unexpectedly ran out of money. (App-I 1153-1155.) This generous settlement offer – which American Interstate's experienced workers' compensation counsel described as "huge" and would have been the largest in the lengthy career of Claims Manager Luann Miller – in and of itself demonstrates the absence of reprehensibility, particularly given American Interstate's ongoing payment of indemnity and medical benefits at all times to the present. (App-I 1586; App-II 793-795.) Moreover, although Thornton began insisting during settlement negotiations that he wanted an "open file" settlement instead of the closed file arrangement American

Interstate proposed, he also complicated settlement negotiations by demanding approximately $400,000 more in lump sum cash than he could possibly hope to obtain through litigation.

Similarly, American Interstate's suspicion that Siems was not sharing information with his client regarding vocational rehabilitation opportunities turns out to have been correct. Thornton admitted during the PTD hearing he was unaware of those opportunities despite correspondence from Abbas to Siems on the subject, and said he would "love to try" to find a job if one existed that could accommodate his physical limitations. (App-I 1618.) Thornton even independently pursued a job opportunity at a lumberyard after the workers' compensation litigation ended. (App-I 1397-1398.) American Interstate's decision to proceed to hearing on PTD in part to make sure he was aware of vocational rehabilitation opportunities is not reprehensible at all – much less to the point of justifying an unprecedented award of punitive damages.

These facts, among others, help demonstrate the absence of reprehensibility under the five factors the Supreme Court has directed courts to consider: (1) whether the harm was physical as opposed to economic; (2) whether the tortious conduct evidenced an indifference to or reckless disregard of the health or safety of others; (3) whether the target of the

conduct was financially vulnerable; (4) whether the conduct involved repeated actions or was isolated; and (5) whether the conduct was the result of intentional malice or trickery. *Campbell*, 538 U.S. at 419.

First, with the exception of the wheelchair issue in mid-to-late 2014, there was no allegation – much less any evidence – that American Interstate caused any physical harm to Thornton. Instead, the harm was purely economic. *See, e.g., Goddard*, 179 P.3d at 665 (any physical or emotional trauma caused by an insurer's bad faith denial is not "physical harm" for purposes of determining reprehensibility).

With respect to the wheelchair, American Interstate did not act reprehensibly. American Interstate had no involvement in the two primary causes of the delay – Dr. Rogge's failure to complete necessary paperwork and Thornton's delay in visiting the Occupational Therapist to be measured. When American Interstate finally *did* have a role to play – i.e., when the vendor requested authorization for the wheelchair in October 2014 – American Interstate provided unconditional approval within two hours. There is nothing "reprehensible" about this sequence of events, particularly when they are viewed in the larger context of American Interstate paying every medical bill submitted to it since opening Thornton's file in 2009.

Second, for essentially the same reasons, the evidence did not establish that American Interstate acted with indifference or reckless disregard for Thornton's health or safety. To the contrary, Thornton admits American Interstate consistently met or exceeded his medical and other needs. He cannot identify a single medical expense the company failed to pay, expressed satisfaction with the benefits provided to him, and even felt comfortable enough to call the company for help in some of his most vulnerable moments. (App-I 674-675 ("Q. [] When you needed something, you felt like Luann Miller did a pretty good job of helping you get it, didn't she? A. Yes. . . . Q. Okay. When you and Tara decided to separate, you actually called Luann Miller that day for help, didn't you? A. Yes.").)

Third, Thornton was not financially vulnerable because American Interstate paid full indemnity and medical benefits to him throughout the period of the alleged bad faith. There was no evidence American Interstate ever considered cutting off Thornton's benefits; instead, even in the most contentious periods, internal claims notes reflected the company's intention to "continue to issue timely benefit checks as well as authorize and pay for appropriate medical care timely." (App-I 1546-1547.)

Fourth, American Interstate's bad faith conduct was not "repeated" in the way the Supreme Court has interpreted and used that term. In *Campbell*,

the Court concluded that an alleged ongoing pattern of conduct against a single insured is not the type of "repeated misconduct" contemplated in the reprehensibility analysis. 538 U.S. at 423 (rejecting Utah Supreme Court's conclusion that insurer was a recidivist). Instead, the insured must identify instances in which the insurance company engaged in similar misconduct against others. *Id*. Thornton offered no such evidence here. To the contrary, the evidence showed American Interstate has never before been adjudicated to have acted in bad faith (App-I 1041) and has been *accused* of bad faith in litigation only twice during the 31-year career of its Senior Vice President of Claims, Chris Lestage. (App-I 1027, 1029, 1041.) It clearly is not a recidivist.

Even with respect to Thornton, the bad faith conduct was isolated. American Interstate has worked with Thornton since 2009, yet the only bad faith occurred in connection with the PTD hearing – and only in the midst of confusing settlement conduct from Thornton's side. In context, there is no basis for concluding American Interstate engaged in "repeated" misconduct.

Fifth, there was no intentional malice or trickery. As noted above, this Court has already held American Interstate's conduct did not rise to the level of connivance or oppression – a conclusion reinforced by evidence in the retrial. Thornton presumably will argue to the contrary by relying on the

alleged "deception" of Dr. Rogge by Abbas regarding who Abbas represented. In a case involving many years of interactions between American Interstate and Thornton, this is an awfully slender reed on which to support such a large punitive damage award. In any event, Abbas's April 1, 2013, letter to Rogge states in the very first sentence that Abbas represented American Interstate and thus shows the absence of deception. (App-III 108.)

In sum, the reprehensibility factors weigh in favor of a conclusion of little or no reprehensibility, and certainly nothing justifying a $6.75 million award.

2. The Ratio of Punitive to Compensatory Damages Weighs Overwhelmingly In Favor of Remittitur.

Turning to the Supreme Court's second guidepost – the ratio between punitive and compensatory damages – it cannot seriously be doubted that the $382,000 in compensatory damages awarded to Thornton is "substantial." This case therefore squarely implicates the Supreme Court's conclusion that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Campbell*, 538 U.S. at 425. Since *Campbell*, courts have consistently followed the Supreme Court's direction and held that due process permits a ratio of only 1:1 or single digits in even the worst of

insurance bad faith cases involving substantial compensatory damages. *See*, *e.g.*, *Buhmeyer*, 446 F. Supp. 2d at 1047-50 ($10,000 compensatory damage award substantial enough to require remittitur to 4:1 ratio); *Hall*, 179 P.3d at 323-24 (same conclusion with respect to $18,650 compensatory damage award). The 17.7:1 ratio[8] clearly violates due process as recognized in *Campbell*.

The Oregon Supreme Court's decision in *Goddard*, 179 P.3d at 663-71, is instructive. The insurer engaged in bad faith conduct that included "stonewalling," "low-balling," fraudulent manipulation of the claims evaluation process, and refusal to settle even when the matter reached trial and an adverse ruling was virtually guaranteed. *Id.* The Oregon Supreme Court concluded the defendant's conduct, which resulted in $1.28 million in actual and potential harm, was as bad as any economic wrongdoing it could conceive. *Id.* at 670. Nonetheless, the Court had "little difficulty in concluding that the $20 million punitive damages award that the jury awarded in this case is 'grossly excessive,' as that term is used by the Supreme Court." *Id.* at 668. The Court remitted the award to a ratio of 4:1,

[8] The ratio grows even higher if the Court remits the compensatory damage awards. If the awards for loss of use of money and loss of mind and body are reduced to $0, for example, the ratio becomes 51:1.

which represented the "highest permissible award" under the due process clause. *Id.* at 670.

Case law abounds with similar holdings. In *Arellano*, 332 P.3d 597, the insurer forged the insured's signature and initials on an insurance application, unilaterally reduced the policy limits without the insured's knowledge, attempted to cancel the policy without notice, and engaged in various other acts falling "on the middle to high range of reprehensibility." *Id.* at 605-06. Nonetheless, the Arizona Court of Appeals concluded "the ratio of 13:1 is too high and we therefore conclude a 4:1 ratio is appropriate and warranted," thus reducing a $1.1 million award to $328,000. *Id.* at 606; *see also Nardelli*, 277 P.3d 789 (remitting to 1:1 ratio despite evidence showing the insurer made no meaningful investigation before valuing the claim, aggravated the insured's mental health condition, hurt the insured's credit score, and otherwise acted unreasonably); *Ceimo v. Gen. Am. Life Ins. Co.*, No. 2:00-CV-1386 FJM, 2003 WL 25481095, at * 2 (D. Ariz. Sept. 17, 2003), *aff'd* 137 F. App'x 968 (9th Cir. 2005) (finding 1:1 ratio of punitive to compensatory damages to be the "maximum allowed under the due process clause of the Constitution" in a case involving delayed disability payments).

In *Hall*, 179 P.3d 276, the Idaho Supreme Court remitted a punitive damage award from $660,000 to $74,600 – thus reducing the ratio from 35:1 to 4:1 – in a case involving an insurance company's delay tactics in settling a claim under a homeowners' policy. The Court found the insurer's conduct to be "highly inconsiderate and perhaps even exploitive," but nonetheless held the conduct did not justify an award "over eight times the ratio that 'might be close to the line of constitutional impropriety.'" *Id.*, 179 P.3d at 286 (quoting *Campbell*).

In *Buhmeyer*, 446 F. Supp. 2d at 1047-50, the United States District Court for the Southern District of Iowa (Pratt, J.) remitted a punitive damage award from $275,000 to $40,000 in a case involving $10,000 in compensatory damages where the insurer denied a workers' compensation claim without reasonable basis against a financially-vulnerable claimant. The court characterized the defendant's conduct as "fall[ing] somewhere in the middle of the reprehensibility analysis" and concluded that $40,000 and a 4:1 ratio would be consistent with due process in light of, among other things, the available civil penalties of $54,000 under Iowa law for similar conduct. *Id.* at 1050.

Finally, and most importantly, *Campbell* itself involved bad faith claims handling practices in which the insurer altered company records,

"disregarded the overwhelming likelihood of liability," and misled the insureds regarding whether their assets would be safe from a verdict. 538 U.S. at 419. Nonetheless, the Supreme Court found the case to be "neither close nor difficult. It was error to reinstate the jury's $145 million punitive damages award." *Id.* at 418.

The district court erroneously declined to follow this overwhelming body of law, instead concluding that "even higher ratios [than 18:1] have been upheld post *Campbell*." (App-I 215-216.) Careful review of the cases on which the court relied demonstrate they have been misapplied.[9] For example, the Order fails to mention that the ratio in *Poage v. Crane Co.*, 523 S.W.3d 496 (Mo. Ct. App. 2017) was 12:1 only after netting out the portion of compensatory damages paid by joint tortfeasors; the true ratio was 7:1. *Id.* at 523. Moreover, *Poage* involved a wrongful death claim arising out of a "gruesome disease" caused by the defendant's conduct. *Id.* at 524. This is a far cry from an insurance bad faith case involving primarily or solely economic damages.

Several other cases cited by the district court (*Gov't Emps. Ins. Co. v. Gonzalez*, 403 P.3d 1153, 1165 (Alaska 2017), *Saint Joseph Healthcare, Inc.*

[9] In fairness to the district court, it simply adopted and entered the proposed order exactly as it had been submitted by Thornton and thus may not have realized the misapplication.

v. Thomas, 487 S.W.2d 864 (Ky. 2016), and *Kennedy v. Supreme Forest Prods.*, 295 F. Supp. 3d 113 (D. Conn. 2017)) involved minimal compensatory damage awards and thus followed the principle that greater ratios are permitted when compensatory damages are small. The district court erroneously failed to recognize that "[t]he converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Campbell*, 538 U.S. at 425. Given the substantial compensatory award here, the ratios in *Gonzalez*, *Thomas*, and *Kennedy* (the latter two of which are not, in any event, insurance bad faith cases) provide no guidance. Finally, the district court cited several state and federal cases predating *Campbell*. Whatever portion of those cases might have survived *Campbell* is insufficient to sustain an 18:1 ratio.

In sum, existing case law – properly interpreted – overwhelmingly demonstrates that a ratio of 18:1 is excessive in an insurance bad faith case involving substantial damages and must be reduced to something at or near 1:1.

3. The Level of Civil Penalties Authorized in Comparable Cases Reinforces the Excessiveness of the Punitive Damage Award.

The comparison of the $6.75 million award to civil penalties authorized for similar conduct further confirms American Interstate's due process rights were violated. *See Campbell*, 538 U.S. at 428 (third guidepost is "the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases'") (quoting *Gore*, 517 U.S. at 575).

Iowa Code § 86.13 reflects the Iowa Legislature's belief that a penalty of fifty percent of workers' compensation benefits unreasonably delayed or denied is sufficient to deter an insurer's inappropriate conduct. In *Buhmeyer*, 446 F. Supp. 2d at 1050, Judge Pratt recognized that Iowa Code § 86.13 was the appropriate benchmark against which to measure the jury's punitive damage award in a workers' compensation bad faith case. The same conclusion is appropriate here.

Under § 86.13, there was *no* penalty that could have been awarded because American Interstate paid full benefits to Thornton throughout the workers' compensation litigation. Thornton therefore did not even ask for a penalty from the Deputy Commissioner. It follows that this guidepost

further demonstrates the jury's $6.75 million award does not comport with due process and must be remitted to a ratio at or near 1:1.

III. IN LIGHT OF THE POSSIBLE THIRD TRIAL, THIS COURT SHOULD PROVIDE DIRECTION TO THE DISTRICT COURT REGARDING THE IMPERMISSIBILITY OF ATTORNEY SIEMS SERVING AS TRIAL COUNSEL AND THE LOSS OF MIND AND BODY JURY INSTRUCTION.

In addition to the arguments raised above, which justify judgment notwithstanding the verdict and/or remittitur and conditional new trial, American Interstate respectfully requests that the Court address two additional issues that are likely to arise on remand if conditional new trial is granted and Thornton elects retrial instead of accepting the remitted award. To be clear, American Interstate is *not* asking this Court to grant new trial on the basis of these two additional issues (although existing precedent would warrant this relief).[10] Rather, American Interstate is simply asking this Court to exercise its discretionary authority to provide direction to the district court regarding the third trial if it should occur. *See, e.g., Cawthorn v. Cath. Health Initiatives Iowa Corp.*, 743 N.W.2d 525, 528 (Iowa 2007) (addressing issues likely to arise on retrial).

[10] This matter has already been tried to jury twice, and American Interstate believes the parties and district court alike are ready for finality.

First, the Court should disqualify Attorney Siems from serving as trial counsel in light of his heavy involvement in the underlying workers' compensation proceedings and the extent to which his own actions and decisions are at issue. *See, e.g.*, *Weigel v. Farmers Ins. Co.*, 158 S.W.3d 147, 153-55 (Ark. 2004) (disqualifying counsel in bad faith case who had represented litigant in underlying insurance dispute); *Nelson v. Hartford Ins. Co. of the Midw.*, No. CV 11-162-M-DWM, 2012 WL 761965, at *4-8 (D. Mont. Mar. 8, 2012) (same); *Adeniyi-Jones v. State Farm Mut. Auto. Ins. Co.*, Civ. Action No. 14-7101, 2016 WL 3551486 (E.D. Pa. June 30, 2016) (same); *Korfman v. Kemper Nat'l Ins. Co.*, 685 N.Y.S.2d 282 (N.Y. App. Div. 1999) (same); *155 N. High, Ltd. v. Cincinnati Ins. Co.*, 650 N.E.2d 869, 872-74 (Ohio 1995) (same). The district court denied American Interstate's pretrial motion to disqualify Siems on this basis, instead accepting Siems' representations that he had no unique knowledge or information regarding settlement discussions or other controverted issues and that any evidence American Interstate needed on such issues could come from Plaintiff himself. (App-I 124.)

These representations were untrue. During trial, Siems: (1) objected that Thornton lacked foundation to testify about American Interstate's settlement proposals, which Thornton later confirmed he "didn't really

understand" (App-I 629, 695, 718-719); (2) objected that Thornton lacked foundation to explain why Siems had waited two-and-one-half months to file a PTD petition in early 2012 despite Thornton allegedly facing a "financial emergency" during that period (App-I 693); (3) objected on foundation grounds to Thornton testifying about whether American Interstate covered all medical expenses and whether Thornton was claiming to have been underpaid in his weekly indemnity benefits (App-I 701-703); (4) volunteered from counsel table his disagreement with Thornton's testimony regarding when Siems became aware of the prescription for the replacement wheelchair (App-I 663 ("MR. SIEMS: Let me interpose an objection. First, it's [Thornton's testimony] not the truth of the matter and, second, it presumes what I would or wouldn't have known. I don't think this witness can speak to that.") (App-I 1257-1258 ("Q [by Siems]. Right. And in that [September 10] deposition I asked you about that July 1 [prescription] - strike that. I did not. We didn't even know about it at that time."); (5) offered as exhibits many of his own emails containing hotly-contested statements of fact[11]; and (6) made arguments in the bad faith trial that

[11] *See, e.g.*, App-II 43-45, 49-50 (emails from Siems claiming there would be negative mental health implications for Thornton if he participated in vocational rehabilitation even though Thornton's prior mental health records and own testimony showed this was not true); App-II 51 (email from Siems claiming Abbas made "threats" during mediation, which Abbas denied).

contradicted some of the statements in his own emails.[12] In a case where Thornton and his counsel attacked American Interstate for alleged delays and unreasonable settlement conduct, American Interstate's inability to question the most knowledgeable witness on Thornton's side (i.e., Siems) about those issues was highly prejudicial. Siems was, for example, the only witness who could explain why Thornton chose to make a final settlement demand during mediation in October 2012 for $400,000 more in cash than Thornton could hope to recover through litigation in the Workers' Compensation Commission. The district court should not have allowed Siems to serve as trial counsel in such circumstances.

Siems' most egregious misconduct occurred when he began arguing that American Interstate underpaid Thornton when it provided weekly indemnity payments from July 2009 through May 2014. (App-I 959-962.) ***Siems himself had stipulated in the Workers' Compensation Commission in March 2013 that the weekly payment amount was correct*** (App-III 147-148), and thus his attack on American Interstate for allegedly not paying

[12] *See*, *e.g.*, App-II 41-42, 43-45, 49-50 (emails from Siems interpreting American Interstate expert Phil Davis as expressing the opinion that Thornton was not permanently and totally disabled, in contrast to Siems' argument at trial that Davis did *not* express such an opinion); App-II 49-50 (emails from Siems criticizing American Interstate's "offer" of vocational services, in contrast to his argument at trial that no such "offers" were made).

enough in benefits was essentially an attack on himself and his stipulation. When this contradiction was pointed out, Siems began (over objection) asking hypothetical questions of American Interstate's corporate representative regarding why an attorney in Siems' position reasonably might have stipulated to an incorrect wage rate in order to expedite the workers' compensation litigation. (App-I 961 ("Q [by Siems]. . . . So we can see that when his attorney [Siems] says we're going to stipulate to the wage because we've asked for it; they won't give it to us . . . You can see where he [Siems] would do that, wouldn't you?"); *id.* App-I 963 ("THE COURT [after overruling an objection]: The simple question is do you understand why he [Siems] would have signed the stipulation. THE WITNESS: I understand what he's suggesting that he's – why he did that, yes."); *id.* App-I 969-970 ("Q. . . . So you can agree – you can understand, again, why someone [Siems] might stipulate to wages to take your ability away to appeal and draw this out further; fair?").) These questions were plainly improper and illustrate the extent to which Siems placed himself in the middle of disputed issues of fact.

To make matters worse, Siems later admitted on the witness stand during an offer of proof that he ***could not remember*** why he stipulated in March 2013 that the weekly payment amount was correct. (App-I 1023-

1024 (“I’ve got to be honest, five years ago, I honestly don’t remember. I don’t remember what was going through my mind.”).) In other words, the insinuation in Siems’ questioning of American Interstate’s witness that he stipulated to prevent further delay was a farce. Siems tried to justify the farce by arguing that an attorney is permitted to “look[] for arguments to give to the jury” even when the attorney was at the center of the underlying events and cannot say as a matter of fact whether the argument is true. (App-I 1024 (“I don’t remember what was going through my mind. But as I reviewed this file in getting ready for now, I looked at this and I said this is an issue. I think it’s red meat and I think I’m going to give it to the jury.”).) He also taunted American Interstate’s counsel (“I would think that I came up with some pretty good arguments because I got you flustered and so I think the jury is hearing this. I think I’m doing a good job of it.”) and admitted he “do[es] a lot of shoot from the hip when it comes to research.” (App-I 1021, 1024.)

It is difficult to imagine a clearer example of misconduct under Iowa R. Prof. Conduct 32:3.7 than an attorney who injects himself into a case by attacking the substance of his own stipulation, asks hypothetical questions of the opposing party’s witness to try to establish a reasonable justification for the stipulation, and then is forced to admit under oath that the purported

justification is not true as a matter of fact. For this, and other reasons, the Court should disqualify Attorney Siems from serving as trial counsel if there is a third trial in this matter. *State v. Vanover*, 559 N.W.2d 618, 629-34 (Iowa 1997).

The Court also should direct the district court not to allow the jury to award loss of mind and body damages. It is undisputed that Thornton did not suffer any functional impairment as a result of American Interstate's bad faith (although he did, of course, suffer such impairment from the underlying accident). Instead, any "loss of mind and body" he experienced from American Interstate's conduct is subsumed within the category of pain and suffering damages. *See Brant v. Bockholt*, 532 N.W.2d 801, 804-05 (Iowa 1995) (district court erred in instructing jury that it could award damages for loss of mind and body without showing of any loss of function, notwithstanding physical and emotional pain). The district court erred under *Brant* in allowing the jury to award loss of mind and body damages over American Interstate's objection, and this Court should ensure the error is not repeated in the event of a third trial.

CONCLUSION

The district court erred in refusing to award judgment notwithstanding the verdict or remittitur and conditional new trial on the compensatory and

punitive damage awards. American Interstate respectfully requests that this Court reverse and remand for entry of judgment in a reduced amount or grant remittitur and conditional new trial.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests to be heard orally upon the submission of this appeal.

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PROOF OF SERVICE

I hereby certify that on the October 5, 2018, I electronically filed the foregoing Final Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the below listed attorneys. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 13,623 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in Times New Roman 14 pt.

Dated: October 5, 2018

/s/ V. Drake

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