IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

FERN JOHNSON,

Plaintiff/Appellee,

-vs-

UNITED PARCEL SERVICE INC.,
LIBERTY MUTUAL FIRE INSURANCE CO.,

Defendants/Appellants.

Appeal Nos. 28598, 28599
Filed: May 16 & May 17, 2018

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL DISTRICT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE JANE WIPF PFEIFLE,
CIRCUIT COURT JUDGE

APPELLANTS' OPENING BRIEF

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JURISDICTIONAL STATEMENT

The circuit court entered judgment on March 19, 2018, and filed a notice of entry of judgment on March 22. The appellants, Liberty Mutual Fire Insurance Company and United Parcel Service, Inc., timely filed their notices of appeal on April 17, 2018 and April 18, 2018, respectively.

STATEMENT OF THE ISSUES

1. A bad faith claim requires proof of an intentional denial of a claim without a reasonable basis. The appellants followed the advice of their counsel, Eric Schulte, advice that was reasonable based on the law at the time, before discontinuing appellee Fern Johnson's benefits. Did the circuit court err in denying the appellants' judgment on Johnson's bad faith claim as a matter of law?

   Yes. The circuit court erred by granting summary judgment in favor of Johnson that the appellants' decision was not fairly debatable, and by denying the appellants' renewed motion for judgment as a matter of law.

   - *Champion v. United States Fid. & Guar. Co.*, 399 N.W.2d 320 (S.D. 1987).
   - *Dakota, Minnesota & Eastern R.R. Corp. v. Acuity*, 2009 S.D. 69.
   - *Hayes v. Rosenbaum Signs & Outdoor Advertising, Inc.*, 2014 S.D. 64.

2. Pecuniary harm resulting from the coverage denial is a necessary element to recover emotional distress damages for a bad faith claim. Johnson did

not seek pecuniary damages as part of her bad faith claim. Did the circuit court err by denying the appellants judgment on Johnson's bad faith claim as matter of law?

Yes. The circuit court erred by denying the appellants' renewed motion for judgment as matter of law.

- *Kunkel v. United Sec. Ins. Co.*, 84 S.D. 116 (1969).
- *Paulsen v. Ability Ins. Co.*, 906 F. Supp. 2d 909 (D.S.D. 2012).

3. The jury instructions and evidentiary rulings barred the jury from considering evidence of Schulte's advice for the intent prong of Johnson's bad faith claim, as well as considering that advice to show the appellants' lack of malicious intent, a necessary element of punitive damages. Did the circuit court err by not granting the appellants a new trial?

   Yes. The circuit court erred by denying the appellants' motion for a new trial.

   - *Champion v. United States Fidelity & Guar. Co.*, 399 N.W.2d 320 (S.D. 1987).
   - *Crabb v. Nat'l Indemnity Ins. Co.,* 87 S.D. 222 (1973).
   - *Hannahs v. Noah*, 83 S.D. 296 (S.D. 1968).

4. The jury awarded $500,000 in compensatory damages and $45 million in punitive damages. The circuit court reduced the punitive award to $10 million. At most, a 1:1 ratio of compensatory to punitive damages is appropriate given the appellants' reliance on advice of counsel and the size of the compensatory award, which contained a punitive component. Did

the circuit court err by refusing to vacate the punitive damages award, or alternatively, reducing the punitive award to at most a 1:1 ratio?

Yes. The circuit court erred by not reducing the punitive damage award to, at most, a 1:1 ratio.

- *Grynberg v. Citation Oil & Gas Corp.*, 1997 S.D. 121.
- *Roth v. Farner-Bocken Co.*, 2003 S.D. 80.
- *State Farm v. Campbell,* 538 U.S. 408 (2003).
- *O'Neill v. O'Neill*, 2016 S.D. 15.

STATEMENT OF THE CASE

Fern Johnson sued the appellants, Liberty Mutual Fire Insurance Company and United Parcel Service, Inc., in May 2014 in the Seventh Judicial District Circuit Court, alleging claims, including for bad faith and conversion, relating to the appellants' discontinuance of Johnson's workers' compensation benefits. In March 2017, the appellants moved for partial summary judgment on whether their cessation of Johnson's benefits was "fairly debatable." At a hearing in April 2017, Judge Pfeifle denied the appellants' motion, determining that fact issues existed precluding summary judgment. (R.2526.)[1]

In June 2017, the circuit court *sua sponte* sent a letter to the parties advising that it would reconsider its ruling on the "fairly debatable" question. (R.2783.) After additional briefing, the court advised that it would grant summary judgment on the issue to Johnson, the non-moving party. (R.2829, A.12.) This Court declined the appellants' interlocutory appeal. (R.II.3504.)

[1] "R__" refers to the first volume of the settled record. "R.II.__" refers to the second volume of the settled record. "A__" refers to the appendix.

The lawsuit proceeded to trial on Johnson's bad faith and conversion claims. On November 17, 2017, the jury entered a verdict in Johnson's favor, awarding her $500,000 in non-pecuniary damages for bad faith, and $2,750 for conversion. (R.II.2321, 2341, A.3, 171.) The jury found UPS 25% at fault and Liberty Mutual 75% at fault. (R.II.2341, A.3.) The jury also awarded $15 million in punitive damages against UPS, and $30 million against Liberty. (*Id.*)

The appellants filed post-trial motions seeking judgment as a matter of law, a new trial, or alternatively, remittitur. (R.II.3509, 3560.) On March 19, 2018, the circuit court denied the appellants' JMOL and new trial motions, but reduced the conversion damages to $2,042.50 and the punitive award to $10 million, allocating $7.5 million to Liberty Mutual and $2.5 million to UPS. (R.II.3880-81, A.37-38.) The court entered judgment, including prejudgment interest, of $7,877,482.07 as to Liberty and $2,625,827.34 as to UPS.

On April 17, 2018, Liberty timely appealed. (R.II.3922.) On April 18, UPS timely appealed. (R.II.3966.) On May 1, 2018, Johnson timely cross-appealed.

STATEMENT OF FACTS

A. Fern Johnson's Medical Condition.

Fern Johnson is a former UPS employee. (R.184-85.) In November 1995, she began experiencing pain in her lower right groin. (R.185.) She consulted her gynecologist, thinking her groin pain arose from her chronic endometriosis, a non-work-related condition. (*Id.*) Her doctor performed a laparoscopy procedure in January 1996, which revealed that Johnson suffered from a hernia. A month later, Johnson underwent a combined surgery for a hysterectomy (to treat her endometriosis) and hernia repair. (*Id.*)

Johnson returned to work later that spring, but her active employment with UPS ended in December 1997, when she suffered both groin and back pain while loading packages at UPS. (R.186.)

B. The 2006 DOL Order.

Johnson filed a workers' compensation complaint in 1996, seeking benefits and expenses relating to her combined surgery, as well as other benefits. (R.186.) In 2002, a DOL administrative law judge determined that Johnson's ongoing groin pain had not been caused by her employment at UPS. The ALJ also rejected Johnson's claims that she had suffered a wrist injury at work, and found that she was not entitled to benefits for her lower back condition either. (R.187.) The ALJ did, however, find that Johnson's hernia operation in 1996 was work-related, and found that temporary benefits associated with her recovery from surgery were reasonable. (*Id.*)

Johnson filed multiple appeals over the next several years. (R.187-88.) In February 2006, the DOL rejected her requests for permanent partial disability benefits and for medical expenses related to her 1996 hernia surgery. The circuit court disagreed in part, and the DOL followed with an order finding that Johnson's groin pain was causally related to her employment (the "Order" or "2006 Order"). (R.373-74.) "The exact name of the condition or the injury was not a finding, but . . . doctors had diagnosed it as a neuroma (impingement of nerve scar tissue) or a 'casualgia' or a 'neuralgia' (nerve-related pain)." (R.16.)

The Order provided that Johnson was entitled to "necessary, suitable, and proper medical expenses casually related to her work-related groin condition." (R.374.) It did not specify what types of treatments or expenses were necessary,

or for how long treatment would be necessary. Nor did the Order specify that, going forward, the DOL was the entity that would determine whether any particular treatment was necessary.

Johnson appealed the 2006 Order, and filed other petitions, motions, and appeals regarding these issues over the next several years. (R.189-99.) This Court resolved those issues by summary adjudication in February 2009. (R.II.2739.)

C. The Advice Of Counsel To Request An IME.

In September 2009—more than 13 years after Johnson suffered her groin injury, and more than 3 years after the 2006 Order—Liberty sought the advice of South Dakota worker's compensation counsel Eric Schulte about the propriety of conducting an independent medical exam (IME). Liberty wished to evaluate whether Johnson's medical treatment at that time (consisting of "pool therapy three times daily, medication twice daily, and the use of a TENS unit[2] once per day") was still related to her 1996 groin injury. (R.33-34; R.55-56; R.3661-62; R.3805-06; *see generally* R.2803-09.) This was the only South Dakota claim that Therese Johnk, the claims adjuster, had ever been assigned, and she sought the legal advice to ensure that the appellants acted appropriately. (R.3642; R.3828.) Because Liberty does not handle a high volume of cases in South Dakota, claims adjusters working in South Dakota rely heavily on the advice of experienced local counsel. (R.3649-51; R.3661-62; R.3813; R.3131.)

[2] A TENS unit provides electrotherapy by sending electric pulses through electrodes attached to the skin.

During the life of Johnson's claims, the appellants were represented by Davenport Evans, one of the largest firms in South Dakota with expertise in handling workers' compensation claims. (R.3130.) In 2000, upon joining Davenport Evans, Schulte began working on the Johnson matter, and by 2009 was well familiar with Johnson's case. (R.3556-58, 3560; R.3130; R.3627.) Schulte was past President of the South Dakota Bar Association, and has been recognized as a Great Plains Super Lawyer on insurance matters and the 2nd Circuit's Lawyer of the Year.

Schulte initially recommended pursuing a medical record review before proceeding with an IME. (R.3836.) But the medical opinions at issue were almost ten years old, and Johnson's treatment had changed since the time of her injury. Accordingly, Schulte, after "round-tabling" the issue with his partners, advised that an IME was proper, and located a doctor to perform one. (R.3851-58; R.3646-47; R.3862; R.II.1961.) This was the first IME the appellants had ever requested from Johnson.

The IME took place on June 10, 2010. (R.1724-36.) By this time, without seeking medical advice or approval, Johnson had decided to install an indoor therapy pool in her home, (R.55-56), and requested reimbursement from the appellants. (R.33-34.)

Dr. Bruce Norback, who conducted the IME, concluded that Johnson's work injury no longer remained the major contributing cause of Johnson's condition, and that the treatments Johnson sought were not necessary or suitable and proper. (R.II.1379; R.II.1391.) The doctor also opined that there had been no definitive diagnosis for Johnson's groin-pain condition, and that the in-home

pool and radiofrequency ablation treatments she had been receiving were not beneficial to that condition. (R.5; R.67; R.II.1391.)

Based on that information, Schulte advised the appellants that they could discontinue benefits, and they did so by letter from Schulte on August 9, 2010. (R.3649-51; R.3814-19, 3822-26, 3831-32; R.3902-10; R.II.1468.) After Johnson (and later, her attorney) objected, Schulte advised the appellants that he was confident his position was correct. (R.3566, 3568-69, 3573, 3583-85, 3589; R.4221.)

D. The DOL Proceedings After Benefits Were Discontinued.

After the denial, Johnson instituted proceedings before the DOL. (R.5.) Dr. Norback testified at the hearing, and the ALJ, Catherine Duenwald, found that he "presented credible testimony and was a credible witness." (R.17.) Yet the ALJ found the testimony of Johnson's doctor to be more persuasive regarding her medical condition. On December 1, 2011, the ALJ granted Johnson's claim for present and ongoing medical benefits, which was later affirmed, in part, by the circuit court. (R.6, 31.) The DOL did conclude that Johnson's in-home pool, which was the bulk of the disputed claim, was not necessary or suitable and proper, and that claim was denied. (R.37.)

After the ALJ's ruling, Johnson received payment in full, plus interest, for the medical expenses covered by the ruling. The expenses totaled less than $13,000. (R.815; R.II.2307; R.II.2922; R.3362-69; R.II.2923-26; R.II.2927-31.) The appellants have authorized medical treatments related to Johnson's groin pain condition since that date. (R.815.)

E. The Current Lawsuit.

In this lawsuit, Johnson claimed that the appellants breached their duty of good faith and fair dealing in the handling of her workers' compensation medical benefits from 2009 to 2011. The appellants' primary defense was that they sought out and relied on experienced South Dakota worker's compensation counsel, who advised them that they had the right under South Dakota law to conduct an IME to determine if Johnson's work injury still remained, some three years after the 2006 Order, a major contributing cause of her medical condition.

Before trial, however, the circuit court ruled that the appellants' decision to deny coverage in 2009 was not fairly debatable as a matter of law because they were under the 2006 Order at the time, and needed to petition the DOL if they wanted to revisit the issue. (R.II.337-41). At the conclusion of trial, the court instructed the jury that the appellants lacked a reasonable basis to deny coverage: "The Defendants' legal duties set forth above were not fairly debatable. That is to say, their legal duties were clear from the plain language of the law." (R.II.2321-22.)

The circuit court went further, however, instructing the jury that the appellants knew what they did was unreasonable. "[T]he Defendants may not argue, and you may not conclude, that the Defendants misunderstood these legal duties," the circuit court instructed the jury over objection. (*Id.*) And the court specifically instructed the jury not to consider Schulte's advice:

> "You may not consider legal advice of Defendants' legal counsel, Mr. Eric Schulte, when determining whether [the appellants] knew there was no reasonable basis, or exhibited a reckless disregard for whether there was

no legal basis, to disregard the court order by delaying, denying or failing to pay benefits when the IME was requested or when terminating Plaintiff's workmen's compensation benefits on August 9, 2010."

(R.II.2324.) To that end, the court instructed the parties to redact all documents introduced at trial that reflected Schulte's advice to proceed with the IME, explaining his rationale, or reaffirming his confidence in the appellants' position. (*See, e.g.,* R.II.2846; R.II.1649; R.II.1668-69.) The court further prevented Schulte from testifying as to why he believed the appellants' actions were appropriate and why he reached the conclusions he did. (*See, e.g.,* Tr.642-44.)

Given that the court (a) directed the jury that the appellants lacked a reasonable basis to deny coverage, and (b) prevented the appellants from mounting their good-faith defense based on Schulte's advice, the circuit court essentially directed a verdict as to liability.

SUMMARY OF THE ARGUMENT

Johnson's bad faith claim never should have gone to the jury because the appellants' actions were objectively reasonable at the time, and thus fairly debatable. At every step, the appellants consulted with a respected workers' compensation attorney who provided advice consistent with industry practice and based on a reasonable reading of South Dakota law. It was not until four years later this Court in *Hayes*, after applying principles of statutory construction to multiple worker's compensation statutes, determined that an employers' sole source of relief from ongoing benefit obligations was via SDCL 62-7-33. The circuit court also should have granted judgment as a matter of law on the bad-

faith claim because Johnson did not seek and was not awarded pecuniary damages, a prerequisite for such a claim.

At a minimum, the circuit court should have granted a new trial because it prevented the appellants from putting on the heart of their remaining defense, namely, that they acted in good faith. Schulte was barred from explaining the bases of his advice, and the jury was not permitted to consider his advice—essentially directing a verdict as to bad-faith liability. Those limitations also prevented the appellants from showing why they did not act with malice, a necessary element of punitive damages.

Faced with no explanation from the appellants for why they acted as they did, the jury awarded $500,000 in pecuniary damages and $45 million in punitive damages. While the circuit court reduced the punitive award to $10 million, awarding 20 times compensatory damage does not pass constitutional muster. At most, a 1:1 ratio is appropriate in light of the amount of the compensatory award, the appellants' reliance on advice of counsel, and the small civil penalties available under the worker's compensation statutes.

ARGUMENT

I. Johnson's Bad Faith Claim Fails As A Matter Of Law.

Because the appellants' actions were fairly debatable at the time, the trial court erred by denying their renewed motion for judgment as a matter of law on Johnson's bad faith claim. SDCL 15-6-50(b). The trial court further erred by granting Johnson summary judgment on the fairly debatable issue. (R.II.341.)

The appellants were also entitled to judgment as a matter of law because there was insufficient evidence that the appellants, who relied on the advice of

experienced counsel, intentionally or recklessly denied Johnson's claim without a reasonable basis.

A. Standard of Review.

This Court reviews de novo the denial of a motion for judgment as a matter of law. *Center of Life Church v. Nelson*, 2018 S.D. 42, ¶ 18. There is "no deference to the circuit court's decision," or even its "analysis." *Id.* at ¶¶ 18, 21. A court should grant judgment as a matter of law if the testimony and evidence, when viewed in the light most favorable to the verdict or nonmoving party, does not support the verdict. *Bauman v. Auch*, 539 N.W.2d 320, 325 (S.D. 1995).

This Court also reviews de novo a grant of summary judgment. *Hass v. Wentzlaff*, 2012 S.D. 50, ¶11. "The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party." *Id.* (quoting *Saathoff v. Kuhlman*, 2009 S.D. 17, ¶ 11).

B. Bad Faith Requires Both A Lack Of Reasonable Basis To Deny A Claim, And An Intentional Denial Of A Claim Without A Reasonable Basis.

To prove liability for the intentional tort of bad faith failure to pay a workers' compensation claim, "there must be an absence of a reasonable basis for denial of policy benefits *and* the knowledge or reckless disregard of a reasonable basis for denial[.]" *Champion v. United States Fid. & Guar. Co.*, 399 N.W.2d 320, 324 (S.D. 1987) (emphasis in original) (citation omitted). A bad faith claim must involve an "insurance company consciously [engaging] in wrongdoing." *Dakota, Minn. & E. R.R. Corp. v. Acuity*, 2009 S.D. 69, ¶ 18. Mistakes, errors in judgment, negligence, or sloppy business practices are insufficient to sustain a

verdict of bad faith. *Bierle v. Liberty Mut. Ins.,* 992 F.2d 873, 876 (8th Cir. 1993).

"If an insured's claim is fairly debatable either in fact or law, an insurer cannot be said to have denied the claim in bad faith." *Acuity*, 2009 S.D. 69, ¶ 20 (quoting 46A C.J.S. Insurance § 1873 (2008)). "The fact that the insurer's position is ultimately found to lack merit is not sufficient by itself" to prove whether a denial was fairly debatable. *Id.* (internal quotations omitted). Rather, the "focus is on the existence of a debatable issue, not on which party was correct." *Id.* "The issue is determined based upon the facts and law available to the insurer at the time it made the decision to deny coverage." *Id.* at ¶ 19 (internal brackets and quotations omitted); *see also Walz v. Fireman's Fund Ins. Co.*, 1996 S.D. 135, ¶ 8.

C. The Appellants' Denial Of Coverage Was Fairly Debatable At The Time.

When Liberty adjuster Therese Johnk reached out to Eric Schulte in September 2009 to inquire about the propriety of conducting an IME, her inquiry was hardly unreasonable. It had been 13 years since Johnson's groin injury and more than three years since the medical opinions that gave rise to the 2006 Order, and Johnson's treatments had changed significantly since the time of her injury. (R.II.909; R.II.1351-54.)

Schulte advised the appellants that scheduling an IME was an appropriate way to determine if Johnson's work injury so many years before remained the cause of her medical condition. Acting on his advice, the appellants scheduled an IME, the doctor concluded that Johnson's work injury was no longer a major

contributing factor to her medical condition, and Schulte sent a letter to Johnson to that effect.

In response, Johnson's counsel contended that since the DOL held that in 2006 her work injury caused her medical condition, the appellants could not discontinue benefits without re-engaging the Department. Schulte told the appellants that Johnson's position was incorrect, and that if it were correct, it would constitute a significant change in how worker's compensation worked in South Dakota. (R.II.1957-59, 1961, 1977, 1980; R.4221.)

The appellants' decision to discontinue Johnson's benefits based on the IME results was fairly debatable for three reasons. First, Schulte's advice was a reasonable reading of South Dakota law, and a position generally followed at the time. Second, the 2006 Order was written so that determinations of what were necessary or suitable medical treatments were left to the parties, not the DOL. Third, in discontinuing coverage, the appellants relied on the recommendation of experienced workers' compensation counsel.

1. South Dakota Law Was Fairly Debatable In 2010.

Under South Dakota law, a worker's entitlement to benefits does not continue ad infinitum. "Even if there is no dispute that a claimant suffered an initial work-related injury, that injury does not automatically establish entitlement to benefits for her current claimed conditions." *Vollmer v. Wal-Mart Store, Inc.*, 2007 S.D. 25, ¶ 14 (internal quotations omitted); *see also Haynes v. Ford*, 2004 S.D. 99, ¶ 17 (same). Indeed, SDCL 62-1-1(7) provides that to be an "injury" under the worker's compensation statutes, an injury must "remain" a major contributing cause to the current "need for treatment." Accordingly, the

worker's compensation statutes allow an employer to request an IME from time to time to assess whether an employee's injury still remains a major contributing cause of requested medical expenses. SDCL 62-7-1.

The dispute in this case turned on whether the appellants could discontinue benefits because of the IME's findings, or whether, in light of the 2006 Order, the appellants' sole option was to petition the DOL to adjust or discontinue her benefits, arguing that "a change in the condition of the employee warrants such action." SDCL 62-7-33.

The circuit court held that SDCL 62-7-33 plainly applied, that the actions taken by the appellants were thus an unreasonable reading of the worker's compensation statutes, and that they were not fairly debatable as a result.

The circuit court erred in so finding. After all, SDCL 62-1-1(7)(b) provides that "the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment." And SDCL 62-7-33 nowhere expressly compels an insurer that has determined a condition no longer "remains" compensable under SDCL 62-1-1(7) to first petition the DOL to confirm that fact. Rather, SDCL 62-7-33 provides only that "[a]ny payment . . . *may* be reviewed by the Department of Labor and Regulation pursuant to § 62-7-12 at the written request of the employer or of the employee and on such review payments may be ended, diminished, increased or awarded[.]" (emphasis added). SDCL 62-7-33 thus could be read to provide for permissive administrative review when sought by either the employer or the employee, and

not for mandatory, pre-termination review whenever an employer determined a condition was no longer compensable.

In *Hayes v. Rosenbaum Signs & Outdoor Advertising, Inc.*, 2014 S.D. 64, published four years after the denial in this case, this Court determined that that once an employee had established a compensable condition, employers had to petition the DOL before changing or discontinuing benefits. *Id.* ¶ 29.

But when this Court decided *Hayes*, it did not find this to be a simple case of applying the plain language of one statute. Rather, the Court engaged its rules of statutory construction to determine the meaning of "is and remains" in SDCL 61-1-1(7) and to analyze the interplay between SDCL 61-1-1(7), 62-7-1, and 62-7-33. *Id.* at ¶¶ 28-29. The Court found that with respect to worker's compensation statutes, "if the statute has an ambiguity, it should then be liberally construed in favor of injured employees." *Id.* at ¶ 28 (citations omitted). And it held that SDCL 61-1-1(7) needed to be construed in light of other statutes. "When SDCL 62–1–1(7) is read not in isolation but as a whole in light of other enactments, specifically SDCL 62–7–33, the statute's intent is not to place a continuous burden on a claimant once he or she proves a compensable injury." *Id.* at ¶ 29.

The Court did not cite any prior authority so holding, nor did it suggest that the language was clear on its face. Nor did *Hayes* suggest that the employer/insurer's interpretation of SDCL 62-7-1, 62-7-33, and 62-1-1(7) violated public policy or was absurd. Rather, the Court simply held that "[w]e, however, do not interpret SDCL 62–1–1(7) that way." *Id.* at ¶ 28. Given the statutory ambiguity, it was fairly debatable in 2010 whether the appellants' sole

source of relief from ongoing benefit obligations was through a petition to establish a "change in condition" under SDCL 62-7-33.

One need look no further than the underlying DOL and trial court decisions in *Hayes* to establish the reasonableness of the appellants' construction of South Dakota law at the time of the denial here. Those *Hayes* decisions—rendered years after the denial in this case—affirmed the employer/insurer's discontinuation of benefits because the employee could not establish that the work injury "remained a major contributing cause" under SDCL 62-1-1(7). (R.II.3548, 3550, 3553-54 (*Hayes*, May 6, 2013 Order); R.II.3557-59 (*Hayes*, Oct. 25, 2013 Order).) While this Court ultimately interpreted the statute differently, the earlier decisions reflect the reasonableness of Schulte's construction.

Moreover, the DOL held on a number of occasions before *Hayes* that SDCL 62-7-1 provided a mechanism for employers to adjust benefits after an IME. *See, e.g., Duane E. Sundberg, Claimant*, 1991 WL 525057, at *2 (S.D. Dept. Lab. Apr. 3, 1991); *Wiedmann v. Merilatt Indus.,* 2007 WL 5188049, at *2-3 (S.D. Dept. Lab.); *Harter v. Store Servs., Inc.,* 2007 WL 3055174, at *1 (S.D. Dept. Lab.). When those employees then petitioned the DOL to reinstate their benefits, the Department did not find that the employer/insurers had acted improperly.

Indeed, as of August 2010, no case had previously held that the sole means by which an employer/insurer could deny benefits was through SDCL 62-7-33. During the administrative hearing below, Judge Duenwald observed that "there are no South Dakota decisions or Circuit Court decisions that I know of in which

an Employer/Insurer have brought a 62-7-33 case prior to denial." (R.1793.) During the hearing, Johnson's counsel also stated that he was unaware of any such case. (R.1790-91.)

The circuit court held that its rejection of the "fairly debatable" defense was compelled by this Court's decision in *Bertelsen v. Allstate Ins. Co. ("Bertelsen III")*, 2013 S.D. 44, *abrogated on other grounds, Magner v. Brinkman*, 2016 S.D. 50. But the statute at issue there was "plain, unambiguous, and not susceptible to debate," *Bertelsen v. Allstate Ins. Co. ("Bertelsen I")*, 2009 S.D. 21, ¶ 20, and as such "an interpretative decision from [the Supreme] Court was not necessary for Allstate to have determined its duty under its policy." *Bertelsen III*, 2013 S.D. 44, ¶ 53. Rather, the defendant insurer's adjuster simply "was unaware" of the operative statute. *Id.* at ¶ 15. (Ironically, given the circumstances here, *Bertlesen III* took the insurer to task for not contacting counsel.) Given the statutory ambiguity here, *Bertelsen III* does not apply.

That the issue was fairly debatable is also reflected in the fact that in 2010, South Dakota workers' compensation attorneys—not just Schulte—regularly advised their clients that benefits could be denied under SDCL 67-7-1 if an IME revealed that an individual's injury no longer remained a major contributing factor to her condition. (R.II.1783.) The circuit court acknowledged this to be the case. (Tr.716-17.) *See Hanson v. Prudential Ins. Co.*, 783 F.2d 762, 767 (9th Cir. 1985) (no bad faith for handling claim consistent with insurance industry practice); *Hamilton v. Sommers*, 2014 S.D. 76, ¶ 23 (considering "local considerations and custom" when determining the reasonableness of lawyer's conduct).

2. The Language Of The Order Also Made The Appellants' Denial Fairly Debatable.

The language of the 2006 Order—an order for temporary benefits—also made the appellants' actions reasonable. It did not direct the appellants to pay for the treatments Johnson was undergoing in 2009—radiofrequency ablation, TENS therapy, and the like—nor did it order the appellants to pay for such treatments for a certain period of time or at a certain dollar level. Instead, it simply provided that Johnson was "entitled . . . to necessary, suitable, and proper medical expenses causally related to her work-related groin condition." (R.II.2694.) And SDCL 62-4-1.1 provides that an insurer retains the right to investigate and challenge whether treatment is reasonable, necessary or suitable and proper.

Given the Order's language, it was reasonable for Schulte to have concluded that the appellants could modify or discontinue benefits if the IME revealed that the treatments she requested no longer remained "necessary, suitable, or proper." Indeed, when Johnson's attorney pointed to the language of SDCL 62-7-33, Schulte's reaction was that the appellants were not seeking to modify the Order or reopen the award, but were seeking to follow the Order's terms. (R.II.1649-50; R.II.1959.)

Accordingly, even if the statutory provisions were not themselves ambiguous, the language of the Order itself was open to different reasonable interpretations, making the issue fairly debatable.

3. The Appellants' Reliance On Schulte's Advice Also Made Their Decision Fairly Debatable.

The appellants also reasonably believed that their use of the IME results was appropriate. To establish bad faith, a plaintiff must prove not only that the defendant's denial of coverage was objectively unreasonable, but also that the defendant acted with subjective ill will—i.e., that it knew or recklessly disregarded the lack of a reasonable basis. *Champion*, 399 N.W.2d at 324.

In this case, this subjective question turned on the advice of counsel. Liberty responsibly sought out Schulte's advice. Schulte advised the appellants that SDCL 62-1-1(7) was a proper mechanism to revisit the question of whether Johnson's work condition remained a contributing cause of her current condition. Schulte based his analysis on the "remains" language of SDCL 62-1-1(7), the language of the Order, South Dakota case law, and the practice of South Dakota worker's compensation attorneys at the time. (R.II.1953, 1956-57, 1959, 1961-62, 1964, 1968-69, 1977-80.) Schulte "round-tabled" the matter with other partners in his firm before finalizing his advice to the appellants. (R.II.1961.)

The appellants' expert Jeff Shultz, an attorney with 30 years of experience in South Dakota workers' compensation law whose testimony also was erroneously excluded, corroborated the reasonableness of Schulte's advice. He stated that in 2010, it was not clear that SDCL 62-7-33 was the only mechanism for an employer to challenge an employee's benefits after a Department of Labor determination. (R.2906-11.) For example, he pointed to SDCL 62-4-1.1, which allows an employer/insurer to challenge medical bills without resort to SDCL 62-7-33. (*Id.*) In his opinion as well, using an IME was an appropriate way to

proceed prior to the *Hayes* decision. (R.II.1759-60, 1765, 1767, 1769, 1771-72, 1775, 1777-78.)

Schulte's advice—even if ultimately erroneous—negated the claim that the appellants knew or recklessly disregarded that they were intentionally violating the law. *See, e.g., Crabb v. Nat'l Indem. Ins. Co.,* 87 S.D. 222, 228 (1973) (advice of counsel a factor to consider in determining bad faith); *Hannahs v. Noah*, 83 S.D. 296, 305 (1968) (advice-of-counsel defense applies when "the advice was requested in good faith and on full disclosure, and was given in good faith with respect to a course involving legal questions . . . ."); *Anderson v. W. Nat'l Mut. Ins. Co.*, 857 F. Supp. 2d 896, 905 (D.S.D. 2012) (no bad faith in part because insurer hired "an experienced and capable outside-counsel from South Dakota, to evaluate Anderson's claim" and issue was fairly debatable).

Other jurisdictions agree. *See, e.g., Brandon v. Sterling Colo. Beef Co.*, 827 P.2d 559, 561 (Colo. App. 1991) (insurer's reliance on recommendations of counsel negated assertion that it knowingly or recklessly engaged in unreasonable conduct); *T.G.S. Transp., Inc. v. Canal Ins. Co.,* 216 F. App'x 708, 709 (9th Cir. 2007) (same); *Larsen v. Allstate Ins. Co.,* 857 P.2d 263, 266 (Utah Ct. App. 1993) (same); *see also Briesemeister v. Lehner*, 720 N.W.2d 531, 543-44 (Wis. Ct. App. 2006) (same); *Trask v. Iowa Kemper Mutual Ins. Co.*, 248 N.W.3d 97, 100-01 (Iowa 1976) (same).

It is undisputed that the appellants sought legal advice on how to proceed under South Dakota law, received that advice, and followed it. That advice came from an experienced and well-respected member of the South Dakota bar.

Accordingly, the appellants lacked the subjective intent for a bad faith claim as a matter of law.

D. Johnson's Bad-Faith Claim Also Fails As A Matter Of Law Because She Failed To Prove Any Economic Damages.

The appellants are independently entitled to judgment as a matter of law on Johnson's bad faith claim because she presented no evidence of pecuniary damage flowing from the denial of her claim—a necessary element of her claim.

In *Kunkel v. United Sec. Ins. Co.*, 84 S.D. 116, 135 (1969), this Court held that non-economic damages are not available on a bad faith claim unless the insured has suffered economic damages as well. Accordingly, the jury's award of compensatory damages cannot stand. And without any compensatory damages, a punitive damage award cannot stand either. "We have 'consistently held that punitive damages are not allowed absent an award for compensatory damages.'" *O'Neill v. O'Neill*, 2016 S.D. 15, ¶ 23 (quoting *Hoaas v. Griffiths,* 2006 S.D. 27, ¶ 18).

While Johnson testified about out-of-pocket expenses she allegedly suffered, she sought no pecuniary damages as part of her bad faith claim, and was awarded no such damages. The jury was only instructed upon—and only awarded—bad faith damages relating to pain and suffering, mental anguish, and loss of capacity of the enjoyment of life experienced from 2009-2012. (R.II.2332; R.II.2341.)

In *Kunkel*, the only evidence of mental suffering from the defendant insurer's bad faith conduct came from the plaintiff and his wife. 84 S.D. 116 at 132. Because there was no evidence that the plaintiff "suffered any financial

distress, lost either property or employment, or otherwise sustained pecuniary loss because of the excess judgment," this Court reversed the damage award for mental suffering. *Id.* at 136.

Consistent with *Kunkel*, courts applying South Dakota law have held that there must be pecuniary damages resulting from the bad faith conduct to recover for pain and suffering. For example, in *Paulsen v. Ability Ins. Co.*, 906 F. Supp. 2d 909, 915 (D.S.D. 2012), the court rejected plaintiff's argument that the "deplet[ion of] her own funds" to pay for long term care was sufficient pecuniary damage, because she "received all money due, including interest." *Id.*; *see Hammonds v. Hartford Fire Ins. Co.*, 501 F.3d 991, 998 (8th Cir. 2007) (bad faith claim barred because plaintiff failed to show "compensable loss of services or attendant care as a result of the delays in payment").

The circuit court provided no reason for denying the appellants' post-trial motion on this issue. (R.3880.) Because Johnson failed to establish any pecuniary damages, the circuit court erred in not granting judgment to the appellants as a matter of law.

II. Alternatively, A New Trial Is Required.

The circuit court also erred in not granting a new trial. The circuit court wrongly instructed the jury that Schulte's advice could not be considered for the intent prong of Johnson's bad faith claim. As the court had already instructed the jury that the appellants' actions were not fairly debatable, this intent instruction essentially granted Johnson judgment as a matter of law on her bad faith claim.

Compounding this error, the appellants were also barred from explaining the advice they received from their counsel about the decision to deny benefits to

Johnson. That excluded evidence—including testimony from Schulte, the appellants' experts Shultz and Peter Hildebrand, and documents explaining Schulte's advice in 2010—relating directly to the intent element of Johnson's bad faith claim. That excluded evidence was also critical proof of the appellants' lack of malicious intent, a necessary element of punitive damages.

A. Standard of Review.

The Court reviews particular jury instructions for abuse of discretion, looking to see if they are erroneous and prejudicial. "Erroneous instructions are prejudicial under SDCL 15–6–61 when in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party." *Vetter v. Cam Wal Elec. Co-op., Inc.,* 2006 S.D. 21, ¶ 10. Yet "when the question is whether a jury was properly instructed overall, that issue becomes a question of law reviewable de novo. Under this de novo standard, we construe jury instructions as a whole to learn if they provided a full and correct statement of the law." *Id.* (footnote and internal quotations and citations omitted). *See also Schultz v. Scandrett*, 2015 S.D. 52, ¶ 22 (same).

This Court reviews other aspects of the denial of a motion for a new trial for abuse of discretion. *Center of Life Church v. Nelson*, 2018 S.D. 42, ¶ 31 n.3.

A new trial is warranted when there is irregularity in the proceedings by which either party was prevented from having a fair trial. *Ortman v. DeJager*, 2010 S.D. 65, ¶ 6; SDCL 15-6-59(a)(1). A new trial is also warranted under SDCL 15-6-59(a)(6) when the verdict is insufficient, against law, or "the evidence was conflicting on several controlling points and . . . the findings of fact were

unreasonable, arbitrary, and unsupported in light of other evidentiary facts proven." *Klug v. Keller Industries, Inc.*, 328 N.W.2d 847, 849 (S.D. 1982).

B. The Jury Instructions Prevented The Jury From Considering Schulte's Advice When Considering The Appellants' Intent.

On October 6, 2017, the circuit court ruled that the appellants could introduce evidence of their advice of counsel—namely, that they could terminate benefits as a result of the IME—as a factor in considering whether the appellants' actions constituted bad faith. (R.II.388-89; *see also* R.II.876-77.)

But after the close of evidence, the court reversed course, and advised the parties that she has stayed up late thinking about and researching the advice-of-counsel issue. (Tr.851-52.) The court also advised the parties that she had struggled with the issue, noting the absence of any analogous precedent. (Tr.851, 853-54, 855.) The court reiterated this at the post trial hearing, stating, "[t]he issue on advice of counsel, of course, I'm very interested to hear what the Supreme Court has to say." (R.II.3790.).

Ultimately, the circuit court determined that based on qualified immunity cases, specifically *Sloane v. Herman,* 983 F.2d 107 (8th Cir. 1992), and *Walters v. Grosheim,* 990 F.2d 381 (8th Cir. 1983), she would instruct the jury that it could not consider advice of counsel when determining whether the appellants "knew there was no reasonable basis, or exhibited a reckless disregard for whether there was no legal basis, to disregard the court order[.]" (Tr.852-53; R.II.2324.)

But the standard for qualified immunity is objective reasonableness, for which intent has no role. *See Sloane,* 983 F.2d at 110 (for qualified immunity,

"good faith or bad faith is irrelevant"); *Walters,* 990 F.2d at 384 (same). In contrast, in bad-faith cases, intent is one of the two elements. *See Champion*, 399 N.W.2d at 324. And because intent is an element, advice of counsel is directly relevant. *See Crabb*, 87 S.D. at 228; *see also Andrews v. Ridco, Inc.*, 2015 S.D. 24, ¶ 24 (insurer that "place[s] at issue its subjective good-faith reliance on the advice of counsel" in bad-faith litigation may waive the attorney-client privilege); *Bertelsen III*, 2013 S.D. 44, ¶ 54 (same).

Having already ruled that the appellants' denial of benefits was not fairly debatable, the circuit court's erroneous instruction that the jury could not consider Schulte's advice eviscerated the appellants' case-in-chief that they had already presented to the jury, and left the appellants with no defense to liability on the bad faith claim.

Viewing the instructions as a whole under the de novo standard, the instructions did not present a full and correct statement of the law. Alternatively, viewing Instruction 27 for abuse of discretion, eliminating the appellants' sole defense to liability—a defense that was proper under the law and supported by the facts—likely had an effect on the jury's verdict, requiring a new trial.

C. The Trial Court Also Improperly Excluded Evidence Of Advice Of Counsel Bearing Directly On The Appellants' Good Faith.

Before deciding at the close of the evidence that advice-of-counsel evidence was irrelevant to Johnson's bad faith claim, the circuit court severely limited the appellants' ability to introduce evidence regarding advice of counsel. This too was reversible error.

Based upon its rulings on advice of counsel, the circuit court instructed the parties to redact all communications reflecting Schulte's opinions and arguments about the use of the IME to terminate benefits. (*See, e.g.*, R.II.2846; R.II.1649-50; R.II.1668-69.) The court even ordered the redaction of Schulte's impressions regarding the likelihood of prevailing before the DOL. (*See, e.g*. R.II.2865.) And during trial, Schulte and the appellants' insurance practices expert Hildebrand were both barred from showing the jury why the appellants believed their conduct did not violate the Order and from explaining why their counsel came to that conclusion. For example, Schulte was not permitted to testify that he round-tabled the issues with his partners, that he believed SDCL 62-1-1 and 62-1-1(7) permitted the denial, that he analyzed the issue in detail, that he believed the conduct he recommended did not violate the Order, and that he conveyed that information to the appellants. (*E.g.*, Tr.755-759, 761-62, 770-71.) Hildebrand was barred from testifying that the appellants acted consistent with industry custom and practice, or that insurers should generally follow the advice of counsel. (*E.g.*, Tr.812-14.) And the court barred Shultz from testifying altogether. (R.II.436-39; R.II.623-24.)

Consequently, the jury was not permitted to understand why the appellants believed they could proceed in the manner they did. This evidence was directly relevant to the issue of whether the appellants "knew or recklessly disregarded the lack of a reasonable basis" under *Acuity*, 2009 S.D. 69, ¶ 32.

Compounding the error, in an attempt to split the baby, the circuit court allowed the appellants to establish the *fact* that they relied on the advice of counsel, but did not allow them to explain what that advice was, or why counsel

gave it. In other words, the court limited all testimony to simply stating that Schulte provided advice to the appellants and that they followed it. (*E.g.*, Tr.642-44.)

Hemmed in by these restrictions, Schulte was unable to give an accurate defense of his advice on cross-examination. Johnson's counsel asked Schulte whether the appellants had a duty to follow the 2006 Order. (Tr.705-06.) Outside the presence of the jury, Schulte explained to the court that he could not answer the question without violating the circuit court's evidentiary rulings because he believed that his analysis of the workers' compensation statutes provided the appellants with a good-faith basis to deny benefits despite the 2006 Order. (*See generally* Tr.755-71; R.II.2846; R.II. 1649-50; R.II.1668-69; R.II.2865-66; R.1865.)

But the court precluded Schulte from explaining his advice to the jury, and instead ordered him to simply state, without context or explanation, that he believed court orders should be followed:

> Q: Mr. Schulte, your clients have to obey the orders regardless of your advice; true?
>
> A: This is a difficult question for me to answer in this case, but, yes, Mr. Barari, court orders must be followed.

(Tr.720 (objection omitted).)

Needless to say, the court's limitations of Schulte's testimony made him appear on cross-examination as a ne'er-do-well attorney who was either in the appellants' pocket or simply incompetent, willingly advising his clients to defy a

judicial order. The manner and scope of the permitted questions and answers regarding Schulte's testimony thus exacerbated the prejudice to the appellants.

D. Schulte's Advice That Was Excluded Also Relates To Johnson's Punitive Damage Claim.

A new trial is also required as to punitive damages because the legal advice that Schulte was barred from discussing, and the actions the appellants' took based on that advice, were directly relevant to punitive damages.

Before punitive damages can be assessed, proof of oppression, fraud or malice is required. *See* SDCL 21-3-2. "Actual malice is a positive state of mind, evidenced by the positive desire and intention to injure another, actuated by hatred or ill-will towards that person." *Isaac v. State Farm Mut. Auto. Ins. Co.*, 522 N.W.2d 752, 761 (S.D. 1994). Presumed malice is established by willful and wanton misconduct, which is defined as a conscious realization that "its conduct would in all probability, as distinguished from possibility, harm [the plaintiff]." *Bierle v. Liberty Mut. Ins.*, 992 F.2d 873, 876 (8th Cir. 1993) (brackets omitted).

As this Court has held, advice of counsel is relevant to punitive damages if "the advice was requested in good faith and on full disclosure, and was given in good faith with respect to a course involving legal questions and not questions of common morality[.]" *Hannahs*, 83 S.D. at 305 (internal quotations omitted). Indeed, "the fact that defendant acted under advice of counsel may be sufficient to prevent an award of [exemplary] damages." *Id.*; *Szumigala v. Nationwide Mut. Ins. Co.*, 853 F.2d 274, 282 (5th Cir. 1988) (same); *Stanton v. Astra Pharm. Prods., Inc.*, 718 F.2d 553, 580 (3rd Cir. 1983) (same); *Gordon v. Nationwide Mut. Ins. Co.*, 285 N.E.2d 849, 852 (N.Y. 1972) (same).

Indeed, even if *Hayes* had been the law in 2010, Schulte's advice would still have been relevant to punitive damages, because the failure to follow a statute does not alone warrant the imposition of punitive damages. *Maryott v. First Nat. Bank of Eden*, 2001 S.D. 43, ¶ 38.

Schulte's explanation of why he believed discontinuing benefits after the IME was consistent with the 2006 Order, was in fact the standard practice at the time, and was what he counseled the appellants to do, went to the heart of the appellants' defense to punitive damages. The redaction of documents and testimony regarding Schulte's advice requires a new trial on the bad faith claim, or at a minimum, on the question of punitive damages.

III. The Twenty-Fold Punitive Damages Awards Are Excessive Under South Dakota Law and the Due Process Clause.

While the award of punitive damages is traditionally the province of the jury, this Court "will not uphold punitive damage awards that are oppressive or so large as to shock the sense of fair-minded persons." *Grynberg v. Citation Oil & Gas Corp.*, 1997 S.D. 121, ¶ 36. The circuit court properly recognized that the $45 million in punitive damages awarded by the jury—$30 million against Liberty Mutual and $15 million against UPS—was excessive under South Dakota and constitutional law, and reduced the total punitive damage award to $10 million.

In its stead, the trial court applied a 20:1 ratio to compensatory damages, resulting in a total punitive damage award of $10 million. But the circuit court gave no rationale for why it selected a 20:1 ratio—which was just as constitutionally suspect as the jury's award—and admitted that it was "interested

in what our Supreme Court would say about this." (R.II.3791.) What the trial court should have done, consistent with South Dakota and the Due Process Clause, was vacate the punitive damages award, or, at a minimum, reduce the award to no more than a 1:1 ratio to compensatory damages.

South Dakota historically applied a five-factor test to assess whether an award of punitive damages was appropriate: (1) the ratio of punitive damages to compensatory damages; (2) the "nature and enormity of the wrong"; (3) the defendant's intent; (4) the defendant's financial condition; and (5) "all of the circumstances attendant to the wrongdoer's actions." *Grynberg*, 1997 S.D. 121, ¶¶ 37-46.

In *Roth v. Farner-Bocken Co.*, 2003 S.D. 80, this Court acknowledged that while states have the discretion to impose punitive damages, "there are procedural and substantive constitutional limitations on these awards." *Id.* at ¶ 44 (citing *State Farm v. Campbell,* 538 U.S. 408, 416 (2003)). Accordingly, this Court folded its guideposts into the three enunciated by the United States Supreme Court in *Campbell*: the degree of reprehensibility, the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages, and the difference between the punitive damages awarded and civil penalties awarded in comparable cases. *Campbell,* 538 U.S. at 418; *Roth*, 2003 S.D. 80, ¶ 47.

A. A $10 Million Punitive Damage Award That Is Twenty Times Higher Than An Already Excessive Compensatory Damages Award Violates South Dakota Law And The Constitution.

SDCL 21–1–3 provides that damages "must in all cases be reasonable[.]" In reviewing an award of punitive damages for reasonableness, "[t]he first factor to be considered is the amount of compensatory damages and its relationship or ratio to the amount of punitive damages." *O'Neill v. O'Neill*, 2016 S.D. 15, ¶ 24. "The amount of punitive damages *must* bear a reasonable relationship to the compensatory damages." *Id.* (quoting *Grynberg*, 1997 S.D. 121, ¶38) (emphasis in original).

Absent unusual circumstances, such as when a compensatory award is nominal, the United States Supreme Court has held that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Campbell,* 538 U.S. at 425; *see also May v. Nationstar Mortg., LLC*, 852 F.3d 806, 817 (8th Cir. 2017) ("A 4–to–1 ratio likely will survive any due process challenge given the historic use of double, treble, and quadruple damages.") (internal citation and quotations omitted); *Roth,* 2003 S.D. 80, ¶ 68 (same).

When, as here, the compensatory damage award is large, only a 1:1 ratio may pass constitutional muster. When "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Campbell,* 538 U.S. at 425.

This is particularly true when, as here, the compensatory damage award already contains a punitive component. In *Roth*, this Court reduced a punitive

damage award to the amount of compensatory damages where "there was a substantial compensatory damage award containing a punitive element which fully compensated Roth for the harm caused[.]" 2003 S.D. 80, ¶ 75. This Court found the punitive element in the compensatory damage award because economic damages were minimal and compensatory damages instead "consisted of emotional distress, including feelings of anger, betrayal and devastation." *Id.* at ¶ 70. In such a circumstance, this Court held, "we find 'a punitive damages award at or near the amount of compensatory damages' is justified." *Id.* at ¶ 75 (citing *Campbell*, 538 U.S. at 425).

That is precisely what occurred here. Johnson testified that she felt anger and betrayal when the appellants scheduled an IME, and the verdict reflects that the jury sympathized with her position. Yet the fact remains that Johnson received all of her medical care and was never out of pocket. Her private insurer covered the cost, Liberty ultimately paid Johnson the amount her private insurer paid, and the amount in question was only $13,000. As such, it cannot be seriously disputed that an award of $500,000 in emotional distress damages included, in large respect, a punitive component.

As such, the circuit court's imposition of $10 million in punitive damages—based on a 20:1 ratio that the circuit court somehow landed on—should be reversed. In light of SDCL 21-1-3, the Due Process Clause, and the holdings of this Court and the United States Supreme Court, the Court should either vacate the punitive damage award or reduce it to an amount not exceeding the amount of compensatory damages.

B. The Appellants, Guided By Experienced South Dakota Worker's Compensation Counsel, Did Not Act Reprehensibly.

This constitutional limitation on punitive damages is further buttressed by an analysis of the degree of reprehensibility of the appellants' conduct. *Roth*, 2003 S.D. 80, ¶ 48 (citing *BMW of N.A., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). "It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability . . . is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.* at ¶ 54 (*quoting Campbell*, 538 U.S. at 419).

In this analysis, the Court considers five guideposts: (a) whether Johnson suffered physical harm; (b) whether the appellants' conduct "evinced an indifference to or a reckless disregard of the health or safety of others," (c) whether Johnson was financially vulnerable, (d) whether "the conduct involved repeated actions or was an isolated incident," and (e) whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id.* at ¶ 48 (quoting *Campbell*, 538 U.S. at 409).

The appellants acted on the advice of their counsel, not maliciously. Turning to the last guidepost first, it cannot be said that the appellants' actions were the result of intentional malice, trickery or deceit. The appellants sought and obtained the advice of experienced South Dakota counsel on whether it could obtain an IME—years after Johnson's work injury—to determine whether Johnson's treatment remained work-related . After the IME concluded that it did not remain work-related, again based on the advice of counsel, the appellants

discontinued benefits. The fact that (a) the appellants sought out advice of South Dakota worker's compensation counsel, (b) the advice was grounded in a reasonable interpretation of the law, (c) the advice was standard practice at the time, and (d) that the DOL, the courts, and employees took no issue with this approach, all made it reasonable for the appellants to follow that advice. It was years before this Court's decision in *Hayes*, and even the Department and circuit court in *Hayes* did not take issue with this approach.

Johnson did not suffer physical or financial harm as a result of the appellants' actions. Turning to the first three guideposts, it is undisputed that Johnson had private insurance that paid for her medical treatment during the period in which Liberty denied coverage. This fact counters any claim that Johnson was financially vulnerable, that she suffered physical harm, or that the appellants recklessly disregarded her health. Indeed, Johnson specifically told the appellants that if they would not preauthorize her scheduled treatment given the impending IME, she would proceed with it anyway, using private insurance—and that is precisely what she did. The appellants acted with knowledge that her treatment would continue unabated, she never missed a medical treatment, and she suffered no financial loss. Accordingly, each of the first three guideposts weighs against the award of punitive damages.

The appellants' actions, derived from their counsel's advice, are more reasonably viewed as a single act. The fourth guidepost asks whether the conduct was isolated or involved repeated actions. The appellants' actions are reasonably viewed as a single act—the denial of coverage, based on the results of the IME, that flowed from their counsel's advice.

Considering all the reprehensibility factors, even a cursory glance at other punitive damages cases shows just how disproportionate the punitive damages award was here. Consider *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004). In *Williams*, the plaintiff sued for racial harassment and received a $600,000 compensatory award and a $6 million punitive damages award. The Eighth Circuit reduced the punitive damages award to $600,000, a 1:1 ratio. In that case, nooses were left at work stations of African-American employees; a black doll was hung by a noose in the factory; African-American employees received invitations to Ku Klux Klan hunting parties; and African-American female employees received break time based upon whether or not they would respond favorably to sexually suggestive remarks made by white managers. *Id.* at 793. Despite this reprehensible conduct over a lengthy period of time, the Eighth Circuit, relying on *Campbell*, reasoned that "[the] large compensatory award . . . militates against departing from the heartland of permissible exemplary damages. . . . [The plaintiff] received $600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money. Accordingly, we find that due process requires that the punitive damages award on [his] harassment claim be remitted to $600,000." *Id.* at 799 (citation omitted).

In *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005), the plaintiff established through expert testimony that a faulty cigarette design resulted in excessively high levels of carcinogens being introduced into smokers' lungs that proximately caused illness and death. *Id.* at 599. The plaintiff was awarded $4 million in compensatory damages and $15 million in punitive damages. *Id.* at 598. The Eighth Circuit held that the defendant

exhibited callous indifference and disregard for the health of its customers. Yet despite the "highly reprehensible" conduct, the *Boerner* court did not find present the factors justifying a higher punitive damages award, such as "the presence of an 'injury that is hard to detect' or a 'particularly egregious act [that] has resulted in only a small amount of economic damages[.]'" *Id*. at 603 (quoting *Gore*, 517 U.S. at 582). The court reduced punitive damages to $5 million, a "ratio of approximately 1:1." *Id*.

Whatever one thinks of the appellants' actions in this case, their actions did not remotely approach the reprehensibility of the conduct in *Williams* and *Boerner*. If those cases warranted punitive damages at a 1:1 ratio, this case calls for an even lower ratio, if any—particularly since, as set forth above, the compensatory damages already include a punitive component.

C. There Is A Vast Disparity Between The Punitive Damages Award And Comparable Civil Penalties.

"The third guidepost . . . is the disparity between the punitive damages award and the civil penalties authorized or imposed in comparable cases." *Campbell*, 538 U.S. at 428 (internal quotations and citation omitted); *see also Roth*, 2003 S.D. 80, ¶ 73. The most relevant civil penalty can be found in SDCL 62-4-1.2, which in 2010 assessed a $500 fine for noncompliance with SDCL 62.4.1.1, the statute that instructed an employer to pay an employee's medical bill or deny the portion that is not compensable or not medically necessary within a certain time frame—except that the fine did not apply if the employer had good cause for noncompliance. And the maximum fine levied against insurance companies for various other violations under South Dakota law appears to be

$25,000. *See, e.g.,* SDCL 58-5A-64; 58-29B-11; 58-5A-62; 58-5A-30. Needless to say, this is worlds apart from the punitive damages award here, and further counsels in favor of a punitive damage award that does not exceed compensatory damages. The trial court failed to address the civil penalty prong when setting punitive damages at $10 million.[3]

For all these reasons, this case cannot support the circuit court's award of punitive damages at a 20:1 ratio to compensatory damages. The Court should remit the punitive damage award to no more than a 1:1 ratio to compensatory damages.

CONCLUSION

The Court should grant the appellants judgment as a matter of law on Johnson's bad faith claim. Alternatively, a new trial is required. At a minimum, the punitive award should be vacated or significantly reduced. The appellants request oral argument.

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[3] Historically, this Court also considered a defendant's net worth when assessing whether punitive damages are excessive. But in *Campbell*, the United States Supreme Court held that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." 538 U.S. at 427. In *Roth,* this Court, heeding *Campbell*, held that "where we have determined the reprehensibility and harm guideposts in favor of a lower punitive damages award, we need not address the wrongdoer's financial condition[.]" 2003 S.D. 80, ¶ 72.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with SDCL 15-26A-66(4). The brief is 38 pages long (exclusive of the table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service), is typeset in 12-point Georgia font (a proportional font), and contains 9,944 words. The appellants used Microsoft Word to prepare the brief.

Dated this 22nd day of August, 2018.

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The undersigned, one of the attorneys for appellant, hereby certifies that on August 22, 2018, a true and accurate copy of **APPELLANTS' OPENING BRIEF** was electronically transmitted to:

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The original and two copies of **APPELLANTS' OPENING BRIEF** were mailed by first-class mail, postage prepaid to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court, Supreme Court of South Dakota, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070. An electronic version of the brief was also electronically transmitted in Microsoft Word format to the Clerk of the Supreme Court.

Dated at Cleveland, Ohio, this 22nd day of August, 2018.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

FERN JOHNSON,
Plaintiff/Appellee,

vs.

UNITED PARCEL SERVICE, INC., AND
LIBERTY MUTUAL FIRE INSURANCE CO.,
Defendants/Appellants.

Appeal Nos. 28598, 28599, 28609
Notices of Appeal Filed: April 17 & 18, 2018
Notice of Review Filed: May 1, 2018

Appeal from the Circuit Court, Seventh Judicial Circuit
Pennington County, South Dakota
Hon. Jane Wipf Pfeifle, presiding

APPELLEE'S BRIEF

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JURISDICTIONAL STATEMENT

After a jury verdict was entered on November 17, 2017, the Seventh Circuit Court entered a Judgment on March 19, 2018. Notice of Entry of Judgment was filed on March 22, 2018. Defendants/Appellants filed Notices of Appeal on April 17 and April 18, 2018. Plaintiff/Appellee filed a Notice of Review on May 1, 2018.

STATEMENT OF THE ISSUES

Appellants' Issues

1. Whether the circuit court erred in denying the appellants' judgment on Johnson's bad faith claim as a matter of law?

   No. The circuit court did not err by granting summary judgment that the Appellants' decision was not fairly debatable, or by denying the appellants' renewed motion for judgment as a matter of law.

   - *Hanson v. Penrod Const. Co.*, 425 N.W.2d 396 (SD 1988).
   - *Larsen v. Sioux Falls School Dist. No. 49-5*, 509 N.W.2d 703 (S.D.1993).
   - *Bertelsen v. Allstate Ins. Co.,* 2013 SD 44, 833 N.W.2d 545.
   - SDCL §§ 62-4-1, 62-3-18, 62-7-33.
   - U.S. Const. amend. XIV, § 1 and S.D. Const. art. VI, § 2.

2. Whether the circuit court erred by denying the Appellants judgment on Johnson's bad faith claim as matter of law for lack of damages?

   No. The circuit court did not err by denying the appellants' renewed motion for judgment as matter of law.

- *Fix v. First State Bank of Roscoe*, 2011 S.D. 80, 807 N.W.2d 612.
- *Zuke v. Presentation Sisters,* 1999 SD 31, 589 N.W.2d 925.
- *Grynberg v. Citation Oil & Gas Corp.*, 1997 S.D. 121, 573 N.W.2d 493.
- SDCL §§ 21-1-1, -2, 21-3-1.

3. Whether the circuit court erred by not granting Appellants a new trial?

   No. The circuit court did not err by denying the Appellants' motion for a new trial.

   - *Helmbolt v. LeMars Mut. Ins. Co.,* 404 N.W.2d 55 (S.D. 1987).
   - *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353 (S.D. 1992).
   - *Bertelsen v. Allstate Ins. Co.,* 2011 S.D. 13, 796 N.W.2d 685.
   - SDCL §§19-19-401, -402, -403

4. Whether the circuit court erred by refusing to vacate the punitive damages award, or alternatively, reducing the punitive award to at most a 1:1 ratio?

   No. The circuit court did not err by refusing Appellants' request to vacate punitive damages or reduce the punitive damages to a 1:1 ratio.

   - *Grynberg v. Citation Oil & Gas Corp.*, 1997 S.D. 121.
   - *Roth v. Farner-Bocken Co.*, 2003 S.D. 80.
   - *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, (1991).
   - *State Farm v. Campbell,* 538 U.S. 408 (2003).

- U.S. Const. amend. XIV, § 1.

Appellee's Issues by Notice of Review

1. Whether the circuit court erred by reducing the punitive damages awarded by the jury Verdict to a 20:1 ratio?

   Yes. The circuit court erred in its application of the law by reducing the jury's punitive damages verdict, given the circumstances in this case.

   - *Grynberg v. Citation Oil & Gas Corp.*, 1997 S.D. 121.
   - *Roth v. Farner-Bocken Co.*, 2003 S.D. 80.
   - *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, (1991).
   - *State Farm v. Campbell,* 538 U.S. 408 (2003).
   - U.S. Const. amend. XIV, § 1.

2. Whether the circuit court erred by not expressly including the verdict date as the start of the accrual of post-judgment interest?

   Yes. The circuit court, at the post-trial hearing, awarded post-judgement interest from the date of the verdict. Appellants objected. The judgment does not expressly include post-verdict interest, required by SDCL § 15-6-3.

   - *Jacobs v. Dakota Minnesota and Eastern RR Corp.,* 2011 S.D. 68, 806 N.W.2d 209.
   - SDCL §15-6-3.

STATEMENT OF THE CASE

Plaintiff/Appellee Johnson ("Johnson") filed suit against the Defendants/Appellants, Liberty Mutual Fire Insurance Company ("Liberty") and United Parcel Service, Inc. ("UPS"), in May 2014 in the Seventh Judicial Circuit Court, Pennington County, alleging claims for the termination of her workers' compensation benefits. Jury trial was held November 2017 before Judge Wipf-Pfeifle. A verdict was returned for Johnson; Judgment was entered March 2018.

STATEMENT OF THE FACTS

Johnson suffered a work injury and groin pain condition in 1996. In 2006, the South Dakota Department of Labor ("DOL") entered an Order adopting the Circuit Court's prior decision regarding the claim's compensability. (Tr.Exs.15, 20).[1] This Court affirmed in early 2009. (Tr.Exs.48, 49). The DOL's 2006 Order, (Tr.Ex.20), was never stayed. (R.II.2275 at 77:7-77:13; R.II.2416 at 105:12-108:12). Defendants knew they had a legal duty to provide ongoing medical benefits. (R.II.2408-09 at 75:22-77:4; R.II.2415-16 at 104:21-105:4). Defendants did not obey the Order. (R.II.2275 at 77:1 to 17; R.II.2284-85 at 144:11-145:21; R.II.2419 at 119:21-120:2; R.II.2430 at 163:13 to 21).

Less than seven months after this Court's Judgment, Defendants sought to close the claim. (Tr.Ex.56). On September 23, 2009, Liberty's Team Manager, Robert Streff, wrote:

> … I'm in agreement w/ determining the proper physician for an IME and will SCM will work w/ defense to have this scheduled *so we can finally*

[1] "Tr.Ex._" refers to the admitted Trial Exhibit. "R.__" refers to the first volume of the *updated* settled record, after the Stipulation to Correct the Record on Appeal. "R.II.__" refers to the second volume of the updated settled record. The transcripts included as R.II.2260-2492 were played or read in Plaintiff's case in chief, as noted in the trial transcript and the Stipulation. (R.II.2253).

> *push her treatment to conclusion.* .... The CLT is not likely to resolve the claim in settlement so I anticipate that the matter will ultimately be tried. ... Once the time is right, we should obtain the IME and *push for positive resolution and swift closure.*

Id. (emphasis added). Legal counsel was contacted the next day. (Tr.Ex.56-01).

On April 7, 2010, Defendants requested a compulsory medical examination. (Tr.Ex.77). The next day, Defendants began delaying or denying benefits. (*Id.;* Tr.Exs.78, 83; R.II.2279-81 at 108:5-113:9; R.II.2374 at 81:23-84:15; R.II.2450-51 at 244:19–245:10; R.II.1585-86 at 433:3–434:22). Liberty knew it had no authority to disapprove treatment and that it carried the burden to show the care was not necessary, suitable or proper. (Tr.Ex.165-30). Defendants knew they must obey orders, regardless of advice of counsel. (R.II.1902 at 720:9 to14; R.II.1935 at 753:3 to 15; R.II.2019-20 at 801:21-802:9). Liberty failed to follow industry customs and practices. (R.II.2023-25 at 805:20 to 21, answered at 806:15-807:3; R.II.2025 at 807:13 to 19).

Defendants delayed, denied, or failed to process or pay for *other* medical care, *before* they had a medical opinion. (Tr.Exs.87, 88, 89). Defendants knew prior orders had not been stayed, (R.II.2274-75 at 75:22 – 78:3), and knew they had no basis for delay or denial. (R.II.2380-81 at 124:19–128:24; R.II.2451-52 at 247:21–250:24).

Defendants *entirely* denied benefits on August 9, 2010. (Tr.Ex.92, 93). They did not invoke the DOL's jurisdiction under SDCL § 62-7-33. Defendants knew the denial was based on the same arguments finally resolved by this Court. (Tr. Exs. 88, 92, 15; R.II.2382-85 at 134:12 - 148:12; R.II.2435 at 182:2 to 17; R.II.2453 at 254:11–255:18). Past materials showed them this history.

(R.II.2383-84 at 140:6 - 141:15; R.II.2386 at 152:11 to 24). Defendants knew there would be financial and medical consequences for their denial. (R.II.2426-28 at 148:3-155:7).

On August 24, 2010, Johnson sent a first letter requesting reconsideration. (Tr.Ex.95). Defendants did not investigate the materials identified. (R.II.2272-73 at 63:14-67:14; R.II.2388-89 at 160:23-164:11; R.II.1648-50 at 496:9-498:6). Defendants refused to reconsider. (Tr.Ex.98). Instead, they offered to settle *all* of Johnson's present and future claims for $15,000 for "a full and final Release of All Claims." (Tr.Exs.97, 98), consistent with their goal to close the claim. (R.II.2271 at 58:3 to 8; R.II.2277 at 99:8 - 100:10; R.II.2459 at 279:25–280:12). Defendants knew $15,000 would not cover future medical expenses, because their valuation was not based on medical costs. (Tr.Ex.116-02-03; R.II.2460-3 at 284:7–295:15). On October 12, 2010, Johnson sent a second reconsideration request, rejecting settlement or mediation. (Tr.Ex.102). Defendants, again, insufficiently reviewed the request. (R.II.2391 at 169:14-170:22; R.II.1651-52 at 499:16-500:8).

Johnson filed a Petition in October 2010. (Tr.Ex.105). Despite everything in the Petition being true, for a third time, rather than reconsider, Defendants continued to deny. (R.II.2392-93 at 173:10–178:12; R.II.1652 at 500:9 to 13). In November 2010, Defendants admitted the facts determined in prior proceedings were undisputed. (Tr.Ex.108-02).

In late November 2010, for a fourth time, Johnson asked Defendants to reconsider. (Tr.Exs.107, 106). On December 10, 2010, claims adjuster Johnk wrote– "I say maintain the denial…." (Tr.Ex.111-02). Defendants knew they had

no new evidence. (R.II.2392 at 178:16–179:5). Defendants' employees admit that relitigating facts previously decided, without new information, was not "fair." (R.II.2350-53 at 76:17-85:5; R.II.2384 at 141:20-142:18).

Prior to the hearing, Defendants again discussed settlement. (Tr.Ex.115). On May 24, 2011, Liberty (Streff) emailed UPS (Dillard): "… *As much as I want to bury her,* settlement up to $35k would be a fantastic result on this claim." *Id.* (emphasis added). Streff did not preserve this email. (R.II.2468-69 at 387:11 – 389:3; Tr.Ex.112; R.II.2468 at 388:22 to 24). This email was not produced by Liberty in discovery, but by UPS. (R.II.1646-47 at 494:19-495:5).

The "bury her" email should have been preserved by Liberty. (R.II.1263-65 at 144:25–146:10; R.II.2398-2400 at 12:13-19:12; *see also* R.II.1905-06 at 723:7-724:3). Liberty's claims adjuster Amy Little stated, based on her training, this email should have been preserved. (R.II.2354-2355 at 144:18 - 147:15). She changed this testimony at trial. (R.II.1908-09 at 726:4 to 6 and 726:23-727:2).

At trial, Team Manager Streff claimed that the $35,000 settlement recommendation was in the claims file. (R.II.1619-22 at 467:2-470:8). It was not. (*Id.*; *compare* Tr.Ex112 (discussing $25,000) *to* Tr.Ex.115 (discussing $35,000)). Defendants knew the settlement discussed a "full, final, and complete" release of *all* claims, including tort claims, such as the current litigation. (R.II.1799-1802 at 617:6-620:13).

Defendants knew their denial had consequences for Johnson. (R.II.2427-28 at 150:23-151:20, 152:14-155:7, 155:24-156:12). Johnson unnecessarily incurred costs. (R.II.2282-83 at 130:22 to 135:1; Tr.Ex. 125).

Johnson's right to benefits was affirmed by the DOL. (Tr.Exs.127, 130). Defendants presented no evidence on several issues. (R.II.2291 at 199:6-200:21). Defendants did not seek their administrative remedy under SDCL 62-7-33; the DOL rejected their arguments. (Tr. Ex. 127 at R.7702-04; Tr. Ex. 130 at R.7711-12). The amount owed was approximately $13,000, paid in March 2012. (Tr. Exs. 132, 136, 137). The Seventh Circuit affirmed in September 2012. (Tr. Ex. 139, at R.7727-28). Defendants did not appeal.

Johnson filed suit against Defendants in 2014. Trial was held in November 2017. The jury returned a verdict awarding damages for bad faith, conversion, and punitive/exemplary damages. (R.7133-34). Defendants post-trial motions were heard on February 16, 2018. (R.II.615-621; 708-09). Judgment was entered March 19, 2018. (R.II.710-11).

ARGUMENT

Defendants raise four issues on appeal. Appellants' Opening Brief (Appellants Br.) 1-3. Defendants have abandoned their *factual* disputes and their *separate* liability. *Id.* Issues not briefed are waived. *Black Hills Truck & Trailer, Inc. v. South Dakota Dept. of Revenue,* 2016 S.D. 47, ¶10, n.3, 881 N.W.2d 669, 672, n.3. The remaining issues present questions of *law*. To aid analysis, the "fairly debatable" issue will be discussed before the individual appellate issues. Johnson will then address the Notice of Review.

I. Summary of the "Fairly Debatable" Issue.

A. SDCL §62-4-1, 62-7-33

The duty to provide medical care is mandatory. SDCL 62-4-1 ("… the employer shall provide necessary… medical care."). SDCL 62-4-1 ensures a

"statutory right to continuous payment of medical expenses." *Stuckey v. Sturgis Pizza Ranch,* 2011 SD 1, ¶24, 793 N.W.2d 378, 388. "Once notice has been provided and a physician selected or, as in the present case, acquiesced to, the employer has no authority to approve or disapprove the treatment rendered." *Hanson v. Penrod Const. Co.*, 425 N.W.2d 396, 399 (SD 1988).

> "It is in the doctor's province to determine what is necessary or suitable and proper. When a disagreement arises as to the treatment rendered or recommended by the physician, it is for the employer to show that the treatment was not necessary or suitable and proper."

Streeter v. Canton School Dist., 2004 SD 30, ¶25, 677 N.W.2d 221, 226 (citations omitted). Johnson's right to benefits became *res judicata* in 2009.

> [W]orker's compensation awards, ... following an adjudication, are res judicata as to all matters considered.... A statutory exception to the finality rule is found in SDCL 62-7-33 which gives the Department continuing jurisdiction to adjust payments when there is a physical change in the employee's condition from that of the last award.

Larsen v. Sioux Falls School Dist. No. 49-5, 509 N.W.2d 703, 706-07 (S.D. 1993) (citations omitted). To end Johnson's medical benefits, Defendants were required to follow SDCL § 62-7-33:

> Any payment, including medical payments under § 62-4-1... made or to be made under this title may be reviewed by the Department of Labor pursuant to § 62-7-12 at the written request of the employer ... and on such review payments may be ended ... if the department finds that a change in the condition of the employee warrants such action. ...

SDCL § 62-7-33. This has been the law for decades. *See, e.g., Stender v. City of Miller,* 82 S.D. 334, 337, 145 N.W.2d 913, 915 (1966) (Employer/insurer initiated); *Sopko v. C & R Transfer Co.*, 1998 S.D. 8, ¶¶ 11-12, 575 N.W.2d 225, 230-31; *Stuckey,* 2011 S.D. 1, ¶27, 793 N.W.2d at 389. Defendants' failure to

exhaust their administrative remedy bars their arguments. *Zuke v. Presentation Sisters,* 1999 SD 31, ¶¶15-22, 589 N.W.2d 925, 928 - 930.

The DOL and the Seventh Circuit addressed these issues in the 2010-13 proceedings and rejected Defendants' arguments. (R.II.3589-97; R.II.3682, at 3689-95; DOL: R.II. 3707, at 3709-3713; R.II.3716); (Seventh Circuit under SDCL 62-7-33, 62-7-1, and 62-4-1.1[2]: R.II.3723, at 3726-28):

> UPS and Liberty's interpretation would actually render S.D.C.L. § 62-7-33 worthless as it applies to employers/insurers. An insurer/employer would not bother complying with S.D.C.L. § 62-7-33 to establish a change in condition if it could unilaterally determine that it was no longer bound to payment using S.D.C.L. § 62-7-1.

(*Id.* at 3727). Defendants did not appeal. Therefore, these issues are the law of the case, *res judicata,* or collaterally estopped here. *In re Estate of Siebrasse,* 2006 S.D. 83, ¶¶16-17, 722 N.W.2d 86, 90-91; *see also* (R.5411 – 5412, ¶¶1-7).

Given the "plain language" of these statutes and orders, Defendants' legal duties were "not fairly debatable." *Bertelsen v. Allstate Ins. Co.,* 2009 S.D. 21, ¶17, 764 N.W.2d 459, 500 (*Bertelsen I)*. As in *Bertelesen I*, "[Defendants'] obligation was clear from the *statutory language alone*, and an interpretive decision from this Court was not necessary for [Defendants] to have determined its duty under its policy." 2009 SD. 21, ¶20, 764 N.W.2d at 501 (emphasis added). Because the Defendants *breached* these "not fairly debatable" legal duties, either *substantively* by *not* providing the care under § 62-4-1 or the prior orders, or *procedurally* by not following § 62-7-33, the trial court was *required* to instruct

[2] SDCL 62-4-1.1 addresses "bills," not treatment. Defendants' expert witness agrees it is inapplicable. (R.II.2588 at 52:2–55:13; R.II.2595-8 at 78:20–91:18). It was enacted in 2008, SL 2008, ch 279 §1, and does not apply to the 1996 injury. *See Sopko v. C & R Transfer Company, Inc.,* 2003 S.D. 69, ¶12, 665 N.W.2d 94, 97-98.

on these issues. *Bertelsen v. Allstate Ins. Co.,* 2011 S.D. 13, ¶¶ 21, 32, 36, 796 N.W.2d 685, 694, 697-98 (*Bertelsen II*). Defendants could not argue that they "misunderstood" their legal duties. *Bertelsen v. Allstate Ins. Co.,* 2013 SD 44, ¶¶10, 17-18, 54, 833 N.W.2d 545, 552, 554-55, 563 (*Bertelsen III)*; *see also* (R.2783; R.2829; R.5129-31).

Defendants knew of *res judicata* and SDCL 62-7-33 *prior* to 2010. They used them *offensively* in the 1996-2009 proceedings. (R.2329 at 2330, ¶5). The DOL *accepted* these arguments. (R.224 at 236-37; *see also* R.400 at 405; R.606 at 615-616; R.620 at 628-629). Defendants used SDCL 62-7-33 against *other* injured workers. *Silbernagel v. UPS and Liberty Mutual,* 1998 WL 687339 (S.D. Dept. Lab.); (R.II.2747-60 at 120:21 – 133:1). Defendants should be judicially estopped from arguing that they did not *know* of *res judicata* or SDCL § 62-7-33's requirements, or that these laws did not *apply* to Johnson's claim. *Hayes v. Rosenbaum Signs & Outdoor Advertising, Inc.,* 2014 S.D. 64, ¶¶14-15, 853 N.W.2d 878, 882-83.

Contrary to the above, Defendants argue it was "fairly debatable" for employers and insurers to *unilaterally* delay or terminate benefits, prior to *Hayes, despite* the plain language of SDCL 62-7-33. *See generally* Appellants Br. Because Defendants' theory is not identified by a statute, case name, or other name, Johnson will use "unilateral termination theory" to describe the argument.

B. "Unilateral termination theory" violates lawful orders

> "*A statutory mandate and a court order* are not invitations, requests or even demands; *they are mandatory*. Those who totally ignore them … should not be heard to complain that a sanction was too severe."

Storm v. Durr, 2003 S.D. 6, ¶ 17, 657 N.W.2d 34, 38 (emphasis added) (citation omitted). An orderly society requires orders be obeyed until stayed or reversed. *See, e.g., Walker v. City of Birmingham*, 388 U.S. 307, 320 (1967); *United States v. United Mine Workers*, 330 U.S. 258, 293–294 (1947). "Any reasonably competent official must know that unless a judgment has been stayed, it must be obeyed." *Walters v. Grossheim,* 990 F.2d 381, 384 (8th Cir. 1993).

"Unilateral termination theory" is an admission of bad faith. "[Defendants'] conduct in this case was tantamount to a *unilateral* revocation or *termination* of *mandatory* coverage. On its face, that is conduct in bad faith." *Helmbolt v. LeMars Mut. Ins. Co.,* 404 N.W.2d 55, 58–59 (S.D. 1987) (emphasis added). Employers, insurers, or their legal counsel, cannot "veto" or "void" lawful orders of the DOL – or this Court. This is not "fairly debatable."

C. "Unilateral termination theory" violates Due Process

State *statutory* rights create a *property* interest in the continued receipt of benefits, which is protected by Due Process. *See Daily v. City of Sioux Falls,* 2011 S.D. 48, ¶¶13-25, 802 N.W.2d 905, 910-916. Johnson had a legally protected property interest in her continued benefits. *Stuckey*, 2011 S.D. 1, ¶ 24, 793 N.W.2d at 388. "Unilateral termination theory" ignores the due process protections of SDCL 62-7-33, U.S. Const. amend. XIV, § 1, and S.D. Const. art. VI, § 2. As in *Vreugdenhil v. First Bank of South Dakota, N.A.* 467 N.W.2d 756, 760 (S.D. 1991), Johnson "was thereby denied [her] constitutional right of due process;" Defendants' actions "were at least wanton." *Id.*

D. SDCL § 62-1-1(7)

The plain language of SDCL 62-1-1(7) does not provide a procedure for ending benefits; it is not an *alternative* to SDCL § 62-7-33. *Hayes,* 2014 S.D. 64, ¶29. Defendants argue that *Hayes* changed the law, because it "did not cite *any prior authority* so holding…" Appellants Br. 16-17 (emphasis added). However, Paragraph 29 of *Hayes* cites *Kasuske v. Farwell, Ozmun, Kirk & Co.*, 2006 S.D. 14, ¶ 12, 710 N.W.2d 451, 455, and earlier decisions. Moreover, the DOL and circuit court decisions in *Hayes* do not suggest that the insurer's position was "fairly debatable." To the contrary, the DOL and circuit court in *Hayes* fell victim to a "perversion of the judicial machinery" perpetuated by similar "unilateral termination theory" arguments. *Hayes,* 2014 S.D. 64, ¶¶8-23.

Defendants fail to discuss the legal standard for their "new law" argument. *Larsen*, 509 N.W.2d at 705-09, applies "retroactivity" analysis *specifically* to SDCL 62-7-33, when analyzing *Whitney v. AGSCO Dakota*, 453 N.W.2d 847 (S.D. 1990). Rulings of the DOL have the effect of *res judicata* - the finality rule. *Larsen,* at 706-07. This has been the law for decades. *Id*. *Hayes* simply reaffirms the "finality" rule, with SDCL 62-7-33 as the *exception* to finality. *See Hayes,* 2014 S.D. 64, ¶29, 853 N.W.2d at 886. Like *Whitney*, *Hayes* did not announce new law regarding SDCL § 62-7-33. *Larsen,* 509 N.W.2d at 706-708.

Defendants state "unilateral termination theory" was "standard practice at the time." Appellants Br. 30. This admits there are many more victims of this unlawful scheme. Given the plain language of the SDCL 62-7-33 and the cases applying it, including *Stender, Larsen, Sopko,* and *Kasuske,* the "unilateral

termination" practices of employers and insurers cannot be explained. "Considering the language that was used in [*Hayes'*] former precedents, we are at a loss to explain [the] former practice." *Larsen,* 509 N.W.2d at 707.

E. SDCL § 62-7-1 and -3

SDCL § 62-7-1 and -3, by *their* plain language, do not support "unilateral termination theory." (R.5130-31; R.II.3727). *See Mordhorst v. Dakota Truck Underwriters & Risk Admin. Servs.*, 2016 SD 70, ¶12, 886 N.W.2d 322, 325. SDCL 62-7-3 allows *temporary suspension,* inapplicable here. Defendants' proposed testimony does not support their argument. (Schultz - R.II.2587-88 at 47:18 – 50:24; Schulte - R.II.2514-16 at 97:17 – 102:25).

F. Defendants fail to distinguish "initial" and "subsequent" claims

Defendants cite inapplicable cases. They fail to distinguish between *initial* claims for benefits, and *subsequent* efforts to expand or reduce the obligations. *See* Appellants Br. 14 (citing *Vollmer v. Wal-Mart Store, Inc.,* 2007 S.D. 25, 729 N.W.2d 377 (initial) and *Haynes v. Ford,* 2004 S.D. 99, 686 NW.2d 657 (initial)), p. 17 (citing *Duane E. Sundberg, Claimant,* 1991 WL 525057 (S.D. Dept. Lab. Apr. 3, 1991) (reduction of benefits *prior* to initial claim), *Wiedmann v. Merilatt Indus.*, 2007 WL 5188049 (S.D. Dept. Lab., Nov. 14, 2007) (claimant initiated SDCL § 62-7-33 proceeding; *see generally Wiedmann v. Merillat Industries,* 2009 SD 109, 776 N.W.2d 824, explaining the history), and *Harter v. Store Servs. Inc.,* 2007 WL 3055174 (S.D. Dept. Lab., Oct. 12, 2007) (initial). The "initial" cases do not apply here.

G. SDCL § 62-3-18

At the time of Johnson's injury, SDCL 62-3-18 provided:

> No contract or agreement, express or implied, *no rule, regulation or other device*, shall in *any* manner operate to relieve any employer in whole or in part of any obligation created by this title *except* as herein provided.

Caldwell v. John Morrell & Co., 489 N.W.2d 353, 360 (S.D. 1992) (emphasis added). Analyzing *Caldwell,* SDCL 62-7-33, and 62-3-18 together, *Sopko* explains the purpose of this statute is:

> to ensure that an employer, does not, because of *ruse, artifice, inequality of bargaining power,* or by other means, *cheat* any employee out of either coverage or those *benefits an employee would be entitled to* under our worker's [sic] compensation act.
>
> Yet the core intent underlying this provision is to *ensure injured employees obtain their statutory benefits*.

Sopko, 1998 S.D. 8, ¶ 13, 575 N.W.2d at 231 (emphasis added, citations omitted). "Unilateral termination theory" is a "cheat." *Id.*

II. Appellants' Issue One: Bad Faith Claim is Valid

> Because "[t]he relationship between a workers' compensation claimant and an insurer is adversarial[3] and not contractual [,]" *Hein v. Acuity,* 2007 S.D. 40, ¶ 18, 731 N.W.2d 231, 237.... a [bad-faith] claimant must prove two things to be successful: (1) "an absence of a reasonable basis for denial of policy benefits[,]" and (2) "the [insurer's] knowledge ... of [the lack of] a reasonable basis for denial." "[K]nowledge of the lack of a reasonable basis may be inferred and imputed to an insurance company where there is a ... reckless indifference to facts or to proofs submitted by the insured."

Mordhorst, 2016 S.D. 70, ¶ 9, 886 N.W.2d at 324 (citations omitted).

[3] Johnson asks that *Hein's* "adversarial relationship" rationale, based on a non-contractual relationship, be reconsidered in light of SDCL 58-20-6 (requiring workers' compensation "be construed to be a direct obligation by the insurer to the person entitled to compensation...") and *Sowards v. Hills Materials Co.*, 521 N.W.2d 649, 652 (S.D. 1994) (deeming workers compensation "non-adversarial."). These authorities were not referenced in *Hein*.

A. Law Was Not "Fairly Debatable" in 2010

Defendants' violation of prior orders and "unilateral termination theory" are not fairly debatable." *See supra*. Defendants *facially* committed bad faith when they ended mandatory benefits. *Helmbolt,* 404 N.W.2d at 58-59. *Hayes* did not announce new law. *Larsen, supra*. Judgment could not be entered in Defendants' favor, but in *Johnson's* favor as *not* "fairly debatable." *Bertelsen III,* 2013 SD 44, ¶¶10, 17-18, 54, 833 N.W.2d at 552, 554-55.

B. Orders Were Not Fairly Debatable.

Providing medical benefits under SDCL 62-4-1 is an *affirmative* duty. *Cozine v. Midwest Coast Transport, Inc.,* 454 N.W.2d 548, 555 (S.D. 1990). Defendants' arguments on pages 14 and 19 of their Opening Brief are entirely new and wrong. (p. 14: "Second, the 2006 Order was written so that determination of what were necessary or suitable medical treatments were *left to the parties, not the DOL.*") This new argument, not raised below, should be rejected. *Wyman v. Bruckner*, 2018 S.D. 17, ¶ 16, 908 N.W.2d 170, 176. The *medical* provider makes these determinations, not the parties. *Hanson, Streeter, supra*. Defendants' arguments reject these precedents.

The duty to provide *ongoing* benefits was emphasized by the DOL in June 2007. (R.1408-1411 at 4:8 – 6:10). Liberty admitted that the orders and intent were clear. (R.II.2867-2870 at 240:12 -243:5). A party "cannot … assert a better version of the facts than [their] prior testimony and 'cannot … claim a material issue of fact which assumes a conclusion contrary to [their] own testimony.'"

Loewen v. Hyman Freightways, Inc., 1997 S.D. 2, ¶ 16, 557 N.W.2d 764, 768 (citations omitted).

C. Advice of Counsel Does Not "Negate" Intent

Defendants argue they lacked "subjective" intent for bad faith. Appellants Br. 20-22. Defendants frame this as a question of *law*. Appellants Br. 22. "Intent" is a factual issue. *Bertelsen III,* 2013 S.D. 44, ¶54. While advice of counsel might be a "factor," it is not an absolute defense. *Crabb v. Nat'l Indem. Ins. Co.,* 87 S.D. 222, 228 (1973); *Hannahs v. Noah,* 83 S.D. 296, 305 (1968) (if "the advice was *requested* in *good faith* and on full disclosure, and was given in *good faith* with respect to a course involving legal questions *and not questions of common morality…*") (emphasis added). That this is a *factual* issue is reflected in *Mordhorst,* 2016 S.D. 70, ¶¶ 12-13, 886 N.W.2d at 325-26. While defendants have a right to request an IME, or seek counsel, that does not provide an absolute defense, as a matter of law. *Id.* This is a jury issue. *Id.* Alternatively, the duty to obey a lawful order is an issue of "common morality," not law.

"Clearly, attorneys are not insurers to their clients for any losses the client may sustain based on wrongful intentional acts by the client." *Greene v. Morgan, Theeler, Cogley & Petersen*, 1998 S.D. 16, ¶39, 575 N.W.2d 457, 464 (Gilbertson, J., concurring and dissenting, in part). The advice of counsel is not an "insurance policy" to protect against Defendants' intentional torts. *Id.*

Lawyers cannot "void" the orders of the DOL or this Court. If accepted, Defendants' argument invites anarchy and the end of the rule of law. Jurisdictions across the country have rejected arguments that the advice of counsel is a valid "intent" defense to disobeying lawful orders. *See State ex rel.*

Walker v. Giardina, 170 W.Va. 483, 486, 294 S.E.2d 900, 983 (W.Va. 1982); *State v. Price*, 820 A.2d 956, 967 (R.I. 2003); *In re Home Disc. Co.*, 147 F. 538, 555–56 (N.D. Ala. 1906); *Kindt v. Murphy,* 312 Ky. 395, 398, 227 S.W.2d 895, 897 (1950); *Slone v. Herman*, 983 F.2d 107, 111 (8th Cir. 1993); *Walters,* 990 F.2d at 384. Bad advice is accepted at the client's peril. *Steinert v. United States*, 571 F.2d 1105, 1108 (9th Cir. 1978) (extended to legal counsel in *United States v. Armstrong*, 781 F.2d 700, 706-07 (9th Cir. 1986)). The *Price* court explains:

> In establishing *intent*, it is sufficient to find that a *refusal to obey was the product of rational choice*. The fact that the rational choice is predicated on the *advice of counsel is irrelevant*. * * *
>
> *… The responsibility of complying or not complying with a court order rests solely with the person commanded*. Viewed cynically, a defense to contempt based on advice of counsel is an invitation to every *sophisticated scoundrel* to seek an attorney who will give advice that he or she need not obey the order and thus be safe in the *expectation that there will be immunity from the consequences of the disobedience*."

Price, 820 A.2d at 967 (emphasis added, citations omitted)).

Advice of counsel must be "sought in good faith, from honest motives, and for good purposes." *Bucher v. Staley*, 297 N.W.2d 802, 805 (S.D. 1980). The jury rejected Defendants' defenses regarding advice of counsel and that Defendants wanted to "help" Johnson. Defendants have not appealed from these factual determinations.

III. Appellants' Issue Two: Damages Were Sufficient.

Johnson recovered approximately $13,000 in economic damages in the 2010-13 DOL proceedings. Johnson could not get a "double recovery" on these damages. Defendants argue that, because they paid the unlawfully denied benefits, no "economic" damages sustain the bad faith claim. Yet:

> Every person who suffers *detriment* from the *unlawful act or omission* of another may recover from the person in fault a compensation therefor in money, which is called damages. *Detriment* is a loss or harm suffered in person *or* in property.

SDCL § 21-1-1 (emphasis added). Defendants' actions were "unlawful;" they disobeyed lawful orders and statutes. Johnson suffered "detriment" as a result. The law demands a remedy; otherwise Defendants' misconduct would be cost-free. The existence and amount of damages were jury questions. Johnson recovered compensatory damages for "pain and suffering, mental anguish, and loss of capacity of the enjoyment of life" in addition to economic damages for conversion. (R.7133). The "detriment" to her "person" was recoverable under the *tort* claims. SDCL 21-3-1; *Fix v. First State Bank of Roscoe*, 2011 S.D. 80, ¶ 14-16, 807 N.W.2d 612, 617-18, *Richardson v. Richardson,* 2017 S.D. 92, 906 N.W.2d 369 (rejecting artificial barriers to tort recovery related to necessarily separate court proceedings); *Roth v. Farner–Bocken Co.,* 2003 S.D. 80, ¶ 27, 667 N.W.2d 651, 662. Legally, Johnson was *at least* allowed to seek "nominal" damages. SDCL 21-1-2. Defendants have not appealed from the jury's determination of these issues.

Public policy should not tolerate Defendants' arguments in workers' compensation. *Kunkel v. United Sec. Ins. Co.,* 84 S.D. 116, 135, 168 N.W.2d 723 (1969), concerning bad faith failure to settle within policy limits, is distinguishable. *See Helmbolt,* 404 N.W.2d at 60 (rejecting *Kunkel's* holding regarding damages). Here, there was an invasion of a property right to ongoing benefits. *See Stuckey, supra*. "Breach of contract" *and* bad faith damages were recoverable in *Bertelsen*. Defendants should not escape liability, simply because

of jurisdictional limitations. *See Bertelsen II,* 2011 S.D. 13, ¶¶23-24, 796 N.W.2d at 694-95. Injured workers *have* economic damages, but jurisdictional limitations require that those be recovered before the DOL. SDCL Title 62; *Zuke,* 1999 SD 31, ¶¶15-22, 589 N.W.2d at 928-30. Under *Zuke,* a claimant must establish entitlement to benefits with the DOL, *before* bringing a bad faith claim in court. *Id*. Defendants argue that once a claimant *establishes* their rights, the employer and insurer may "purge" bad faith by paying the statutory obligation. In other words, the right to bring a claim in *tort* disappears as soon as it is created. Defendants ask to overturn *Zuke*.

This Court has rejected that approach, endorsing the reasoning of *Oestreicher v. American National Stores Inc.,* 290 N.C. 118, 225 S.E.2d 797, 809 (1976):

> In the so-called breach of contract actions that smack of tort because of the fraud and deceit involved, we do not think it is enough just to permit defendant to pay that which the ... contract required him to pay in the first place. *If this were the law, defendant has all to gain and nothing to lose*. If he *is not caught* in his fraudulent scheme, *then he is able to retain the resulting dishonest profits*. If he *is caught*, he *has only to pay back that which he should have paid in the first place*.
>
> To hold otherwise would give parties to a contract a *license to steal*....

Grynberg v. Citation Oil & Gas Corp., 1997 S.D. 121, ¶ 26, 573 N.W.2d 493, 502 (emphasis added). Defendants ask this Court to grant them a "license to steal."

If employers and insurers can deny established medical benefits, and then, *if* challenged, pay without consequences, they would have nothing to lose. Many workers would not, or could not, mount a challenge to the denial. Thus, the employer and insurer would reap the benefit of their unlawful "cheat." SDCL 62-3-18. Under *Grynberg,* this violates public policy, because employers and

insurers would have no incentive to obey the law, but significant incentive to disobey it. Defendants' argument *encourages* unlawful actions where employers and insurers reason it is "cheaper to cheat" than to obey the law. This attitude is reflected in the Defendants' claims notes. "If worst comes to worst, we'll be on the hook for ongoing treatment." (Tr.Ex.111).

Further, Defendants argue that the "unilateral termination theory" is widely practiced; resolving these issues as a matter of law would injure the public further. Workers' compensation insurers have *knowingly* and *unlawfully* required *other* insurers or governmental programs to pay for their legal obligations, through "unilateral termination." (R.II.2427-28 at 148:3 – 149:7). They have exploited *other* insurers, by operation of SDCL 62-1-1.3. *See generally Bertelsen I*. Public policy demands a remedy to address these unlawful schemes and "cheats."

IV. Appellants' Issue Three: A New Trial is Not Warranted

> The denial of a motion for a new trial is reviewed for an abuse of discretion. "This Court will uphold a jury verdict 'if the jury's verdict can be explained with reference to the evidence,' viewing the evidence in a light most favorable to the verdict." "This Court should only set a jury's verdict aside in 'extreme cases' where the jury has acted under passion or prejudice or where 'the jury has palpably mistaken the rules of law.' " "'[I]f a verdict is susceptible to more than one construction, the construction which sustains the verdict must be applied.' " [4]

[4] The jury's rejection of the "advice of counsel" could be understood as a *Mordhorst*-type claim for bad faith. *Mordhorst,* 2016 S.D. 70, ¶ 13, 886 N.W.2d at 325-26. Similarly, a *Walz*–type bad faith claim was presented. *Walz v. Fireman's Fund Ins. Co.,* 1996 S.D. 135, ¶¶ 12, 19, 556 N.W.2d 68, 71, 73. The evidence shows that Johnson repeatedly asked Defendants to reconsider, based on the "directly controlling" prior rulings. *Id*. Also, the "low ball" and "complete" settlement offer could be considered an *Isaac*-type bad faith. *Isaac v. State Farm Mut. Auto. Ins. Co.,* 522 N.W.2d 752, 761-62. The Defendants' failure to follow

Lenards v. DeBoer, 2015 S.D. 49, ¶ 10, 865 N.W.2d 867, 870 (citations omitted).

The trial court found that the damages were reasonable, supported by the evidence, and not the product of passion or prejudice. (R.II.616-17 at 2:9-3:15; R.II.620 at 6:1 to 3). It found Johnson credible, and that Defendants' witnesses lacked credibility, except Mr. Schulte. (R.II.616 at 2:16 to 22; R.II.614). This was based on verbal and non-verbal indicators. *Id*. In bad faith, rulings might *appear* to be resolving issues as a matter of law, even when they are not. *Helmbolt,* 404 N.W.2d at 61 (Wuest, CJ, concurring).

A. Jury Instructions

Defendants argue that the jury instructions were improper because they prevented arguments regarding the advice of counsel as "intent." Appellants Br. 25-26. Defendants also claim "unilateral termination theory" was improperly excluded as to punitive damages. Appellants Br. 29-30. Yet, the trial record is replete with testimony of reliance on the "advice of counsel." For example, Defendants' closing statement repeatedly references their reliance on the advice of counsel. (R.II.2177-88 at 959:24 – 970:13). Defendants had ample opportunity to explain their intent, but were not allowed to argue they misunderstood the law. *See Bertelsen III,* 2013 S.D. at ¶54, 833 N.W.2d at 563.

Instruction No. 25, (R. 7113), properly follows *Bertelsen II,* 2011 S.D. 13, ¶¶32, 35-36, and 41. Because such a breach and "denial of a claim that is not fairly debatable is strong evidence of bad faith," it would be prejudicial to

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lawful orders *alone* supports the jury's verdict. *Helmbolt, supra*. These theories sustain the verdict, regardless of the "unilateral termination theory" issue. *Lenards, supra.*

Johnson to exclude this instruction. *Id.* In the alternative, Defendants suggest Jury Instruction No. 27 was an abuse of discretion. Appellants Br. 26. Defendants misstate the instruction. It provides:

> You may not consider legal advice of Defendants' legal counsel, Mr. Eric Schulte, when determining whether [Defendants] knew there was no reasonable basis, or exhibited a reckless disregard for whether there was no legal basis, to disregard the court order, by delaying, denying or failing to pay benefits when the IME was requested or when terminating [Johnson's] workmen's compensation benefits on August 9, 2010.
>
> You *may* consider the legal advice of Defendants' legal counsel, Mr. Eric Schulte in [Defendants'] decision to seek a records review and an IME, to engage in settlement negotiations, and the amount of the proposed settlement.

(R.7116) (emphasis added). This instruction *only* limited consideration of a *specific issue* (knowledge or "reckless disregard"), of a *specific activity* ("disregard[ing] the court order"), at two *specific times* ("when the IME was requested,"[5] and "when terminating… benefits on August 9, 2010."), consistent with the law. The instructions allowed consideration of the legal advice to other actions and as a mitigating factor to punitive damages. (R.7125-26, Jury Instruction No. 36, at (5), "All of the circumstances concerning the Defendant's action, including any mitigating circumstances, *such as the advice of counsel,…*" (emphasis added)). Defendants have not shown the jury instructions were improper or "in all probability… produced some effect upon the verdict and were harmful to the substantial rights of a party." *Bertelsen II,* 2011 S.D. 13, ¶ 26, 796 N.W.2d at 695. In the "totality of the events at trial," there is no indication that the jury would reach a different verdict. *Id.* 2011 S.D. 13, ¶29.

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[5] Appellants' concern is "namely, that they could terminate benefits as a *result* of the IME." Appellants Br. 25. The jury instruction applies to the time period *before* the "result" of the IME was obtained. *See* Statement of Facts, *supra*.

B. Testimony/Evidence

The admission of expert evidence is reviewed for an abuse of discretion that must be accompanied by an appellate finding that "the jury's consideration of the erroneously excluded evidence might and probably would have resulted in a different finding by the jury." *O'Day v. Nanton*, 2017 S.D. 90, ¶ 17, 905 N.W.2d 568, 572 (citations omitted). Because the legal duties were not fairly debatable, the trial court properly excluded evidence and testimony that the Defendants "misunderstood" these legal duties. *Bertelsen I, II, III, supra*. These *legal* rulings were not relevant to the issues before the jury. SDCL 19-19-401, -402, -403.

Defendants sought to present "statutory interpretation" as a question of *fact*. However, statutory interpretation, like insurance policy interpretation, is a question of *law*. *Bertelsen I, II, III, Caldwell*, 489 N.W.2d at 364, *Western National Mutual Ins. Co. v. TSP, Inc.,* 2017 S.D. 72, ¶11, 904 N.W.2d 52, 57. "Matters of law are for the trial judge, and it is the judge's job to instruct the jury on them." *S. Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 841 (8th Cir. 2003). Defendants ask that the jury be allowed to nullify the trial court's legal interpretations. This is improper.

An attorney's legal analysis is not *evidence*. *See McElgunn v. Cuna Mut. Grp.*, No. CIV. 06-5061-KES, 2008 WL 6898653, at *1 (D.S.D. Mar. 24, 2008) (R.2947 - 50), at *2 (citing *Estes v. Moore*, 993 F.2d 161, 163 (8th Cir.1993) (proper to exclude legal conclusions). In Defendants' offer of proof, Mr. J.G. Schultz, testified that the courts have incorrectly applied or interpreted the law. (R.II.2582 at 21:24 -24:21; R.II.2592-93 at 67:6 – 72:12; R.II.2595-96 at 78:20 – 84:17); *see also* (R.II.2585 at 39:2 – 41:20; R.II.2586-87 at 43:25 – 46:22 –

discussing the Circuit Court's analysis of the legal issues in the 2010-2013 proceedings; R.II.2604 at 117:5 – 118:13 – discussing *Stuckey* and SDCL 62-7-33; *see Stuckey,* 2011 S.D. 1, ¶27, 793 N.W.2d at 389). Mr. Schulte's and Mr. Schultz's testimony was correctly limited or excluded. *Estes, supra*.

Defendants state, "Hildebrand was barred from testifying that the appellants acted consistent with industry custom and practice, or that insurers should generally follow the advice of counsel." Appellants Br. 27. This is inaccurate. Mr. Hildebrand was allowed to testify that the Defendants complied with industry custom and practice and on the advice of counsel. (R.II.2008 at 790:16 to 22[6]; R.II.2010 at 792:7 to 9; R.II.2011-15 at 793:14 to 22, continuing at 794:2 – 797:2; R.II.2016 798:3-799:12; R.II.2019-25 at 801:21 – 802:9, continuing at 802:24 – 804:12, continuing at 805:8 – 14, continuing at 805:20 to 21, answered at 806:19-807:3, continuing 807:13 to 19). Defendants did explore these issues, or would have been allowed to explore these issues further, but they failed to do so. (R.II.2039 at 821:3 to 12). This was their error, not the court's.

V. Appellants' Issue Four: Punitive Damages

A. Standard of Review.

Evidence clearly supports punitive damages; Defendants have not challenged that *factual* finding. The trial court agreed with the jury's apparent credibility findings favoring Johnson. (R.II.616 at 2:16 to 22; R.II.614). The court found Defendants' actions: resulted in physical and economic harm; employed trickery and used the system in a way not intended; and were indifferent to

[6] The trial court excluded Hildebrand's statement regarding the "order" and "appropriateness," but not the "industry custom and practice" testimony.

Johnson's health and safety. (R.II.618-19 at 4:25-5:7). The court expressed its desire to allow the jury's verdict to stand on the amount of punitive damages, as reasonable and supported by the evidence. (R.II.619 at 5:16 to17; R.II.708-09). Defendants' challenge, then, focuses on Due Process limits. Accordingly, *de novo* review applies. *Roth*, 2003 S.D. 80 at ¶44, n.4, 667 N.W.2d at 665, n.4.

B. Courts Reject Defendants' Simple Mathematical Calculation Approach.

Defendants take a simplistic approach to excessiveness, asking, if not dissolved altogether, a ratio of 1:1 be imposed. Both this Court and the U.S. Supreme Court have emphatically rejected that mathematical bright-line straitjacket. *See Wangen v. Knudson*, 428 N.W.2d 242, 246 (S.D. 1988) (citation omitted) ("There is no precise mathematical ratio between compensatory and punitive damages."); *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 425 (2003) ("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed."). Defendants misrepresent *State Farm* when they claim it supports a 4:1 rubric as "close to the line of constitutional impropriety." Appellants Br. 30. (citing *State Farm*, 538 U.S. at 425). Instead, *State Farm* acknowledges past statements to that effect but then adds that such "ratios are not binding," even when "instructive." *State Farm*, 538 U.S. at 425. That means "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1." *Id*. Higher ratios can be justified. A ratio above single digits prompts additional *scrutiny*; it is not an unsurpassable *boundary*.

Even where the Court recited that 4:1 "may be close to the line' of constitutional permissibility," it upheld a 526-to-one ratio, finding the ratio not controlling in a "case of this character" and not "grossly excessive." *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459, 462 (1991). This, too, is a case of the character that warrants large punitive damages, but the ratio here does not approach 500:1.

Although *State Farm* recognized that, where the compensatory damages "are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," 538 U.S. at 425, the Court has imposed that limit in only *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), where the compensatory damages were *$507.5 million*. It was an exercise of the Court's *common-law* authority over maritime law, not required by due process. *Id*. at 515, 502, 489-90. The compensatory damages here are not substantial in the same sense as the half billion dollars at issue in *Exxon Shipping*, but are orders of magnitude smaller. The issue here is not one of legislating punitive damage limits, but reviewing a jury decision to assure that due process is not offended.

C. Due Process Does Not Require Reduced Punitive Damages.

This Court adopted a five-factor analysis to determine punitive-damage excessiveness:

> (1) the amount allowed in compensatory damages, (2) the nature and enormity of the wrong, (3) the intent of the wrongdoer, (4) the wrongdoer's financial condition, and (5) all of the circumstances attendant to the wrongdoer's actions.

Grynberg, 1997 S.D. 121, ¶ 37, 573 N.W.2d at 504 (citation omitted). Subsequently, it "incorporate[d] our five factor analysis with the three guideposts outlined by the [U.S.] Supreme Court." *Roth*, 2003 S.D. 80, ¶ 47, 667 N.W.2d at 666. Federal due-process guideposts are reprehensibility, proportionality, and comparability. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996).

1. State's Interest.

The due-process inquiry begins "with an identification of the state interests that a punitive award is designed to serve." *BMW*, 517 U.S. at 568. Punitive damages amount to a private attorney general function that serves the State's interests in punishment and deterrence. *Grynberg*, 1997 S.D. at ¶ 26, 573 N.W.2d at 502; *State Farm*, 538 U.S. at 416.

Here, the egregious misconduct directed at Johnson is compounded by Defendants' defiance of court orders. Defendants, by "unilateral termination," operated as a law unto themselves. That action challenged both the rule of law and the authority of the legal system. These interests are second to none. No one is above the law. *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006).

2. Reasonable Relationship.

The "first factor to be considered is the amount of compensatory damages and its relationship or ratio to the amount of punitive damages," which "must bear a reasonable relationship to the compensatory damages." *Grynberg*, 1997 S.D. at ¶ 38, 573 N.W.2d at 504 (citation omitted). There are no mathematical bright-lines. Moreover, ratio comparisons "are of limited value." *Id.* at ¶ 38, 573 N.W.2d at 505 (citations omitted). Treating punitive damages as a simple reflection of the relationship between actual and punitive damages fails to

account for fact-sensitive considerations, the totality of the circumstances, and, most especially, potential harm to Johnson or, in this instance, the rule of law. *Cf. TXO*, 509 U.S. at 460. Here, had Defendants gotten away with their gambit, evidence in the record demonstrated that Johnson's potential damages would have been significant. Future medical expenses were $10,000 per year, plus the cost of future modalities. (Tr.Ex. 116-02). The damage to the legal system, if major players can override judgments against them unilaterally, would be incalculable. As in *TXO,* a higher ratio is warranted here.

Defendants' argument trivializes the determination entrusted to the jury by SDCL 21-3-2, and this Court's judicial review of the same. Reliance on ratios improperly denigrates the primary, important, and historic role that reprehensibility plays in both the assessment of punitive damages and the determination of their proportionality. After all, "some wrongs are more blameworthy than others." *Schaffer v. Edward D. Jones & Co.*, 1996 SD 94, ¶ 32, 552 N.W.2d 801, 812.

A mechanical, mathematical approach utterly ignores a State's authority to determine when and to what extent, within constitutional limits, punitive damages may be levied. "Were there to be some bright-line rule on ratios as Jones implies, the remaining four criteria would become irrelevant and the entire process of judicial review would be reduced to that of a turn at a calculator." *Id.* at ¶ 28, 552 N.W.2d at 810. Defendants exhibit a pattern of disregard or disrespect for the rule of law and claim it to be an industry practice. Defendants' arguments also seek to embolden further violations of the law, because they ask to have punitive damages mathematically "capped." If capped in this manner, then

employers and insurers will more easily *calculate* when it is "cheaper to cheat" than to obey the law. *See supra*.

Defendants also speculate that the compensatory award included a punitive element. Appellants Br. 30-31. Although the U.S. Supreme Court said, humiliation and indignation can include a punitive element, *see Roth*, 2003 S.D. 80, ¶ 70, 667 N.W.2d at 670 (citing *State Farm*, 538 U.S. at 426), the Court also recognized that compensatory damages, including non-economic damages, represent findings of fact committed to the jury's province and not subject to judicial revision without the offer of a new jury trial. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 (2001). This Court also holds that pain and suffering damages are "a disputed question of fact for the jury." *Lenards*, 2015 S.D. 49, ¶ 13, 865 N.W.2d at 871. As a disputed factual question, this Court assumes the jury acted properly upon an appropriate theory of law. *Id.*; *see also Baddou v. Hall*, 2008 S.D. 90, ¶ 15, 756 N.W.2d 554, 559. Nothing in the record otherwise suggests Johnson sought a punitive element in her compensation, or implies the jury punished Defendants in the compensatory verdict. (R.II.2176 at 958:11-21).

Punitive damages "are not designed to compensate victims," but punish and deter. *Olson-Roti v. Kilcoin*, 2002 S.D. 131, ¶¶ 32, 33, 653 N.W.2d 254, 260. The jury *separately* assessed the damages necessary to compensate Johnson and the damages necessary to punish and deter Defendants – and the trial court found nothing wrong with either assessment.

Reasonableness, rather than an unbounded speculative endeavor, applies. A reasonable and appropriate amount of punitive damages "deter[s] the person

against whom they are awarded from repeating the offense and others from committing it." *Grynberg*, 1997 S.D. at ¶ 36, 573 N.W.2d at 504. Here, Defendants *still* assert that there is nothing wrong with unilateral termination, and their smirking mockery of the idea suggested to the jury that Defendants will "do it again." *Id.* ¶47 (citation omitted).

3. Reprehensibility.

The "most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419 (citation omitted). That principle, "'the enormity of the offense,'" is "'deeply rooted and frequently repeated in common law jurisprudence.'" *BMW*, 517 U.S. at 575 n.24 (citation omitted).

The "two South Dakota factors relating to reprehensibility are the defendant's intent and the enormity of the wrong." *Dziadek v. Charter Oak Fire Ins. Co.*, 213 F. Supp. 3d 1150, 1172 (D.S.D. 2016), *aff'd,* 867 F.3d 1003 (8th Cir. 2017). They align with the "aggravating factors" formulated by the U.S. Supreme Court: whether the harm caused was physical as opposed to economic; evinced an indifference to or a reckless disregard of the health or safety of others; involved a person who is financially vulnerable; involved repeated actions rather than an isolated incident; and was the product of intentional malice, trickery, or deceit, or mere accident. *Id.* at 575-76. *See also Roth*, 2003 S.D. 80, ¶ 49, 667 N.W.2d at 666.

i. Harm was intentional.

The harm directed at Johnson was not inadvertent, but an intentional course of conduct to deprive her of continuing benefits. The evidence makes plain

that Defendants sought to end their obligations, carefully devising a course of action to make what they *knew* to be unreasonable *appear* reasonable. They understood that they had no unilateral authority to end treatment and bore the burden to show the care was not necessary, suitable or proper. (R.7761; R.II.2375 at 85:5-86:23). Liberty had trained on the relevant South Dakota law. Existing orders *required* them to finance ongoing medical care. (R.II.2377 at 106:13–107:1). Defendants had to obey these orders, which could not be swept aside even with the fig leaf of seeking advice of counsel. (R.II.1902 at 720:9 to14; R.II.1935 at 753:3 to 15; R.II.2019-20 at 801:21-802:9).

Defendants' intent is further exposed by their anxiousness to deny paying Johnson's medical care and treatment *before* they had a medical opinion and even though they understood the impropriety of that approach. (R.II.2378-81 at 114:3–128:24; R.II.2451-52 at 247:21–250:24; R.7621-29; R.7630-34; R.7635-36; R.II.1640-43 at 488:14-491:5; R.II.1925-28 at 743:24-746:4). They did not proceed in good faith, but used what the court termed "trickery." (R.II.619 at 5:1 to 4).

Once a new medical exam had been obtained, Defendants jumped on it to deny benefits entirely, even though all the IME did was duplicate evidence that had proved insufficient in the previous round of litigation. (Tr. Exs. 88, 92, 15;). Thus, no *new* information triggered this plan to deprive Johnson of benefits, just an obstinate belief by Defendants that they should not have to provide benefits to Johnson.

Just as trickery and deceit are more reprehensible than mere negligence, *see Roth*, 2003 S.D. 80, ¶ 49, 667 N.W.2d at 666, intentional misconduct is yet

more egregious, sitting at the extreme end of the reprehensibility scale. *See Exxon Shipping*, 554 U.S. at 493.

ii. Enormity of the Wrong.

While Defendants minimize the enormity of the wrong by suggesting they merely followed counsel's advice, the two companies were not babes in the woods dealing with their first workers' compensation claims. As in *Grynberg*, then, "the expertise of the two parties becomes worthy of note." 1997 S.D. 121, ¶ 39, 573 N.W.2d at 505. Yet, instead of using that expertise to comply with the law that they knew applied, they used it to evade their legal responsibilities.

The record is replete with testimony that they understood their legal obligations, but attempted to undermine those responsibilities by unilaterally terminating Johnson's benefits. (R.7540-41). What they could not accomplish through legal means, they sought through unlawful means. In other words, Defendants sought revenge on Johnson for being awarded future medical benefits. Similarly, Defendants refused to accept the determinations of the DOL and this Court, and chose to operate outside of the law's view.

Defendants' actions, then, were not merely intentional but the product of malice, motivated by profit,[7] and "conceived in the spirit of mischief or criminal indifference to civil obligations." *Case v. Murdock*, 488 N.W.2d 885, 891 (S.D.

[7] "Malice may be either actual or presumed" based on the acts committed. *Holmes v. Wegman Oil Co.*, 492 N.W.2d 107, 112 (S.D. 1992). As discussed above, "unilateral termination theory" denials *automatically* shift financial and legal duties to *other* insurers, pursuant to SDCL 62-1-1.3, *Bertelsen I*. This bad faith *directly* "saves" money for the wrongdoer, by *unilaterally* passing financial obligations to the injured worker and that person's other sources of care. The victims of this scheme are not only the injured worker and the rule of law, but also other insurance companies or governmental programs, who must "pick up the tab" for the tortfeasor's wrongdoing.(R.II.2426 at 148:3 – 149:7).

1992) (citation omitted). Defendants' animus to Johnson was apparent. Intentional or malicious conduct is more reprehensible than reckless conduct and justify higher punitive damage awards. *See Exxon Shipping*, 554 U.S. at 493. When motivated by profit, there is "an enhanced degree of punishable culpability." *Id.* at 494; *see also Isaac,* 522 N.W.2d at 761-62 (discussing "reckless disregard" of the insured's rights, including settlement offers conditioned on the release of bad faith claims, as appears here). With both intent and malice present here, and each of the other aggravating factors, the highest possible award is warranted.

Further, Defendants attempted to "bully" Johnson into accepting a "low ball" settlement, while giving up *all* of her rights. *See Isaac, supra*. They calculated that a poorly resourced claimant would give up and accept that *de minimis* offer. They believed, even if they lost, they would only be on the hook for what they owed anyway. Punitive damages disrupt the calculation that it is "cheaper to cheat" than to obey the law.

iii. Physical harm, indifference and financial vulnerability.

Defendants' claim that "Johnson did not suffer physical or financial harm," Appellants Br. 32, rings hollow. They assert that the existence of Johnson's private health insurance "counters any claim that Johnson was financially vulnerable, that she suffered physical harm, or that the appellants recklessly disregarded her health." *Id.* The fortuity of Johnson's personal insurance, however, does not change the reprehensibility of Defendants' actions. They specifically cut off benefits necessary to prevent further physical harm.

"'[I]ndifference to and reckless disregard for the health or safety of other[s]'" are of a "more serious nature" than even trickery or deceit. *Veeder v. Kennedy*, 1999 SD 23, ¶ 54, 589 N.W.2d 610, 621 (quoting *BMW*, 517 U.S. at 576), *cited with approval in Roth*, 2003 S.D. 80, ¶ 49, 667 N.W.2d at 666.

Johnson's use of her health insurance was not cost-free. Health insurance plans impose both a yearly and lifetime limit on paid-for expenditures. Christopher MacDonald, *Coverage Capped When You Need It Most: The Effect of Lifetime Insurance Limits on Cancer Patients*, 22 Annals Health L. Advance Directive 1, 3 (2013). By forcing Johnson to use insurance benefits now, they limited her potential claims for the future. In addition, usage may also be reflected in future rising premiums.

Because reprehensibility takes into account "the magnitude of the potential harm," S*chaffer,* 1996 S.D. 94, ¶ 51, 552 N.W.2d at 816 (quoting *TXO*, 509 U.S. at 460), Defendants receive no credit for Johnson's foresight in obtaining private health insurance. *Cf. Papke v. Harbert*, 2007 S.D. 87, ¶ 69, 738 N.W.2d 510, 532. Defendant's use of this collateral source to mitigate damages is a "forbidden purpose." *Cruz v. Groth*, 2009 S.D. 19, ¶ 13, 763 N.W.2d 810, 814. Johnson's injury was not merely economic and did involve a financially vulnerable individual; the cost of *future* treatment for the rest of her life, is a major expense for anyone to bear. The trial testimony, the jury verdict, and the trial court's comments at the post-trial hearing, all show that Johnson suffered physical pain and suffering, from Defendants' actions. (R.7133 "Pain and suffering"; R.II.618-19 at 4:25 – 5:7; R.II.620 at 6:1 to 3).

iv. Product of repeated actions.

Defendants blithely assert that their "actions are reasonably viewed as a single act—the denial of coverage, based on the results of the IME, that flowed from their counsel's advice." Appellants Br. 33. The statement demonstrates that Defendants *still* do not appreciate the depth of their misconduct, and such a facile approach ignores the issues implicated. Each case "must be governed by its own peculiar facts," and "all circumstances are to be considered." *Grynberg*, 1997 S.D. at ¶ 36, 573 N.W.2d at 504 (citation and internal ellipsis omitted).

Without hesitation, Defendants denied medical benefits, forcing Johnson's return to the DOL to obtain the same benefits she had previously won. Johnson *repeatedly* implored Defendants to reconsider their denials and obey the law and lawful orders entered against them. (Tr. Ex. 130, p. 7, 13). Unlike defendants who exhibit a pattern of misconduct against multiple parties, Defendants transformed a legitimate initial evaluation of her claim into a patently unlawful one, with ongoing bad faith denials and repeated refusals to reconsider. This was not a one-time mistake, but a sustained and repeated pattern of intentional, calculated bad faith, deserving the highest condemnation possible. Curiously, it is the *Defendants* who argue that "unilateral termination" is the "standard practice" in this state. Appellants Br. 30. If considered, as Defendants' suggest, this factor weighs in favor of the reprehensibility of the wrong, as a product of repeated action. It is reasonable to assume that Liberty engaged in these "standard practices" in other workers' compensation matters, even without record evidence, because Liberty withheld relevant documents from discovery and its testimony

was not credible. This is a key feature of “unilateral termination:” there is no record of the activity, because it evades oversight of the law.

v. Defendants' finances.

A further factor in evaluating punitive damages is the "wrongdoer's financial condition." *Roth*, 667 N.W.2d at 665. It serves two purposes. First, it assures that the punitive damages do not financially devastate the defendant. *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 706 (1st Cir. 1995). Second, it assures that punitive damages are large enough "to accomplish the objective of punishing the wrongdoer and deterring others from similar wrong." *Engels v. Ranger Bar, Inc.*, 604 N.W.2d 241, 247 (S.D. 2000). An "amount sufficient to serve this purpose in one instance might be wholly inadequate in another." *Grynberg*, 1997 S.D. at ¶ 36, 573 N.W.2d at 504. In other words, this ensures the punishment "fits" the *defendant*, not simply the wrong.

Defendants are companies of vast wealth and told the court below that the full $45 million in punitive damages "will not destroy either company," but merely be "a blow for any company to do." (R.7040-45 – "Defendants' Pkt. Br. Regarding Punitive Damages Award," at 7044). The $2.5 million awarded against UPS and the $7.5 million awarded against Liberty amount to less than one-tenth of one percent of UPS's net worth ($24,589,000,000)[8] and half of one percent of Liberty's net worth ($1,474,600,000). (Tr. Ex. 170, at 2; Tr. Ex. 167). Under no criterion is that tiny percentage excessive.

[8] Assets: $40,377,000,000 minus Long-term debt, Shareowners' equity, and Capital expenditures. (Tr. Ex. 170, p.2). If only Assets are considered, the punitive damages are only 0.037% of that figure.

4. Comparability.

The last federal guidepost for punitive damages examines "the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *BMW*, 517 U.S. at 575. Courts consider both relevant criminal and civil penalties in assessing this factor. *State Farm*, 538 U.S. at 428. Still, punitive damages many times any comparable penalty are regularly approved. *Id.*

Defendants understood their actions to be in disobedience to orders from this Court and the DOL that constituted *res judicata* in this dispute. *Cf. Fienup v. Rentto*, 52 N.W.2d 486, 488 (S.D. 1952) (an "attempt contumaciously to relitigate questions determined by the court" serves as a basis for contempt). Trial courts have significant "power to punish willful or contumacious failure to comply with their authority and to find the uncooperative party in contempt." *Johansen v. Johansen*, 365 N.W.2d 859, 862 (S.D. 1985). Contempt is an inherent judicial power that is exercised equitably in proportion to the offense. *City of Mt. Vernon v. Althen*, 72 S.D. 454, 458, 36 N.W.2d 410, 412 (1949). Because courts are invested with broad discretion to fashion a remedy for contempt, it provides no limit upon which Defendants can claim that the punitive damages are excessive.

D. Conclusion

Because of the existence of every aggravating factor and the absence of reason to believe the punitive damages judgment effectuated a form of passion and prejudice, Defendants have failed to carry their burden to support a further reduction. The trial court's decision to award a total of $10 million in punitive

damages against the two Defendants did not exceed any limits due process imposes. To the contrary, the jury's verdict should be reinstated, as discussed below.

VI. Appellee's Issue One: Reinstatement of Verdict

The jury concluded that the proper amount of punitive damages, based on the record in this case, should be $15 million against UPS and $30 million against Liberty. The trial court reduced both verdicts, arriving at $2.5 million and $7.5 million, respectively, despite its agreement with the jury's assessment and apportionment. (R.II.708-09, 710-11). The court did so under the mistaken impression that it was required, by constitutional due process requirements, to reduce the punitive damages. *Id.* Due process, however, did not require these reductions.

A. Standard of Review.

Constitutional challenges to punitive damages are reviewed *de novo*. *Roth,* 2003 S.D. 80, ¶44, n. 4, 667 N.W.2d at 665, n. 4.

B. The Judge's Review of the Record Supports the Jury's Verdict.

In reducing the punitive damages, Judge Pfeifle expressed her reluctance to do so. She affirmatively stated, "I would like to allow the jury's verdict to stand on the amount of punitive damages." (R.II.619 at 5:16-17). She agreed there was ample evidence of reprehensible conduct. (R.II.618-19 at 4:25-5:7). She found aggravating factors present, including physical harm and damages, trickery, and indifference to health and safety. *Id.* The reduction she ordered reflected her belief that she was *required* to do so. (R.II.618-19 at 4:20 to 24, 5:16 to 25; 708-09).

A trial judge has "the 'unique opportunity to consider the evidence in the living courtroom context,' while appellate judges see only the 'cold paper record.'" *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 438 (1996) (citations omitted). Although "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), and are binding on courts, *Sporleder v. VanLiere,* 1997 SD 110, ¶ 27, 569 N.W.2d 8, 15 (prohibiting the reweighing of evidence or gauging of witness credibility), a trial judge's concurrence with those determinations makes them unassailable.

The trial court contrasted some of Defendants' witnesses, who "lacked credibility, with Johnson's testimony, which was credible." *Id*. at 616:12-22. Judge Pfeifle called out the testimony of Team Manager Streff who "had sort of a smirking response to questions." (R.II.616 at 2:18 to 22). Judge Pfeifle believed the jury "considered all that," were attentive, and disbelieved Defendants' testimony that they were trying to help Johnson when they plotted to take away Johnson's benefits. (R.II.616 at 2:22, 14; 617 at 3:3-4).

A "jury's verdict should not be set aside except in extreme cases where it is the result of passion or prejudice or the jury has palpably mistaken the rules of law." *Roth*, 2003 S.D. at ¶ 10, 667 N.W.2d at 659 (internal quotation marks omitted) (quoting *Biegler v. American Family Mut. Ins. Co.*, 2001 SD 13, ¶ 32, 621 N.W.2d 592, 601); *see also Grynberg*, 1997 SD at ¶ 36, 573 N.W.2d at 504. "The trial court is best able to judge whether the damages awarded by a jury are the product of passion or prejudice." *Kusser v. Feller*, 453 N.W.2d 619, 621 (S.D. 1990). The judge's agreement with the jury's assessment of punitive damages

confirms that the verdict was not engendered by passion and prejudice. (R.II.616 at 2:12 to 14). Because the influence of passion and prejudice is absent, this Court should uphold the jury's punitive-damage verdict. *Roth, supra*.

C. Proportional to the Egregious Harm and Potential Harm.

1. Ratios are not determinative.

As discussed above, the limits imposed by due process are not matters in which a court wields a calculator. There "are no rigid benchmarks that a punitive damages award may not surpass." *State Farm*, 538 U.S. at 425.

While a large ratio may "raise a suspicious judicial eyebrow," *TXO*, 509 U.S. at 481 (O'Connor, J., concurring), no ratio is *per se* unconstitutional. The ratio standard triggers scrutiny, not a limit. In *TXO*, the punitive damages were $10 million on $19,000 in compensatory damages, representing more than a 500:1 ratio, *id*., and were affirmed. *State Farm* also recognized that a 500:1 ratio can comport with due process in an appropriate case. 538 U.S. at 425. In 2009, the U.S. Supreme Court let stand a $79.5 million punitive damage judgment on compensatory damages of $821,000, a 96:1 ratio. *Philip Morris USA Inc. v. Williams*, 556 U.S. 178 (2009) (per curiam). When an $821,000 compensatory damage award can support $79.5 million in punitive damages after repeated scrutiny in the courts (96.8:1 ratio), the jury's $45 million verdict in this case can be supported on the facts and circumstances here (90:1 ratio).

2. Reprehensibility justifies the jury's punitive damage verdict.

In addressing Appellants' Issue Four, Johnson detailed the aggravating factors applicable in this case. *See* Section V., *supra*. Those factors are equally applicable and equally justify reinstatement of the jury's verdict.

The facts and circumstances here warrant the jury's full verdict. They show that Defendants plotted to unilaterally override their defeat in the earlier litigation by taking a legitimate claim for benefits, confirmed in this Court and, utilizing their size and wealth, to "bury" Johnson (Tr. Ex. 115) and transcend the laws of this State to exact their revenge. They understood their actions would likely engender litigation (R.II.2426-28 at 148:3-155:7) but were confident that the resources they could bring to the litigation would enable them to prevail.[9] Even if they did not succeed, they calculated that the only downside was to pay the previously determined obligation. (Tr. Ex. 111).

BMW teaches that a "particularly egregious act [that] has resulted in only a small amount of economic damages," also justifies a higher punitive damage judgment. 517 U.S. at 582. That rubric is particularly applicable here. The liability

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[9] Where a defendant's resources "enable[s] the defendant to mount an extremely aggressive defense against suits such as this and by doing so to make litigating against it very costly," higher punitive damages are justified. *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003). Defendants had unlimited resources to fund their litigation goals. (Defendants' Offers of Proof – R.6524-32; R.II.2958 – 2962, at 331:23 – 335:7 (discussing Defendants' reports to the DOL of approximately $1.249 Million paid in attorneys' fees for the Johnson claim from June 2006 – October 2013)). (This issue was excluded from trial, based on Defendant's Motion. R.5409. However, Defendants then sought to introduce this issue in their Offer of Proof. R.6524-32. Defendants effectively barred Johnson from presenting these issues, by the sequence of their arguments).

In contrast, injured workers are significantly limited in their ability to obtain representation to secure the benefits denied by "unilateral termination." Johnson recovered approximately $13,000 in denied benefits. An injured workers' attorneys' fees are "capped" to a percentage of the recovery, SDCL § 62-7-36, while there are no limits on the employer's "unilateral termination." The uneven availability of resources creates a "chilling effect" on the availability of counsel to injured workers as described in *Stuckey*, 2011 S.D. 1, ¶ 14, 793 N.W.2d 378, 384 (citations omitted), because when used as Defendants did, it enables the employer (or its insurer) to engage in aggressive and unlawful tactics that are less likely to be challenged and exposed, thereby escaping punishment and deterrence.

that Defendants assumed they might have for this wrongful denial was limited to the $13,000. Ex. 111. High punitive damages are necessary to prevent any calculus that small compensatory damages and limited punitive damages are unlikely to be pursued in a significant number of injured workers' cases. Punitive damages also "must be relatively large to accomplish the objective of punishing the wrongdoer and deterring others from similar wrongdoing," *Wangen*, 428 N.W.2d at 246, so that it is not written off as simply the cost of doing business. It must be noticeably large to change behavior.

The reprehensibility of Defendants' misconduct toward Johnson was compounded by their disregard for the rule of law and judicial authority in taking the law into their own hands. As explained earlier, *see* Section V.C.1. *supra*, punitive damages vindicate state interests. *BMW*, 517 U.S. at 568. The State interests implicated are extremely important. Defendants' admission that "unilateral termination" was a "standard practice" suggests that deterrence requires an award that will raise a *corporate* eyebrow.

3. Comparability considerations do not apply here.

While the U.S. Supreme Court authorized consideration of other penalties under this guidepost, it also recognized the limited utility of these comparisons. *State Farm*, 538 U.S. at 428. Criminal penalties poorly translate into an amount of dollars even if it indicates "the seriousness with which a State views the wrongful action." *Id*. Defiance of a court order is a form of contempt and can result in either civil or criminal penalties. *Sazama v. State ex rel. Muilenberg*, 2007 S.D. 17, ¶ 23, 729 N.W.2d 335, 344. Criminal contempt is available when, as

here, a party takes actions to "subvert, embarrass, or prevent the administration of justice." *Id.* at ¶ 24, 729 N.W.2d at 344.

Civil penalties also provide little assistance. In *State Farm*, the most comparable civil penalty for the misconduct at issue a "$10,000 fine for an act of fraud." 538 U.S. at 428. Nonetheless, the Court found no basis on those grounds for further review of the Utah Supreme Court's subsequent determination that more than $9 million in punitive damages were justified. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2004 UT 34, ¶ 41, 98 P.3d 409, 418, *cert. denied*, 543 U.S. 874 (2004). The Utah Supreme Court acknowledged that "the quest to reliably position any misconduct within the ranks of criminal or civil wrongdoing based on penalties affixed by a legislature can be quixotic." *Id.* at ¶ 44, 98 P.3d 409, 419. Indeed, when comparable penalties really do not exist, as they do not here, courts generally hold that the comparability guidepost "has no application." *See Haynes v. Stephenson*, 588 F.3d 1152, 1159 (8th Cir. 2009).

4. Punitive damages of $45 million are appropriate to change Defendants' conduct.

It is axiomatic that punitive damages "must be sufficiently large to accomplish the objectives of punishing the wrongdoer and deterring others from committing similar acts." *Hoff v. Bower*, 492 N.W.2d 912, 915 (S.D. 1992). A "smaller punitive damage award may negate these objectives." *Id.* A "defendant's financial resources, which include net income as well as its net worth, [are an] appropriate yardstick for determining punitive damages." *Schaffer*, 1996 S.D. at ¶ 36, 552 N.W.2d at 813. *See also Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1273 (10th Cir. 2000).

As discussed above, UPS' $15 million jury-assessed share of the punitive damages constitutes about 0.06% of its net worth. (Note 8, *supra.;* Tr.Ex. 170, at 2). Liberty's $30 million share constitutes about 2.03% of its net worth. (Tr.Ex. 167). Although "there is no general rule defining the maximum proportion of net worth that may be exacted," *CEH, Inc.*, 70 F.3d at 706, this Court has approved punitive damages as high as 12.75% of net worth. *Veeder*, 1999 S.D. 23, ¶56, 589 N.W.2d at 622. In *Fritzmeier v. Krause Gentle Corp*, this Court held that an award of 5.5% of net worth was "not so high that it shocks the senses." *Id.* 2003 S.D. 112, ¶54, 669 N.W.2d 699, 710. The considerably smaller percentages here similarly should not shock the senses, but warrant reinstitution of the jury's award as a fitting punishment for *these* defendants.

5. Defendants' continued denial of wrongdoing also supports reinstitution of the jury's award.

A preeminent purpose of punitive damages is "to deter the wrongful conduct" in the future. *Grynberg*, 1997 S.D. at ¶ 20, 573 N.W.2d at 500. A defendant who shows no contrition for a reprehensible act has greater blameworthiness and properly ought to pay higher punitive damages. *Veeder*, 1999 S.D. 23, ¶55, 589 N.W.2d at 622. Here, the lack of remorse was evident to the judge and jury. Even while admitting that they understood the law and the mandatory obligations it imposed on them, they maintained they could cut off benefits. (R.II.1902 at 720:9 to14; R.II.1935 at 753:3 to 15; R.II.2019-20 at 801:21-802:9). Defendants' witnesses lacked credibility, smirked in answering questions, and falsely claimed that they were seeking to help, not hurt, Johnson. (R.II.616-17 at 2:16- 3:4). The jury understood this, *id.*, and arrived at the correct

amount of punitive damages. This Court should restore the jury's determination, as the trial judge believed should be the case.

D. Conclusion

For the foregoing reasons, this Court should reverse the trial court's reduction of punitive damages and restore the jury's assessment of $45 million.

VII. Appellee's Issue Two: Post-judgment Interest from the date of the Verdict.

Johnson requested that post-judgment interest and interest from the time of the verdict be added to the judgment, which the trial court allowed. (R.II.668 at 45:11-16; R.II.677 at 54:2-3). Defendants later objected. (R.II.679-80). Johnson responded, (R.II.699-701), citing SDCL § 15-16-3, 54-3-5.1, and *Jacobs v. Dakota Minnesota and Eastern RR Corp.,* 2011 S.D. 68, ¶¶22-25, 806 N.W.2d 209, 215-216, noting that these authorities superseded SDCL 21-1-13.1 and *Stockmen's Livestock Mkt. Inc. v. Norwest Bank of Sioux City,* 135 F.3d 1236, 1246-47 (8th Cir. 1998). The Judgment incorporates the February 16, 2018 oral ruling, but does not reflect interest from the date of the verdict.

Considering FELA's bar on prejudgment interest, *Jacobs* held that SDCL 15-16-3's "post-verdict" interest is "post-judgment." *Jacobs, supra*. Thus, SDCL 15-16-3 does not conflict with SDCL 21-1-13.1's bar on prejudgment interest. *See id*. Johnson asks that the judgment be corrected to include post-verdict interest, per SDCL 15-16-3 and *Jacobs*.

CONCLUSION

Johnson respectfully requests the Court deny the Appellants' requests for relief and instead enter a decision in Johnson's favor, reinstating the jury's

Verdict on punitive damages, with interest on damages to be calculated from the date of the Verdict.

Dated this 19th Day of November, 2018.

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Certificate of Compliance

This brief is submitted under SDCL § 15-26A-61. I certify that the brief complies with the typeface specified in § 15-26A-66 having been printed in a 12-point, proportional font (Georgia) using Microsoft Word 2010 and does not exceed the 12,500 word limitation, granted by the Court, excluding the sections omitted from the word count by SDCL 15-26A-66(3). (Word count of software - 12,083).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he filed the original and two copies of this document with the South Dakota Supreme Court by serving them upon:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

FERN JOHNSON,
Plaintiff/Appellee,

vs.

UNITED PARCEL SERVICE, INC., AND
LIBERTY MUTUAL FIRE INSURANCE CO.,
Defendants/Appellants.

Appeal Nos. 28598, 28599, 28609
Notices of Appeal Filed: April 17 & 18, 2018
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Appeal from the Circuit Court, Seventh Judicial Circuit
Pennington County, South Dakota
Hon. Jane Wipf Pfeifle, presiding

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Table of Contents

Statutory Addendum

SDCL 15-16-3

When a judgment is for the recovery of money, interest from the time of the verdict or decision until judgment be finally entered must be added to the judgment of the party entitled thereto.

SDCL 19-19-401:

Evidence is relevant if:

(a) It has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) The fact is of consequence in determining the action.

SDCL 19-19-402:

All relevant evidence is admissible, except as otherwise provided by constitution or statute or by this chapter or other rules promulgated by the Supreme Court of this state. Evidence which is not relevant is not admissible.

SDCL 19-19-403:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

SDCL 21-1-1:

Every person who suffers *detriment* from the *unlawful act or omission* of another may recover from the person in fault a compensation therefor in money, which is called damages. *Detriment* is a loss or harm suffered in person *or* in property.

SDCL 21-1-2:

When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages.

SDCL 21-1-13.1:

Any person who is entitled to recover damages, whether in the principal action or by counterclaim, cross claim, or third-party claim, is entitled to recover interest thereon from the day that the loss or damage occurred, except during such time as the debtor is prevented by law, or by act of the creditor, from paying the debt. Prejudgment interest is not recoverable on future damages, punitive damages, or intangible damages such as pain and suffering, emotional distress, loss of consortium, injury to credit, reputation or financial standing, loss of enjoyment of life, or loss of society and companionship. If there is a question of fact as to when the loss or damage occurred, prejudgment interest shall commence on the date specified in the verdict or decision and shall run to, and include, the date of the verdict or, if there is no verdict, the date the judgment is entered. If necessary, special interrogatories shall be submitted to the jury. Prejudgment interest on damages arising from a contract shall be at the contract rate, if so provided in the contract; otherwise, if prejudgment interest is awarded, it shall be at the Category B rate of interest specified in § 54-3-16. Prejudgment interest on damages arising from inverse condemnation actions shall be at the Category A rate of interest as specified by § 54-3-16 on the day judgment is entered. This section shall apply retroactively to the day the loss or damage occurred in any pending action for inverse condemnation. The court shall compute and award the interest provided in this section and shall include such interest in the judgment in the same manner as it taxes costs.

SDCL 21-3-1:

For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

SDCL 21-3-2:

In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual

or presumed, or in any case of wrongful injury to animals, being subjects of property, committed intentionally or by willful and wanton misconduct, in disregard of humanity, the jury, in addition to the actual damage, may give damages for the sake of example, and by way of punishing the defendant.

SDCL 54-3-5.1:

Interest is payable on all judgments and statutory liens, exclusive of real estate mortgages and security agreements under Title 57A, and exclusive of support debts or judgments under § 25-7A-14, at the Category B rate of interest as established in § 54-3-16 from and after the date of judgment and date of filing statutory lien. On all judgments arising from inverse condemnation actions, interest is payable at the Category A rate of interest as established by § 54-3-16.

SDCL 58-20-6:

No such policy of insurance shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to compensation all installments of the compensation that may be awarded or agreed upon, and that the obligation shall not be affected by any default of the insured after the injury, or by any default in the giving of any notice required by such policy, or otherwise. Such agreement shall be construed to be a direct obligation by the insurer to the person entitled to compensation, enforceable in his name.

SDCL 62-1-1 (7) (SL 1995, ch 296 § 6; SL 1995 ch 297 §6):

(7) "Injury" or "personal injury," only injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:

(a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or

(b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment or need for treatment

(c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment.

SDCL 62-1-1.3

If an employer denies coverage of a claim for any reason under this Title or any reason permissible under Title 58, such injury is presumed to be nonwork related for other insurance purposes, and any other insurer covering bodily injury or disease of the injured employee shall pay according to the policy provisions. If coverage is denied by an insurer without a full explanation of the basis in the insurance policy in relation to the facts or applicable law for denial, the director of the Division of Insurance may determine such denial to be an unfair practice under chapter 58-33. If it is later determined that the injury is compensable under this Title, the employer shall immediately reimburse the parties not liable for all payments made, including interest at the category B rate specified

SDCL 62-3-18 (Prior to revisions of SL 2008, ch 278, §14).

No contract or agreement, express or implied, no rule, regulation, or other device, shall in any manner operate to relieve any employer in whole or in part of any obligation created by this title except as herein provided.

SDCL 62–4–1 (SL 1993, ch 381, § 1).

The employer shall provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care including medical and surgical supplies, apparatus, artificial members and body aids during the disability or treatment of an employee within the provisions of this title. Repair or replacement of damaged prosthetic devices is compensable and is considered a medical service under this section if the devices were damaged or destroyed in a work related accident. Repair or replacement of damaged hearing aids, dentures, prescription eyeglasses, eyeglass frames or contact lenses is considered a medical service under this section if the hearing aids, dentures, prescription eyeglasses, eyeglass frames or contact lenses were damaged or destroyed in an accident which also causes another injury which is compensable under this law. The employee shall have the initial selection to secure his own physician, surgeon, or hospital services at the employer's expense. If the employee selects a health care provider located in a community not the home or workplace of the

employee, and a health care provider is available to provide the services needed by the employee in the local community or in a closer community, no travel expenses need be paid by the employer or the employer's insurer. If an injured employee has not required medical treatment for a period of three years, it is presumed that no further medical care with respect to the injury is necessary.

SDCL 62-4-1.1 (SL 2008, ch 279, § 1).

Employer's duties upon receipt of medical bill. Within thirty days after receiving a properly submitted bill for medical payments, the employer shall:

(1) Pay the charge or any portion of the bill that is not denied;

(2) Deny all or a portion of the bill on the basis that the injury is not compensable, or the service or charge is excessive or not medically necessary; or

(3) Request additional information to determine whether the charge or service is excessive or not medically necessary or whether the injury is compensable.

SDCL 62–7–1 (prior to SL 2008, ch 278, § 42 revisions).

An employee entitled to receive disability payments shall be required, if requested by the employer, to submit himself at the expense of the employer for examination to a duly qualified medical practitioner or surgeon selected by the employer, at a time and place reasonably convenient for the employee, as soon as practicable after the injury, and also one week after the first examination, and thereafter at intervals not oftener than once every four weeks, which examination shall be for the purpose of determining the nature, extent, and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this title.

SDCL 62–7–3 (prior to SL 2008, ch 278, § 44 revisions).

If the employee refuses to submit himself or herself to examination pursuant to § 62–7–1 or unnecessarily obstructs the examination, the employee's right to compensation payments shall be temporarily suspended until the examination takes place. No compensation is payable under this title for such period.

SDCL 62–7–12 (SL 1993, ch 375, § 44).

If the employer and injured employee or his representative or dependents fail to reach an agreement in regard to compensation under this title, either party may notify the department of labor and request a hearing according to rules promulgated pursuant to chapter 1–26 by the secretary of labor. The department shall fix a time and place for the hearing and shall notify the parties.

SDCL 62-7-33 (SL 1993, ch 381, § 3; SL 1993, ch 383, § 1).

Any payment, including medical payments under 62-4-1, and disability payments under § 62-4-3 if the earnings have substantially changed since the date of injury, made or to be made under this title may be reviewed by the department of labor pursuant to § 62-7-12 at the written request of the employer or of the employee and on such review payments may be ended, diminished, increased or awarded subject to the maximum or minimum amounts provided for in this title, if the department finds that a change in the condition of the employee warrants such action.

SDCL 62-7-36 (SL 1993, ch 379, § 5; SL 1993, ch 383, § 1).

Except as otherwise provided, fees for legal services under this Title shall be subject to approval of the department.

Attorneys' fees may not exceed the percentage of the amount of compensation benefits secured as a result of the attorney's involvement as follows:

(1) Twenty-five percent of the disputed amount arrived at by settlement of the parties;

(2) Thirty percent of the disputed amount awarded by the department of labor after hearing or through appeal to circuit court;

(3) Thirty-five percent of the disputed amount awarded if an appeal is successful to the Supreme Court.

Attorneys' fees and costs may be paid in a lump sum on the present value of the settlement or adjudicated amount.

Dated this 19th Day of November, 2018.

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The undersigned hereby certifies that he filed the original and two copies of this document with the South Dakota Supreme Court by serving them upon:

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A true and correct copy of the **Appellee's Appendix** was served by electronic means to:

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Attorneys for Appellants.

Dated this 19th day of November, 2018.

/s/ David S. Barari
David S. Barari

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

FERN JOHNSON,
Plaintiff/Appellee,

vs.

UNITED PARCEL SERVICE, INC., AND
LIBERTY MUTUAL FIRE INSURANCE CO.,
Defendants/Appellants.

Appeal Nos. 28598, 28599, 28609
Notices of Appeal Filed: April 17 & 18, 2018
Notice of Review Filed: May 1, 2018

Appeal from the Circuit Court, Seventh Judicial Circuit
Pennington County, South Dakota
Hon. Jane Wipf Pfeifle, presiding

APPELLEE'S APPENDIX

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Statutory Addendum

SDCL 15-16-3

When a judgment is for the recovery of money, interest from the time of the verdict or decision until judgment be finally entered must be added to the judgment of the party entitled thereto.

SDCL 19-19-401:

Evidence is relevant if:

(a) It has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) The fact is of consequence in determining the action.

SDCL 19-19-402:

All relevant evidence is admissible, except as otherwise provided by constitution or statute or by this chapter or other rules promulgated by the Supreme Court of this state. Evidence which is not relevant is not admissible.

SDCL 19-19-403:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

SDCL 21-1-1:

Every person who suffers *detriment* from the *unlawful act or omission* of another may recover from the person in fault a compensation therefor in money, which is called damages. *Detriment* is a loss or harm suffered in person *or* in property.

SDCL 21-1-2:

When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages.

SDCL 21-1-13.1:

Any person who is entitled to recover damages, whether in the principal action or by counterclaim, cross claim, or third-party claim, is entitled to recover interest thereon from the day that the loss or damage occurred, except during such time as the debtor is prevented by law, or by act of the creditor, from paying the debt. Prejudgment interest is not recoverable on future damages, punitive damages, or intangible damages such as pain and suffering, emotional distress, loss of consortium, injury to credit, reputation or financial standing, loss of enjoyment of life, or loss of society and companionship. If there is a question of fact as to when the loss or damage occurred, prejudgment interest shall commence on the date specified in the verdict or decision and shall run to, and include, the date of the verdict or, if there is no verdict, the date the judgment is entered. If necessary, special interrogatories shall be submitted to the jury. Prejudgment interest on damages arising from a contract shall be at the contract rate, if so provided in the contract; otherwise, if prejudgment interest is awarded, it shall be at the Category B rate of interest specified in § 54-3-16. Prejudgment interest on damages arising from inverse condemnation actions shall be at the Category A rate of interest as specified by § 54-3-16 on the day judgment is entered. This section shall apply retroactively to the day the loss or damage occurred in any pending action for inverse condemnation. The court shall compute and award the interest provided in this section and shall include such interest in the judgment in the same manner as it taxes costs.

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in disregard of humanity, the jury, in addition to the actual damage, may give damages for the sake of example, and by way of punishing the defendant.

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(a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or

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(c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent

injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment.

SDCL 62-1-1.3

If an employer denies coverage of a claim for any reason under this Title or any reason permissible under Title 58, such injury is presumed to be nonwork related for other insurance purposes, and any other insurer covering bodily injury or disease of the injured employee shall pay according to the policy provisions. If coverage is denied by an insurer without a full explanation of the basis in the insurance policy in relation to the facts or applicable law for denial, the director of the Division of Insurance may determine such denial to be an unfair practice under chapter 58-33. If it is later determined that the injury is compensable under this Title, the employer shall immediately reimburse the parties not liable for all payments made, including interest at the category B rate specified

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No contract or agreement, express or implied, no rule, regulation, or other device, shall in any manner operate to relieve any employer in whole or in part of any obligation created by this title except as herein provided.

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The employer shall provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care including medical and surgical supplies, apparatus, artificial members and body aids during the disability or treatment of an employee within the provisions of this title. Repair or replacement of damaged prosthetic devices is compensable and is considered a medical service under this section if the devices were damaged or destroyed in a work related accident. Repair or replacement of damaged hearing aids, dentures, prescription eyeglasses, eyeglass frames or contact lenses is considered a medical service under this section if the hearing aids, dentures, prescription eyeglasses, eyeglass frames or contact lenses were damaged or destroyed in an accident which also causes another injury which is compensable under this law. The employee shall have the initial selection to secure his own physician, surgeon, or hospital services at the employer's expense. If the employee selects a health care provider located in a community not the home or workplace of the employee, and a health care provider is available to provide the services needed by the employee in the local community or in a closer community,

no travel expenses need be paid by the employer or the employer's insurer. If an injured employee has not required medical treatment for a period of three years, it is presumed that no further medical care with respect to the injury is necessary.

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(1) Pay the charge or any portion of the bill that is not denied;

(2) Deny all or a portion of the bill on the basis that the injury is not compensable, or the service or charge is excessive or not medically necessary; or

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An employee entitled to receive disability payments shall be required, if requested by the employer, to submit himself at the expense of the employer for examination to a duly qualified medical practitioner or surgeon selected by the employer, at a time and place reasonably convenient for the employee, as soon as practicable after the injury, and also one week after the first examination, and thereafter at intervals not oftener than once every four weeks, which examination shall be for the purpose of determining the nature, extent, and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this title.

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If the employee refuses to submit himself or herself to examination pursuant to § 62–7–1 or unnecessarily obstructs the examination, the employee's right to compensation payments shall be temporarily suspended until the examination takes place. No compensation is payable under this title for such period.

SDCL 62–7–12 (SL 1993, ch 375, § 44).

If the employer and injured employee or his representative or dependents fail to reach an agreement in regard to compensation under this title, either party may notify the department of labor and request a hearing according to rules promulgated pursuant to chapter 1–26 by the secretary of labor. The department shall fix a time and place for the hearing and shall notify the parties.

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Any payment, including medical payments under 62-4-1, and disability payments under § 62-4-3 if the earnings have substantially changed since the date of injury, made or to be made under this title may be reviewed by the department of labor pursuant to § 62-7-12 at the written request of the employer or of the employee and on such review payments may be ended, diminished, increased or awarded subject to the maximum or minimum amounts provided for in this title, if the department finds that a change in the condition of the employee warrants such action.

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(3) Thirty-five percent of the disputed amount awarded if an appeal is successful to the Supreme Court.

Attorneys' fees and costs may be paid in a lump sum on the present value of the settlement or adjudicated amount.

Dated this 19th Day of November, 2018.

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The undersigned hereby certifies that he filed the original and two copies of this document with the South Dakota Supreme Court by serving them upon:

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Dated this 19th day of November, 2018.

/s/ David S. Barari
David S. Barari

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

FERN JOHNSON,

Plaintiff/Appellee,

-vs-

UNITED PARCEL SERVICE INC.,
LIBERTY MUTUAL FIRE INSURANCE CO.,

Defendants/Appellants.

Appeal Nos. 28598, 28599, 28609
Notice of Appeals Filed: April 16, 2018 & April 17, 2018
Notice of Review Filed: May 1, 2018

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL DISTRICT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE JANE WIPF PFEIFLE,
CIRCUIT COURT JUDGE

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REPLY

The appellee paints a picture of the appellants as companies bent on violating court orders and deserving of the full force of the law. But it cannot be seriously disputed that the appellants acted responsibly in seeking out the advice of experienced South Dakota counsel to guide its actions. Eric Schulte—whom the lower court expressly found to be a credible witness—made an independent determination, based on the governing law and industry practice at the time, that the appellants could seek an IME to assess whether Ms. Johnson's workplace injury 13 years before remained the cause of her medical condition. ("R.II.614 ("I found Mr. Schulte credible.").) Given the fairly debatable nature of that decision, this case should never have gone to the jury. Nor should it have gone to the jury given the lack of pecuniary damages, a prerequisite for a bad-faith claim.

Compounding these errors, the trial court forced the appellants to trial without allowing them to defend themselves. It prevented Mr. Schulte from explaining why he gave the advice he did. And it specifically directed the jury that it could not consider Mr. Schulte's advice in deciding whether the appellants lacked bad-faith intent. These rulings and instructions prevented a fair trial.

With that erroneous instruction, and without allowing any explanation for why the appellants acted as they did—except Ms. Johnson's exhortation that the appellants liked to violate court orders—it is hardly surprising that the jury awarded Johnson substantial punitive damages. Should the Court reach this issue, it should vacate or reduce the punitive damages award to one commensurate with due process.

I. The Bad-Faith Claim Should Never Have Gone To The Jury Because Schulte's Advice Was Objectively Reasonable And Johnson Sought No Pecuniary Damages.

A. The Law Was Fairly Debatable In 2010.

Johnson contends that SDCL 62-7-33 plainly required Liberty to seek modification of the DOL's 2006 Order before adjusting benefits. This was the trial court's position as well. It based its decision on this Court's *Bertelsen* opinions, in which this Court found that where a statute was "plain, unambiguous, and not susceptible to debate," *Bertelsen v. Allstate Ins. Co.*, 2009 S.D. 21, ¶ 20 ("*Bertlesen I*"), "an interpretative decision from [the Supreme] Court was not necessary for Allstate to have determined its duty under its policy." *Bertelsen v. Allstate Ins. Co.*, 2013 S.D. 44, ¶ 53 ("*Bertelsen III*").

But the trial court's analogy to *Bertelsen* was flawed, much like Johnson's analysis here, because the effect of the patchwork of South Dakota worker's compensation statutes in 2010 was "susceptible to debate." While SDCL 62-7-33 provided an avenue to review a prior DOL order, it did not indicate that administrative review was either compelled or exclusive. Rather, it provided only that any payment "may be reviewed" by the DOL "at the written request of the employer or of the employee[.]" *Id.* SDCL 62-1-1(7), meanwhile, provided that a condition was compensable only if it "remain[ed] a majority contributing cause of the . . . need for treatment." And SDCL 62-7-1 expressly gave an employer the authority to seek an IME to determine whether an employee's work injury remained the cause of her need for medical treatment.

As such, when the Court finally resolved this issue in *Hayes v. Rosenbaum Signs & Outdoor Advertising, Inc.*, 2014 S.D. 64, the existence of overlapping

statutes required the Court to engage its rules of statutory construction (including resolving ambiguities in favor of injured workers) to analyze the interplay between multiple statutes including SDCL 62-1-1(7), 62-7-1, and 62-7-33. *Hayes* at ¶¶ 28-29. The Court did not suggest that the language was clear on its face, nor did the Court suggest that the employer's position was unreasonable.

Johnson argues that *Hayes* did not announce new law because it cited to this Court's 2006 opinion in *Kasuske v. Farwell, Ozmun, Kirk & Co.*, 2006 S.D. 14. (Johnson Br. 10.) But *Kasuske* involved the interpretation of the term "change in condition," not whether SDCL 62-7-33 provided an employer the sole avenue to challenge whether an employee's workplace injury remained the cause of her medical treatment. The latter question was one of first impression in *Hayes*.

Similarly, Johnson cites pre-*Hayes* cases for the unremarkable proposition that the DOL may only reopen an award under SDCL 62-7-33 if a "change in condition" is shown. (Johnson Br. 6, 10 (citing and quoting *Sopko v. C & R Transfer Co., Inc.*, 1998 S.D. 8; *Larsen v. Sioux Fall School Dist. No. 49-5*, 509 N.W.2d 703 (S.D. 1993); *Stender v. City of Miller*, 82 S.D. 334 (1966)).)

In truth, as of August 2010, no case had previously held that the only way by which an employer/insurer could deny benefits was through SDCL 62-7-33. During the administrative hearing below in this case, Judge Duenwald observed that "there are no South Dakota decisions or Circuit Court decisions that I know of in which an Employer/Insurer have brought a 62-7-33 case prior to denial." (R.1793.) Johnson's counsel conceded that he too was unaware of any such case. (R.1790-91.)

The fairly debatable nature of the question Schulte faced in 2010 is perhaps best exemplified by the decisions of the DOL and the circuit court in *Hayes* itself—rendered years after Schulte gave his advice in this case—that affirmed the employer's discontinuation of benefits under SDCL 62-1-1(7) because the employee could not establish that the work injury remained a contributing cause of his medical condition. (R.II.376, 378, 381-82 (*Hayes*, May 6, 2013 Order); R.II.385-87 (*Hayes*, Oct. 25, 2013 Order).) While this Court ultimately disagreed, the earlier decisions show how reasonable minds could differ on the matter.

Johnson's only response to this is that the DOL and circuit court decisions in *Hayes* "fell victim to a perversion of the judicial machinery perpetuated by similar" arguments. (Johnson Br. 10.) It is not clear what Johnson means by this. If she is suggesting that the DOL and circuit court were following earlier decisions, that would only buttress the conclusion that the question was fairly debatable. Surely she cannot be suggesting that something insidious affected the intellectual capabilities of these deliberative bodies.

Johnson also repeatedly contends that appellants' arguments are barred by the doctrines of res judicata, collateral estoppel, and judicial estoppel because appellants did not ultimately prevail in the DOL proceedings and the subsequent appeal. (*E.g.*, Johnson Br. 6-7, 8, 10.)

But the issue in this case is not whether appellants are bound by prior tribunals' determination of the scope of the 2006 Order. They are, and appellants complied with those rulings long before Johnson filed her bad faith lawsuit. Rather, the issue is whether Schulte's advice in 2009-10 regarding

Johnson's benefits was fairly debatable, an issue that was not before any tribunal before Johnson's bad-faith lawsuit. Johnson's citations of *Larsen* and *Whitney v. ASCO Dakota*, 453 N.W.2d 847 (S.D. 2000), are similarly inapposite. Those cases simply restate the law of res judicata and that SDCL 62-7-33 is an exception to the finality rule. They did not involve a bad faith claim, let alone an analysis of whether earlier actions were fairly debatable.

Johnson also argues that the appellants are somehow estopped because the appellants availed themselves of SDCL 62-7-33 in earlier cases. It is unclear what theory of estoppel would preclude the appellants' position in this case, and Johnson made no such claim below. But in any event, the appellants (and other employers and insurers) also availed themselves of SDCL 62-1-1(7) and 62-7-1, and they never took the position that SDCL 62-7-33 was the sole means for an employer to modify benefits. (R.II.1939-41, 1948-49.)

Finally, in their opening brief, the appellants cited to a group of opinions, authored before Schulte gave his advice, that implicitly acknowledged that SDCL 62-7-1 was a proper method for employers to adjust benefits based on a change in an employee's condition without first seeking relief with the DOL under SDCL 62-7-33. Johnson argues that these cases involved initial, not subsequent, claims for benefits. (Johnson Br. 11.) But many of those cases involved reductions in benefits after initial determinations. *See, e.g., Duane E. Sundberg, Claimant*, 1991 WL 525057, at *2 (S.D. Dept. Lab. Apr. 3, 1991); *Wiedmann v. Merilatt Indus.,* 2007 WL 5188049, at *2-3 (S.D. Dept. Lab.); *Harter v. Store Servs., Inc.,* 2007 WL 3055174, at *1 (S.D. Dept. Lab.). And in none of those cases did the DOL take issue with the employer's reduction or discontinuation of benefits after

the results of an IME pursuant to SDCL 62-7-1 without first seeking relief with the DOL via SDCL 62-7-33.

B. The Order's Language Was Fairly Debatable.

The language of the 2006 Order—an order for temporary benefits—also made the appellants' actions reasonable. Johnson argues that the appellants admitted in deposition that the 2006 Order was "clear." Indeed, the Order was clear. It clearly provided that Johnson was entitled to "necessary, suitable, and proper medical expenses causally related to her work-related groin condition." (R.7486.) And it clearly did *not* specify what types of treatments or expenses were necessary, or for how long treatment would be necessary. Nor did it specify that, going forward, only the DOL could determine whether any particular treatment was necessary. That is consistent with SDCL 62-4-1.1, which provides that an insurer retains the right to investigate and challenge whether treatment is reasonable, necessary, suitable, or proper.

Given the Order's language, it was reasonable for Schulte to conclude that it permitted the appellants to modify or discontinue benefits if the doctor conducting the IME concluded that the treatments Johnson requested no longer remained "necessary, suitable, or proper." (R.2537, 6441-42; R.II.1948-49.) Accordingly, even if the statutory provisions were not themselves unclear in 2010, the language of the Order made Schulte's advice objectively reasonable.

To this, Johnson offers no response, except to say that the issue was not raised below. (Johnson Br. 13.) But this argument was raised below and considered by the trial court. (*See, e.g.*, R.2537, 5136-38; R.II.345-47, 525-28.)

C. Schulte's Counsel Made Appellants' Actions Fairly Debatable.

It is undisputed that the appellants sought legal advice on how to proceed under South Dakota law, received that advice, and followed it. That advice came from an experienced and well-respected member of the South Dakota bar. Accordingly, the appellants lacked the subjective intent for a bad faith claim as a matter of law.

Johnson argues that parties cannot flout the law and then hide behind the advice of counsel. That is true. When a statute or order is plain, advice of counsel should not shield a party from the consequences of disobeying it. But when the law is unsettled, the advice of seasoned counsel is critical. At the time of the denial, it was not settled law that the only way for an employer/insurer to reduce benefits was via SDCL 62-7-33. Indeed, in 2010, South Dakota workers' compensation attorneys (not just Schulte) regularly advised their clients that benefits could be adjusted under SDCL 62-7-1 if an IME revealed that an individual's injury no longer remained a major contributing factor to her condition. (R.II.1850, 1939-41, 1952-53, 2029.) The lower court acknowledged that this was common practice at the time. (R.5176-77; R.II.669-70, 1898-99.)

Schulte's advice was researched, analyzed, and round-tabled with his partners. (R.II.1939-41, 1953.) Nothing in the record contradicts this. And the circuit court went out of its way to find that Schulte was a credible witness. (R.II.614.)

Given Schulte's expertise, industry practice, and the uncertain state of the law in 2010, Liberty's reliance on Schulte's advice—even if ultimately erroneous—

negated any claim that the appellants knew or recklessly disregarded that they were intentionally violating the law. *See, e.g., Crabb v. Nat'l Indem. Ins. Co.,* 87 S.D. 222, 228 (1973); *Hannahs v. Noah*, 83 S.D. 296, 305 (1968); *Anderson v. W. Nat'l Mut. Ins. Co.*, 857 F. Supp. 2d 896, 905 (D.S.D. 2012). *See also* cases cited in Opening Br. 19-20.

Johnson also argues that the jury, by finding for the plaintiff, implicitly rejected the appellants' advice-of-counsel defense. (Johnson Br. 15.) But that has no probative value, as the appellants were barred from explaining Schulte's advice to the jury and were wrongly instructed that his advice was not probative to the appellants' intent. In any event, this issue never should have gone to the jury in the first place, as the appellants lacked bad-faith intent as a matter of law.

* * * *

In sum, because the appellants' actions were fairly debatable at the time, the trial court erred by denying their renewed motion for judgment as a matter of law on Johnson's bad faith claim and by granting Johnson summary judgment on the fairly debatable issue. (R.II.708.) The appellants were also entitled to judgment as a matter of law because there was insufficient evidence that the appellants, who relied on the advice of experienced counsel, intentionally or recklessly denied Johnson's claim without a reasonable basis.

D. Johnson's Bad-Faith Claim Also Fails As A Matter Of Law Because She Failed To Prove Any Pecuniary Damages.

The circuit court also should have granted judgment as a matter of law on the bad faith claim because Johnson did not seek, and was not awarded, economic damages on that claim. Under *Kunkel v. United Sec. Ins. Co.*, 84 S.D.

116, 135 (1969) and its progeny, non-economic damages are not available on a bad faith claim unless the insured establishes that pecuniary damages exist as well. *Kunkel v. United Sec. Ins. Co.*, 84 S.D. 116, 135 (1969).

Johnson admits that she did not seek pecuniary damages on her bad-faith claim, only on her conversion claim. (Johnson Br. 16.) The jury was only instructed upon—and only awarded—bad faith damages relating to pain and suffering, mental anguish, and loss of capacity of the enjoyment of life experienced from 2009-2012. (R.7124, 7133.) Johnson argues that she could have sought nominal damages on her bad-faith claim. (Johnson Br. 16.) Whether or not nominal damages would have sufficed under *Kunkel*, Johnson did not seek nominal damages.

Johnson argues that the $13,000 in damages she recovered in the DOL proceedings should "count" for purposes of *Kunkel*. But the economic damages necessary to bring a bad-faith claim must independently flow from the insurer's bad faith itself, not from the contract. "To recover damages for emotional distress in South Dakota, a plaintiff must establish that he sustained a pecuniary loss *because of* the bad faith of an insurer." *Athey v. Farmers Ins. Exch.*, 234 F.3d 357, 363 (8th Cir. 2000) (citing *Kunkel*, 168 N.W.2d at 734) (emphasis added). The $13,000 Johnson recovered in the DOL proceedings, in contrast, were for policy benefits—the cost of her procedures initially not covered by the appellants. (In fact, Johnson was never out this $13,000, because her primary insurer paid for her treatment in the first instance, and the appellants later paid her the $13,000. (R.II.2045-47.))

Paulsen v. Ability Ins. Co., 906 F. Supp. 2d 909 (D.S.D. 2012), is on point. In *Paulsen*, the court, relying on *Kunkel*, rejected a bad-faith claim where the insured's only pecuniary damages were contract damages based on "the failure to pay benefits due under the policy." *Id.* at 915. Paulsen did not allege economic damages arising from the bad faith itself. "Plaintiff does not allege that she suffered any additional pecuniary loss outside of the costs she incurred at Benet Place that would otherwise have been covered under the policy." *Id.* Moreover, as here, the plaintiff in *Paulsen* ultimately received all of her policy benefits; the fact that she had to 'deplet[e] her own funds to pay for her long term care,' without more, is insufficient." *Id.* Without economic damages flowing from bad-faith, the court held that a bad-faith claim could not stand. *See also Hammonds v. Hartford Fire Ins. Co.*, 501 F.3d 991, 998 (8th Cir. 2007) (bad faith claim barred because plaintiff failed to show "compensable loss of services or attendant care as a result of the delays in payment").

Johnson complains that an insurer or employer should not be able to "purge" a claim of bad faith by paying what is owed under the policy. (Johnson Br. 16-17.) This misapprehends the law. If there are economic damages independently flowing from the insurer's bad faith, paying what is owed under the policy will not negate a bad-faith claim. It is the plaintiff's obligation to plead and prove such independent damages, however, and Johnson failed to articulate any such damages here.

For this same reason, Johnson's citation to *Zuke v. Presentation Sisters, Inc.*, 1999 SD 31, is inapposite. Requiring a claimant to establish an entitlement to benefits before bringing a bad-faith claim has no bearing on whether the

claimant suffered pecuniary damages independently flowing from the insurer's bad faith, as is required for a bad-faith claim.

Johnson also cites this Court's decision in *Grynberg v. Citation Oil & Gas*, 1997 SD 121, arguing that the appellants' position would give insurers a "license to steal." (Johnson Br. 17.) But *Grynberg* was a punitive damages case, and its reasoning went to why punitive damages can be appropriate. In fact, *Grynberg* is unhelpful to Johnson. In that case—unlike here—the claim for breach of the duty of good faith was supported by independent damages over and above contract damages, making it viable under *Kunkel*. 1997 SD 121, ¶ 13.

Accordingly, Johnson did not have a viable bad-faith claim.

II. Alternatively, A New Trial Is Required.

The jury instructions and evidentiary rulings barred the jury from considering evidence of Schulte's advice for the intent prong of Johnson's bad faith claim, as well as considering that advice to show appellants' lack of malicious intent, a necessary element of punitive damages. At a minimum, the circuit court should have granted a new trial.

A. The Instructions Prevented The Jury From Considering Schulte's Advice When Evaluating Appellants' Intent.

The circuit court improperly relied upon qualified immunity cases when it held at the last minute that the jury could not consider advice of counsel when determining whether the appellants "knew there was no reasonable basis, or exhibited a reckless disregard for whether there was no legal basis, to disregard the court order[.]" (R.7116; R.II.2069-73.) That is because, in contrast to a bad faith claim, the standard for qualified immunity is objective reasonableness, for

which intent has no role. *Compare Sloane v. Herman,* 983 F.2d 107, 110 (8th Cir. 1992); *Walters v. Grosheim,* 990 F.2d 381, 384 (8th Cir. 1983) *to Champion*, 399 N.W.2d at 324; *Crabb v. Nat'l Indemnity Ins. Co.,* 87 S.D. 222, 228 (1973).

Johnson does not seek to defend the circuit court's erroneous reliance on these cases. Instead, she seeks to minimize the effect of the error, arguing that jury instruction no. 27 only barred the consideration of certain aspects of Schulte's advice, namely in evaluating appellants' intent when the IME was requested and when terminating Johnson's benefits in August 2010. (Johnson Br. 20.)

But those were the two circumstances at the heart of Johnson's bad-faith claim. That the jury was permitted to consider Schulte's advice to seek a records review and to engage in settlement negotiations was irrelevant to the key liability issue in the case once the court had wrongly dispensed with the "fairly debatable" defense—namely, whether the appellants knew or recklessly disregarded "a reasonable basis for denial[.]" *Champion v. United States Fid. & Guar. Co.*, 399 N.W.2d 320, 324 (S.D. 1987) (citation omitted). The upshot of the circuit court's instruction was to eliminate any meaningful defense to bad faith.

Johnson argues that a later instruction, instruction no. 36, cured the earlier misstatement of law by allowing the jury to consider the advice of counsel. (Johnson Br. 20.) But that instruction was directed only to calculating the amount of punitive damages. It provided that the jury could consider "[a]ll of the circumstances concerning the Defendant's actions, including any mitigating circumstances, such as the advice of counsel, which may operate to reduce, without wholly defeating, punitive damages." (R.7125-26.)

An instruction dealing with the amount of punitive damages could not cure the error in instruction no. 27, which prevented the jury from considering advice of counsel in determining whether there was bad-faith liability in the first instance. It dealt only with calculating the amount of punitive damages *after* bad-faith liability and punitive liability had already been established.

Because jury instruction no. 27 was improper as a matter of law, a new trial is required. "[N]o court has discretion to give incorrect, misleading, conflicting, or confusing instructions: to do so constitutes reversible error if it is shown not only that the instructions were erroneous, but also that they were prejudicial. Erroneous instructions are prejudicial under SDCL 15-6-61 when in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party." *Vetter v. Cam Wal Elec. Co-op., Inc.*, 2006 S.D. 21, ¶ 10. Here, the circuit court wrongly instructed the jury that Schulte's advice could not be considered for the intent prong of Johnson's bad faith claim—a critical element of the claim. As the court had already instructed the jury that the appellants' actions were not fairly debatable, this intent instruction essentially granted Johnson judgment as a matter of law on her bad faith claim.

B. The Circuit Court Improperly Excluded Evidence Of Advice Of Counsel Critical To Showing The Appellants' Good Faith.

Compounding this error, the appellants were also barred from explaining the advice they received from their counsel about the decision to deny benefits to Johnson. The excluded evidence—including testimony from Schulte, the appellants' experts Shultz and Peter Hildebrand, and documents explaining

Schulte's advice in 2010—related directly to the intent element of Johnson's bad faith claim.

Johnson does not dispute that a significant portion of the appellants' testimony and documentary evidence regarding its advice-of-counsel defense was excluded. Instead, she argues that the evidence was properly excluded because Schulte's advice involved questions of law for the judge, not the jury. (Johnson Br. 21.) But the relevance of Schulte's testimony was not whether it was legally correct, but instead the effect it had on the appellants' state of mind when denying coverage—a critical issue bearing on bad-faith intent. On that fact question, advice of counsel was directly relevant. *Dakota, Minnesota & Eastern R.R. Corp. v. Acuity*, 2009 S.D. 69, ¶ 32 (intentional or reckless disregard of lack of reasonable basis for denial is necessary element for bad faith claim). The circuit court reasoned that excluding this evidence was appropriate because the relevant statutory provision was obvious, citing *Bertelsen*. But as explained above, the result in *Hayes* was not a foregone conclusion.

Johnson seeks to minimize the court's error, contending that "the trial record is replete with testimony of reliance on the 'advice of counsel.'" (Johnson Br. 19.) But in truth, Schulte's testimony was gutted. The circuit court refused to allow him to explain that he believed the actions he recommended did not violate the 2006 Order, that he analyzed the issue in detail, that he round-tabled the issues with his partners, or that he believed SDCL 62-7-1 and 62-1-1(7) permitted the denial. The court further instructed the parties to redact all communications reflecting Schulte's opinions, arguments, and actions. (*See, e.g.*, R.7645, 7655, 7657; R.II.1144-47, 1176-77, 1657-81, 1751-54, 2051, 2118-2146.)

The appellants' insurance practices experts were also limited. Shultz was barred from testifying at all, and Hildebrand's testimony was significantly limited. While Johnson suggests that Hildebrand was free to testify about any topic (Johnson Br. 22), Hildebrand's testimony was severely hemmed in by the Court's evidentiary rulings, particularly as it related to Schulte's advice and industry custom regarding following "court orders." (*See, e.g.* R.II.2009-2012, 2019, 2022, 2025 (sustaining objections to testimony).) Hildebrand, like Schulte, proffered that had he been permitted to testify, he would have testified about industry custom and practice and the hiring and reliance on counsel for advice. (*E.g.,* R.II.2029-34.)

As a result of these evidentiary exclusions, the jury was not permitted to learn why the appellants believed they could proceed in the manner they did. Excluding this evidence prevented the appellants from defending themselves by showing that they did not "know or recklessly disregard the lack of a reasonable basis" under *Dakota, Minnesota & Eastern R.R. Corp. v. Acuity*, 2009 S.D. 69, ¶ 32.

C. Reversal Is Also Required Because Schulte's Excluded Advice Related Directly To Punitive Damages.

Those evidentiary limitations also prevented the appellants from showing why they did not act with malice, a necessary element of punitive damages. While Johnson argues that the excluded evidence was irrelevant to her bad faith claim under *Bertlesen*, Johnson does not dispute the relevance of advice of counsel to punitive-damage liability. *Hannahs v. Noah*, 83 S.D. 296, 305 (S.D. 1968).

Schulte's explanation of why he believed discontinuing benefits after the IME was consistent with the 2006 Order was in fact the standard practice at the time and went to the heart of the appellants' defense to punitive liability. Indeed, even if *Hayes* had been the law in 2010, Schulte's advice would still have been relevant to punitive damages, because the failure to follow a statute does not alone warrant the imposition of punitive damages. *Maryott v. First Nat. Bank of Eden*, 2001 S.D. 43, ¶ 38.

The lower court's wrongful exclusion of Schulte's testimony as to punitive intent is a straightforward, indisputable basis for reversal.

III. At A Minimum, The Punitive Damage Award Greatly Exceeds Due Process Limits.

The circuit court knew that the punitive damage award in this case was far too high to pass constitutional muster. But the twenty-fold award that remained after the circuit court's remittitur is still wildly excessive.

It is true, as Johnson states, that punitive damage ratios are not to be mechanically applied—one size does not fit all. But the appellants' actions in this case fall well within the parameters of a case in which punitive damages are not warranted.

Let us start from the premise that if the Court is considering the punitive damage award, it has embraced the notion that the appellants' decision was not fairly debatable as a matter of law. Because it is undisputed that the appellants sought out and relied upon Schulte's advice, the fact that Schulte advised the appellants to act as they did can mean only one of two things—that Schulte

simply told the appellants what they wanted to hear, or that Schulte wrongly advised the appellants to act as they did.

The first of these can be dispensed with quickly. Schulte testified that he made an independent decision based on his years of experience, his analysis of the facts and the law, and his round-tabling of the decision with his partners. (R.II.1939-41, 1953.) The circuit court found Schulte's testimony to be credible. (R.II.614.) And at no time did Johnson present any evidence that Schulte did not exercise independent judgment.

So that leaves us with the second alternative—that Schulte was incorrect, despite the practice at the time. The appellants have taken the position throughout this case that Schulte's advice was objectively reasonable—but if the Court were to find that South Dakota law plainly precluded the course of action Schulte recommended, there would be no alternative but to conclude that Schulte wrongly advised his clients.

The appellants sought out and relied on the advice of Schulte, a well-respected attorney and Past President of the South Dakota Bar Association. (R.3130.) The appellants respectfully submit that it would be inconsistent with due process to sustain a massive punitive damage award simply because Schulte gave them incorrect advice.

Let us consider the punitive damage factors, and Johnson's arguments, in turn.

A. The Appellants, Following Schulte's Advice, Did Not Act Reprehensibly.

The appellants acted on the advice of counsel, not maliciously. The most important aspect of the reprehensibility analysis is intent. Johnson argues that the appellants acted intentionally to deprive her of benefits, "carefully devising a course of action to make to what they knew to be unreasonable appear reasonable." (Johnson Br. 28.) But nothing in the record supports the notion that the appellants knew the actions they were taking were unreasonable. To the contrary, it is undisputed that Johnson's claims adjuster had never been assigned a South Dakota claim before, prompting her to seek out Schulte's advice. (R.3642.) It is similarly undisputed that the appellants acted upon Schulte's advice and the conclusions of the doctor who conducted the IME. (R.3832.)

Johnson argues that the appellants acted maliciously by denying payment for her medical care before the IME took place, suggesting that the fix was in. (Johnson Br. 29.) This misstates the record. In truth, the appellants did not deny *any* payment for Johnson's medical care before the IME. While the IME was pending, the appellants approved and paid for Johnson's out-of-home hydrotherapy and TENS unit. (R.2108-09; R.II.1583-85, 1589-91.) The only thing the appellants declined to do, on the advice of Schulte, was preauthorize Johnson's April 2010 radiofrequency treatment in the days preceding the IME. (R.5259-60, 5262; R.II.1363-64, 2011, 2030-31.) But preauthorization was not necessary for coverage, and the appellants paid Johnson's radiofrequency invoices upon receipt. (R.1583-86, 5259-60, 2054-55, 2059-61.)

Given that the appellants followed Schulte's advice, Johnson cannot be heard to contend that the appellants acted with the malicious intent to undermine the rule of law in South Dakota. Say what one will about Schulte's advice, there is no evidence that he crafted his advice with the intent to flout the authority of the legal system. To the contrary, he researched and analyzed the issue, discussed the issue with his partners, and followed industry practice. And in relying on his advice, the appellants cannot be said to have intended to flout the law either.

The other aspects of the reprehensibility analysis similarly do not support a significant punitive damage award.

- *No physical injury*. Johnson argues that she suffered physical harm because of the denial of coverage. But she presented no evidence at trial that she suffered any physical injury. To the contrary, she continued to receive uninterrupted medical treatments throughout the entire period. (R.II.1363-64.)
- *No financial vulnerability*. Johnson claims to have been financially vulnerable because she had to rely on private health insurance until the appellants paid her back, and "health insurance plans impose a yearly and lifetime limit on paid-for expenditures[.]" But no evidence exists in the record that Johnson's health plan had a yearly limit or that she approached such a limit. (R.II.2044-49.) Moreover, the Affordable Care Act eliminated "lifetime limits on the dollar value of benefits for any participant or beneficiary." 42 U.S.C. § 300gg-11(a)(1)(A).

- *No indifference to Johnson's health and safety.* Johnson contends that the appellants were indifferent to her health and safety because they "cut off benefits necessary to prevent further physical harm." (Johnson Br. 31.) But it is undisputed that Johnson never missed a medical treatment and that the appellants knew her private insurance would cover her treatment while the results of the IME were pending.
- *An isolated incident, unlikely to repeat.* Johnson argues that the appellants' denial of coverage involved a pattern of misconduct. But all of the conduct to which Johnson alludes—the requests for reconsideration, the filing of a DOL claim—flowed directly from the denial of coverage.[1] And however one characterizes the appellants' acts, *Hayes* has now settled the matter, meaning that this type of dispute will not arise again.

B. Given The Large Compensatory Damage Award And The Lack Of Reprehensibility, A Punitive Damage Award Exceeding A 1:1 Ratio Would Violate Due Process.

This Court has routinely held that "[t]he amount of punitive damages *must* bear a reasonable relationship to the compensatory damages." *O'Neill v. O'Neill*, 2016 S.D. 15, ¶ 24 (*quoting Grynberg v. Citation Oil & Gas Corp.*, 1997 S.D. 121, ¶38) (emphasis in original).

[1] Johnson speculates that there were other individuals in South Dakota whom the appellants treated similarly. Such speculation is improper in the reprehensibility analysis. *See Campbell*, 538 U.S. at 423 ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis").

Johnson concedes that the 20:1 ratio settled upon by the circuit court requires "additional scrutiny" by this Court. (Johnson Br. 23.) She nonetheless argues that her award is not excessive, citing the plurality opinion in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1991), which upheld a 526:1 punitive award. But *TXO* involved a relatively low compensatory damages award ($19,000) compared to "the millions of dollars potentially at stake" if the defendant's fraudulent and deceitful conduct had gone undetected. *Id.* at 444. And in justifying that ratio, the plurality noted that the defendant's conduct "was part of a larger pattern of fraud, trickery and deceit" that was directed at many others, not merely the plaintiff. *Id.* at 462.

A decade after the *TXO* decision, the Supreme Court clarified why such a high ratio comported with due process, explaining that ratios greater than 4:1 "may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages." *Campbell*, 538 U.S. at 425 (quotation omitted). In contrast, the Court held that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damage, can reach the outermost limit of the due process guarantee." *Id.*

Johnson offers no similarly compelling reason for why her 20:1 ratio passes constitutional muster. Indeed, no evidence exists in the record to support that "millions of dollars [were] potentially at stake" as in *TXO*. *See, e.g.*, *Kimble v. Land Concepts, Inc.*, 845 N.W.2d 395, 405 (Wis. 2014) (noting that in *TXO*, the millions of dollars potentially at stake was "derived from the record").

Johnson argues that the $500,000 in compensatory damages that she was awarded is not substantial compared to the $500 million awarded in *Exxon*

Shipping Co. v. Baker, 554 U.S. 471 (2008). (Johnson Br. 24.) True. But $500,000 is still a substantial award of compensatory damages, particularly in a case involving a single plaintiff. Indeed, courts have consistently held that similarly sized compensatory awards are "substantial" under *Campbell*. *See, e.g.*, *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) ($600,000 compensatory award); *see also Bridgeport Music, Inc. v. Justin Combs Pub.*, 507 F.3d 470, 490 (6th Cir. 2007) (same, $366,939 compensatory award); *Bach v. First Union Nat'l Bank*, 486 F.3d 150, 156-57 (6th Cir. 2007) (ratio of 1:1 is "outer boundary of what the Constitution will permit" for $400,000 compensatory award).

One need only compare the appellants' actions with those of the defendants in *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004)—which Johnson failed to address in her brief—to see how out of whack even the remitted punitive damage award was here. In *Williams*, the defendants conducted a ghastly long-term pattern of racial harassment, leaving nooses at the work stations of African-American employees, hanging a black doll by a noose, and sending African-American employees invitations to KKK hunting parties. 378 F.3d at 793-99.

Yet despite this patently reprehensible conduct, the Eighth Circuit reduced punitive damages from $6 million to $600,000 because the plaintiff had been awarded $600,000 in compensatory damages. As the Court held, the plaintiff "received $600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money. Accordingly, we find that due process requires

that the punitive damages award on [his] harassment claim be remitted to $600,000." *Id.* at 799 (citation omitted).

There is no constitutionally significant distinction between the $500,000 in compensatory damages awarded here and the $600,000 awarded in *Williams*. Both are "a lot of money." And given that the conduct in this case was not even remotely as reprehensible as what occurred in *Williams*, if a 1:1 ratio is all that due process permitted in *Williams*, surely a 1:1 ratio is at the outer boundary of what is constitutionally permissible here. Indeed, given the lack of reprehensibility, a strong case can be made that no punitive damages award is warranted at all, much less the $10 million in punitive damages awarded by the lower court.

Nor can Johnson uphold her punitive damages award based on the appellants' respective financial health. Although Johnson correctly notes that Liberty Mutual and UPS are large corporations, the appellants' financial circumstances cannot justify a punitive damage award absent a finding of reprehensibility and proportionality. *See, e.g.*, *Campbell*, 538 U.S. at 418; *Roth*, 2003 S.D. 80, ¶ 72 ("wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award"). This is especially true since the appellants conduct only minimal business in South Dakota. (R.3642, 3813.)

Because Johnson's punitive damages bears no reasonable relationship to her compensatory damages, this Court should vacate the circuit court's punitive damage award or, at a minimum, limit her punitive damages to an amount no greater than Johnson's compensatory damages.

C. The Punitive Damage Award Is Excessive When Compared to South Dakota's Civil Penalties.

Finally, the $10 million punitive damage award grossly exceeds the maximum civil penalties allowed under South Dakota's workers' compensation statutes, which appear to be $25,000. *See, e.g.,* SDCL 58-5A-64; 58-29B-11; 58-5A-62; 58-5A-30. This would translate to a 400:1 punitive-damage-to-civil-penalty ratio.

Johnson argues that the courts can also consider criminal penalties. (Johnson Br. 35.) But in *Campbell*, the Supreme Court warned against using criminal penalties to evaluate the propriety of a punitive damage award, reasoning that "[p]unitive damages are not a substitute for the criminal process[.]" 538 U.S. at 428.

Johnson also argues that the appellants' actions are more akin to contempt. As a preliminary matter, the comparison is inapt because the appellants were never held in contempt—nor could they have been, given that they relied on the advice of seasoned South Dakota counsel in interpreting the 2006 Order. And in any event, civil contempt exists to bring parties into compliance with court orders, and the appellants had already done so before this lawsuit was ever filed.

* * * *

For all these reasons, this case cannot support the circuit court's award of punitive damages at a 20:1 ratio to compensatory damages. The Court should vacate the punitive damage award or remit it to no more than a 1:1 ratio to compensatory damages.

RESPONSE TO APPELLEE'S CROSS-APPEAL

IV. Due Process Prohibits Reinstatement Of The Jury's Ninety-Fold Punitive Damage Award.

Johnson's request to reinstate the punitive damage award of the jury's verdict lacks merit. As explained above, the evidentiary record supports a punitive damage award of, at most, a 1:1 ratio to compensatory damages. Needless to say, a punitive damage award of $45 million—a 90:1 ratio to compensatory damages—is that much more violative of due process than the already constitutionally improper $10 million remitted award.

V. Johnson Cannot Seek To Correct An Alleged Clerical Error In The Judgment For The First Time On Appeal.

Johnson contends that the circuit court intended to award interest from the date of the verdict, but that the judgment inaccurately states that interest will run from the date of the judgment.

If the circuit court actually intended to award interest from the date of the verdict, then Johnson should have filed a motion under Rule 60(a) to correct a clerical error in the judgment. "[C]lerical corrections include the implementation of what was intended and what the court had accepted as the proper resolution," but failed "to memorialize [as] part of a decision." *Reaser v. Reaser,* 2004 SD 116, ¶ 29 (citations and quotation marks omitted).

Johnson has yet to file such motion. And because the settled record has already been transmitted to the clerk of this Court, the circuit court may only entertain such a motion with leave of this Court. SDCL 15-6-60(a). Accordingly, if this issue is preserved, the issue is not yet ripe for consideration.

CONCLUSION

The Court should grant judgment as a matter of law on Johnson's bad faith claim. Alternatively, a new trial is required. At a minimum, the punitive award should be vacated or reduced to an amount no greater than the amount of compensatory damages.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with SDCL 15-26A-66(4) and this Court's November 30, 2018 Order Granting Appellants' Motion for Additional Words In Appellants' Reply Brief. The brief is 26 pages long (exclusive of the table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service), is typeset in 12-point Georgia font (a proportional font), and contains 6,656 words. The appellants used Microsoft Word to prepare the brief.

Dated this 17th day of December, 2018.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for appellant, hereby certifies that on December 17, 2018, a true and accurate copy of **APPELLANTS' REPLY BRIEF** was electronically transmitted to:

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Dated at Cleveland, Ohio, this 17th day of December, 2018.

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