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 POTTAWAMATTIE COUNTY
HON. JAMES HECKERMAN

APPELLANT'S FINAL REPLY BRIEF

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I. THE COURT SHOULD STRIKE THE FACTUAL ASSERTIONS IN THORNTON'S BRIEF UNSUPPORTED BY CITATION TO THE RECORD.

Iowa R. App. P. 6.903(2)(f) requires "[a]ll portions of the statement [of facts] shall be supported by appropriate references to the record or the appendix in accordance with rule 6.904(4)." Thornton repeatedly violates this Rule by making factual assertions (1) without providing a record citation or (2) for which the citation provides no support. The Court should strike these assertions. *See Tratchel v. Essex Grp., Inc.*, 452 N.W.2d 171, 174 (Iowa 1990) ("Courts should not be required to search the record to verify the facts and actions taken and are warranted in ignoring uncited contentions, especially in cases where the record is voluminous.") *abrogated on other grounds by Comes v. Microsoft Corp.*, 775 N.W.2d 302, 307-10 (Iowa 2009).

The frequency and substance of Thornton's violations of Rule 6.903(2)(f) make clear this was not mere procedural error, but rather an intentional effort to suggest the record more strongly supports his claims than it actually does. For example, many of Thornton's unsupported contentions revolve around settlement discussions, during which he accuses American Interstate of "attempt[ing] to convince Thornton to accept a lump

sum settlement that would have saved American about $2.3 million from its actual liability." (Br. 17; *see also* Br. 18-19, 53, 56.) This entire line of attack is inappropriate because this Court already concluded American Interstate's settlement conduct was not bad faith. *See Thornton v. Am. Interstate Ins. Co.*, 897 N.W.2d 445, 466-67 (Iowa 2017). Even setting this Court's decision aside, however, there is no evidence in the record that American Interstate was trying to save $2.3 million through its settlement proposals; to the contrary, the company used annuities to offer $2.1 million *more* in medical benefits to Thornton than it expected him to need while simultaneously providing full weekly indemnity benefits. (App-I 1134-1136; App-II 671, 818; App-III 15-81.) Indeed, at trial Thornton's counsel abandoned an ill-fated attempt with American Interstate's corporate representative to prove the company was trying to save "millions" through settlement, which likely explains the absence of record citations in his Brief. (App-I 938-940.)[1]

[1] Thornton's counsel initially had the witness compare the cost of the settlement proposals against American Interstate's reserves to try to prove "millions" in savings. (App-I 938-940.) Counsel realized, however, this was not the proper comparison because the reserves included more than $1 million that had *already been paid*. (Id. App-I 939-940 ("Q. All right. Now I'm wrong...").) That left purported savings of "[a]bout a million bucks." (Id.) But even *that* number was wrong because the reserves were not discounted to present value and thus counsel was making an "apples to

Thornton also inaccurately claims, without citation, "[t]he record shows that had [he] accepted either of [the settlement] options...he would now be without any resources to cover non-Medicare medical expenses, a fact that American was seemingly aware of as it faced constant pressure to increase its anemic reserves." (Br. 17-18.) The record shows no such things. It is instead undisputed that American Interstate's offers included a Custodial Medical Account ("CMA") with sufficient funding to provide nearly $3.3 million for future non-Medicare expenses. (App-I 1135; App-II 666.)

Thornton makes other false and unsupported factual assertions, some of which are discussed below. For now, a few more examples suffice: American Interstate "refused to ever voluntarily pay [him] the benefits" (Br. 55), (*contra* App-I 689-690, 702, 1047-1050 (American Interstate voluntarily began making benefit payments immediately after Thornton's accident)); mediation occurred before Thornton filed his PTD petition (Br. 19), (*contra* App-I 1243; App-III 424 (PTD petition was filed May 24, 2012 and mediation occurred on October 25, 2012)); Attorney Siems told American Interstate "[i]mmediately after becoming involved" that Thornton

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oranges" comparison of the discounted, present-day cost of settlement against *un*discounted future medical expenses. (Id. App-I 1134.)

was PTD and entitled to partial commutation (Br. 18); (*contra* App-II 26-28; App-III 146, 424 (Siems became involved in early March 2012, did not file a PTD petition until late May 2012, and is not on record mentioning partial commutation until September 2012)); American Interstate's counsel waited until after the Deputy Commissioner's PTD ruling to approach Dr. Rogge for a second time about vocational rehabilitation (Br. 24), (*contra* App-Iii 52-57; App-III 108-113 (second letter to Dr. Rogge was April 1, 2013; ruling was May 23, 2013)); and American Interstate has not acknowledged its error in proceeding to hearing on PTD (Br. 22, 59), (*contra* App-I 1160 ("Q…[W]as this the right decision for you to make [to go to hearing]? A. No, sir.")).

Similarly, although not necessarily *contradicted* by the record, Thornton provides no citation for many other statements of "fact," including his contention that "[d]uring mediation American's representative acknowledged that Thornton was 'probably' permanently totally disabled and would 'probably' prevail in any action to have those payments made in the form of a partial commutation." (Br. 18-19). American Interstate's counsel, Cory Abbas, never testified to making such statements, and the only person who could have established otherwise was Attorney Siems – who

insisted prior to trial he did *not* have firsthand knowledge of controverted facts.

It should go without saying that American Interstate's conduct must be evaluated on the basis of the record as it exists, and not through distortions or misstatements of fact. Thornton repeatedly fails to comply with this basic expectation of appellate advocacy, and the factual contentions for which no appropriate record citation is provided should be disregarded. *See Tratchel,* 452 N.W.2d at 174.

II. THORNTON OFFERS NO PERSUASIVE REASON TO SUSTAIN THE COMPENSATORY DAMAGES AWARDS.

A. The Lost Investment Income Award Remains Unsupported.

Thornton's misstatements pervade not just his Statement of Facts, but also his legal argument. With respect to lost use of money damages, he criticizes American Interstate for "fail[ing] to reference" certain testimony from Tim Thornton that, in Thornton's view, "unquestionably" shows he would have invested more aggressively had he received his lump sum sooner. (Br. 33 (citing App-I 762-763).) His claim that American Interstate "fail[ed] to reference" Tim's testimony is patently false; its Brief quoted verbatim the very testimony on which Thornton relies. (Appellant's Br. 40-41.)

The problem for Thornton – which he fails to address in any meaningful way – is that Tim's testimony is factually and legally insufficient to sustain a damage theory that contradicts the theory Thornton successfully asserted before the Workers' Compensation Commission. As a factual matter, Tim's testimony was merely that Thornton could have been "a bit little (sic.) more risky" with his investment had he received the lump sum sooner. This is a far cry from suggesting Thornton would have invested the *entire lump sum* in the S&P 500, particularly where both Thornton and Tim disavowed the stock market as an investment option and Thornton's counsel (a) never mentioned the S&P 500 in partial commutation filings dating to November 2012, and (b) instead indicated to Thornton's financial consultant that the lump sum would have been invested in the AMP Wealth Management Fund no matter when it was awarded or in what amount. (App-II 78, 114, 117, 118, 121, 463.) As the jury's award was premised on Thornton investing the entire sum in the S&P 500, it must be reduced under judicial and collateral estoppel and for lack of sufficient evidence.

Thornton's statement that he was "forced to pay attorney's fees to receive [the partial commutation]" (Br. 33) highlights the insufficiency of the evidence. This Court already concluded as a matter of law that American Interstate did not act in bad faith in resisting partial commutation.

Thornton, 897 N.W.2d at 470. It follows, also as a matter of law, that any fees Thornton incurred in obtaining partial commutation did not result from bad faith and cannot support an award of compensatory damages. *See id.* Thornton's reference to those fees illustrates his dissatisfaction with this Court's opinion but does not support his S&P 500 theory of damages.

Thornton treads even deeper into inappropriate territory when he argues that "[b]y design, American continues to deprive Thornton of this opportunity by delaying his day in court and driving up his attorneys' fees." (Br. 33.) In other words, Thornton asks the Court to punish American Interstate for *appealing this bad faith case!*[2] His hostile attitude toward the appellate process is troubling but, again, does not justify a damages theory that contradicts the position he asserted in the Workers' Compensation Commission.

Thornton also misunderstands judicial and collateral estoppel. It is not enough for him to claim he would have made riskier investments had he received the lump sum sooner and in a greater amount; he also must

[2] This was not an isolated comment. Thornton's hostile attitude toward the appellate process is reflected elsewhere in his Brief (*see, e.g.*, Br. 59 (accusing American Interstate of conduct that "continues today" and "further delay[s] his access to the compensation awarded by the jury")) and in his counsel's repeated references during closing argument below to the duration of the bad faith litigation (App-I 1724, 1738, 1742, 1803).

establish the Deputy Commissioner would have *granted* the partial commutation despite the riskier strategy. Neither his Brief nor the underlying record provides any support for such a conclusion. Instead, the Deputy expressly relied on Thornton's conservative investment strategy in deciding to award partial commutation (App-II 162).

The judicial and collateral estoppel doctrines are tailor-made for situations like this. A litigant cannot take one position in the Workers' Compensation Commission but then contradict that position a few years later as part of a tort case. *See Winnebago Indus. v. Haverly*, 727 N.W.2d 567, 573-75 (Iowa 2006); *Wilson v. Liberty Mut. Grp.*, 666 N.W.2d 163, 166-67 (Iowa 2003). These cases, which Thornton fails to discuss, are governing and require the Court to reduce the lost use of money award by $114,000.

B. The Lost Home Equity Award Remains Unsupported.

Thornton also offers no persuasive reason for the Court to disregard the record deficiencies on lost home equity damages, which include: (1) his expert's admission that he made no attempt to quantify such damages; and (2) the mathematical fallacy of using monthly rent payments as a proxy to calculate home equity.

Rather than confront these problems, Thornton focuses largely on his desire to purchase a home and the budget he prepared during workers' compensation proceedings. (Br. 35-37.) This misses the point. The question is not whether he intended to purchase a house or how he budgeted for it, but rather whether the record supports $36,000 in lost home equity damages.[3] Thornton made no effort to prove damages in such amount (or any other) in the district court. The award must be reversed.

Thornton tries to avoid this outcome by relying on precedent that if there is "a reasonable basis in the record from which the amount of damages can be inferred…, recovery will be allowed." *Robinson v. Perpetual Servs. Corp.*, 412 N.W.2d 562, 567 (Iowa 1987). This reliance is misplaced. Contrary to *Robinson* and similar cases, Thornton's expert did not offer a "reasonable" methodology for calculating lost home equity damages; he offered no methodology at all. *Contra id.* at 564, 567 (damage award was premised on plaintiff's lost business volume). The lack of testimony almost certainly was a strategic decision prompted by Thornton's recognition that he suffered little, if any, lost home equity. Instead, the overwhelming

[3] Although difficult to decipher, Thornton may be arguing that $25,000 of the lost home equity award should be sustained because he intended to make a down payment in that amount. (Br. 36-37.) Because he did not purchase the home, however, the $25,000 stayed in his pocket. Accordingly, he did not suffer "damage" in that amount.

portion of each monthly mortgage payment would have gone toward interest, insurance, and taxes – none of which build equity. Thornton should not be rewarded for not creating a record on an item of purely economic damages. *See Data Documents, Inc. v. Pottawattamie Cty.*, 604 N.W.2d 611, 616-17 (Iowa 2000); *Shannon v. Hearity*, 487 N.W.2d 690, 693 (Iowa Ct. App. 1992).

The Court also should reject Thornton's argument that the $150,000 award should be sustained because it is impossible to determine which portion is lost home equity and which is lost investment income. (Br. 34.) He offers no alternative to American Interstate's explanation for how the jury arrived at the award, which matches his counsel's closing argument (less a mathematical error). Moreover, although Thornton criticizes American Interstate for citing his counsel's argument (Br. 34), *this is exactly the point*. Thornton offered no *actual evidence* of the amount of lost home equity, and thus counsel's argument was the only source of information. Finally, as there are fatal problems with both the home equity and investment income portions of the award, it ultimately does not matter how much falls into each category. Remittitur or judgment notwithstanding the verdict is required under any circumstance.

C. Thornton Fails to Explain Why an Insurance Company Is Responsible for Delays Caused by the Insured and His Doctor.

1. The Record Does Not Support an Award of Physical Pain and Suffering or Loss of Mind and Body Damages

With respect to physical pain and suffering and loss of mind and body damages, Thornton does not expressly dispute the facts or law presented by American Interstate. Indeed, he largely ignores the pertinent events between July and October 2014, including: Dr. Rogge's delay in completing paperwork; Thornton's delay in getting measured for the wheelchair; the absence of any role for American Interstate to play prior to receiving the DME Order; and American Interstate's prompt action once it received that Order in late September. Thornton bypasses the crucial issue – why an insurance company should be responsible for the failure of a doctor and patient to complete the steps necessary for a replacement wheelchair to be ordered.

Thornton instead devotes his attention to false and misleading statements of "fact," irrelevant events, and hyperbole. He alleges, for example, that American Interstate "ignored requests from Thornton's physician, his attorney and American's vendor for wheelchair approval." (Br. 40.) The citation he provides (App-II 401-403) establishes no such

thing, nor is there support for it elsewhere in the record. Instead, the undisputed facts show:

- Dr. Rogge did not complete the DME Order until September 22, 2014 (App-III 122);
- the DME Order was not provided to American Interstate until September 29, 2014, when Thornton's counsel sent it (App-III 429-431);
- American Interstate's claims manager, Jami Rodgers, immediately referred the DME Order to a vendor to begin the ordering process (Id.); and
- less than two weeks later, on October 10, 2014, Rodgers authorized the wheelchair within one hour and forty-five minutes of being asked (App-III 143-145).

These facts show American Interstate promptly responding to inquiries about the wheelchair, not "ignor[ing]" them.

Similarly, Thornton argues that in a deposition on September 10, 2014, Rodgers "swore that she was unaware of any recommendation for the replacement of Thornton's wheelchair (Rodgers Depo.)..In contradiction to this sworn testimony, the wheelchair vendor inquired as to the status of the wheelchair that Dr. Rogge had prescribed on July 1, 2014 (Ex. 144)." (Br. 41-42.) Thornton provides no pin cite for the Rodgers deposition transcript, which was not an exhibit, nor was there an Exhibit 144 at trial. Among actual trial evidence, the first interaction with the wheelchair vendor occurred on September 29 and was initiated *by Rodgers* immediately after receiving the DME Order. (App-III 429-431 ("Thank you for sending this

Cory. I had not received it yet.").) By distorting the record to suggest American Interstate "ignored" requests about the wheelchair, Thornton all but concedes the actual facts do not constitute bad faith.

Even the facts in Thornton's Brief that *do* find support in the record are taken out of context and irrelevant to whether an insurance company is responsible for delays caused by others. Thornton criticizes American Interstate's claims manager and outside counsel for a comment in a private email chain dated October 23, 2014 – two days after Thornton's counsel filed an alternative medical care petition. (Br. 40-41.) The substance of the email does not change the fact that Thornton's counsel filed the petition nearly two weeks after American Interstate *had already authorized and ordered the wheelchair*. (App-II 434-445; App-III 142-145.) The alternate medical care petition was wholly unnecessary. (App-II 260-261 ("After discussion of the issues on the record, the undersigned determined that there was not truly a justiciable controversy pending.").)

In sum, Thornton does not address the crucial facts that American Interstate had no role in the replacement wheelchair process until receiving the DME Order and took prompt steps thereafter to ensure manufacture and delivery. These facts show the absence of bad faith as a matter of law. The

Court should reverse the physical pain and suffering award of $40,000 and loss of mind and body award of $100,000.

2. Thornton Misunderstands Loss of Mind and Body Damages.

Thornton appears to argue in the alternative that the loss of mind and body award should be sustained even if there was no bad faith regarding the wheelchair. (Br. 42-43.) He supports this argument, in part, by accusing American Interstate of "continu[ing] to deny he was permanently and totally disabled even while hospitalized after trying to take his own life." (Br. 43.) This is an incredible distortion of the record. Thornton overdosed on pain medication in February 2011. (App-I 679-680.) He received mental health treatment until August 2011, at which point it ended because he no longer needed it and had "worked through issues and developed positive self-focus." (App-I 603, 2110.) He did not file a petition to be declared PTD until nearly one year later, on May 24, 2012. (App-III 424.) The PTD litigation therefore was not contemporaneous with his drug overdose. It is highly misleading for Thornton to suggest otherwise.

In any event, Thornton's argument that an alternative ground exists to sustain the $100,000 award is premised on a misunderstanding of loss of mind and body damages. Such damages must be based on "the inability of a particular body part to function in a normal manner," *Brant v. Bockholt*, 532

N.W.2d 801, 804-05 (Iowa 1995), or where there is a "deprivation of mental powers," *Schnebly v. Baker*, 217 N.W.2d 708, 726 (Iowa 1974). In other words, loss of mind and body is a temporary or permanent disability. *Id.*; *see also Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d 468, 473 (8th Cir. 1977) ("[U]nder Iowa law pain and suffering and disability are different items of injury.").

Although Thornton suffers from a permanent disability, it was caused by the underlying accident, not American Interstate's bad faith. Indeed, except for the wheelchair, he identifies no mental or functional impairment allegedly caused by American Interstate's conduct. It follows that no alternative basis exists to sustain the $100,000 award.

D. Thornton All But Admits the Impropriety of the Consequential Damage (i.e., Attorney's Fee) Award.

Thornton does not seriously contest that the consequential damages award includes attorney's fees incurred before his filing of the PTD petition and during the parties' settlement negotiations, which this Court already concluded did not involve bad faith. *See Thornton*, 897 N.W.2d at 467 ("American Interstate's bad faith was in contesting Thornton's PTD status, not in offering structured settlement proposals."). This alone requires reduction of the award.

Thornton tries to salvage the award by asking this Court to amend the jury's finding as to when bad faith began from October 25, 2012, to September 1, 2009. (Br. 44-45.) Thornton made no such request in post-trial motions, however, and thus has waived the issue. *See Modern Piping, Inc. v. Blackhawk Automatic Sprinklers, Inc.*, 581 N.W.2d 616, 626 (Iowa 1998) (error not preserved and issue waived where not raised in motion for directed verdict or post-trial motion), *overruled on other grounds by Wesley Retirement Servs., Inc. v. Hansen Lind Meyer, Inc.*, 594 N.W.2d 22 (Iowa 1999).[4]

There is, in any event, no basis to conclude bad faith started prior to October 25, 2012. Thornton's argument for is based on American Interstate's alleged failure to provide sufficient wage information in 2009. The record shows, however, that Thornton's then-counsel was satisfied with the information he received. (App-I 1064, 1068, 1071-1072, 1076-1077; App-II 710.) In fact, Thornton's current counsel stipulated in the Workers' Compensation Commission in March 2013 that the wage rate was correctly

[4] Thornton filed a post-trial motion asking the district court to hold that bad faith began on June 25, 2012. (App-I 191.) Although he filed a notice of appeal from the denial of that motion, his Brief contains no separate section for the cross-appeal and thus this issue also is waived. *See Randolph Foods, Inc. v. McLaughlin*, 115 N.W.2d 868, 879-80 (Iowa 1962) (declining to consider argument not raised in cross-appeal section of appellee's brief).

calculated using that information. (App-III 147-148.) Moreover, Thornton repeatedly expressed his satisfaction with American Interstate's handling of his file through 2011. (*E.g.*, App-I 670, 674, 689.) These undisputed facts establish that pre-2012 attorney's fees should be remitted from the consequential damages award.

This Court's holding that American Interstate did not act in bad faith in making structured settlement proposals – a conclusion reinforced by the substance of those proposals, which offered more in benefits than Thornton was expected to receive in the absence of settlement – shows as a matter of law that fees incurred by Thornton between February and October 2012 also should not have been included. *See Thornton*, 897 N.W.2d at 467. Thornton's repeated attacks on American Interstate's settlement conduct (Br. 17-19, 53, 56) do not change this Court's previous ruling against him.

Remittitur also is necessary for fees of $5,433.66 incurred in connection with Jami Rodgers' September 2014 deposition. Thornton does not even bother to argue otherwise, nor could he possibly overcome this Court's holding that he is not entitled to fees incurred in this litigation. *See id.* at 474-76. Moreover, his argument for the wheelchair-related fees of $4,230 suffers from the same infirmities as his argument for pain and suffering and loss of mind and body damages; namely, that an insurance

company is not responsible for delays caused by a doctor and patient/insured. Those fees also should be remitted.

Finally, the Court should reject Thornton's unsupported argument that the consequential damages award might have included "other damages" beyond attorney's fees and costs. Thornton never argued at trial (and offers no record citation) that he suffered "other" consequential damages beyond attorney's fees; instead, the $52,000 award matches (rounded down) the sum of fees and costs reflected in his testimony and Siems' fee affidavit. (App-I 613-614; App-II 447, 448.) For these reasons, and others in Appellant's Brief, the consequential damages award should be remitted to $17,145.

III. THORNTON PROVIDES NO PERSUASIVE SUPPORT FOR THE DISPROPORTIONATE PUNITIVE DAMAGE AWARD.

A. The Non-Iowa Cases Cited in Thornton's Brief Do Not Support His Position.

Thornton cites a handful of cases from other states that he claims undermine American Interstate's position that the $6.75 million award and nearly 18:1 ratio exceed the limits of the due process clause under *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). (Br. 64-65.) A careful review of these cases shows the opposite: Thornton is asking this Court to reach an unprecedented conclusion.

Thornton's descriptions of two of the non-Iowa cases – *Seltzer v. Morton*, 154 P.3d 561 (Mont. 2007) and *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003) – are substantively wrong. He claims *Seltzer* "reinstat[ed]" a $20 million punitive damage award and 18:1 ratio (Br. 65); in reality, the Montana Supreme Court affirmed the lower court's *reduction* of the award to $9.9 million and 9:1 ratio. 154 P.3d at 614-15. *Seltzer* therefore provides more support for American Interstate's position than Thornton's. Similarly, *Mathias* did not, as Thornton claims, uphold a punitive damage award of "$18,372,000" (Br. 65), but rather a far more modest award of $372,000 in a case involving only $10,000 in compensatory damages. 347 F.3d at 674. The Seventh Circuit expressed doubt that such a large ratio would be appropriate in a case involving substantial compensatory damages. *Id.* at 677. Given the substantial compensatory damages at issue here, *Mathias* provides no support for Thornton's position.

Nominal compensatory damages also were central to the Oregon Supreme Court's decision in *Hamlin v. Hampton Lumber Mills, Inc.*, 246 P.3d 1121 (Ore. 2011), which reinstated a punitive damage award of $175,000 where compensatory damages were $6,000. Like *Campbell* and *Mathias*, the Oregon Supreme Court recognized ratios are of "limited assistance" to determining constitutionality when compensatory damages are

nominal. *See id.* at 1128. The Oregon Supreme Court surely would not support Thornton's attempt to apply *Hamlin* to a case involving substantial compensatory damages. *See id.* at 1130 (reiterating the importance of the "low" compensatory damage award in sustaining the award); *see also Goddard v. Farmers Ins. Co. of Oregon*, 179 P.3d 645, 667-71 (Ore. 2008) (reducing punitive damage award from 16:1 to 4:1 where jury awarded "substantial compensatory damages").

No crystal ball is necessary to conclude the Oregon Supreme Court also would not support Thornton's attempted reliance on *Williams v. Philip Morris, Inc.*, 176 P.3d 1255 (Ore. 2008), in which the court affirmed a 97:1 ratio in a wrongful death case against a tobacco company. The Oregon Supreme Court later expressly held that the ratio affirmed in *Williams* is not remotely appropriate in the insurance bad faith context. *See Goddard*, 179 P.3d at 667-68 (insurer's bad faith conduct "is in no way comparable to, for example, Philip Morris's 50-year campaign to delude a large portion of the population of Oregon about the potentially devastating physical effects of smoking its products"). Thornton's willingness to rely on *Williams* in a circumstance where even the Oregon Supreme Court says it does not apply illustrates the absence of authority supporting his position.

Like *Williams*, two other non-Iowa cases relied upon by Thornton also involved conduct resulting in death. *See Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 54-56 (Ky. 2003) (affirming 11:1 ratio in gross negligence case resulting in two deaths); *Bullock v. Philip Morris USA, Inc.*, 131 Cal. Rptr. 3d 382, 395 (Cal. Ct. App. 2011) (affirming 16:1 ratio against tobacco company for causing plaintiff's death through years-long "public campaign designed to obscure and deny the truth"). No such circumstances are present here.

Finally, Thornton cites *Nickerson v. Stonebridge Life Ins. Co.*, 371 P.3d 242 (Cal. 2016), in which the California Court of Appeals affirmed remittitur of a $19 million punitive damage award and held that $475,000 (a 10:1 ratio) was the maximum permissible award in an insurance bad faith case. It is unclear why Thornton views this as helpful authority given the ratio in *Nickerson*, if applied here, would reduce his punitive damage award to no more than $3.82 million (and even lower if the compensatory damage award is reduced). In any event, as to ratios, *Nickerson* is an outlier both in California and nationally. *Contrast 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*, 371 P.3d 242; *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); *see* Appellant's Br. at 54-55 (citing cases from other jurisdictions remitting awards in insurance bad faith cases to 4:1 or lower).

In sum, the non-Iowa cases cited in Thornton's Brief stand, at best, for the proposition that a ratio in excess of 10:1 is permissible only when compensatory damages are nominal or the defendant is responsible for someone's death. Neither circumstance is present here, and thus Thornton's Brief essentially confirms that the punitive damage award of $6.75 million must be remitted under the due process clause.

B. The Iowa Cases Cited in Thornton's Brief Also Do Not Support His Position.

Thornton also relies on two pre-*Campbell* cases from Iowa, *Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388 (Iowa 2001), and *Wilson v. IBP, Inc.*, 558 N.W.2d 132 (Iowa 1996), to support the disproportionate ratio of punitive to compensatory damages. (Br. 46-48.) His discussion of *Gibson* is bizarre. This Court did not, contrary to Thornton's argument (Br. 47), hold that a 277:1 ratio of punitive to compensatory damages was constitutional; indeed, the constitutionality of an award was not even at issue in *Gibson* because the district court granted directed verdict for the defendant on punitive damages. 621 N.W.2d at 401. This Court merely

reversed the directed verdict and remanded for new trial. *Id.* Thornton utterly misreads the case – which, ironically, he accuses American Interstate's counsel of violating the duty of candor for not having cited. (Br. 48.)

Thornton does better in his discussion of *Wilson* – which is to say, he correctly describes its holding – but he misunderstands that *Wilson*, to the extent it remains good law at all, is more helpful to American Interstate's position than his. In *Wilson*, this Court *reduced* a punitive damage award from $15 million to $2 million even though the defendant slandered the plaintiff as part of a "malicious course of conduct that was in line with the climate established by IBP concerning its injured workers." 558 N.W.2d at 148. By contrast, American Interstate's conduct here was a one-off event; the company has never before been adjudicated to have acted in bad faith and has been *accused* of bad faith only twice in over 30 years. (App-I 1041-1042.) Moreover, *Wilson* focused heavily on the defendant's size in determining the permissible award, explaining IBP was the "largest producer of fresh beef and pork in the world," had 29,000 employees, and had $11.6 billion in annual sales. *Id.* at 148. Here, American Interstate is a mid-market insurance company with only 450 employees (App-I 1036), $396 million in annual revenue (App-III 463), and assets approximately one-one

hundredth the size of its largest competitors (App-I 1697-1699). In these circumstances, *Wilson* establishes that even a $2 million award is excessive – much less $6.75 million.

Wilson did not, in any event, survive *Campbell* fully intact. *Wilson* justified the punitive damage award in substantial part because of concerns about how IBP's conduct might affect other employees in Iowa and elsewhere. 558 N.W.2d at 148 ("Other workers with injuries could be profoundly affected as a result of the policy actions carried out by [IBP]."). *Campbell* makes clear this is not permitted: "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." 538 U.S. at 423; *see also Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007) ("[W]e can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others.").

Similarly, *Wilson* relied on *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993) (plurality) for the proposition that courts must consider "whether there is a reasonable relationship between the punitive damages award and the harm likely to result from defendant's conduct as well as the harm that actually has occurred." *Wilson*, 558 N.W.2d at 145-46

(quoting *TXO*, 509 U.S. at 460). In *Williams*, the Supreme Court "made clear that the potential harm at issue was harm potentially caused *the plaintiff*." 549 U.S. at 354 (emphasis in original). *Wilson* did not make this distinction and instead appears to have punished IBP for potential harm *to others*. For these reasons, among others, *Wilson* should be recognized as having been at least partially overruled by *Campbell*. *See also Seltzer*, 154 P.3d at 613 n.34 (concluding that as a mere plurality opinion, "we cannot treat *TXO* as controlling authority regarding the ratio analysis").

The third Iowa case on which Thornton relies, *Christensen v. Good Shepard, Inc.*, No. 17-0516, 2018 WL 2731626 (Iowa Ct. App. June 6, 2018), is of minimal relevance. Thornton misleadingly asserts that *Christensen* "cit[es] *Wilson* as controlling Iowa authority" (Br. 47); this is true only with respect to the standard of review on a directed verdict motion. *See Christensen*, 2018 WL 2731626 at *8. On the issue of constitutional limits, *Christensen* does not mention *Wilson* and instead cites most heavily to *Campbell* and *Wolf v. Wolf*, 690 N.W.2d 887, 893 (Iowa 2005) – two cases cited heavily in American Interstate's Brief. As *Christensen* affirmed a much lower (5:1) ratio in circumstances very different from those present here, it does not support Thornton's position that a double-digit ratio is somehow acceptable. Instead, the overwhelming weight of post-*Campbell*

authority continues to demonstrate that a 17.7:1 ratio is excessive in an insurance bad faith case involving substantial compensatory damages. Remittitur is required.

C. Thornton's Misleading and Often Unsupported Recitation of Facts Is Insufficient to Overcome the Dearth of Precedent Supporting the Punitive Damage Award.

Turning to the facts, Thornton engages in more misstatements and exaggerations in an attempt to cast American Interstate's conduct as "reprehensible." He argues, for example, that American Interstate "sought to force Thornton into an economically disastrous settlement" that would have "saved American approximately $2.3 million." (Br. 56.) This is utterly false. American Interstate offered a structure that included weekly indemnity benefits to Thornton at the full permanent and total disability level and two fully-funded medical set aside accounts with future benefits far in excess of what the company expected him to need. (App-I 1136-1137, 1145-1146.) This Court already has explained that these settlement proposals were not bad faith, *Thornton*, 897 N.W.2d at 467, and there is no evidence that American Interstate was using them to save $2.3 million or that Thornton would have experienced an "economic disaster" had he accepted one. Thornton's arguments to the contrary should be rejected.

Thornton's arguments that "[f]rom the beginning American has ignored [his] health, safety, and well-being" (Br. 56), engaged in bad faith "for more than half a decade" (Br. 52), and "refused to ever voluntarily pay Thornton the benefits to which [it] knew he was entitled" (Br. 55) are equally false. American Interstate voluntarily provided uninterrupted medical and indemnity benefits to Thornton beginning immediately after his accident in June 2009 and continuing to the present day. (App-I 689-690, 702.) The company's claims manager worked hard to ensure Thornton's needs were met, including, for example, spending countless hours making arrangements so he could leave the hospital and move home with his family and, later, live and drive independently. (App-I 1799-1801, 1804-1806; App-II 700-715.) Thornton repeatedly expressed satisfaction with the company's efforts through 2011[5] and had such a positive relationship with his claims manager that he called her for help in his times of greatest need,

[5] (*See, e.g.*, App-I 670 (Thornton got along well with claims manager Luann Miller and had no complaints); App-I 674 (Miller helped Thornton get what he needed); App-I 676 (modification of Thornton's van in late 2010 to allow self-driving was "awesome" and led to "[s]o much more freedom"); App-II 716 ("All else was great and no other requests at this time."); App-II 756 ("[Thornton] is now driving and is very excited about this. The adjustments of the van have been tremendous…he has no complaints at this time."); App-II 764 ("[Thornton] is doing well and having no issues."); App-II 765 ("Things are going well for him."); App-II 768 ("Everything else is going great.").)

including the day he separated from his wife. (App-I 675.) Against this backdrop, the notion that American Interstate "refused to ever voluntarily pay benefits" or acted in bad faith "for more than half a decade" or "from the beginning" is baseless.

Thornton similarly distorts the record when he accuses American Interstate of "intentional misdirection" in connection with vocational rehabilitation expert Phil Davis. (Br. 54.) Thornton asserts that trial testimony from Davis and others "make[s] clear that Mr. Davis was not retained to provide a vocational rehabilitation opinion." (Id.) It is unclear what testimony Thornton is referencing[6], but Davis's report says: "I have been asked to provide a Vocational Opinion with regard to Mr. Thornton's ability to return to gainful employment activities…I would opin[e] that with proper assistance, motivation, and retraining, Mr. Thornton's potential to obtain and maintain competitive employment exists." (App-II 64-65.) Thornton's Brief makes no sense.

Thornton also misstates facts in connection with the replacement wheelchair. He claims American Interstate "arranged for inexpensive repairs" to the wheelchair instead of replacing it. (Br. 55.) This is untrue.

[6] The exhibits he cites (Exs. 326-327) are medical records relating to his replacement wheelchair and have nothing to do with Davis.

Thornton himself arranged for the repairs without American Interstate's knowledge; the company merely later paid the bill. (App-I 1257; App-III 139-141.) Why Thornton chose to have the wheelchair repaired instead of getting measured for a new one remains a mystery but is not evidence of reprehensibility.

Similarly, Thornton's vague discussion (Br. 56-57) of Jami Rodgers' so-called "inconsistent testimony" regarding the wheelchair (for which no record citation is provided) does nothing to establish reprehensibility. The facts are not complicated: Dr. Rogge's office note mentioning the replacement wheelchair prescription likely reached Rodgers' desk sometime in July 2014, but she did not recall it and could not have done anything with it anyway until Rogge prepared the DME Order. When the DME Order reached Rodgers' desk in late September, she quickly forwarded it to the vendor and later approved the vendor's authorization request within two hours of receiving it. (App-III 142-145, 429-431.) None of this is "reprehensible."

Thornton also misses the mark in discussing his alleged financial vulnerability. (Br. 57-59.) American Interstate paid weekly indemnity benefits and medical expenses at all relevant times and never once considered or suggested cutting those benefits off. (App-I 689-690, 701-

702, 1546-1547). Moreover, American Interstate offered settlement proposals at the full PTD level with advantageous tax consequences and, later, a cash settlement in greater amount than Thornton eventually received through litigation in addition to two large medical set-aside accounts. The use of inflammatory phrases like "budgetary crisis" and "life at poverty level" in Thornton's Brief cannot mask these undisputed facts, which are fatal to Thornton's financial vulnerability. Indeed, insurance bad faith cases often involve defendants refusing to pay benefits altogether. *See*, *e.g.*, *Buhmeyer v. Case New Holland, Inc.*, 446 F. Supp. 2d 1035 (S.D. Iowa 2006). American Interstate engaged in no such conduct here.

Thornton's discussion of whether the conduct was "repeated" is similarly misguided. He once again attacks this Court's ruling on partial commutation (*see* Br. 53 (arguing American Interstate's "repeated actions" included the "denial of several petitions[7] before the Workers' Compensation Court")) and criticizes American Interstate for appealing this bad faith case (*see* Br. 59 (accusing American Interstate of "further delaying his access to the compensation awarded by the jury")). Both arguments are

[7] Thornton filed only one "petition" in the Workers' Compensation Commission for declaration of permanent total disability, and thus his use of the plural word "petitions" necessarily means he is trying to use American Interstate's conduct with respect to partial commutation as support for the punitive damage award.

inappropriate; neither establishes reprehensibility. Thornton also falsely claims American Interstate "continues to state it has done nothing wrong" (Br. 59, fn. 5) and "still denies bad faith" (Br. 62) despite testimony from American Interstate's corporate representative that the company erred and should have stipulated to PTD after settlement discussions failed (App-I 1160).

In sum, Thornton's discussion of punitive damages mirrors the remainder of his Brief in its willingness to obfuscate the facts and law.[8] This strategy is ultimately self-destructive and demonstrates the absence of legitimate factual or legal support for the disproportionate award. American Interstate respectfully requests that the Court disregard Thornton's unsupported factual assertions, reject his strained interpretation of punitive damage case law, and remit the punitive damage award to something at or near a 1:1 ratio of punitive to compensatory damages.

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[8] American Interstate rests on its opening Brief for the remaining issues raised in Thornton's Brief, including in response to Thornton's argument that Iowa Code Section 86.13 is somehow not the appropriate benchmark to compare punitive damages against civil penalties for similar conduct. The only reported Iowa case to have addressed this issue, *Buhmeyer*, 446 F. Supp. 2d at 1050, agrees with American Interstate's position. Moreover, the fact that no penalties were available in the Workers' Compensation Commission (Br. 66) is exactly the point – American Interstate was paying benefits all along.

IV. THE COURT SHOULD CORRECT OTHER ERRORS LIKELY TO ARISE IN THE EVENT OF A THIRD TRIAL.

Thornton's Brief says little about the two issues American Interstate asked the Court to address in case Thornton declines to accept a remitted award and insists on a third trial. With respect to Attorney Siems serving as trial counsel, Thornton offers no justification for his improper conduct at trial and instead merely argues there would be "substantial hardship" if disqualification is ordered. Given the frequency with which the remainder of Thornton's Brief discusses facts for which Siems is a necessary witness – including the sufficiency of the wage information Thornton received from American Interstate, the merits of settlement proposals, substance of communications between Siems and Abbas, and circumstances surrounding the replacement wheelchair – this argument falls well short of justifying his continued involvement. *See generally State v. Vanover*, 559 N.W.2d 618 (Iowa 1997).

Thornton offers even less resistance to American Interstate's argument that the district court erred in allowing the jury to award both physical pain and suffering and loss of mind and body damages. *Brant*, 532 N.W.2d at 804-05, squarely applies. This Court should instruct the District Court to follow it next time.

CONCLUSION

Thornton's Brief repeatedly misstates facts and law in an attempt to convince the Court to sustain unsupported awards of compensatory and punitive damages. This Court should reject Thornton's arguments, reduce compensatory damages to $57,145, and reduce punitive damages to an amount at or near the compensatory award.

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PROOF OF SERVICE

I hereby certify that on the October 5, 2018, I electronically filed the foregoing Proof Reply 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 6,944 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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