IN THE SUPREME COURT OF IOWA

NO. 18-0809

TOBY THORNTON
Appellee/Cross-Appellant
v.
AMERICAN INTERSTATE INSURANCE COMPANY
Appellant/Cross-Appellee

APPEAL FROM THE IOWA DISTRICT COURT FOR POTTAWATTAMIE COUNTY
THE HONORABLE JAMES S HECKERMAN

APPELLEE/CROSS-APPELLANT'S AMENDED FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

The American's appeal is appropriate for retention by the Iowa Supreme Court as there are urgent issues of broad public importance requiring a prompt or ultimate determination by the Supreme Court. *See* Iowa R. App. P. 6.1101(2)(f).

STATEMENT OF THE CASE

Toby Thornton ("Thornton") agrees with the chronology of those procedural facts set forth in American's brief; however, Thornton must provide additional procedural events, considering that American's Statement of the Case is incomplete.

Thornton first filed suit against American in December 2013, which he amended August 8, 2014. (APP-I, 15-28; APP-I, 29-47) In late 2014, both parties moved for summary judgment on claims for bad faith associated with American denying Thornton was permanently and totally disabled, bad faith in denying that a partial commutation was in Thornton's best interest, and on the Thornton's abuse of process claim. In early 2015, the district court denied American's Motion for Summary Judgment and granted Thornton's Motion for Summary Judgment on two issues: that American acted in bad faith in denying that Thornton was permanently and totally disabled, and that American acted in bad faith in denying that a partial commutation was in Thornton's best interest. The court determined bad faith first occurred on March 11, 2013.

Although the district court granted summary judgment on two counts for Thornton, these two counts were not the only issues pleaded. (cf. Def. App. Brief, p. 13) Both parties also moved for summary judgment on Thornton's abuse of process claim, the court denied American's motion on this issue and declined to decide Thornton's Motion on the issue having already found bad faith as a matter of law. (SJ order pg. 13) Having found bad faith as a matter of law, the court held that "the issues remaining for trial when or if American's denial of Thornton's requests became unreasonable prior to its counsel's email of 11 March 2013, and the extent of damages." (SJ order, p. 14).

The first trial occurred in February 2015. Consistent with the court's order on summary judgment, the jury's task was to determine not only damages, but also whether bad faith occurred before or after the date the court determined bad faith commenced in its summary judgment order. (SJ Order, pg. 14; 1st set of jury instructions)

American inaccurately suggests that the only decision for the jury to determine at the first trial was the extent of damages. On the contrary, the jury also determined the extent of compensatory and punitive damages, and found that bad faith occurred prior to the March 11, 2013. Furthermore, the jury found that American committed bad faith in delaying Thornton's ability to receive a new

wheelchair. The first jury awarded Thornton compensatory damages of $284,000.00 and punitive damages of $25 million.

American appealed the jury's verdict. This Court reversed and remanded for a new trial, affirming the trial court's award of summary judgment for Thornton on the permanent total disability issue, but reversing the district court's summary judgment ruling that American's handling of the partial commutation claim constituted bad faith. *Thornton v. American Interstate Insurance Co.,* 897 N.W2d 445 (Iowa 2017) (hereinafter "*Thornton I*"). The issue of damages was also before this Court during the Thornton I appeal. This Court included in its remand instructions that damages be determined at the new trial. This Court did not expressly prohibit any elements of damages awarded during the first trial in its Order on remand.

In February 2018, on retrial, the court excluded evidence regarding American's actions during the partial commutation proceedings. Because this Court upheld the finding of bad faith as a matter of law, the jury on re-trial was only asked:

- to determine the extent of damages;
- whether American acted in bad faith in delaying Thornton's ability to receive a new wheelchair; and,
- the date bad faith first occurred.

The jury found that bad faith occurred on October 25, 2012, and that Thornton suffered $382,000.00 in compensatory damages. The jury also found punitive damages appropriate and awarded punitive damages of $6.75 million.

Statement of Facts

American's recitation of the facts omits important facts unfavorable to its position, substitutes argument for other facts, and otherwise recasts the facts in the light most favorable to its appeal. Accordingly, recitation of the facts here is necessary pursuant to Rule 6.903(3).

I. Background and Accident

Appellee, Toby Thornton ("Thornton"), grew up in Monona, Iowa, a city of approximately 1,200 people. (APP-I, 503: 15-504:9) He worked various unskilled labor positions following his high school graduation and then attended local community college. (APP-I, 517:4-13) Thornton completed only one semester before dropping out because he wasn't a good student. (*Id.*)

With limited education and job skills, he turned to over-the-road truck driving, a field in which his parents worked since his childhood. (APP-I, 517:2-518:6) As an over-the-road driver, Thornton eventually took a job with Clayton County Recycling in Monona. (APP-I, 533:18-24)

On June 25, 2009, while driving a tractor-trailer, his life changed forever. (APP-I, 542:24) Traveling downhill on a highway near Richardsville, he followed

a bend in the road to the left. (APP-I, 543:14-16) As he rounded the turn, the load of scrap metal in the thirty-ton tractor-trailer shifted, causing the unit to jackknife and roll off the highway. (APP-I,547:18-21; APP-I,1819-1829)

Crushed inside the cab of the tractor for what seemed like an eternity, emergency workers eventually pried Thornton from the cab using the "jaws of life." (APP-I,552:14) He suffered the following life-changing injuries:

- a severe spinal cord injury;
- vertebral body fractures;
- multiple facial fractures;
- a femur fracture of his left leg; and,
- multiple rib fractures. (APP-I,1830-1838; APP-I,1839-1891)

The injuries left Thornton permanently paralyzed from the chest down and in the left arm. He retained only limited use of his right hand. (*Id.*)

An ambulance first took Thornton to the hospital in Dubuque, where he was stabilized. (APP-I,1830-1838) Because of the severity of his injuries, he was then life-flighted to the University of Iowa Hospital in Iowa City. (APP-I, 1839-1891) Thornton was admitted to intensive care, where he remained for many weeks. (Id.) There, Thornton underwent multiple surgical procedures while he slipped in and out of consciousness. (Id.)

Soon after the accident, his treating doctors confirmed that Thornton was a quadriplegic, requiring extensive care with virtually all aspects of his daily routine. (APP-I,584:14-25) Thornton requires additional care if he experiences any incontinence throughout the day. (APP-I, 584:17-25) Thornton's children have to assist him any time he soils himself if his home health care nurse is unavailable. (APP-I,778:11-19) Because of his injuries, Thornton's physicians concluded that his life expectancy likely decreased by 20-30 years. (APP-I, 1702:22-1703:2)

Due to his severe disability, Clayton County eventually terminated Thornton. In December 2009, Thornton began receiving Social Security disability benefits, being deemed unemployable by the Social Security Administration. (APP-I,566:24-67:6)

At the time of Thornton's accident, American, a carrier specializing in insuring high risk employers, insured Clayton County. The premiums charged by American allows it to remain profitable, even though it handles numerous catastrophic injuries in the ordinary course of its business. American was notified shortly after Thornton's accident and the assigned claims representative, Luann Miller ("Miller"), met with Thornton's family while he was in the intensive care unit, telling them that American would "stand by [Thornton],... to take care of [him], [and would] make sure [Thornton got] the benefits that [he] deserves." (APP-III,490:21-91:5; APP-III,511:7-11)

II. Early Claims Handling

American commenced payment of certain indemnity and medical benefits soon after Thornton's accident. Within weeks, American had conducted a thorough claim investigation and set reserves to reflect permanent total disability ("PTD") exposure. American approved indemnity reserves, totaling a present day value of about $762,000, which remained unchanged throughout its handling of Thornton's claim. American's exposure evaluation was consistent with the facts at the time, including a report written on July 12, 2009, by Thornton's treating physician, Dr. Brian Dalm, indicating that Thornton had suffered "PTD". (APP-I,1944)

From the date the reserves were set, American referred to Thornton's claim internally as a PTD case. (APP-1,1919) Claims adjusters, supervisors, claims investigations, claims notes and periodic reports all indicated that Thornton was PTD. (APP-1,1916-1943) Accordingly, Miller reported to the Iowa Industrial Commission that American converted Thornton's benefits to PTD payments, even before American approached Thornton about efforts to resolve his claim. (APP-II,122) Despite its obligations to do so, American never reported this change in benefits to Thornton.

Soon after the accident, Thornton's wife sought legal advice. (APP-II,421-427) Her attorney wrote to American on several occasions, requesting one year's

worth of wage information in an effort to determine Thornton's correct weekly compensation payments. (*Id.*) American did not provide the requested annual wages, despite the possibility of a misdemeanor criminal citation. Iowa Code §85.40

After Thornton was released from the hospital, he moved in with his wife's family. (APP-I,599:4-6) Thornton's wife provided at-home care, which included addressing Thornton's morning routine and care throughout the day. (APP-I, 586:20-87:17) Eventually, the stress proved to be too much for his wife and the couple separated. Thornton was forced out of his in-law's home and had to find an apartment elsewhere in Monona. (APP-I,590:16-19)

To compound Thornton's difficulties, his mother passed away shortly after he and his wife separated. (APP-I,598:10-13) Tragically, Thornton slipped into a deep depression, eventually attempting to take his own life by overdosing on his pain medication. (APP-I,601:6-602:9) As Thornton testified, in an odd way this was one of the best things that could have happened to him because he realized he survived in order to be the best parent he could be. (App-I, 602:4-9) Indeed, Thornton testified at trial that his kids continued to be his lifeline and his reason for living. With such devotion, Thornton obtained joint physical and legal custody. (App-II,15-24)

III. American's Settlement Plans and Mediation

Thornton set about putting his life back together, which included his plan to buy a house for his children. While in this emotionally vulnerable state, American sought to resolve his claim at a substantial discount. Specifically, American attempted to convince Thornton to accept a lump sum settlement that would have saved American about $2.3 million from its actual liability. American presented Thornton with settlement option A and B.[1] (APP-I,266-68; APP-I,269-71) The record shows that early settlement discussions were had when Thornton was unrepresented and in a financially-vulnerable condition.

The record shows that had Thornton accepted either of those options or an equally valued option, 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. American knew the extent of Thornton's substantial future medical needs and still the carrier structured its settlement proposals substantially below the amount it thought it would incur.

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[1] The terms of the offers made by American varied in form but not in value. American's settlement proposal sought to cut about $160,000 from the lump sum indemnity it had calculated for permanent total disability and further reduced the amount that it calculated would be required for Thornton's future medical treatment. American had never offered $800,000 in indemnity standing alone and did not disclose the cost to American of the settlement proposal until discovery in the bad faith litigation. The $800,000 figure represented a combination of indemnity and non-Medicare medical expenses.

Thornton retained new counsel, who wrote to American, asking for details regarding its position. (APP-I,146) Rather than respond, American immediately assigned defense counsel. In making the assignment, American wrote to its attorney that "we have voluntarily accepted this claim as a PTD exposure." (APP-I,263) Nevertheless, American continued its efforts to compel settlement at a deep discount and on a closed-file basis, outwardly stating that Thornton was not permanently and totally disabled. This closed file settlement was the only arrangement American was ever willing to discuss with Thornton, although it had settled other cases by leaving medical benefits "open."

Immediately after becoming involved, Thornton's current counsel explained to American that Thornton was indisputably permanently totally disabled and that a partial commutation of his indemnity benefits in an amount of about $762,000 was in his best interest. American denied these facts, stating it would never concede either of these points. American did suggest mediating the claim and Thornton agreed.

Mediation occurred on October 22, 2012. During 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; but American clung to settlement offers tailored to save it millions of dollars. When it became apparent that Thornton

would not agree to the American's terms, the carrier's counsel threatened that unless Thornton settled, it would deny, defend and appeal every aspect of the claim, while drawing the proceedings out for another two to three years. Knowing that his attorneys were billing Thornton on an hourly basis, American's attorney further threatened to drive up Thornton's legal costs unless he settled on the carrier's terms. (APP-II,26-28; APP-II,39-40) Thornton's counsel immediately pointed out that these threats amounted to bad faith.

After the failed mediation, defense counsel wrote to American, indicating that settlement was not possible on American's closed file, low-indemnity terms because Thornton was unwilling to close out his medical benefits. Without American acknowledging that Thornton was permanently totally disabled or entitled to benefits paid in the form of a lump sum, Thornton proceeded with two petitions on May 5, 2012: one alleging permanent total disability, and the second alleging that a partial commutation was in Thornton's best interest. (APP-II,450-464)

More than three months later, American answered Thornton's PTD petition, denying that Thornton was totally disabled. American then moved to dismiss Thornton's partial commutation petition, arguing that the amount owed could not be calculated at that time because it refused to acknowledge that Thornton was permanently totally disabled. As such, Industrial Commissioner determined that

the petition for partial commutation should be dismissed as premature, but allowed the petition for permanent total disability benefits to move forward.

IV. PTD Litigation

As the permanent total disability litigation proceeded, the above-mentioned facts were established, as were facts demonstrating Thornton had no transferable skills, had an inability to be retained in work, and had a lack of a doctor's release for any work or vocational services. (APP-II:52-57) American filed an answer denying that Thornton was permanently totally disabled and aggressively defended the claim thereafter.

To support its argument that Thornton was not entitled to PTD benefits, American represented that vocational services were being offered and that Thornton could be retrained to obtain suitable employment. American witnesses testified that the impetus for going to trial on the PTD claim was a concern that Thornton had not been made aware of vocational services that had allegedly been offered; but in making this assertion, American fails to acknowledge that its own witnesses testified that vocational services had, in fact, not been offered. (Defendant's brief P. 23)

American represented to the workers' compensation court that it had retained a vocational counselor, Phil Davis ("Davis"), who suggested in a report that Thornton could consider participation in a program with the Catalyst

Company, a company that provides telemarketing training. (APP-II,49-50; APP-II,66) Davis also stated in his report that it was "unfortunate" that Thornton did not help himself by unilaterally contacting Iowa Vocational Rehabilitation Services with Iowa Workforce Development. (APP-II,62-65; APP-III,741(40:20-41:2))

Davis later testified in deposition that he was never retained to offer vocational services or to conduct an industrial disability analysis. (APP-III,739(30:22-31:12)–740(35:3-13)) He asserted that had he been asked to determine whether Thornton was permanently totally disabled, he would have stated that Thornton was clearly incapable of engaging in competitive employment. (APP-III,745(56:13-17)) Davis expressed disappointment that his opinions were contorted and used to argue that Thornton was capable of working. (APP-III,754(91:4-10))

In spite of American's reference to vocational services, no physician had ever released Thornton to participate in any such activity. To the contrary, the physician that American handpicked to provide care for Thornton, Dr. Michael Rogge, M.D. ("Rogge"), expressly told defense counsel during a phone conference that he would not release Thornton to participate in vocational rehabilitation and that Thornton was permanently totally disabled. (APP-I,1815-1816; APP-II,1916-1943; APP-III,708:3-17) Upon hearing these opinions, counsel for American opted not to request a report from Rogge. In fact, upon being informed of Rogge's

opinion, the new claims adjuster, Jami Rodgers ("Rodgers") contacted Catalyst immediately before the PTD trial to inform Catalyst that their services would not be needed. (APP-II,107) None of this information was shared with Thornton or his counsel until discovery during the bad faith litigation.

This Court previously held that there were no valid defenses to Thornton's petition for PTD benefits, and that American had acted in bad faith. Despite this ruling, American continues to argue that it had legitimate reasons to take this matter to hearing on the determination of permanent total disability. American makes these assertions even in light of an e-mail its attorney sent on March 11, 2013 stating that "there is really no possible situation where Claimant is not going to be found to be permanently and totally disabled in this matter." (APP-I,1815) American still forged ahead, insisting on having its day in court but it offered little evidence at that trial. Leading up to trial, however, American had mounted as aggressive a defense as it could possibly conceive under the circumstances. It was in part because of the aggressive albeit frivolous defense this Court found that American committed bad faith as a matter of law.

Following trial on Thornton's PTD petition, the presiding Deputy Industrial Commissioner issued an award in Thornton's favor, finding that Thornton's "catastrophic injury" rendered him quadriplegic. (APP-II,52-57) The Deputy rejected American's position that Thornton was somehow qualified for competitive

employment in spite of his injuries, paralysis, need for daily care and physical limitations, noting that:

> [The Defendant's] [v]ocational consultant Phil Davis has never met or spoken to Thornton, but issued, nearly on the proverbial eve of trial, an occupational evaluation based strictly on a review of records. Defendants have offered no job placement, educational or vocational consulting services whatsoever, relying strictly on an evaluation prepared for trial. Davis, in an apparent effort to shift responsibility for this failure to Thornton, is critical of Thornton for not contacting 'agencies to assist him with either retraining or occupational pursuits.' Defendants, facing the risk of an adverse decision on the issue of permanent total disability, apparently did not think enough of Thornton's chances to finance any such rehabilitation. Davis concludes: 'I would opinion [sic] that with proper assistance, motivation, and retraining, Mr. Thornton's potential to obtain and maintain competitive employment exists.' Davis is not specific about what 'retraining' and 'competitive employment' he means. He does not persuade.

(Id. at 54) The Deputy concluded that "[t]he decision in this case is clear and obvious: Thornton is now subject to permanent total industrial disability as the result of his work injury of June 25, 2009, and is entitled to benefits on that basis." (Id. at 56)

Next, Rodgers was ordered to "prevent [the partial commutation] from happening." To that end, American's counsel asked the Deputy to reconsider his determination that Thornton was permanently totally disabled and that vocational services had not been offered. (APP-II, 105) The Deputy denied the motion so far as it concerned the PTD finding. (Id.) Based upon a patent misrepresentation by

American, the Deputy reversed his prior finding that vocational services had not been offered. (Id.)

After entry of the PTD award, American also asked the Deputy to stay any petition for partial commutation, suggesting that it might appeal the award of PTD benefits. The Deputy rejected this motion, thus preventing any further delay that American otherwise could have imposed through appeal. (APP-II,105-6) The second-filed petition for partial commutation of benefits went forward, but only after American rejected another of Thornton's requests for payment of indemnity benefits in the form of a lump sum. (App-II,109-110)

Unfazed by the Deputy's rebuke in the award of PTD benefits, counsel for American again approached Rogge. (APP-I,2083-84) In this second contact with Rogge, counsel wrote a letter, representing that Thornton wanted to return to the workforce and that the American arranged for him to work with a vocational counselor to that end. (Id.) This was false.

In his deposition given during the workers' PTD claim, Thornton testified that he was bored being stuck at home and that, although he would like to work, he would have to find someone willing to take him in his current condition. As noted above, Davis was never retained to offer vocational services. (APP-III,739(30:22-31:12),) Still, based upon the carrier's misrepresentations and upon creating the impression that it was Thornton who wished to pursue retraining, Rogge completed

the subsequent questionnaire submitted by defense counsel, checking a box to indicate that Thornton could consider the Catalyst program if he wished. (APP-III,722:6 - 723:3)

As Rogge would later testify, he understood the request for an opinion to be based upon Thornton's affirmative desire to participate in a return to work program, not upon counsel's improper attempt to bolster American's defense. (Id.) When the truth came to light, Rogge testified that he felt deceived, particularly as he had previously told American that Thornton could not successfully participate in vocational services. (APP-III,728:11-23) He also clarified that he stood by his original opinions and that there was no gainful employment that Thornton would be capable of pursuing in light of his physical condition. (APP-III,727:18-24)

IV. Partial Commutation Litigation

Thornton filed his second petition for partial commutation soon after receiving the PTD decision. On May 16, 2014, the Deputy presiding over the partial commutation matter issued an award for Thornton, ordering an indemnity lump sum to be paid by American to Thornton, totaling about $752,000 in indemnity benefits, which sum represented the present-day value of Thornton's lifetime PTD benefits when the award was entered. *Thornton I* Thornton's attorney fee in obtaining this award depleted the amount Thornton had planned to invest. (*Id.*)

In reaching the Commission's decision, the hearing Deputy indicated that Thornton's petition requested "an obviously reasonable commutation in the best interest of the claimant." (*Id.*) American did not appeal this decision.

V. Alternate Medical Care Petition

Thornton requires regular ongoing medical treatment as a result of his catastrophic injuries. (APP-I,48) This includes replacement of his wheelchair about every five years. (Id.) Consistent with this need, Rogge recommended such a replacement on July 1, 2014, and wrote a prescription for the new chair on that same date. (APP-III,701:18–702:4; APP-I,2045-46; APP-I,2047) Instead of replacing the wheelchair in accordance with Rogge's recommendation, American made inexpensive patchwork repairs to Thornton's wheelchair. As a direct result of American's delay in providing the wheelchair, Thornton suffered bursitis in both of his elbows. (APP-I,652:6–653:3) Bursitis led to severe cellulitis and in-patient treatment due to infection. (*Id.*)

Thornton's whole body, systemic infection and later hospitalization caused him further physical and mental pain. (APP-I,2068-2076) Before hospitalization, Thornton's elbows swelled to an alarming degree. At the same time his "pain became very intense and he felt like his arm was on fire." (APP-I,2068-77) Moreover, while in the hospital, Thornton was away from his children and his normal routine. Evidence even shows that Thornton could have avoided this injury

had American abided by its obligations to timely provide Thornton with a new wheelchair. (APP-III,702:17-703:16)

Regarding Thornton's wheelchair, Rodgers testified in deposition on September 10, 2014, that she was unaware of any recommendation for the replacement of Thornton's wheelchair at that time. She further claimed, however, that if "ordered" to replace the wheelchair, she would do so. In a contradiction to this sworn testimony, the wheelchair vendor inquired as to the status of the wheelchair that Rogge had prescribed on July 1, 2014. (APP-I,256-259) When Thornton's attorney forwarded an inquiry to American's attorney, on September 29, 2014, there was dead silence. (Id.) Another email followed October 20, 2014, and yet still no confirmation that Rodgers ordered the wheelchair. (Id.) As a result, on or about October 21, 2014, Thornton's counsel filed a Petition for Alternate Medical Care, so that Thornton could obtain a court order requiring American to provide a replacement wheelchair. (APP-II,434-35)

Thornton's request for prompt medical care to which he is clearly entitled was referred to by American's representatives as "more drivel from [Attorney] Siems" (APP-II,640) Moreover, rather than simply conceding entitlement to the wheelchair, American's representative, Jami Rodgers, instructed her attorney to "slap around" Thornton's attorney at the alternative medical hearing in connection with the claim for a new wheelchair. (App-I,1489:6-15)

On November 4, 2014, the Iowa Workers' Compensation Court issued a consent order, requiring American to provide Thornton with a new wheelchair under to Rogge's original request on July 1, 2014. (APP-II,260-61) Immediately thereafter, Rodgers gave a second deposition on November 5, 2014, in which she now testified that she was aware of Rogge's request as soon as two weeks after it had been written. She went on to suggest that Thornton's wheelchair had not been approved earlier because she had been waiting for the prescription from Rogge's office. In truth, this prescription was written on the same day as Rogge's report: July 1, 2014. (APP-I,2045-46; APP-I,2047)

VI. Bad Faith Proceedings

In December 2013, Thornton first filed his bad faith Petition in Pottawattamie County District Court. Prior to trial the district court granted summary judgment for Thornton on the issues of permanent total disability benefits, and a partial commutation of those benefits. Trial on Thornton's bad faith claim against American commenced on February 3, 2015. The trial lasted five days and the jury reached its verdict the day after the parties rested. Based upon the facts presented at trial, the jury returned a verdict of $284,000 in compensatory damages and $25 million in punitive damages. *Thornton I* In reaching its verdict, the jury determined that American's bad faith conduct extended over five years,

starting the day that the carrier first failed to provide Thornton with his requested wage information. (*Id.*)

American appealed the first jury verdict and this Court retained the case on appeal. This Court reversed and remanded the trial court's award finding that while the district court was correct in finding that American committed bad faith as a matter of law in denying that Thornton was entitled to PTD benefits, the trial court went too far in awarding summary judgment on the issue of partial commutation. *Id.* This Court remanded for a new determination of when bad faith occurred, a determination of damages, and a determination of whether bad faith occurred in American's delay in providing Thornton a new wheelchair.

On February 6, 2018, the second jury trial commenced and again lasted five days with the jury deliberating on the 6th day. The second jury returned a verdict for Thornton of $382,000 in compensatory and $6.75 million in punitive damages. American filed post-trial motions including judgment notwithstanding the verdict or in the alternative, remittitur, and conditional new trial. Thornton filed a post trial motion for attorney fees. The district court denied all post-trial motions and American appealed.

ARGUMENT

I. The trial court correctly denied American's Post Trial Motion.

Following the verdict, American moved the district court for judgment notwithstanding the verdict, remittitur or conditional new trial. (APP-I,195-97) The court correctly denied American's motions. An appellate court reviews the denial of a motion for judgment notwithstanding the verdict for correction of errors at law. Iowa R. App. P. 6.907. *Van Sickle Const. Co. v. Wachovia,* 783 N.W.2d 684, 687 (2010) This Court must view the evidence in the light most favorable to the nonmoving party. *Id.*

American suggests a higher appellate standard because the trial court entered a proposed order submitted by Thornton but a higher standard is not allowed. *NevadaCare, Inc. v. Dep't of Human Services*, 783 N.W2d 459, 465 (Iowa 2010). The trial court correctly denied American's post-trial motions, including American's request that the jury's award of damages be reduced. It is well-established Iowa law that a motion for judgment notwithstanding the verdict should be denied when a party produces substantial evidence to support the jury verdict. See *Revere Transducers, Inc., v. Deere & Co.*, 595 N.W.2d 751, 759 (Iowa 1999). According to this standard, evidence must be examined in the light most favorable to the nonmoving party. *Revere Transducers*, 595 N.W.2d at 763. Applying this test, the trial court correctly found that substantial evidence supported the jury's verdict.

Furthermore, a jury's finding regarding damages must be upheld on appeal "unless it is (1) flagrantly excessive or inadequate, or (2) shocks the conscience or sense of justice, or (3) raises a presumption it is the result of passion, prejudice or other ulterior motive, or (4) lacks evidential support." *Id.* at 769 (internal citations omitted). This Court has further stated that "...we will uphold an award of damages so long as the record discloses a reasonable basis from which the award can be inferred or approximated." *Id.* (internal citations omitted). Although "[t]here is a distinction between proof of the fact that damages have been sustained and proof of the amount of those damages,... if the uncertainty merely lies in the amount of damages sustained, 'recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated.'" *Pavone v. Kirke,* 801 N.W.2d 477, 495 (Iowa 2011) (internal citations omitted). Thus, although overly speculative damages cannot be recovered, some uncertainty regarding the amount of damages is acceptable. *Id.*

In this case, controlling authorities dictate that the jury's verdict must stand. There is no basis in the record for appellant's assertion that "... this Court in [*Thornton I*] contemplated a lower compensatory damage award on retrial...." (American's Brief p. 30) While this Court remanded this action for a new trial, this Court did not limit the damages that Thornton was allowed to present to the jury. (*Id.)*

Substantial evidence supports the jury verdict of $382,000 in compensatory damages and $6.75 million in punitive damages. In its brief, American suggests that judicial estoppel prohibits Thornton from providing certain evidence to the jury regarding loss of use of money, that American was not the cause of Thornton's physical pain and suffering and that the jury's award of consequential damages was not supported by substantial evidence. (Appellants Brief p 34; p 42; 44; 48) These statements misstate the law and the facts.

A. Judicial Estoppel and Collateral Estoppel do not apply to the facts of this case.

American argues that Thornton should be prohibited by judicial estoppel from receiving damages for loss of use of money based on an investment product different than the investment vehicle he planned to use at the time of his partial commutation hearing. (Appellant's brief p. 34) Despite American's argument to the contrary, judicial estoppel is not applicable to this case. Judicial estoppel "prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent positon in a subsequent proceeding." *Wilson v. Liberty Mut. Grp.*, 666 N.W.2d 163, 166 (Iowa 2003). While Thornton presented evidence to the workers' compensation court during the partial commutation proceedings of his plans to invest his money at that time, he is not prohibited from presenting evidence at trial that he would have made a different

investment plan had he received his lump at an earlier date and had he not been forced to pay attorney's fees to receive it.

American notes that by the time the partial commutation hearing was held, Thornton had formulated a plan for investing the lump sum he would then be expected to receive. (Appellant's brief p. 34). Thus, American suggests that Thornton's damages in the bad faith proceedings should be limited accordingly. (Appellant's brief p. 34) What American fails to reference is testimony and evidence that supports the fact that had Thornton received his partial commutation sooner, and had he not been forced to retain counsel to receive it, he could have unquestionably been more aggressive with his investment choices and he could have invested in other options. Unfortunately, due to the actions of American, Thornton had no other viable investment options available to him at the time of the partial commutation proceeding.

American further ignores this Court's prior ruling that American's delay and denial of Thornton's PTD claim necessarily delayed his ability to receive a partial commutation of his PTD benefits. *Thornton I* By design, American continues to deprive Thornton of this opportunity by delaying his day in court and driving up his attorneys' fees. That this same delay tactic cost Thornton the opportunity to also purchase a home instead of needlessly wasting money on rent was no coincidence.: These threats made by American during mediation, when the

carrier's attorney stated that unless Thornton settled under their terms, they would delay, deny, appeal, force litigation for years and drive up Thornton's attorneys' fees. (APP-I,832:33-17; APP-I,1568:15-1569:21)

As such, judicial estoppel does not apply and American should not be given the opportunity to engage in their delay tactics in an effort to continuously thwart Thornton's day in Court.

Additionally, substantial evidence supports the jury's award of loss of use of money damages of $150,000. American's statement that the jury awarded "(i) $114,000 in lost investment income from the delay in Thornton receiving his partial commutation; and (ii) $36,000 in lost home equity" is disingenuous. (Appellant's brief, p. 33). While the jury indeed awarded Thornton $150,000 in loss of use of money damages, the jury was not instructed to award separate damages for "lost home equity" and "lost investment income" as American suggests. (Jury Instructions). American points to closing arguments to speculate how the jury determined the loss of use of money damages. (Appellant's brief p. 33) Closing arguments are, of course, not evidence.

The court simply instructed the jury that damages for loss of use of money were available to Thornton. In fact, the jury was specifically instructed: "Loss of use of money proceeds - Damages that would place the plaintiff in as good a positon as he would have enjoyed had American not committed bad faith. This

includes, but is not limited to, the lost opportunity to invest and to purchase a home." (Jury Instruction 29). The record shows that when American first approached Thornton about settlement on February 9, 2012, he had already planned to devote a portion of his indemnity benefits to purchase a home. (APP-I,581:22-582:15) Claims representative Miller testified that this plan was reasonable and, in her estimation, would have been approved by the Workers' Compensation Court as a part of any settlement. (APP-III,529:23-530:20,533:25-535:5).

The record also reflects that paying rent was a total waste to Thornton, while paying the same amount towards a mortgage would have helped him build equity while also offering tax benefits for payment of other expenses. (APP-I,744:11-20) American's arguments regarding lost investment income are questions better addressed in cross examination, not on appeal; however, these questions have already been addressed at trial. The record shows that Thornton had an "emergency" fund to assist with fixing any major issues in the home, that he had budgeted for home maintenance, and that while he would have had to pay interest and taxes, he would have also been receiving the tax benefits that come with being a home owner. (APP-I,760:11-22; 761:18-762:3,15) Thus, the jury's award of loss of use of money based on Thornton's lost opportunity to purchase a home was

supported in light of the tax benefits and home equity he would have enjoyed in-lieu of wasting money on rent. (APP-I,762:3-15).

Additionally, even after initial settlement efforts failed, Thornton still wanted to purchase a home. (APP-II,129:) As early as 2012, while seeking the full value of his benefits from American, Thornton identified a specific home to purchase in Monona, for which he had been approved for a home loan.[2] (APP-II,129; APP-I,638:11) The sole contingency of the loan was receipt of a lump sum payment of his workers' compensation benefits. (APP-II,129)

The record also shows that Thornton planned on making a down payment of $25,000.00 out of his partial commutation award and would have saved, at a minimum, $11/month had he not been making rent payments. (APP-II,129; APP-II,32) Of course, this figure did not take into account the likely increases in monthly rent as compared to mortgage payments, which would be expected to remain static for a 30 year term. Regrettably, due to American's delaying tactics, frivolous defenses, and bad faith conduct, American deprived Thornton of the opportunity to purchase the home. (APP-I,639:13-640:11) Rodgers testified she knew Thornton lost the home due to American's decision to go trial on the PTD Petition. (APP-I,1255:11-1256:20). Furthermore, the record shows that in

[2] The home that Thornton identified was a rarity in Monona, Iowa, where most homes are two-story, instead of the ranch that he had planned to buy. (APP-I,640:3-9)

addition to the tax benefits Thornton would have received, he would have also seen the benefits associated with making a down payment on his mortgage and increasing the equity in his home. (APP-I 1255:11-1256:20)

In addition to the lost opportunity to purchase a home, Thornton's expert, Dr. Sherman testified to the lost investment income Thornton suffered as a result of American's denial of Thornton's PTD petition and how such denial delayed his ability to receive benefits in the form of a partial commutation. (APP-I,1641:2-1642-13; Additionally, Dr. Sherman testified to a range of investment income that was lost, which ranged from $28,695.00 to $114,000.00. (APP-I,1641:24-1643:23).

Even if the jury awarded $114,000 in lost investments as American suggests, and even if they are justified in doing so, where there is "a reasonable basis in the record from which the amount of damages can be inferred, recovery will be allowed" by the court. *Robinson v. Perpetual Servs. Corp.*, 412 N.W.2d 562, 567 (Iowa 1987). On appeal, evidence must be viewed "in the light most favorable to the plaintiff." *Claus v. Whyle*, 526 N.W.2d 519, 525 (Iowa 1994). In reviewing the trial evidence in the light most favorable to Thornton, the jury was certainly justified in finding that he experienced damages totaling $150,000 for loss of use of money contributable to both lost investment income and the lost opportunity to purchase a home, coupled with the tax advantages he would have also realized.

Therefore, jury's award of compensatory damages is supported by substantial evidence and the Court should not disturb the award on appeal.

B. Substantial evidence supports the jury's finding of Physical Pain and Suffering and loss of full mind and body damages.

Among other damages, the jury awarded $40,000 to Thornton for the pain and suffering caused by American's bad faith conduct and $100,000 in loss of full mind and body damages. (APP-I,188-90) The jury also awarded $40,000 in mental pain and suffering damages which are not being disputed by American on this appeal. Pain and suffering damages are allowed in bad faith actions for past and present mental and physical pain and suffering. *See Niblo v. Parr Mfg., Inc.*, 445 N.W.2d 351, 354 (Iowa 1989) (stating that when a tort involves unlawful or willful conduct, recovery of mental damages are available even if there is no injury). Thornton testified he experienced physical pain and suffering as a result of the American's handling of his workers' compensation claims in bad faith. (APP-I,659:2-10) In light of this and similar evidence, substantial evidence supports the jury's award of damages of $40,000 for physical pain and suffering, and $100,000 for loss of full mind and body damages.

i. Thornton's award of damages for physical pain and suffering was supported by substantial evidence.

Thornton's physical pain and suffering caused by American's bad faith was real and the jury appropriately awarded damages for his suffering. Because of the

delay in his wheelchair replacement, he experienced cellulitis in his left arm which resulted in hospitalization. (APP-I,652:17-653:6).[3] This was the only wheelchair provided by American after Thornton was released from intensive care following the 2009 accident. (APP-I,648:1-5) The narrow armrests had been a problem for some time and, as American knew, Thornton had developed bursitis even earlier than his eventual hospitalization. (APP-I,1466:21-1467:3) Thornton testified on his own behalf regarding the state of his wheelchair when Dr. Rogge prescribed a new wheelchair. (APP-1 648:8-9.) Thornton stated that he was in his wheelchair 18 hours a day and his chair was in poor condition prior to receiving his replacement wheelchair. The evidence shows that American's refusal to replace Thornton's wheelchair caused his cellulitis.

In addition to Thornton's testimony, Dr. Rogge also testified that the deterioration of Thornton's wheelchair caused his bursitis and eventual hospitalization:

> Q. ---how would you describe the status of that wheelchair, that one he's had?
> A. Poor condition.
> Q. All right. Has that created or caused any other problems for Toby?
> A. I mean, I think his wheel—I mean, one recent incident just happened. Toby was recently hospitalized due to a septic bursitis, and basically what that is is an infection of his elbows….he ended up getting a bursitis, which is inflammation of a sack on your elbow. It got infected, which I suspect is most likely due to chronic irritation.

[3] The cellulitis resulted from bursitis, caused in turn by the dilapidated narrow armrests on Thornton's wheelchair.

> The arms of his old chair are very firm and hard. We've even talked about the other day when he was in, I told him needs to get some type of a towel or extra padding on it because it's just—it's in such grave condition that it probably didn't do him any favors with this infection, and he was hospitalized because of it.

(APP-III,702:19-703:16). Moreover, Dr. Rogge stated that he hoped the new wheelchair ordered would have enough padding to alleviate the risk of future health issues.[4] (APP-III,703:17-18)

Moreover, American knew, as early as April 19, 2013, that Thornton would need a new wheelchair at least every five years. (APP-I,2048-2053) Yet, almost five years following the accident, American ignored requests from Thornton's physician, his attorney and American's vendor for wheelchair approval. (APP-II,401-403). As a result, and in light of testimony from Rodgers that she would replace Thornton's wheelchair if she received an "order" to do so, Thornton filed his Petition for Alternate Medical Care on October 21, 2014. (APP-II,406-420) Unfortunately the petition was too late: Thornton was admitted to the hospital for days with severe cellulitis because his wheelchair lacked adequate support. (APP-I-649:12-25)

Before being hospitalized, Thornton's "pain became very intense . . . like his arm was on fire." (APP-I,2068-77) Thornton described the pain as "lots of

[4]Expert testimony was not required to establish the nexus between Thornton's cellulitis, a latent condition, and this defective wheelchair.

pressure," as if "being in a vice." (APP-I,2068-77) Eventually, "he was no longer able to stand the pain," so he sought aid at the emergency room and was admitted thereafter. (APP-I,2068-77) To add to the suffering, this hospitalization took Thornton away from his children and his normal routine, stripping the limited independence he had left. (APP-I,653:19-23)

Interestingly, American does not suggest in its brief that Thornton did not experience pain and suffering. Instead, American argues that Thornton's pain and suffering is not American's fault. American continues to refuse to accept responsibility for its actions by arguing "American did nothing to cause [the wheelchair] delays". (Appellant brief, p. 46) American continues to make this argument even after the jury heard evidence at trial that its representative knew of the need for a new wheelchair, yet did nothing to order one.

In Rodgers' deposition testimony of September 10, 2014, from Rodgers, in which she swore that she was unaware of any recommendation for the replacement of Thornton's wheelchair at that time. She further claimed, however, that if "ordered" to replace the wheelchair, she would do so. 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. Thornton's request for prompt medical care, to which he is clearly entitled, was referred to by American's representatives as "more drivel from [Attorney] Siems". (APP-II,640) Moreover,

rather than simply conceding entitlement to the wheelchair, American's representative, Jami Rodgers instructed her attorney to "slap around" Thornton's attorney at the alternative medical hearing for Thornton's claim for a new wheelchair.

Rodgers testified that she was confused by the questioning of Siems in her deposition, and even tried to suggest that it was Thornton's counsel who delayed the wheelchair. (APP-I,1490:20-1491:13; APP-I,663:13-15)

The jury heard this evidence, and yet still found that it was American's actions that delayed Thornton receiving a new wheelchair. Moreover, American's conduct in this regard affected Thornton's health, safety and welfare, a factor that was independently relevant in assessing punitive damages.

ii. Thornton's damages for loss of full mind and body are supported by substantial evidence

Just as Thornton's damages for physical pain and suffering are supported by substantial evidence, so too are his damages for loss of full mind and body. American suggests that Thornton's loss of full mind and body damages "revolved solely around the alleged delay in Thornton obtaining a replacement wheelchair." (Appellant brief, p. 44) This simply is not accurate. This Court has recognized "loss of function of the body may be an element of recovery 'for the deprivation of full mind and body, separate and apart from impairment of earning capacity.'"

Brandt v. Bockholt, 532 N.W.2d 801, 804 (Iowa 1995) (quoting; *Schnebly v. Baker*, 217 N.W.2d 708, 726; *Yance v. Hoskings*, 225 Iowa 1108, 1119, 281 N.W. 489, 495 (1938)).

Thornton testified regarding the deprivation of his full mind and body while hospitalized for his bursitis. When American delayed his wheelchair, and when American continued to deny he was permanently and totally disabled even while hospitalized after trying to take his own life. This functional impairment was and still is separate and apart from the pain and suffering he experienced and as such the trial court appropriately instructed the jury on the loss of full mind and body jury element of damages.

Clearly, substantial evidence supports the jury's finding of pain and suffering for Thornton's physical damages stemming from American's bad faith conduct that occurred for more than half a decade and for Thornton's loss of full mind and body. Therefore, the trial court's finding in overruling judgment notwithstanding verdict, that Thornton was entitled to $40,000.00 in damages for physical pain and suffering, and $100,000 for loss of full mind and body is based upon substantial evidence. This court should not disturb the court's ruling.

C. The jury's award of consequential damages is supported by substantial evidence.

Just as the other elements of damages are supported by substantial evidence, so too are the consequential damages awarded. The jury awarded consequential

damages to Thornton in the amount of $52,000. (APP-I,188-190) This amount is supported by substantial evidence and should not be reduced on appeal. As to the issue of consequential damages the Court instructed the jury: "Consequential Damages – Attorney fees and all other damages incurred which were necessary in recovering the workers' compensation benefits to which Plaintiff was entitled." (Jury Instruction 29) (emphasis provided) Despite this instruction, American argues that the amount awarded in consequential damages should be reduced to $17,145.00, the amount of attorney fees incurred after October 22, 2012, the date the jury found bad faith to have commenced. (Appellant brief, p. 49)

This argument ignores the district court's instruction to the jury that consequential damages consisted of "attorney fees and all other damages" incurred by Thornton in recovering his workers' compensation benefits. (Jury Instruction 29) The jury heard evidence that Thornton incurred fees in the amount of $52,301.46 from 2009 through January 2018, for work associated with his PTD claim. (APP-I,446-448) The jury also heard evidence regarding damages Thornton incurred throughout his workers' compensation claim.

If American is right and the jury intended to award Thornton his attorney fees dating back to 2009 this Court should amend the jury verdict to reflect a date of bad faith commencing on September 1, 2009. The jury heard evidence that Thornton had requested wage information from American on July 8, 2009, and

again on August 25, 2009. (APP-I,1061:4-8; APP-II,421-426) It is undisputed that information is a benefit under an insurance policy and that American had a statutory duty to provide this wage information to Thornton. Iowa Code §85.36(6) American knew it had a duty to provide this information to Thornton, yet it failed to do so without a reasonable basis. The correct date for bad faith to have commenced was September 1, 2009.

While substantial evidence supports the jury's award of consequential damages, in the event this Court determines that the amount of consequential damages should be reduced, that reduction would be minimal and would not substantially effect the outcome of this case, as such the trial court's order should not be disturbed.

II. The punitive damage award is within the constitutionally acceptable limits

Appellate courts review punitive damage awards for excessiveness de novo. *Wolf v. Wolf*, 690 N.W.2d 887, 894 (Iowa 2005). After a thorough review of American's post-trial arguments, it is clear that the trial court correctly refused to reduce the compensatory and punitive damages amounts, because substantial evidence supported the awards. As discussed below, the punitive damages awarded by the jury do not violate the Due Process Clauses of the Iowa or United States Constitutions and should be affirmed

A. The punitive damages award is within the constitutionally acceptable limits of the Iowa constitution.

Iowa statutory law allows an award of punitive damages where a preponderance of clear, convincing and satisfactory evidence shows "willful and wanton disregard for the rights or safety of another". Iowa Code §668A.1(1)(a). "Under Iowa law, punitive damages may be imposed to punish Defendant's willful and wanton conduct and to deter the Defendant, or others, from repeating such conduct in the future." *Buhmeyer v. Case New Holland, Inc.*, 446 F. Supp. 2d 1035, 1047 (S.D. Iowa 2006). Before a plaintiff may recover punitive damages, the plaintiff must prove that "the conduct of the Defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." *Id.* There are, of course, also limitations on the amount of punitive damages that a fact finder can award.

This Court has analyzed the reasonableness of punitive damages awards in numerous cases, and analyzed the award of punitive damages specific to bad faith worker's compensation claims in at least two significant cases; *Wilson v. IBP Inc.*, 558 N.W.2d 132 (Iowa 1997), and *Gibson v. ITT Hartford,* 621 N.W.2d 388 (Iowa 2001). In *Wilson v. IBP, Inc.*, this Court analyzed the constitutionality of a punitive damages award and found that an award of punitive damages 500:1 the compensatory damages in a bad faith action against a workers' compensation carrier did not violate the due process clause of the Iowa or United States

Constitutions. 558 N.W.2d 132, 146 (Iowa 1997). Similarly, in *Gibson v. ITT Hartford*, this Court held that an award of punitive damages 277:1 the compensatory damages were also constitutional. 621 N.W.2d 388, 398 (Iowa 2001). The 17:1 ratio in this case being substantially lower than either the *Wilson* or the *Gibson* cases is clearly supported by Iowa law and the facts of this case, particularly considering the shocking conduct of American over the course of several years.

Further, the Iowa Court of Appeals recently issued a decision applying the *State Farm Mutual Ins. Co. v. Campbell,* 538 U.S. 408, 418 (2003) guideposts and citing *Wilson* as controlling Iowa authority in *Christensen v. Good Shepherd*, No. 17-0516, (Iowa App. 2018). In *Good Shepherd*, a resident of the Good Shepherd assisted living facility died from complications of a fall while residing at Good Shepherd. The resident had a history of falls, and suffered from dementia. Good Shepherd staff knew of the resident's history of falls, and classified the resident as "high fall risk" resident. Despite this knowledge, Good Shepherd did little to prevent these falls. The trial record also showed that the resident had lost weight while residing at Good Shepherd and was not given medication on numerous occasions.

The jury returned a verdict of $150,000 in compensatory damages and $750,000 in punitive damages. On appeal, and in regards to the punitive damages

ratio issue Good Shepherd argued that under the Campbell analysis the ratio of 5:1 was excessive and should have been reduced to a one-to-one ratio. The court of appeals refused to reduce the punitive damages award noting:

> To be clear, the Court in Campbell did not impose a four-to-one ceiling....Rather, the Court restated its 'reluctance to identify concrete constitutional limits on the ratio between harm, or potential harm to the plaintiff and the punitive damages award,' and 'declined again to impose a bright-line ratio which a punitive damages award cannot exceed.

Good Shepherd, 23 (internal citations omitted)

Remarkably, American fails to cite to *Good Shepherd*, *Wilson*, or *Gibson*, despite defense counsel serving as appellate counsel on all three cases, notwithstanding of American's duty of candor to the court. (S*ee Iowa R. of Prof. Conduct* 32:3.3).

American likely does not bring these cases to the Court's attention as these cases are directly adverse to American's position. Contrary to American's suggestion, *Campbell* does not set forth a bright line rule for a single digit ratio of compensatory to punitive damages. Indeed, the Iowa Court of Appeals reiterated the *Campbell* holding recently; "[the defendant] Good Shepherd clings to selective language in *Campbell*...To be clear, the Court in *Campbell* did not impose a four-

to-one ratio ceiling." *Good Shepherd*, pg. 23. In applying Iowa law, the *Good Shepherd* Court also noted that the consideration of the constitutionality of the punitive damages award is not limited to a review of the ratio of compensatory to punitive damages, as the Court of Appeals noted also of importance in the consideration is the "relationship between the punitive damages award and the likely harm to result from the American's conduct as well as the harm that actually occurred." *Good Shepherd*, pg. 24 citing *Txo Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 460 (1993).

Here, not only is the ratio of compensatory damages to punitive damages less than similar cases applying the *Campbell* guideposts, but the behavior in the case at bar is far more egregious than the behavior in similar cases. Here the misconduct justified an even higher punitive damages award. In determining if a punitive damages award falls into a constitutionally acceptable limit the Iowa and Federal Courts must analyze the three guideposts as set forth in *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996) and addressed in *Campbell,* 538 U.S. at 418, detailed hereinafter. As set forth below, the punitive damages awarded in this case clearly satisfy all guideposts under the United States and Iowa constitutions as such this Court should affirm the trial court's decision.

B. The punitive damage award is within the constitutionally acceptable limits under federal law.

The punitive damages awarded in this case not only satisfy the Iowa constitution and Iowa statutory law, but also the United States Constitution. The test set forth in *BMW of N. Am.* and addressed in *Campbell* is appropriate in analyzing the constitutionality of the punitive damages awarded. This test provides three guideposts for constitutional punitive damage awards:

(1) the degree of reprehensibility of the American's conduct,

(2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded, and

(3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases.

Campbell, 538 U.S. at 418, *BMW of N. Am., 517 U.S. 559.*

American suggests that *Campbell* stands for the proposition that only a single digit ratio of compensatory to punitive damages is constitutionally permissible; but, this argument lacks traction. The United States Supreme Court in *Campbell* reaffirmed earlier holdings regarding punitive damages stating; "[w]e decline again to impose a bright-line ratio which a punitive damages award cannot exceed." *Campbell,* 538 U.S. at 423. The Supreme Court further reiterated that punitive damages are intended for deterrence and retribution, and that no mathematical calculation could be applied in all cases. *Id.* at 415.

Campbell involved a bad faith action against State Farm for failing to settle a claim within policy limits thereby exposing its insureds to personal liability for damages incurred by an injured party in a car accident caused by the *Campbell* plaintiffs. *Id.* The jury in the bad faith trial awarded $1 million in compensatory damages for emotional distress, and $145 million in punitive damages. The Utah Supreme Court affirmed the trial court's award. The United States Supreme Court granted Certiorari to determine the issue of constitutionality of the punitive damages award. In analyzing the award's proportionality the Supreme Court focused on evidence that was offered at trial of the insurers conduct nationwide as opposed to conduct specifically targeted at the *Campbell* plaintiffs. It noted that some the defendant's behavior, while not permissible in Utah, was permissible in the jurisdictions in which the behavior took place. The Court then concluded that State Farm could not be punished by the Utah court for permissible behavior in other jurisdictions. It further noted that the plaintiffs were awarded $1 million dollars solely for emotional distress they underwent over the course of 18 months throughout the personal injury litigation against them. Evidence presented at the bad faith trial indicated that State Farm had paid out the excess judgment against the *Campbell* plaintiffs before the bad faith complaint had been filed.

Here, Thornton's distress and emotional rollercoaster caused by American has lasted for several years. Clearly, the facts of the case at hand are substantially

more egregious than the facts of *Campbell*. Thornton, a financially and emotionally vulnerable quadriplegic, was the victim of targeted bad faith for more than half a decade before the first bad faith trial, and arguably even longer, as American's behavior continues. The jury awarded Thornton damages, not only for mental pain and suffering, but also for physical pain and suffering, loss of use of money, loss of full mind and body, and consequential damages, totaling $382,000. It is clear that the $6.75 million punitive damages award still has not served the purpose of deterring American from its bad faith conduct. American has yet to take responsibility for its bad faith conduct and continues to argue, even on this appeal, that it had a basis to take Thornton's PTD petition to trial.

Contrary to American's suggestion, *Campbell* did not overturn existing law, but instead simply provides an analysis that a court should apply when determining the appropriateness of a punitive damages award; an analysis that the trial court correctly applied when it determined that the $6.75 million punitive damages awarded were appropriate.

i. American's conduct was reprehensible.

Reprehensibility "is perhaps the most important indicium of the reasonableness of a punitive damages award." *BMW of N. Am.*, 517 U.S. at 575. To determine the reprehensibility of the American's conduct, the first guidepost, the court must consider five factors:

> (1) whether the harm caused was physical, or merely economic; (2) whether the tortious conduct involved indifference to the health or safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct justifying the award of punitive damages involved repeated actions or was merely an isolated incident; and (5) whether the tortious conduct was merely accidental or instead involved intentional malice, trickery or deceit.

Campbell, 538 U.S. at 419. Each of these factors and the evidence presented at trial weigh in favor of the verdict. The evidence supports the punitive damages awarded.

(1) Thornton suffered physical and economic harm.

The first factor of the reprehensibility test, whether the harm caused was physical or merely economic, weighs heavily in favor of the punitive damages awarded by the jury because both harms existed. American knew Thornton was physically, economically and mentally fragile as a result of his injury. Nevertheless, American sought to take advantage of Thornton's vulnerable position in an attempt to save approximately $2.3 million. This substantially affected Thornton's mental and physical wellbeing. American threatened to deny Thornton the benefits to which he was entitled, to delay his day in court, and to drive up his attorney fees, American made good on all of these threats. (APP-I,883:8-884:5)

Thornton further suffered mental pain and suffering when American continued to suggest it was doing everything in his best interest when it clearly was not, and when American knew about Thornton's fragile mental state but continued

to act in bad faith. Curiously, American notes at one point in its brief that American was unaware of mental health care as it was being provided. (American's Brief p.17) In a nearly contemporaneous statement, however, American goes on to imply that it was justified in its defense because Thornton confided in his therapist that he wanted to try new things. (American's Brief P. 17)

This intentional misdirection is not unlike the American's tactic in defending the workers' compensation claim, when Cory Abbas suggested to various individuals that Thornton had testified that he wanted to work. American outrageously doubles down on this comment when it suggests in its brief that "Based upon [the suggestion that Thornton wanted to work], vocational rehabilitation expert Phil Davis issued a report stating that Thornton might be capable of competitive employment and should pursue vocational rehabilitation opportunities." (Appellant's Brief p. 22) This is an inaccurate reference to the trial transcript. Phil Davis' testimony and the testimony of American's representatives make clear that Mr. Davis was not retained to provide a vocational rehabilitation opinion. American continues to take the position that it had valid defenses and Thornton's permanent total disability claim even in light of this Court's order to the contrary.

Beyond mental and emotional harm, American caused physical harm to Thornton. As early as July 15, 2014, American knew that Thornton needed a

replacement wheelchair pursuant to Rogge's prescription dated July 1, 2014. Instead of providing the needed replacement, American arranged for inexpensive repairs that failed to address his risk of injury. Predictably, this refusal to provide requisite care caused contusions to Thornton's elbows, which developed into painful cellulitis and led to hospitalization for days. All the while, his hospitalization took him away from his lifeline and reason for living: his children. The jury also heard testimony from Rodgers, American's representative, attempting to explain her inconsistent testimony. (APP-I,1490:20-1491:13) The jury reviewed the facts in their entirety, and consistent with these facts, the jury awarded $40,000.00 for mental pain and suffering and $40,000.00 for physical pain and suffering.

American's reprehensible conduct also posed an economic harm to Thornton. American refused to ever voluntarily pay Thornton the benefits to which the carrier knew he was entitled. These threats were not harmless considering American knew Thornton was on a very tight budget with only a fixed income. This Court has already held that American's bad faith denial of Thornton's PTD benefits delayed his ability to receive these benefits in a lump sum. (*Thornton* I) This behavior directly deprived Thornton of loss of use of money in the amount of $150,000.00 and consequential damages in the amount of $52,000.00.

(2) American's bad faith conduct showed an indifference to Thornton's health and safety

The second factor of the reprehensibility test is clearly established because American's behavior was more than indifferent to Thornton's health and safety; it was intentional. From the beginning American has ignored Thornton's health, safety, and well-being. American's intentional disregard for Thornton's health and safety is also demonstrated by the carrier's behavior from the very inception of the claim.

First, American refused to provide Thornton with one year's wage information, which was requested on three separate occasions. (APP-II,421-427) Next, American sought to force Thornton into an economically disastrous settlement that would have closed out his file, underpaid him over $160,000 in indemnity payments, and saved American approximately $2.3 million. (APP-II,266-268; APP-II,269-271) Equally important, counsel made explicit threats that the carrier would deny Thornton's claims, delay his ability to prove his entitlement to benefits, appeal at each stage, and drive up his costs at every turn. Unfortunately for Thornton, American made good on these threats.

Initially, Rodgers, a case manager, suggested that she was unaware of Thornton's need for a new wheelchair, indicating she would provide one if "ordered" to do so. When evidence came to light that Dr. Rogge had requested a wheelchair more than two months earlier, however, Rodgers offered inconsistent

testimony that she actually knew a note for a new wheelchair had been made on July 1, 2014, but she did not see a prescription. (APP-I,245-246) Contrary to this sworn testimony, Rogge wrote the prescription on the same day as his request: July 1, 2014. (APP-I,245-246; APP-I,2047) Due to this behavior, Thornton incurred additional physical injury and increased cost in obtaining an order to replace the chair from the Workers' Compensation Court. (APP-II,434-446) Based on counsel's earlier threats, it is easy to conclude Rodgers intentionally delayed a replacement wheelchair in an effort to save costs, drive up Thornton's expenses as previously threatened by American, and punish Thornton for not settling. The jury got it right.

(3) Thornton is financially vulnerable.

Regarding the third factor of reprehensibility, dealing with Thornton's financial vulnerability, American again ignores important evidence the jury considered. American suggests that because it was paying benefits Thornton was not financially vulnerable. This argument ignores this Court's early decision in *Thornton I* finding that American acted in bad faith in delaying Thornton's PTD benefits, and thereby delaying his eventual award of a lump sum payment.

Contrary to American's contentions, it knew of Thornton's financial vulnerability throughout the underlying workers' compensation actions. The evidence shows that American knew about his vulnerability and attempted to

exploit it. Thornton's only source of income throughout the underlying workers' compensation matters was his weekly workers' compensation benefits and social security disability payments. (APP-I,578:24-579:5) After paying his expenses each month and providing for his children's needs, Thornton was just breaking even. Additionally, American's bad faith conduct in denying that Thornton was permanently and totally disabled forced Thornton to hire counsel, providing further financial strain on his already tight budget. (APP-I,620:3-7)

At trial, witness after witness testified that Thornton would live a life at poverty level if he continued to receive weekly payments as opposed to receiving a lump sum payment of his benefits by way of a partial commutation. (APP-I,950:8-18). Defendant knew of Thornton's budget and knew without a lump sum payment he would soon experience a budgetary crisis. (APP-I,950:8-18) By threatening to drive up Thornton's costs unless he capitulated on American's terms, this shows that American attempted to take advantage of Thornton's financial vulnerable condition.

(4) Repeated course of conduct

As with the other elements, the repetitive nature of the conduct also justifies the $6.75 million award. Substantial evidence supports a finding that American's behavior involved repeated actions against Thornton, including its denial of several petitions before the Workers' Compensation Court for benefits, delays and denials

of medical care, and threats and delays throughout the litigation process. The conduct was not one isolated incident but rather atrocious behavior that stretched over a half a decade and continues today.[5] American continues to deny any wrongdoing, even on this appeal. In this appeal, American argues that its bad faith was isolated and only "occurred in connection with PTD hearing – and only in the midst of confusing settlement conduct from Thornton's side." (Appellant's Brief, p. 61). American continues to blame Thornton for its bad conduct. American's continued behavior has kept Thornton in a financially vulnerable position by further delaying his access to the compensation awarded by the jury, to which he is entitled.

American suggests that the course of conduct must be to other individuals. But Iowa statute allows a finding of the willful and wanton behavior to be directed to one Plaintiff. Here we have repeated conduct directed to one Plaintiff: Toby Thornton. At trial, Jami Rodgers testified that Thornton could essentially receive any medical treatment he wanted without the approval of American. This was, of course, a false statement; evidence presented at trial and the testimony of Cory Abbas makes clear that there continues to be issues with Thornton receiving the care he needs even following the first trial. (APP-I,1581:9-1582:11; APP-II,642) For example, Thornton was in need of prescription shampoo due to having to take

[5] American continues to state it has done nothing wrong despite two jury awards and a finding by this Court that it acted in bad faith.

sponge baths as a result of his quadriplegia, Thornton also required a special medication to help with muscle spasms. In order for Thornton to receive either medication involvement by his attorney was necessary. (*Id.*) This repeated conduct towards a vulnerable injured worker supports an award of punitive damages as contemplated by the jury.

(5) Intentional tortious conduct

Lastly, as substantial evidence indicates and the jury found, American's behavior was intentional. This establishes the fifth factor of reprehensibility. American deceived Thornton and the underlying workers' compensation courts by making misrepresentations. American's representative, Lestage, instructed Thornton's partial commutation be delayed at any cost. (APP-I,1916-1944) Furthermore, evidence presented at trial established that American would not voluntarily pay PTD benefits or a partial commutation. The evidence presented established that American was never acting in Thornton's best interest, but was only acting in its own interest in an effort to save money and pay Thornton less than what he was legally entitled to.

American intentionally ignored repeated requests for one year's worth of wage information, which was needed to verify the accuracy of the benefits received. (APP-II,421-427) All witnesses agreed that American was statutorily required to provide such information. (APP-I,1423:11-15) American has failed to

explain why it failed to provide this. Accordingly, all reprehensibility factors weigh heavily in favor of Thornton. This conclusion is not only consistent with the evidence adduced at trial, the jury's verdict and the trial court's ruling on post-trial motions, but also with controlling State and federal authorities.

American continues to argue that it had some reasonable basis to take the PTD to hearing, despite two jury verdicts to the contrary and the decision of this Court, which is now the law of the case. (Appellant's brief pg. 24) Throughout its brief American ignores the extent of Thornton's injuries while magnifying his recovery. For example, American only refers to Thornton's injuries as "severe" and states that "he participated in intensive inpatient rehabilitation and showed signs of functional improvement." (Appellant's brief pg. 14-15) American further states "Thornton is capable of doing more than others with the same spinal cord injury, who are amazed at how well he functions." (Appellant's p. 16) While these statements may be factually accurate they undermine and trivialize Thornton's injuries, which have accurately been described as "catastrophic" by the workers' compensation and district court. *Thornton I*

Further, American attempts to mask its bad acts by bolstering all the "good" things they claim to have done for Thornton. But the only "good act" American can rely on is the payment of certain benefits to which Thornton was already entitled and American was legally obligated to make. Even while making those

mandatory benefit payments, American continued to deny without reasonable basis, Thornton's other benefits, such as his entitlement to PTD benefits. *Thornton I* Despite two trials, and an order from this Court setting forth that American acted in bad faith, it still denies bad faith.

American continues to provide contradictory statements to the Court concealed as "facts" in its brief by insinuating that everything was going well with Thornton until he hired attorney Siems. The truth is that Thornton was a target and victim of American's stated policy of conforming to the "Amerisafe Way" of gaining the trust of the injured worker before attorneys involvement. (APP-II,630; APP-I,461:5-19; APP-II,627-629).

ii. Disparity Between the Actual or Potential Harm

The second guidepost considered under Iowa and federal law in determining the constitutionality of a punitive damages award—the disparity between the actual or potential harm to the plaintiff and the amount of the punitive damages award—also weighs in favor of Thornton. As the trial court found, substantial evidence that supports the finding of a ratio of 17:1, a ratio which is also supported by cases previously heard before this Court and the United States Supreme Court. American mistreated Thornton for over half a decade. Given American's egregious conduct over the years a jury could have found Thornton suffered $382,000 in damages. It also could have found that if American's bad faith conduct continued, the *potential*

harm to Thornton and other injured workers' owed benefits by American would be far greater.

In assessing the disparity between actual or potential harm and the amount of punitive damage award, the United States Supreme Court made clear "there is no bright line ratio" between compensatory to punitive damages. *Campbell*, 538 U.S. at 425; see also *Wilson*, 558 N.W.2d at 145. This Court has similarly recognized that "[n]o mathematical bright line can be drawn between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Wilson*, 558 N.W.2d at 145 (quoting *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991)). More recently in *Good Shepherd* the Iowa Court of Appeals echoed Iowa and United States precedent in stating that there is no mathematical equation to determine the ratio of compensatory to punitive damages.

This Court further recognized prior United States Supreme Court decisions in holding that "[g]eneral concerns of reasonableness and adequate guidance from the court when the case is tried to a jury; however, do not enter into the constitutional calculus." *Wilson*, 558 N.W.2d at 145. Thus, a jury "must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." *Id.* As long as the discretion is exercised within reasonable constraints, due process is satisfied. *Id.* Based upon

these principles, the United States Supreme Court previously upheld an award of $19,000 in compensatory damages and $10 million punitive damages, or a ratio of 526:1, which is far greater than the 17:1 ratio found in this case. *Txo Prod. Corp. v. All. Res. Corp.*, 509 U.S. at 453, 462.

American argues that there are no post *Campbell* decisions in any jurisdiction upholding anything more than a single digit multiplier in workers' compensation insurance bad faith cases. (Appellant's brief p. 54) This is a narrow reading of recent case law. Courts must apply the guideposts set forth in *Campbell* in any case where punitive damages are in play. American's attempt to narrow the analysis to only bad faith insurance cases lacks analytical rigor and is an ostensible attempt to mislead this Court regarding recent punitive damages decisions.

There have been numerous post-*Campbell* cases applying punitive damages guideposts upholding ratios higher than single multipliers (See: *Bullock v. Philip Morris USA, Inc.*, 198 Cal. App. 4th 543, 131 Cal. Rptr. 3d 382 (2011) (The extreme reprehensibility of cigarette manufacturer's misconduct, and its financial condition, justified a $13.8 million punitive damages—a ratio of 16 to 1 to compensatory damages); *Hamlin v. Hampton Lumber Mills, Inc.*, 349 Or. 526, 246 P.3d 1121 (2011) (Oregon Supreme Court found punitive damages not excessive, and stating interests of deterrence and retribution supported 22:1 award); *Seltzer v. Morton*, 336 Mont. 225, 154 P.3d 561 (2007) (Montana Supreme Court overruled

District Court's decision reducing jury awarded punitive damages by reinstating $20 million award with 18:1 ratio, finding it did not exceed the *Campbell* "to a significant degree"); *Phelps v. Louisville Water Co.*, 103 S.W.3d 46 (Ky. 2003) (Supreme Court of Kentucky upheld $2 million punitive damages award—ratio of 11:1 to compensatory damages); *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003) (upheld $18,372,000 award--37:1 ratio for willful and wanton conduct); *Nickerson v. Stonebridge Life Ins. Co.*, 5 Cal. App. 5th 1, 209 Cal. Rptr. 3d 690 (2016) (Court of Appeals upheld $475,000—10:1 ratio on a bad faith insurance claim).)

If American's argument were embraced that only a 1:1 ratio should be mandatory in instances of substantial compensatory damages, this would result in defendants having incentive to drive up plaintiffs' damages to limit the ratio of punitive damages. Obviously, this would not serve the intended purpose of punitive damages. Further, what constitutes "substantial damages" differ from the facts of each case and the harm actually caused. Here, many of the facts presented to the jury demonstrated unacceptable misconduct which have been discussed in fuller detail throughout this brief. All factors weigh in favor of affirming the jury's award of punitive damages.

iii. Punitive Damages Versus Civil Penalties

American contends that the third guidepost—the difference between the amount of the punitive damages awarded and any civil penalties authorized in comparable cases—weighs in favor of American, and as such any award of punitive damages in the bad faith action should be limited to a 1:1 ratio. Just as unpaid medical benefits does not result in penalties, so too were penalties unavailable in this matter before the Workers' Compensation Court. As such, the civil penalty analysis is inapplicable.

Penalties are allowed in the workers' compensation court under limited circumstances; however, the Iowa Supreme Court has made clear that the statutory penalty provision of the Iowa Workers' Compensation Act is not the sole remedy for all types of wrongful conduct by carriers. *Christensen v. Snap-on Tools*, 554 N.W.2d 254, 260 (Iowa 1996). Furthermore, in awarding penalties in the workers' compensation context, the chief consideration is whether any denial was fairly debatable. In contrast, the intention of a defendant is of chief importance in a determination of bad faith. Thus, the workers' compensation penalty provisions are not similar to the award of punitive damages and therefore should not apply here. *Id.*

In *Wilson*, the Court stated when determining a punitive damages award, the jury could consider the following evidence: "1. [t]he nature of the defendant's....conduct[,] 2. [t]he amount of punitive damages which will punish

and discourage like conduct by the Defendant in view of their financial condition [, and] 3. [t]he plaintiff's actual damages." *Wilson* 558 N.W.2d at 142. In neither *Wilson* nor in *Gibson* did this Court dictate the ultimate level of punitive damages awarded required analysis of the amount of penalties available.

Another factor further distinguishing this case from those cited by American involves American's ability to pay a punitive damage award at an amount close to the ultimate verdict reached. The record shows that American is making a substantial amount of money on the investment of premiums paid by Iowa businesses. Hence, American could withstand a substantial punitive damages award. (APP-I,1000:5-10) This position is reinforced by the fact American has never taken this case seriously: not after the accident, not throughout the workers' compensation actions, not following two jury verdicts awarding substantial compensatory and punitive damages and not after a finding by this Court that the American acted in bad faith. American further downplays its culpability by stating "a court would have to find American'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"....The evidence comes nowhere close to satisfying this standard." (Appellant's brief, p. 55) (internal citations omitted) American continues to insinuate that its behavior really wasn't that bad.

American also cites to numerous cases, to suggest that post *Campbell* punitive damages awards must be reduce to a single digit ratio, without setting forth the facts of those cases. (Appellant's Brief, 55) But a multitude of post *Campbell* cases support a higher ratio of punitive damages. The ultimate determination of the constitutionality of a punitive damages award is whether the trial court appropriately applied the *Campbell* guideposts, not whether the ratio is 1:1. For example, the Oregon Supreme Court in *Williams v. Philip Morris, Inc.*, 176 P.3d 1255 (Ore. 2008), held that a compensatory damages award of $821,000 and a punitive damages award of $79.1 million or a ratio of almost 100:1 was constitutional under the Oregon and Federal constitutions.

On appeal to the United States Supreme Court, *Phillip Morris* the Court remanded with instructions for the Oregon court to apply the standards set forth in *Campbell*. After applying these standards the Oregon Supreme Court again upheld the 100:1 ratio. The United States Supreme Court then denied further review.

The district court applied the correct test to the facts as determined by the jury justified that an award of $6.75 million in punitive damages. Therefore, in applying the applicable standards, it is clear that the punitive damages awarded in this case are well within the constitutionally acceptable limits and should be affirmed on appeal.

The fact that American still claims that it did nothing wrong in the defense of Thornton's workers' compensation action demonstrates that the punitive damages amount awarded by the trial court was clearly not enough. Even after two multimillion dollar punitive damage awards against it, American continues to deny any wrong doing in the handling of Thornton's claim. Such actions continue to underscore the reprehensibility of American's actions in handling Thornton's claim. American's behavior coupled with the fact that Thornton is subject to a lifelong relationship with American provides overwhelming support for the punitive damages awarded.

III. In the unlikely event of a third trial Attorney Siems should be allowed to represent Plaintiff and an instruction for damages for loss of full mind and body would be appropriate

A. Siems should be allowed to represent Thornton in any additional bad faith proceedings.

The District Court correctly found that Attorney Siems was not a necessary witness to the bad faith proceedings. American has attempted unsuccessfully to disqualify Siems from this action at both the first and second bad faith trials. Siems is not a necessary witness, he did not testify at either bad faith trials, and it would be improper for this Court to issue a directive that he be disqualified from representing Thornton in any future bad faith proceedings.

American argues that there is virtually no possible situation where an attorney who has represented a client in an underlying insurance dispute may act as trial counsel in a subsequent bad faith action. (Appellant's brief, p. 70) It is well established law; however, that "[a] party's right to select its own counsel is an important public right and a vital freedom that should be preserved; the extreme measure of disqualifying a party's counsel of choice should be imposed only when absolutely necessary." *Williams v. Borden*, 501 F. Supp. 2d 1219, 1223 (S.D. Iowa 2007) (quoting *Machece Transp. Co. v. Philadelphia*, 463 F. 3d 827, 833 (8th Cir. 2006)). The facts of this case do not warrant a disqualification of Siems Moreover, disqualifying Siems would only bring about substantial hardship pursuant to Iowa R. Prof. Conduct 32:3.7. A substantial hardship may exist if the lawyer provides distinctive value. *State v. Vanover*, 559 N.W.2d 618, 633 (Iowa 1997). As in this case, value may be characterized by a lawyer with extraordinary and irreplaceable familiarity with the client's affairs, a long standing relationship with the client, and experience in a highly specialized area of law. *Id.*

B. The loss of full mind and body instruction as appropriate and in the event of a retrial the district court should not be prohibited from instructing the jury.

As noted above, evidence supported the jury's award of loss of full mind and body. As such, no different instruction should be given in the unlikely event of a new trial.

CONCLUSION

Toby Thornton's tumultuous journey with American began in 2009 and continues to this day. Two juries have awarded Thornton substantial damages for the bad faith conduct American has subjected him to. Even despite these jury verdicts and this Court's prior to determination that American acted in bad faith in its handling of Thornton's PTD claims, American refuses to accept responsibility. Substantial evidence supports the jury's verdict. For this reason, and the reasons discussed more fully above, Thornton respectfully requests this Court uphold the jury's verdict and the district court's order.

REQUEST FOR ORAL SUBMISSION

Appellee hereby requests oral argument upon submission to the Supreme Court of Iowa.

By: _____

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PROOF OF SERVICE

I hereby certify that on January 22, 2019, I electronically filed the foregoing Amended 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 the purposes of 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 13,983 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: January 22, 2019