

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30841

MARK FIECHTNER,

Plaintiff and Appellee,

vs.

AMERICAN WEST INSURANCE COMPANY,

Defendant and Appellant.

Appeal from the Circuit Court
Second Judicial Circuit
Lincoln County, South Dakota

The Honorable John R. Pekas, Circuit Court Judge

BRIEF OF APPELLANT AMERICAN WEST INSURANCE COMPANY

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Notice of Appeal of Defendant and Appellant American West Insurance Company
filed September 13, 2024, and Amended Notice of Appeal filed November 11, 2024.

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JURISDICTIONAL STATEMENT

Pursuant to SDCL 15-26A-3, Appellant American West Insurance Company appeals from the circuit court's judgment following a jury trial, specifically, its denial of American West's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial, and award of attorneys' fees to Plaintiff Fiechtner. The circuit court entered a Judgment following a jury trial on August 9, 2024. (R. 2720).¹ Notice of Entry of the Judgment was filed on August 16, 2024. (R. 2722). The circuit court denied American West's Motion for Judgment Notwithstanding the Verdict on September 11, 2024. (R. 2940). The circuit court awarded attorneys' fees to Plaintiff Fiechtner on October 31, 2024 (R. 2958, Appx. 001-002), and a new Notice of Entry of Judgment was filed on November 5, 2024 (R. 3611), which contained the award of attorneys' fees. Appellant American West timely filed its original Notice of Appeal on September 13, 2024 (R. 2924), and timely filed its Amended Notice of Appeal, adding the award of attorneys' fees as an issue for appeal, on November 11, 2024. (R. 3622).

REQUEST FOR ORAL ARGUMENT

Appellant American West respectfully requests oral argument.

STATEMENT OF THE ISSUES

Did the circuit court err in allowing the jury's award for bad faith (\$250,000) to stand in light of the jury's determination that the value of Plaintiff Fiechtner's breach of contract/UIM cause of action was \$400,000, an amount in between both parties' pre-litigation settlement offers (\$10,000 & \$890,000)?

The circuit court erred.

Most relevant authorities:

¹ Citations to "R. [page]" refer to the applicable page numbers in the Certified Record, and "Appx. [page]" refer to the applicable page numbers in the Appellant's Appendix.

- *Harvieux v. Progressive Northern Ins. Co.*, 2018 S.D. 52, 915 N.W.2d 697
- *Anderson v. W. Nat. Mut. Ins. Co.*, 857 F.Supp.2d 896 (D.S.D. 2012)
- *Johnson v. United Parcel Serv., Inc.*, 2020 S.D. 39, 946 N.W.2d 1
- *Tilghman v. Allstate Property & Cas. Ins. Co.*, 22 F.4th 752 (8th Cir. 2022)

Did the circuit court err in allowing the jury's award for punitive damages (\$890,000) to stand in light of the jury's determination that the value of Plaintiff Fiechtner's breach of contract/UIM cause of action was \$400,000, an amount in between both parties' pre-litigation settlement offers (\$10,000 & \$890,000)?

The circuit court erred.

Most relevant authorities:

- *Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, 796 N.W.2d 685
- SDCL 21-3-2
- SDCL 21-1-4.1

Did the circuit court err in awarding Plaintiff Fiechtner attorneys' fees pursuant to SDCL 58-12-3, on the basis of vexatious and unreasonable conduct, in light of the jury's determination that the value of Plaintiff Fiechtner's breach of contract/UIM cause of action was \$400,000, an amount in between both parties' pre-litigation settlement offers (\$10,000 & \$890,000)?

The circuit court erred.

Most relevant authorities:

- *Sawyer v. Farm Bureau Mut. Ins. Co.*, 2000 S.D. 144, 619 N.W.2d 644
- SDCL 58-12-3

Did the circuit court commit evidentiary errors that were prejudicial to American West by permitting Plaintiff Fiechtner to introduce demonstrative exhibits to the jury that were not disclosed to American West prior to trial, were not admitted at trial prior to publication to the jury, lacked foundation, and allowed Plaintiff Fiechtner's expert witness to provide narrative testimony?

The circuit court erred.

Most relevant authorities:

- *Luitpold Pharms. v. Sohne*, No. 11-cv-681 (KBF), 2015 WL 5459662 (S.D.N.Y. Sept. 16, 2015)
- *Harvieux v. Progressive Northern Ins. Co.*, 2018 S.D. 52, 915 N.W.2d 697
- SDCL 19-19-901
- SDCL 19-19-903

STATEMENT OF THE CASE

Appellee/Plaintiff Mark Fiechtner (“Fiechtner”) brought causes of action for breach of contract and bad faith against his auto insurance carrier, Appellant/Defendant American West. Fiechtner’s claims are based upon a claim for underinsured motorist (“UIM”) benefits. Following a jury trial, a Lincoln County jury awarded Fiechtner \$400,000 in breach of contract/UIM benefits, \$250,000 for Fiechtner’s cause of action for bad faith, and \$890,000 in punitive damages. Because the value of Fiechtner’s breach of contract/UIM claim was fairly debatable as a matter of law, and based upon a lack of evidence that American West “consciously engaged in wrongdoing”, the circuit court erred in denying American West’s post-trial Motion for Judgment as a Matter of Law, or in the Alternative, Motion for New Trial regarding Fiechtner’s cause of action for bad faith. For the same reason, the circuit court erred by not setting aside the jury’s award of punitive damages.² Also for the same reasons, and due to a lack of evidence that American West acted vexatiously and unreasonably, the circuit court erred when, post-trial, it awarded attorneys’ fees to Fiechtner.

Finally, during trial, the circuit court abused its discretion by permitting Fiechtner to introduce demonstrative exhibits to the jury that were not provided to American West prior to trial, lacked foundation, were not admitted into evidence prior to Fiechtner’s publication of the exhibits to the jury, and permitted Fiechtner’s expert witness, Dr. Ammar Chaudhry, to provide narrative testimony to the jury.

² Pre-trial, American West moved for Partial Summary Judgment regarding Fiechtner’s claims of bad faith and punitive damages (R. 206), which the circuit court denied (R. 836). American West renewed that Motion for Partial Summary Judgment (R. 850) following the close of discovery, which the circuit court also denied (R. 1398).

American West requests that this Court reverse the circuit court's denial of its Motion for Judgment Notwithstanding the Verdict, and vacate the circuit court's award to Fiechtner for bad faith damages (\$250,000), punitive damages (\$890,000), and attorneys' fees (\$101,999.79). In the alternative, American West requests that this Court grant its Motion for a New Trial on each of these issues.

American West does not seek a reversal of the jury's award of \$400,000 of damages for Fiechtner's breach of contract/UIM cause of action.

STATEMENT OF FACTS

Fiechtner was involved in a motor vehicle accident on April 14, 2018. Accident Report (R. 251, Appx. 052-058); Complaint (R. 2, Appx. 020-024). Fiechtner alleges he was injured. *Id.* The Accident Report indicates that at the time of the accident, Fiechtner was driving his 2017 F-250 pickup truck on 271st Street in Tea, SD. (R. 256). As he approached the intersection of 271st Street and Highway 115, he collided with Caitlynn Belliveau ("tortfeasor" or "Belliveau"), who was driving her 2016 Toyota Corolla south on Highway 115. Belliveau had a red light. She attempted to stop, but slid due to the snowy road conditions. Belliveau slid in front of Fiechtner, causing the front end of Fiechtner's full-size pickup to contact the passenger side of Belliveau's Toyota Corolla. *Id.*

Per the Accident Report, Fiechtner stated that he was not injured. *Id.* He was wearing his seatbelt, and the air bags did not deploy. *Id.* He was not transported to the emergency room. *Id.* His pickup sustained minor damage, and he was able to drive away after the accident. *Id.* Per the Accident Report, there is no dispute that Belliveau was the

party at fault for causing the accident. *Id.* American West has never alleged that Fiechtner had any fault in causing the accident.

At the time of the accident, Fiechtner maintained auto insurance through American West. The American West policy provided \$1 million dollars (\$1,000,000) in UIM benefits. (R. 259). It also provided \$10,000 in medical payment benefits. *Id.*

After the accident, American West mailed a letter to Fiechtner advising of his medical payment benefits of \$10,000. (R. 261). American West contacted Belliveau's insurance to see if they would be accepting liability. (R. 263). On April 27, 2018, American West received photographs of Fiechtner's pickup reflecting the relatively minor damage Fiechtner's pickup incurred in the accident. (R. 265). Following some post-accident treatment by Fiechtner, American West paid Fiechtner's medical providers the \$10,000 of medical payment benefits available in Fiechtner's American West policy. (R. 303).

On July 31, 2019, fifteen months after the accident, Fiechtner made a personal injury claim against tortfeasor Belliveau. Complaint (R. 2, Appx. 020-024); Plaintiff's Settlement Demand (R. 305). As a part of that claim, Fiechtner alleged \$18,435.47 in accident-related medical expenses. *Id.* Fiechtner eventually accepted a settlement of his personal injury claim against Belliveau for \$100,000, which represented Belliveau's auto liability policy limits. (R. 3).

After settling his personal injury claim with the tortfeasor for her \$100,000 policy limits, Fiechtner made a policy limit demand of \$900,000 (\$1 million UIM limits – \$100,000 tortfeasor liability limits = \$900,000) for UIM benefits to American West. Culhane e-mail from August 28, 2019 (R. 312); Complaint (R. 3, Appx. 020-024).

American West evaluated Fiechtner's UIM claim. As part of American West's investigation and evaluation, American West adjuster, Abby Kramer, reviewed the Accident Report and facts pertaining to the nature and severity of the accident, Fiechtner's medical records and bills, as provided by Fiechtner's counsel, post-accident photos of Fiechtner's pickup, and Fiechtner's publicly accessible social media accounts. Kramer also conferred with her manager, American West casualty claims manager, Chris Oen, to discuss and assess the value of Fiechtner's personal injury claim. E-mail exchange between American West and Culhane (R. 314); Kramer Depo. at 22:20-23:9; 46:15-47:3 (R. 320).

Fiechtner's medical records reflect that Fiechtner did not seek any emergency medical treatment post-accident. Fiechtner's first post-accident appointment was with a chiropractor four days post-accident.³ Fiechtner reported to his chiropractor that he did not receive a head injury or lose consciousness, and that he did not strike any portion of his body against any object in his vehicle. (R. 326). Fiechtner had not missed any work since the accident. *Id.* He reported back to the chiropractor for treatment on April 20, 2018, eight days after the accident, and reported that his headaches improved, but still had pain in his upper and mid back. (R. 330). Over the next month after the accident, Fiechtner attended seven chiropractic sessions. (R. 325). The records for each of Fiechtner's initial six visits reflect objective improvements in Fiechtner's condition. *Id.*

Fiechtner was referred to Dr. Wingate at the Orthopedic Institute. During his initial visit with Dr. Wingate, Fiechtner reported neck pain, headaches, and blurred vision.

³ Plaintiff had retained counsel by the time he sought treatment, four days post-accident. (R. 326).

(R. 343). His chief complaint was neck pain. *Id.* X-rays were negative for fractures, dislocation, and scoliosis. *Id.* An MRI was performed, which showed, “Mild cervical degenerative disc disease with very mild disc bulging without spinal stenosis or spinal cord compression. No focal disc herniation.” (R. 349) (emphasis added). Fiechtner was referred to pain management, where he ultimately received four trigger point injections in his neck between June 20, 2018, and November 28, 2018. (R. 342).

Despite denying a head injury at the accident scene, Fiechtner was eventually seen by WorkForce for a concussion evaluation. (R. 350). He was assessed for a possible concussion, and displayed symptoms of contrecoup concussion.⁴ *Id.* An MRI of his brain was ordered, which showed no acute injuries or hemorrhaging. (R. 386). Fiechtner was referred to an ophthalmologist to be assessed for vision therapy.

Fiechtner (now 52) was seen by an ophthalmologist for his complaints about blurred near-sighted vision. (R. 354). He was prescribed six months of vision therapy. Follow-up appointments with the ophthalmologist reflected that Fiechtner was making progress with the blurred vision. *Id.* By February 2019, Fiechtner was reporting no headaches and showing continued improvements with his vision. (R. 382-383). Fiechtner produced no medical records after March 13, 2019. Fiechtner’s post-accident medical bills total \$18,312.15.⁵ (R. 390).

A review of Fiechtner’s publicly accessible social media accounts depicts an accident-related post stating, “[...] I just got in an accident with a young lady who slid

⁴ Contrecoup references the brain striking the opposite side of the skull following impact.

⁵ Plaintiff’s Settlement Demand to Belliveau states post-accident medical bills total \$18,435.47. (R. 309).

through an intersection with her two infant children.... everyone is ok, but could've been much worse.” (R. 393) (emphasis added). A post from April 15, 2018, the day after the accident, depicts Fiechtner using his pickup to plow snow. (R. 394). A post from May 25, 2018, six weeks after the accident, depicts Fiechtner boating. (R. 395). Three days later, Fiechtner posted a picture of himself and his daughter on an airplane going to Phoenix. (R. 396). On January 30, 2019, Fiechtner posted a video showing himself and his daughter throwing water up in the air to watch it freeze. (R. 397).

Based upon these facts, including that Fiechtner had recovered \$100,000 in liability limits from tortfeasor Belliveau, American West agreed to waive its \$10,000 subrogation claim for the med-pay benefits it already paid to Fiechtner's medical providers, and offered an additional \$10,000 in UIM benefits to settle Fiechtner's UIM claim. September 23, 2019, letter from Abby Kramer of American West to Turbak Law office (R. 399); Kramer Depo. at 22:20-23:9; 46:15-47:3 (R. 320). American West's offer represented a total value of Fiechtner's personal injury claim of \$120,000 (\$100,000 tortfeasor limits + \$10,000 medical pay benefits + 10,000 UIM benefits = \$120,000).

Fiechtner declined American West's UIM settlement offer (representing a total personal injury value of \$120,000) and continued to demand the full remaining \$900,000⁶ UIM policy limits. (R. 401). When American West declined to pay the additional \$900,000 in UIM benefits, Fiechtner began this lawsuit.

⁶ After subtracting the tortfeasor's \$100,000 liability limits, and the \$10,000 of med-pay benefits, the actual amount of UIM limits remaining is \$890,000, not \$900,000, as demanded by Fiechtner. “[I]t is a well-settled rule that the UM carrier is entitled to a credit for any amount which it has paid to the plaintiff under the medical payments coverage.” *Kern v. Progressive N. Ins. Co.*, 2016 S.D. 52, ¶ 17, 883 N.W.2d 511, 516.

Fiechtner's claim against American West was tried to a Lincoln County jury on April 9-12, 2024.⁷ During trial, several evidentiary errors occurred. Fiechtner was permitted to publish two exhibits to the jury that Fiechtner did not disclose to American West or the circuit court prior to trial: "Claims Dollar Exhibit" (visual depiction *infra*), and "PowerPoint or slide show" used during Fiechtner's Trial Deposition of Fiechtner's expert witness, Dr. Ammar Chaudhry. Both exhibits were created/partially created by Fiechtner's counsel, and both lacked proper foundation. Further, the "PowerPoint or slide show" exhibit was used to solicit improper narrative testimony from Dr. Chaudhry.

At the close of Fiechtner's case-in-chief, American West moved for a Judgment as a Matter of Law on the issues of bad faith and punitive damages. Transcript, "Jury Trial: Day 2" (R. 3310-3318).⁸ The Court denied American West's Motion and submitted the issues of bad faith and punitive damages to the jury. The jury's Verdict included \$400,000 in damages for Fiechtner's breach of contract/UIM cause of action (not contested by American West via this appeal), \$250,000 for Fiechtner's bad faith cause of action, and \$890,000 for punitive damages. (R. 2678).

Post-trial, on August 28, 2024, American West filed a Motion for Judgment Notwithstanding the Verdict per SDCL 15-6-50(b), or in the Alternative, Motion for New

⁷ Note, the "Amended Order for Jury Trial" (R. 1401) mistakenly states the Jury Trial date was set for April 9-12, 2023, instead of 2024.

⁸ American West did not move for a directed verdict on Fiechtner's UIM/breach of contract cause of action. American West submits that the value of Fiechtner's personal injury UIM claim is inherently subjective, largely due the general damage portion of a personal injury claim, which value was appropriately submitted to the jury. However, the circuit court's ruling on American West's Motion for Directed Verdict indicate that the circuit court conflated Fiechtner's breach of contract/UIM cause of action with Fiechtner's bad faith cause of action.

Trial pursuant to SDCL 15-6-59(a). (R. 2736.) The circuit court denied that Motion on September 11, 2024. (R. 2940).

Also, post-trial, Fiechtner filed a “Brief in Support of Motion for Attorney’s Fees Pursuant to SDCL 58-12-3”, seeking an award of \$196,632.86 in attorneys’ fees, and asserting that American West had engaged in vexatious and unreasonable conduct. (R. 2781).⁹ The circuit court awarded \$101,999.79 in attorneys’ fees via a Judgment dated October 31, 2024. (R. 2958, Appx. 001-002). The new Notice of Entry of the Judgment, which included the award of attorneys’ fees, was filed by Fiechtner on November 5, 2024. (R. 3611).

American West appeals the circuit court’s denial of its Motion for Judgment as a Matter of Law, and Motion Notwithstanding the Verdict, regarding Fiechtner’s cause of action for bad faith and punitive damages, and post-trial award of attorneys’ fees.

ARGUMENT

I. The circuit court erred when it denied American West’s Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial regarding Fiechtner’s cause of action for bad faith, punitive damage claim, and post-trial award of attorneys’ fees.

SDCL 15-6-50(a)-(b) (Appx. 042-043) governs motions for judgment as a matter of law. During trial, and at the close of Fiechtner’s case, American West made an oral Motion for Judgment as a Matter of Law regarding Fiechtner’s cause of action for bad faith, and his request for punitive damages, which was denied by the circuit court.

American West renewed that Motion post-trial. (R. 2736.)

⁹ In regards to Fiechtner’s claim for attorneys’ fees, Fiechtner filed a Brief (R. 2781), but did not file a Motion for attorneys’ fees.

SDCL 15-6-50(a) provides:

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

Id. Similarly, SDCL 15-6-50(b) provides that:

If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than ten days after notice of entry of judgment--and may alternatively request a new trial or join a motion for a new trial under § 15-6-59. In ruling on a renewed motion, the court may:

- (1) If a verdict was returned:
 - (A) Allow the judgment to stand;
 - (B) Order a new trial; or
 - (C) Direct entry of judgment as a matter of law; or

...

The value of Fiechtner's breach of contract/personal injury/UIM claim, which contains a general damage component (pain and suffering and loss of enjoyment of life) (Jury Instruction No. 16, R. 1719), was fairly debatable. At trial, Fiechtner did not present evidence of American West's conscious wrongdoing, which is a necessary element of a bad faith claim. Similarly, with respect to Fiechtner's punitive damage claim, Fiechtner did not present evidence that American West acted with actual or presumed malice, which is a necessary element of punitive damages. Accordingly, the

jury's award of damages for bad faith and punitive damages were not supported by the evidence presented at trial and should be set aside.

In reviewing motions for judgment as a matter of law under SDCL 15-6-50(a)-(b), this Court reviews the circuit court's decision de novo. *Center of Life Church v. Nelson*, 2018 S.D. 42, ¶ 18, 913 N.W.2d 105, 110. Specifically, this Court "...view[s] the evidence in the light most favorable to the verdict or nonmoving party..." and "[t]hen 'without weighing the evidence, the court ... must decide if there is evidence that supports the verdict.'" *Id.* Accordingly, the circuit court's denial of American West's Motion for Judgment Notwithstanding the Verdict is not entitled to deference. *Id.*

American West's post-trial Motion for Judgment Notwithstanding the Verdict was pled as an alternative Motion for a New Trial, as contemplated by SDCL 15-6-50(b), and pursuant to SDCL 15-6-59(a). (Appx. 044). SDCL 15-6-59(a) provides that a new trial may be granted "on all or part of the issues" upon seven (7) grounds. American West's alternative Motion for a New Trial relied upon the grounds set forth in subparts (5), (6), and (7):

(5) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

(6) Insufficiency of the evidence to justify the verdict or other decision or that it is against law;

(7) Error of law occurring at the trial; provided, that in the case of claim of error, admission, rejection of evidence, or instructions to the jury or failure of the court to make a finding or conclusion upon a material issue which had not been proposed or requested, it must be based upon an objection, offer of proof or a motion to strike.

Id. American West advanced the same arguments within Rule 59(a)'s analytical framework as its Motion for Judgment Notwithstanding the Verdict, per Rule 50(a).

The standard of review applicable to denials of motions for new trial pursuant to SDCL 15-6-59(a) is abuse of discretion. *Meilitz v. Schmieg*, 1999 S.D. 104, ¶ 5, 598 N.W.2d 877, 878.

Regardless of the standard of review applied, neither Fiechtner's cause of action for bad faith, nor his claim for punitive damages, were supported by properly admitted evidence at trial. The circuit court's denial of American West's Motion for Judgment Notwithstanding Verdict, or in the Alternative, Motion for New Trial (R. 2736), was erroneous and should be reversed.

A. The circuit court erred in permitting the jury's award of bad faith damages to stand, in light of the jury's award of \$400,000 for breach of contract/UIM benefits, an amount in between the parties' pre-litigation settlement offers.

After hearing the evidence presented at trial, the jury awarded \$400,000 for Fiechtner's breach of contract/personal injury/UIM cause of action. There is no dispute that Fiechtner's pre-trial settlement demand for that cause of action was \$900,000, while American West's pretrial settlement offer was \$10,000, which was in addition to the \$110,000 that Fiechtner had already received from the tortfeasor (\$100,00 tortfeasor liability limits, and \$10,000 of medical payments from American West, represents a total value of Fiechtner's UIM/personal injury claim of \$120,000). Per the jury's Verdict of \$400,000 for Fiechtner's breach of contract/personal injury/UIM cause of action, Fiechtner had over-evaluated his claim by \$500,000 (\$900,000 settlement demand – \$400,000 Verdict award = \$500,000 over evaluation.) American West under-evaluated Fiechtner's breach of contract/personal injury/UIM cause of action, by \$390,000 (\$10,000 settlement offer – \$400,000 Verdict award = \$390,000 under-evaluation).

Bad faith is an intentional tort that requires evidence of conscious wrongful conduct by an insurance company. “A claim of first-party bad faith is an intentional tort that typically occurs when an insurance company consciously engages in wrongdoing during its processing or paying of policy benefits to its insured.” *Harvieux v. Progressive Northern Ins. Co.*, 2018 S.D. 52, ¶ 13, 915 N.W.2d 697, 701; *Zochert v. Protective Life Ins. Co.*, 2018 S.D. 84, ¶ 38, 921 N.W.2d 479, 490. A plaintiff must present evidence to satisfy two separate elements: “(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.” *Harvieux*, 2018 S.D. 52, ¶ 13.

Because Fiechtner is making a first-party claim for insurance benefits, Fiechtner and American West are adversaries. As such, American West is permitted to challenge Fiechtner’s claim if it is fairly debatable. “In [bad faith] cases, the [insurer and the insured] are adversaries, and therefore, an insurer is permitted to challenge claims that are fairly debatable. However, a frivolous or unfounded refusal to comply with a duty under an insurance contract constitutes bad faith.” *Id.*; *Dakota, Minn. & E. R.R. Corp. v. Acuity*, 2009 S.D. 69, ¶ 23, 771 N.W.2d 623, 630. “An insured cannot maintain a bad faith claim for an insurer’s valuation where the insurer was reasonable in its valuation and justified in refusing to pay more.” *Tilghman v. Allstate Property & Cas. Ins. Co.*, 22 F.4th 752, 755 (8th Cir. 2022) (emphasis added).

Given the undisputed fact that the jury determined the value (\$400,000) of Fiechtner’s breach of contract/UIM claim was near the middle of the parties’ pre-suit settlement offers, the value of Fiechtner’s UIM claim meets the very definition of fairly debatable—a value in between the parties’ pre-suit settlement offers. In other words, the

jury's Verdict of \$400,000 for the breach of contract cause of action, which is closer to American West's pre-suit valuation than Fiechtner's valuation, is consistent with a finding that the claim was fairly debatable, and inconsistent with a finding that American West acted in bad faith. If the value of Fiechtner's UIM claim was fairly debatable, as a matter of law, American West did not act in bad faith by declining to pay Fiechtner's \$900,000 pre-suit settlement demand.

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. The fact that the insurer's position is ultimately found to lack merit is not sufficient by itself to establish that the insurer had a reasonable basis to deny the claim. The focus is on the existence of a debatable issue, not on which party was correct.

Johnson v. United Parcel Serv., Inc., 2020 S.D. 39, ¶ 32, 946 N.W.2d 1, 10; *see also* *Muldin v. Hills Materials Co.*, 2007 S.D. 118, ¶ 15, 742 N.W.2d 49, 54 (affirming summary judgment in favor of insurer, finding claim was fairly debatable); *Harvieux*, 2018 S.D. 52, ¶ 22 (affirming summary judgment on the basis of fairly debatable).

Factually, the most analogous precedent is Federal District Court Judge Lange's decision in *Anderson v. W. Nat. Mut. Ins. Co.*, 857 F.Supp.2d 896, (D.S.D. 2012). The facts of Plaintiff Anderson's car accident/UIM claim were more severe than the facts of Fiechtner's UIM claim. Yet, the Court concluded, as a matter of law, that whether Plaintiff Anderson's UIM/personal injury claim value exceeded the tortfeasor's \$100,000 liability limits, was fairly debatable.

Considering the facts in the light most favorable to Anderson (personal injury plaintiff) and the evidence known to Western National during the pertinent time, this Court concludes that Anderson's claim to compensation exceeding \$100,000 was and is fairly debatable. Anderson was not responsible for the motor vehicle accident and was injured. His head struck and shattered the back window of his pickup cab. He was taken by ambulance to a hospital, treated for neck and back strain, and released that day. He underwent extensive chiropractic care and then physical therapy for

neck, back, and shoulder issues and headaches. He has not undergone medical treatment for any injury related to the injuries from the motor vehicle accident since March of 2008, although he does some physical therapy exercises in his home. His total medical bills related to the motor vehicle accident were \$20,721.63. He reports ongoing pain and limitations from his injuries. No physician has assigned a permanent impairment rating to Anderson nor concluded that his injuries are permanent, although they may be. Anderson had a prior history of treatments for neck and back issues. Anderson has a vocational expert who opines that Anderson's income has declined a minimum of \$28,000 per year. A Sioux Falls CPA evaluated Anderson's tax returns and questioned the validity of the loss of earnings claim. Western National hired Deibert, an experienced and capable outside-counsel from South Dakota, to evaluate Anderson's claim. Deibert advised Western National that, based on his experience and review of the file, the claim was likely not worth more than the \$100,000 threshold of the UIM coverage.

Anderson's claim, based on these facts not subject to genuine dispute, might be worth more than the \$100,000 threshold of UIM coverage, or it might not. In short, the question of whether the value of the claim exceeds \$100,000 is fairly debatable.

Id., at 905-06.

Anderson struck his head on his rear windshield, which shattered. Fiechtner did not strike his head on anything. Anderson's medical expenses (\$20k-\$21k) were slightly more than Fiechtner's claimed medical expenses (\$18k-\$19k). Anderson made a claim for future loss of wages. Fiechtner did not lose any work/wages due to the accident and did not make a claim for lost wages at trial. Similar to Anderson, Fiechtner received \$100,000 from the tortfeasor before trial. Whether Fiechtner's breach of contract/personal injury/UIM claim exceeded the tortfeasor's liability limits of \$100,000 was debatable. The jury determined that value to be \$400,000, an amount in between the parties' pre-litigation settlement offers. When compared to the jury's \$400,000 Verdict for breach of contract, American West's decision not to pay Fiechtner's \$900,000 settlement demand was not an act of "conscious wrongdoing".

See also, Lewison v. W. Nat. Mut. Ins., No. 13-cv-4031-KES, 2014 WL 3573403,

(D.S.D. July, 2014):

An insurer cannot be said to have denied the claim in bad faith if the claim is fairly debatable. *Dakota, Minn. & E. R.R. Corp.*, 771 N.W.2d at 630. At the time Western National denied Beverly's UIM claim, she had received \$30,000 in insurance proceeds. Beverly incurred \$12,312.13 in medical expenses related to ailments from the accident. After deducting her medical expenses and her claims of \$1,730.52 for prejudgment interest and \$207.63 for mileage to/from medical appointments, Beverly received \$15,749.72 in damages. Notes from Beverly's last chiropractic visit on January 5, 2011, stated she "reported feeling much better, with very little soreness or discomfort at all over the past 2 weeks.... She is to continue home stretches and heat as needed, and return for treatment as needed if she has any further trouble." Docket 23-5 at 18. She did not return for any treatment. Notes from her last physical therapy session on January 6, 2011, also indicated that she was doing well and noted she could continue her therapy from home. Docket 23-5 at 46. She did not return for additional physical therapy. Moreover, Western National's IME concluded Beverly did not suffer any permanent injuries from the accident and had a full recovery. Based on this information, the court finds that whether Beverly was entitled to UIM benefits was fairly debatable at the time Western National denied her claim.

Id., at *7.

Many other jurisdictions agree that the subjective nature of personal injury claims often render UIM evaluations to be fairly debatable. *See Dayton v. Farmers Ins. Grp.*, 876 P.2d 896, 898 (Wash. 1994) (noting "[l]egitimate differences of opinion in the value of a claim negotiated in good faith do not deprive an insured of the benefit of coverage bargained for"); *Enrique v. State Farm Mut. Auto. Ins. Co.*, 142 A.3d 506, 514 (Del. 2016) ("Without more, rational differences in claim valuations do not lead to an inference of bad faith."); *Pfister v. State Farm Fire & Cas. Co.*, No. 11-799, 2011 WL 3163184, at *4 (W.D. Pa. July 26, 2011) (discrepancy in parties' valuation of claim "alone is not evidence of bad faith"); *Smith v. State Farm Mut. Auto. Ins. Co.*, 506 F.App'x 133, 137 (3d Cir. 2012) ("the failure to immediately accede to a demand for the policy limit

cannot, without more, amount to bad faith.”); *Collins v. Auto-Owners Ins. Co.*, 438 F.App’x 247, 249 (4th Cir. 2011) (“[T]he fact that the parties had different estimations of the value of a claim is not, under South Carolina law, evidence of bad faith on the part of the party offering the lower amount.”); *Gowton v. State Farm Fire & Cas. Co.*, No. 15-1164, 2017 WL 818847, at *4 (W.D. Pa. Mar. 2, 2017) (“In the absence of any supporting facts from which it might be inferred that [Amica’s] investigation was biased or unreasonable, this type of disagreement in an insurance case is not unusual, and cannot, without more, amount to bad faith.”); *Wilson v. 21st Century Ins. Co.*, 171 P.3d 1082, 1088-89 (Cal. 2007) (“[A]n insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured’s coverage claim is not liable in bad faith even though it might be liable for breach of contract.”); *Gov’t Employees Ins. Co. v. Quine*, 264 P.3d 1245, 1251 (Okla. 2011) (holding that an insurer does not act in bad faith by resisting payment when “there is legitimate dispute regarding the amount of noneconomic/general damages suffered by the insured.”); *Saleh v. Farmers Ins. Exch.*, 2006 UT 20, ¶ 24, 133 P.3d 428, 435 (Utah 2006) (“If a claim brought by an insured against an insurer is fairly debatable, failure to comply with the insured’s demands cannot form the basis of bad faith.”); *Snyder v. State Farm Mut. Auto. Ins. Co.*, 586 F.Supp.2d 453, 461 (D.S.C. 2008) (holding that a “miscalculation” of valuation “is not a basis for determining that an insurer’s conduct was unreasonable or in bad faith—to rule otherwise would run the risk of turning every case in which an insurer and an insured were not able to reach a settlement and the insured went on to win a large verdict into a case for bad faith refusal to pay against the insurer.”).

At his deposition, even Fiechtner acknowledged the subjective and debatable nature of his UIM claim.

Q. (By Atty. Arndt) ... You recognize that part of their (American West's) evaluation of your claim is to also evaluate what you've already received from Ms. Belliveau's insurance carrier?

A. (By Fiechtner) Uh-huh.

Q. The hundred thousand dollars?

A. (Indicating).

Q. Plus the \$10,000 that they paid for your medical expenses?

A. (Indicating).

Q. Yes?

A. Yes.

Q. How much more do they need to pay?

A. How do I quantify that? I mean, I don't think you have an answer to that question. I sure don't.

(R. 247, 409-410, Appx. 025-028). Even when Fiechtner's own counsel attempted to correct Fiechtner's testimony with leading questions, Fiechtner candidly acknowledged the subjective nature of his claim.

Q. (By Atty. Culhane) ... And there was a lot of discussion about difficulty to quantify. Is there any question in your mind that your injuries, when -- whether difficult to quantify or not, exceed a million dollars in value?

A. (By Fiechtner) I don't know how to answer that. The unknowns in this situation are the frightening part of it where you just don't know. I mean, I don't know what day my memory doesn't work or what day my neck doesn't work or what day I can't see well enough to do the things I enjoy or the things that I need to do for work. I don't know how to answer that.

Q. Do you think a million dollars is enough?

A. I don't know how to answer that. I don't know. I don't know.

(R. 244, 413, Appx. 029).

B. The circuit court erred in permitting the jury's award of punitive damages to stand, in light of the jury's award of \$400,000 for breach of contract/UIM benefits, and lack of evidence of malice.

For the same reasons that the jury's Verdict awarding damages for bad faith should be set aside, the jury's Verdict of \$890,000 of punitive damages should be set aside. There was a lack of evidence at trial of American West's malice.

The standard for punitive damages, or "exemplary" damages, is set forth in SDCL 21-3-2, and includes "...oppression, fraud, or malice, actual or presumed, ...".

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 21-3-2 (emphasis added). (Appx. 049).

At the close of Fiechtner's case-in-chief, American West moved for Judgment as a Matter of Law regarding punitive damages, which Motion was denied. The standard for submitting a claim for punitive damages to a jury is set forth in SDCL 21-1.4.1.

In any claim alleging punitive or exemplary damages, before any discovery relating thereto may be commenced and before any such claim may be submitted to the finder of fact, the court shall find, after a hearing and based upon clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party claimed against.

SDCL 21-1-4.1 (emphasis added). (Appx. 048).

The disagreement between Fiechtner and American West was the subjective value of Fiechtner's personal injury/UIM claim, over and above the \$110,000 he had already received. The jury determined the value of Fiechtner's breach of contract/UIM claim was

\$400,000, a value in between the parties' pre-trial settlement negotiations. At trial, evidence of willful, wanton, or malicious conduct by American West was absent.

"Malice is an essential element of a punitive damages claim." *Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, ¶ 39, 796 N.W.2d 685, 698.

The required malice may be actual or presumed. Actual malice is a positive state of mind, evidenced by a positive desire and intention to injure one another, actuated by hatred or ill-will towards that person. By contrast, presumed malice is malice which the law infers from or imputes to certain acts. Presumed malice may not be motivated by hatred or ill-will but is present when a person acts willfully or wantonly to the injury of others.

An insurer's clear breach of contract or denial of a claim that is not fairly debatable may indicate malice.

Id., at 699 (emphasis added).

American West was entitled to challenge Fiechtner's claim that his breach of contract cause of action had a value of \$900,000. The jury determined the value was \$400,000, i.e., the jury's Verdict confirmed the value was fairly debatable, which is contrary to a finding that American West acted with malice. Accordingly, the circuit court's refusal to set aside the jury's Verdict of \$890,000 in punitive damages under SDCL 15-6-60(b) was erroneous, and should be reversed. *See Bierle v. Liberty Mut. Ins. Co.*, 992 F.2d 873, 876 (8th Cir. 1993) (judgment as a matter of law on plaintiff's punitive damages claim was appropriate where plaintiffs failed to present evidence insurer's behavior was malicious, willful, or wanton in initial denial of coverage or negotiations). Alternatively, American West seeks a new trial on punitive damages, per SDCL 15-6-59(a)(5) (excessive damages) & (6) (not supported by the evidence).

C. The circuit court erred in awarding attorneys' fees to Fiechtner under SDCL 58-12-3 under the standard of vexatious and unreasonable conduct, as the value of Fiechtner's UIM claim was subjective and fairly debatable.

For the same reasons the circuit court erred by not granting American West's Motions for Judgment as a Matter of Law regarding Fiechtner's bad faith cause of action, and punitive damage claim, the circuit court also erred in granting Fiechtner an award of attorneys' fees. The standard of review on this issue is the clearly erroneous. *Kern v. Progressive N. Ins. Co.*, 2016 S.D. 52, ¶ 32, 883 N.W.2d 511, 518.

Following the circuit court's initial entry of a Judgment, Fiechtner filed a Brief (without a Motion) seeking \$196,632.86 in attorneys' fees per SDCL 58-12-3. (Appx. 050). After a hearing, the circuit court awarded \$101,999.79 in attorneys' fees, and included that amount in a revised Judgment, dated October 31, 2024. (R. 2720). Per SDCL 58-12-3, the circuit court was required to find that American West acted vexatiously or unreasonably.

At trial, Fiechtner did not establish that American West acted vexatiously or unreasonably when American West failed to pay the full amount of Fiechtner's claimed \$900,000 breach of contract claim. To the contrary, the jury's Verdict, awarding \$400,000 in breach of contract damages establishes the opposite—that Fiechtner had significantly overvalued his breach of contract claim.¹⁰ American West was entitled to

¹⁰ Unfortunately, the one-sided nature of first-party insurance litigation does do not permit insurance carriers to make their own motion for attorneys' fees when, as in this case, the jury's Verdict reflects that the insured significantly overvalued his breach of contract claim—in this case, by \$500,000. When only one party has the ability to claim attorneys' fees, or make allegations of bad faith, or punitive damages, the plaintiff becomes incentivized to make unreasonably high settlement demands, even when his personal injury damages do not justify a policy limit award.

contest Fiechtner's \$900,000 settlement demand, as the value of Fiechtner's personal injury claim was subjective, and at a minimum, fairly debatable.

This Court's precedent on a motion for attorney's fees under SDCL 58-12-3 establishes that even a finding of bad faith is not enough, on its own, to support a finding of vexatious and unreasonable conduct. "Before attorney's fees may be awarded under this section, the trial court must find that the insurance company refused to pay the full amount of the insured's loss and that said refusal was either vexatious or without reasonable cause. The jury's finding of bad faith on the part of an insurance company does not mean 'ipso facto' that its conduct was vexatious or without reasonable cause." *Sawyer v. Farm Bureau Mut. Ins. Co.*, 2000 S.D. 144, ¶ 29, 619 N.W.2d 644, 651-52. The evidence does not support a finding that American West acted vexatiously or unreasonably, and the circuit court's award of attorneys' fees should be reversed.

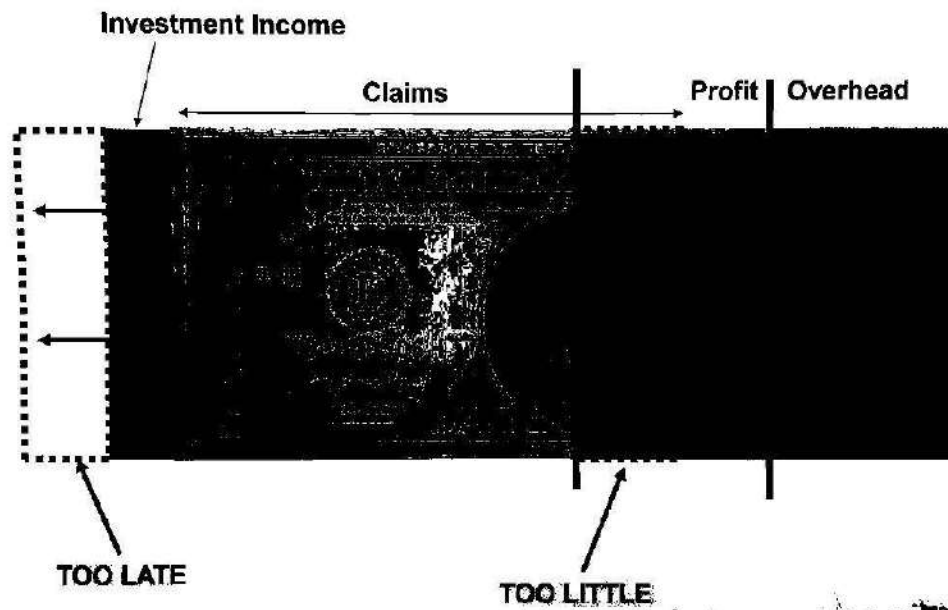
II. Undisclosed Exhibits Published to the Jury

During trial, on two separate occasions, Fiechtner's counsel published exhibits to the jury that were not disclosed to American West prior to trial. Both exhibits were unmarked prior to their publication, and both were created, at least in part, by Fiechtner's counsel. Fiechtner's counsel referred to both exhibits as "demonstrative", which Fiechtner used as justification for not disclosing the exhibits pre-trial. These two exhibits were published to the jury in error, without proper foundation, and in violation of the circuit court's Amended Order for Jury Trial (R. 1401) "...to exchange copies of all Exhibits for Trial...". Fiechtner's publication of both exhibits to the jury was prejudicial.

A. "Claims Dollar Exhibit"

On the first day of trial, Fiechtner called witness, Chris Oen ("Oen"), American West Vice President of Claims, as an adverse witness. During Oen's exam, via use of a

projector, Fiechtner's counsel displayed an image of what Fiechtner's counsel later labeled, "Claims Dollar Exhibit".¹¹ At the time of Fiechtner's initial publication to the jury, the "Claims Dollar Exhibit" had not been disclosed to American West, was unmarked, and had not been admitted as evidence.



("Claims Dollar Exhibit", Plaintiff's Trial Exhibit 6.) As indicated in the trial transcript citation below, the markings on the "Claims Dollar Exhibit" were placed there by Fiechtner's counsel. The parties and the circuit court made the following record following Fiechtner's first publication of the exhibit to the jury, which was the first time American West became aware of the exhibit.

MR. ARNDT: Judge, before we publish things via the monitor, I'd like to make sure they're admitted into exhibits first.

MR. CULHANE: Judge, it's a picture of a dollar.

¹¹ When the circuit court required Fiechtner's counsel to mark the "Claims Dollar Exhibit", Fiechtner's counsel indicated a flash drive was being marked as Exhibit 6, and the flash drive was received by the Court. Transcript, "Jury Trial: Day 1", p. 70. (R. 3121, Appx. 032-034).

MR. ARNDT: Your Honor, I'm going to object. It has not been properly admitted.

THE COURT: Thank you. That's noted for the record.

Transcript "Jury Trial: Day 1", p. 63. (R. 3114, Appx. 030-031).

After this exchange, the circuit court ordered a recess, excused the jury, and the parties made a further record.

THE COURT: Go ahead, Mr. Arndt.

MR. ARNDT: Thank you, Judge. I think just prior to the break, plaintiff's counsel pulled up -- actually flashed it on the screen just for an instant as an exhibit that had not been properly admitted.

He's (Fiechtner's counsel) pulling it up now.

I guess I'd ask the Court to reflect it looks like a dollar bill. And I think plaintiff's counsel's comment was that he wanted to use it for demonstrative purposes. I don't believe if it hasn't been admitted, whether it's for demonstrative or something else, is not something the jury can view.

THE COURT: Thank you. Mr. Culhane, what's your response?

MR. CULHANE: Your Honor, this is, indeed, a picture of a dollar bill. I intend to go through how this dollar bill, which is in the form of a premium payment, gets broken down in the insurance company, which is where we were going with Mr. Oen. It's not intended to go back to the jury. It's just intended to illustrate and help the jury understand how premium payments are separated once they reach an insurance company.

THE COURT: Thank you.

Well, Mr. Arndt is correct. You'll have to lay foundation to get the information that is gleaned in that dollar bill. I saw -- the last one that I saw was painted. It looks like it was broken down.

MR. CULHANE: That's, yeah, part of my work.

THE COURT: I get it, but at this point, until you lay proper foundation, it can't be admitted as a demonstrative exhibit. So once you get the information on the record, then we can go ahead and ask to have this it -- at that point, offered as a demonstrative exhibit.

And then you can go ahead and Mr. Arndt can make an objection or agree to have it admitted and then go ahead and, once again, I believe properly publish for the jury.

MR. CULHANE: Okay. Thank you, Judge.

THE COURT: All right. I think you can do it. You just have to ask the questions to lay foundation.

MR. CULHANE: Perfect. Thank you, Judge.

THE COURT: Yep.

MR. ARNDT: Before that happened, I'd also note that this is not something that's been produced to counsel prior to trial.

THE COURT: Yeah. Noted. Thank you.

Transcript, "Jury Trial: Day 1", pp. 63-65 (emphasis added). (R. 3114-3116, Appx. 030).

Upon the jury's return, Fiechtner's counsel attempted to lay foundation for the "Claims Dollar Exhibit" with witness Oen, who had also never previously seen the exhibit. Fiechtner's counsel then proceeded to reoffer and republish the exhibit over American West's repeated objections. The circuit court allowed Fiechtner to do so, and eventually admitted the "Claims Dollar Exhibit" as a demonstrative exhibit.

MR. CULHANE: Your Honor, at this time I would present to a demonstrative dollar broken into three components he's now described.

THE COURT: Any objection?

MR. ARNDT: Same objection, Your Honor. It's -- proper foundation hasn't been laid. Also wasn't exchanged prior to trial.

THE COURT: Noted. I'm going to go ahead and allow it as a demonstrative exhibit. What is it marked as?

MR. CULHANE: It's just a dollar bill, Judge. It's not going to go to the jury.

THE COURT: All right. Well, we're going to need at least something, so go ahead and at least have it marked.

MR. CULHANE: Okay. I'll give the jump drive to the Court. Does that work?

THE COURT: What do you want it marked as?

MR. CULHANE: The claims dollar.

THE COURT: All right. Claims dollar. And what number should it be?

MR. CULHANE: I think we're on Number 6 if the Court intends to --

THE COURT: That's fine. Number 6 works. Received as a demonstrative exhibit.

Transcript, "Jury Trial: Day 1", pp. 69-70. (R. 3120-3121, Appx. 032-034).

B. Dr. Chaudhry Slide Show

Prior to trial, Fiechtner's counsel took a trial deposition of Plaintiff's medical expert, neuroradiologist, Dr. Ammar Chaudhry, "City of Hope National Medical Center", Duarte, CA. (C.V. of Dr. Chaudhry, Plaintiff's Trial Exhibit 11) (R. 1781). Fiechtner played the entirety of that trial deposition (contained on a flash drive and marked by Fiechtner as Plaintiff's Exhibit 10) to the jury during the second morning of trial.

American West renewed its objections to the exhibits shown to the jury via Dr. Chaudhry's trial deposition, including a "PowerPoint or slide show"¹² that Fiechtner did not previously disclose, mark or admit as an exhibit at trial. The circuit court overruled American West's objections. Transcript, "Jury Trial: Day 2", pp. 32-35. (R. 3197-3200).

Also, prior to trial, on July 5, 2023, Fiechtner filed "Plaintiff's Designation of Dr. Ammar Chaudhry's Deposition Testimony." As reflected in Dr. Chaudhry's trial

¹² The only visual record of "PowerPoint or slide show" is contained in Dr. Chaudry's trial deposition, which is a flash drive, marked as Plaintiff's Trial Exhibit 10 (R. 2949, Appx. 051).

deposition transcript (R. 1255, Appx. 035-041)¹³, American West made a number of objections during Dr. Chaudhry's Trial Deposition, and renewed those objections to the circuit court in response to "Plaintiff's Designation of Dr. Ammar Chaudhry's Deposition Testimony." Although somewhat difficult to decipher, the circuit court's "Amended Order" (R. 1506) denied all of American West's objections made during Dr. Chaudhry's Trial Deposition.

American West's objections made during Dr. Chaudhry's Trial Deposition included an objection to the admission of the "PowerPoint or slide show" that was created, at least in part, by Fiechtner's counsel.

Q: (By Atty. Culhane) Okay. And then moving on to the demonstrative PowerPoint or slide show, whatever you will. Did your office work with my office to prepare a brief slide show?

A: (Dr. Chaudhry) Yup.

Q: Would that be useful, do you think, in explaining some of the things and kind of pulling this all together?

A: Yes.

Q: Would you kindly pull that up and then walk us -- walk us through it, stopping as you see fit to explain?

A: Sure.

Objection: (Atty Arndt) I'm going to form an objection at this point regarding -- I guess whatever we're calling this. Are you marking this as an exhibit, Seamus?

(Atty. Culhane) No. I don't anticipate this going to the jury.

(Atty. Arndt) Well, that's not my question. Are you marking this as an exhibit?

(Atty. Culhane): No.

¹³ The written transcript of Dr. Chaudry's trial testimony is found within "Plaintiff's Designation of Dr. Ammar Chaudry's Deposition Testimony" (R. 1255).

(Atty. Arndt) Okay. I'm going to object to whatever is on the screen now, that it is hearsay, it lacks foundation, and it's duplicative of any testimony that the witness would be orally providing to the jury.

Q: (Atty. Culhane) Okay. Let's go ahead, Doctor. We can move forward with it so we can hopefully get everybody out of here sooner.

A: (Dr. Chaudhry) So, yeah, this is just first slide, patient information. He was involved in a T-bone collision. So after the report, I found out the patient was involved in a car accident. It was a T-bone-type collision. So, yeah, so this is my understanding of the type of T-bone collision. And this is just sort of showing what happens. The middle picture shows, like, what happens biomechanically as patients, you know, are involved in a car accident like this, where there is multiple rotational forces at play. And this third sort of series of images is showing you like how the head is moving. I'll just quickly play it again, and I'm focusing on the person as the head is moving, pieces of the brain lobes are moving. And now this is sort of -- kind of like as the event is happening. If you can focus kindly on the brain, noting that the brain is not stitched on to the skull. The brain is mobile. So I'll hit play now.

Objection: (Atty. Arndt) I'm going to add another objection to this line of question, that it's narrative.

Q: (Atty. Culhane) Go ahead, Doctor.

A: (Dr. Chaudhry) Sure. So you can see, like, the brain slip forward with anterior transition and then posteriorly. And the red is identifying the impact the brain feels when it's hitting the inner part of the skull. So it's kind of like, you know, Jell-O or yogurt in a container and as it's being shook, right, it's moving and there's impact.

(Dr. Chaudhry Trial Depo. Trans (March 3, 2022), p. 37, line 23 through p. 40, line 8, attached to "Plaintiff's Designation of Dr. Ammar Chaudhry's Deposition Testimony" (emphasis added). (R. 1292-1295, Appx. 035-041). American West renewed their objections on pages 51 and 52 of Dr. Chaudhry's Trial Deposition. (R. 1306-1307).

The Court's Amended Order for Jury Trial (R. 1401) included a deadline for the parties "...to exchange copies of all Exhibits for Trial..." Fiechtner did not disclose the, "Claims Dollar Exhibit" nor the "PowerPoint or slide show" prior to trial. This Court has

previously granted a new trial due to undisclosed exhibits admitted at trial. *See Kaiser v. Univ. Physicians Clinic*, 2006 S.D. 95, ¶ 49, 724 N.W.2d 186, 199.

Beyond violating the Court's Amended Order for Jury Trial requiring the parties to exchange exhibits, Fiechtner's counsel's own creation of the undisclosed exhibits violates SDCL 19-19-901 (authenticating and identifying evidence) (Appx. 045-046), and SDCL 19-19-903 (subscribing witness) (Appx. 047). Fiechtner's counsel own creation of both exhibits also violates the fundamental prohibition of counsel acting as both an advocate and witness at trial. *See* SDCL 19-1-3. During another UIM trial, *Kern v. Progressive N. Ins. Co.*, 2016 S.D. 52, 883 N.W.2d 511, this Court confirmed that counsel for the parties could not create their client's evidence.

Regardless of whether Kern intended the letter to show Progressive's bad faith or as substantive evidence contesting Dr. Segal's report, it was still a letter written by Kern's trial counsel containing trial counsel's opinions. Attorneys cannot participate in a trial after they have testified as witnesses in that trial. SDCL 19-1-3. Additionally, the South Dakota Rules of Professional Conduct prohibit an attorney from acting as both an advocate and a witness in a case with exceptions that would not have applied here. South Dakota Rule of Professional Conduct 3.7.

Id. at ¶ 20.

Labeling attorney created exhibits as "demonstrative" does not waive admissibility requirements. American West was prejudiced when Fiechtner published both the "Claims Dollar Exhibit" and "PowerPoint or slide show" to the jury.

Use of the "PowerPoint or slide show" also led Dr. Chaudhry to testify in an improper narrative format. This Court has previously approved a circuit court's ruling restrict narrative testimony.

Tom claims the circuit court abused its discretion in purportedly limiting his testimony relating to specific details concerning the land. Tom provides one example. He claims the circuit court "cut Tom's testimony short by telling

him that he had only 1.5 minutes to testify concerning the various CRP programs and contracts affecting numerous issues in the case.”

The record does not support Tom’s claim that the circuit court prevented him from introducing detailed testimony. Instead, the record quite clearly shows that the court was properly attempting to limit Tom’s long narrative answers in direct examination. The court simply requested Tom’s attorney to ask direct questions for Tom to answer, “as opposed to Mr. Blue just telling [the court] everything.”

Blue v. Blue, 2018 S.D. 58, ¶¶ 21-22, 916 N.W.2d 131, 138.

Narration testimony from an expert witness upon direct examination presents a particular danger. Via a narration, an expert witness may attempt to introduce evidence to a jury, under the guise of expertise, that is otherwise unreliable, or lacks foundation.

It is also inappropriate for experts to become a vehicle for factual narrative. Acting simply as a narrator of the facts does not convey opinions based on an expert’s knowledge and expertise; nor is such a narration traceable to a reliable methodology.

Luitpold Pharms., Inc. v. Ed. Geistlich Sohne A.G. Fur Chemische Industrie, No. 11-CV-681 KBF, 2015 WL 5459662, at *3 (S.D.N.Y. Sept. 16, 2015) (internal citations omitted). The danger described by the *Luitpold Pharms* Court is the type of testimony that Fiechtner’s counsel elicited from Dr. Chaudhry through the previously undisclosed “PowerPoint or slide show”. In reference to the “PowerPoint or slide show”, Fiechtner’s counsel asked Dr. Chaudhry to “...walk us through it, stopping as you see fit to explain.” Dr. Chaudhry proceeded to provide an oral description, as well as a visual depiction of how Fiechtner’s head may have moved as a result of the car collision—not a depiction of how Plaintiff Fiechtner’s head actually moved (no video exists of Fiechtner during the accident), but how Dr. Chaudhry and Fiechtner’s counsel created slides to demonstrate their version of how Fiechtner’s head may have moved in an effort to support Fiechtner’s claim of a brain injury. The introduction of the “PowerPoint or slide show” was a

fundamental violation of rules of evidence 901 and 903, and led to inadmissible narrative testimony.

CONCLUSION

When considering Fiechtner's own evaluation, \$900,000, of his pre-litigation breach of contract claim, compared to the jury's valuation of that claim at \$400,000, the jury's awards of damages for Fiechtner's bad faith cause of action (\$250,000), and punitive damages (\$890,000) against American West are unjustified and contrary to established law. The circuit court's award of attorneys' fees (\$101,999.79) against American West, is also unjustified and contrary to the statutory standard requiring vexatious and unreasonable conduct. Each of these damage amounts should be set aside, as they are contrary to South Dakota law.

Further, Fiechtner's pre-trial lack of disclosure of two exhibits, both published to the jury by Fiechtner during trial, violated the Court's Amended Order for Jury Trial and basic foundational rules of evidence. The improper publication of these two exhibits to the jury undoubtedly impacted the jury's Verdict, and were prejudicial to American West.

American West respectfully requests that this Court reverse the decision of the circuit court's denial of American West's Motion Notwithstanding the Verdict, and set aside the jury's \$250,000 award for bad faith, \$890,000 award for punitive damages, and \$101,999.79 for attorneys' fees. American West is willing to concede that the \$400,000 award for Fiechtner's subjective breach of contract cause of action may stand. In the alternative, American West respectfully requests that this Court reverse the circuit court's denial of American West's Motion for New Trial, vacate the circuit court's most recent Judgment, and remand this case to the circuit court with an Order for a new trial.

Dated at Sioux Falls, South Dakota, this 26th day of December, 2024.

EVANS, HAIGH & ARNDT, L.L.P.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Brief of Appellant American West Insurance Company complies with the type volume limitations set forth in SDCL 15-26A-66(b)(2). Based on the information provided by Microsoft Word 2016, this Brief contains 9,154 words, excluding the Table of Contents, Table of Authorities, Jurisdiction Statement, Statement of the Issues, any addendum materials, and any Certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2016.

Dated at Sioux Falls, South Dakota, this 26th day of December, 2024.

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The undersigned hereby certifies that the foregoing Brief of Appellees, was filed and served using the Court's Odyssey File and Serve system which upon information and belief will send e-mail notification of such filing to:

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Dated at Sioux Falls, South Dakota, this 26th day of December, 2024.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30841

MARK FIECHTNER,

Plaintiff and Appellee,

vs.

AMERICAN WEST INSURANCE COMPANY,

Defendant and Appellant.

Appeal from the Circuit Court
Second Judicial Circuit
Lincoln County, South Dakota

The Honorable John R. Pekas, Circuit Court Judge

APPELLANT'S APPENDIX

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Notice of Appeal of Defendant and Appellant American West Insurance Company
filed September 13, 2024, and Amended Notice of Appeal filed November 11, 2024.

APPENDIX TABLE OF CONTENTS

<u>DOCUMENT</u>	<u>APPENDIX PAGE(S)</u>
<u>Per SDCL 15-26A-60(8):</u>	
(a) Judgment (R. 2958-2959)	Appx. 001-002
(b) Statements of material facts and record citations required in § 15-6-56(c)(1) and (2):	
• “Defendant American West Insurance Company’s Statement of Undisputed Material Facts” (R. 208)	Appx. 003-010
• Plaintiff’s “Response to Defendant’s Statement of Undisputed Material Facts, Supplemented with Additional Material Facts” (R. 814)	Appx. 011-019
(c) Relevant portions of the pleadings, instructions, and transcripts:	
• Complaint (R. 2)	Appx. 020-024
• Deposition of Plaintiff, Mark Fiechtner (R. 403, 409-411, 413)	Appx. 025-029
• Transcript, “Jury Trial: Day 1”, p. 63 (R. 3052, 3114)	Appx. 030-031
• Transcript, “Jury Trial: Day 1”, pp. 69-70 (R. 3052, 3120-3121)	Appx. 032-034
• Dr. Chaudhry Trial Deposition Transcript (March 3, 2022), pp. 37- 40 (R. 1256, 1292-1295, 1306-1307)	Appx. 035-041
(d) Items enumerated in § 15-26A-65:	
• SDCL 15-6-50(a)	Appx. 042
• SDCL 15-6-50(b)	Appx. 043
• SDCL 15-6-59(a)	Appx. 044
• SDCL 19-19-901	Appx. 045-046
• SDCL 19-19-903	Appx. 047
• SDCL 21-1-4.1	Appx. 048
• SDCL 21-3-2	Appx. 049
• SDCL 58-12-3	Appx. 050
(e) Any other parts of the record to which the parties wish to direct the particular attention of the Court:	
• “Physical Exhibit List” (R. 2949)	Appx. 051
• “Flash Drive Dr. Chaudhry Deposition”, Plaintiff’s Trial Exhibit 10 (see footnote ¹² on page 27 of Brief of Appellant)	
• “Flash Drive Claims Dollar Animation”, Plaintiff’s Trial Exhibit 6 (see footnote ¹¹ on page 23 of Brief of Appellant)	
• Accident Report (R.251-257)	Appx. 052-058

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF LINCOLN

SECOND JUDICIAL CIRCUIT

MARK FIECHTNER,
Plaintiff,

v.

AMERICAN WEST INSURANCE
COMPANY,
Defendant.

41CIV19-000648

JUDGMENT

The above-captioned action having been tried to a jury on April 9-12, 2024, the Honorable John Pekas, presiding, and the Jury having entered a verdict for the Plaintiff:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Plaintiff shall have and recover from the Defendant the sum of four hundred thousand dollars (\$400,000) in contract damages together with prejudgment interest from October 23, 2019, in the amount of \$189,369.86.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Plaintiff shall have and recover from the Defendant the sum of two hundred and fifty thousand dollars (\$250,000) for tort damages related to the claims for insurance bad faith together with post-judgment interest here forward to be determined when paid.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Plaintiff shall have and recover from the Defendant the sum of eight hundred and ninety thousand dollars (\$890,000) in punitive damages together with post-judgment interest here forward to be determined when paid.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Plaintiff shall have and recover from the Defendant the sum of one hundred one thousand nine hundred ninety-nine

dollars and seventy-nine cents (\$101,999.79) representing statutory attorneys' fees costs of ninety-six thousand forty-five dollars (\$96,045.00) and sales tax of five thousand nine hundred fifty-four dollars and seventy-nine cents (\$5,954.79).

BY THE COURT:
10/31/2024 12:27:22 PM

Attest:
Anderson, Brittan
Clerk/Deputy



A handwritten signature in black ink, appearing to read "John Pekas", is written over a horizontal line.

Honorable John Pekas
Circuit Court Judge

5. Belliveau had a red light. She attempted to stop, but slid due to the snowy road conditions. Belliveau slid in front of Plaintiff, who could not avoid striking the passenger side of Belliveau's car with the front of his pickup. *Id.*

6. The Accident Report reflected that Plaintiff was not injured in the accident.¹ *Id.* (Accident Report at 4).

7. Plaintiff was wearing his seatbelt and the air bags in his pickup did not deploy. *Id.*

8. Plaintiff was not transported to the emergency room. *Id.*

9. Plaintiff's pickup sustained minor damage, and he was able to drive away after the accident. *Id.* (Accident Report at 6).

10. Per the Accident Report, there is no dispute that Belliveau was the party at fault for causing the accident. *Id.*

11. American West has never alleged that Fiechtner had any fault in causing the accident.

12. At the time of the accident, Plaintiff had automobile insurance through American West. The policy provided \$1,000,000 in UIM benefits. Arndt Aff. ¶ 3, Ex. 2 (FB Policy 0002). It also provided \$10,000 in medical payment benefits. *Id.*

13. After the accident, American West sent correspondence to Plaintiff, advising of his medical payment benefits of \$10,000. Arndt Aff. ¶ 4, Ex. 3 (FB 1048).

14. American West contacted Belliveau's insurance to see if they would be accepting liability. *See* Arndt Aff. ¶ 5, Ex. 4 (FB 1122).

¹ American West recognizes that an individual may only realize an injury after they have left an accident scene. American West offers Plaintiff's lack of a reported injury at the accident scene as context for this accident and all of the claims that Plaintiff is making via this lawsuit.

15. On April 27, 2018, American West received photographs of Fiechtner's pickup reflecting the relatively minor damage to Fiechtner's pickup incurred in the accident. *Id.*; Arndt Aff. ¶ 6, Ex. 5 (FB 1053-1089).

16. Following some post-accident treatment by Fiechtner, American West paid Fiechtner's medical providers the \$10,000 of medical payment benefits provided in Fiechtner's American West policy. Arndt Aff. ¶ 7, Ex. 6 (FB 1124).

17. On July 31, 2019, fifteen months after the accident, Fiechtner made a personal injury claim against Belliveau. Arndt Aff. ¶ 8, Ex. 7 (Plaintiff's Settlement Demand to Belliveau's insurance); Complaint ¶ 3.

18. As a part of his claim against Belliveau, Fiechtner alleged \$18,435.47 in accident-related medical expenses. *Id.* (Plaintiff's Settlement Demand at FB 61).

19. Fiechtner eventually accepted a settlement of his personal injury claim against Belliveau for \$100,000, which represented Belliveau's auto liability policy limits. Complaint ¶ 5.

20. After settling his personal injury claim with the tortfeasor for her \$100,000 policy limits, Fiechtner made a policy limit demand of \$900,000 (\$1 million UIM limits – \$100,000 tortfeasor liability limits = \$900,000) for UIM benefits to American West. Arndt Aff. ¶ 9, Ex. 8 (Culhane e-mail from August 28, 2019); Complaint ¶¶ 9-10.

21. American West evaluated Plaintiff's UIM claim. *See* Arndt Aff. ¶ 10, Ex. 9 (e-mail exchange between American West and Culhane); Arndt Aff. ¶ 11, Ex. 10 (Kramer Depo. at 22:20-23:9; 46:15-47:3).

22. As part of American West's investigation and evaluation, American West adjuster, Abby Kramer, reviewed the accident report and facts pertaining to the nature and severity of the accident, Fiechtner's medical records and bills as provided by Fiechtner's

counsel, post-accident photos of Fiechtner's pickup, and Fiechtner's publicly accessible social media accounts. Arndt Aff. ¶ 10, Ex. 9 (e-mail exchange between American West and Culhane); Arndt Aff. ¶ 11, Ex. 10 (Kramer Depo. at 22:20-23:9; 46:15-47:3).

23. Kramer also conferred with her manager, American West casualty claims manager, Chris Oen, to discuss and assess the value of Fiechtner's personal injury claim. Arndt Aff. ¶ 10, Ex. 9 (e-mail exchange between American West and Culhane); Arndt Aff. ¶ 11, Ex. 10 (Kramer Depo. at 22:20-23:9; 46:15-47:3).

24. Fiechtner's medical records reflect that Fiechtner did not seek any emergency medical treatment after the accident. Arndt Aff. ¶ 12, Ex. 11 (FB 67).

25. Fiechtner's first post-accident appointment was with a chiropractor four days post-accident. *See* Arndt Aff. ¶ 12, Ex. 11 (FB 67).

26. Fiechtner reported to his chiropractor that he did not receive a head injury or lose consciousness, and that he did not strike any portion of his body against any object in his vehicle. Arndt Aff. ¶ 12, Ex. 11 (FB 67).

27. Fiechtner had not missed any work since the accident. *Id.* He reported back to the chiropractor for treatment on April 20, 2018, eight days after the accident, and reported that his headaches improved, but still had pain in his upper and mid back. *Id.* (FB 71).

28. Over the next month after the accident, Fiechtner attended seven chiropractic sessions. *Id.* (FB 67-82).

29. The records for each of Fiechtner's initial six visits reflect objective improvements in Fiechtner's condition. *Id.* (FB 71, 73, 75, 77, 79).

30. Fiechtner was referred to Dr. Wingate at the Orthopedic Institute. During his initial visit with Dr. Wingate, Fiechtner reported neck pain, headaches, and blurred vision. *Id.* (FB 93).

31. His chief complaint was neck pain. *Id.*

32. Cervical x-rays were performed and were negative for fractures, dislocation, and scoliosis. *Id.*

33. An MRI was performed, which showed “Mild cervical degenerative disc disease with very mild disc bulging without spinal stenosis or spinal cord compression. No focal disc herniation.” Arndt. Aff. ¶ 12, Ex. 11 (FB 877) (emphasis added).

34. Fiechtner was referred to pain management, where he ultimately received four trigger point injections in his neck between June 20, 2018, and November 28, 2018. *Id.* (FB 567, 582, 605, 623).

35. Despite denying a head injury at the accident scene, Fiechtner was eventually seen by WorkForce for a concussion evaluation. *Id.* (FB 836-37).

36. He was assessed for a possible concussion, and displayed symptoms of contrecoup concussion.² *Id.*

37. An MRI of his brain was ordered, which showed no acute injuries or hemorrhaging. *Id.* (FB 858-59).

38. Fiechtner was referred to an ophthalmologist to be assessed for vision therapy.

39. Fiechtner (now 52) was seen by an ophthalmologist for his complaints about blurred near-sighted vision. *Id.* (FB 370).

40. He was prescribed six months of vision therapy. *Id.* (FB 375).

41. Follow-up appointments with the ophthalmologist reflected that Fiechtner was making progress with the blurred vision. *Id.* (FB 370-401).

42. By February 2019, Fiechtner was reporting no headaches and showing continued

² A contrecoup injury involves a contusion on the opposite side of the actual site of impact to the head. Again, at the accident scene, Fiechtner denied striking his head.

improvements with his vision. *Id.* (FB 398-399).

43. Fiechtner has no records of any eye treatment after March 13, 2019. *See id.* (FB 370-401).

44. Fiechtner has produced no medical treatment records after March 13, 2019. *See* Arndt Aff. ¶ 12, Ex. 11.

45. In total, Plaintiff's medical bills totaled \$18,312.15. Arndt Aff. ¶ 13, Ex. 12.

46. A review of Plaintiff's social media showed that he posted about the accident on the day that it occurred, stating that "[...] I just got in an accident with a young lady who slid through an intersection with her two infant children.... everyone is ok, but could've been much worse." Arndt Aff. ¶ 14, Ex. 13 (FB 32) (emphasis added).

47. A post from April 15, 2018, the day after the accident, depicts Fiechtner using his pickup to plow snow. *Id.* (FB 33).

48. A post from May 25, 2018, six weeks after the accident, depicts Fiechtner boating. *Id.* (FB 34).

49. Three days later, Fiechtner posted a picture of himself and his daughter on an airplane going to Phoenix. *Id.* (FB 35).

50. On January 30, 2019, Fiechtner posted a video showing himself and his daughter throwing water up in the air to watch it freeze. *Id.* (FB 36).

51. Based on the facts of the accident, Plaintiff's medical records and bills, Plaintiff's social media posts reflecting he was not injured, and the fact that Plaintiff had recovered \$100,000 in liability limits from Belliveau (the at-fault driver), American West agreed to waive its \$10,000 subrogation claim for the med-pay benefits it already paid to Fiechtner's medical providers, and offered an additional \$10,000 in UIM benefits to settle Fiechtner's UIM claim.

Arndt Aff. ¶ 15, Ex. 14 (September 23, 2019, letter from Abby Kramer of American West to Turbak Law office); Arndt Aff. ¶ 11, Ex. 10 (Kramer Depo. at 22:20-23: 9; 46:15-47:3).

52. American West's offer represented a total value of Plaintiff's personal injury claim of \$120,000 (\$100,000 tortfeasor limits + \$10,000 medical pay benefits + 10,000 UIM benefits = \$120,000). *Id.*

53. Fiechtner declined American West's UIM settlement offer (representing a total value of \$120,000) and continued to demand the full remaining \$900,000 in UIM policy limits. Arndt Aff. ¶ 16, Ex. 15 (September 23, 2019, e-mail from Plaintiff's counsel to Abby Kramer of American West).

54. When American West declined to pay the additional \$900,000 in UIM benefits, Plaintiff filed this lawsuit. *See* Complaint.

55. After the accident, Plaintiff was still able to ride his Harley Davidson motorcycle, run his skid steer, and remain physically active every day. Arndt Aff. ¶ 17, Ex. 16 (Fiechtner Depo. at 63:20-64:13).

Dated this 20th day of May, 2022.

EVANS, HAIGH & ARNDT, LLP

/s/ Mark J. Arndt

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20th day of May, 2022, a true and correct copy of the foregoing **Defendant American West Insurance Company's Statement of Undisputed Material Facts** was filed and served using the Court's Odyssey File and Serve system which upon information and belief will send e-mail notification of such filing to Seamus W. Culhane and Nancy J. Turbak Berry of Turbak Law Office, seamus@turbaklaw.com, nancy@turbaklaw.com, attorneys for Plaintiff.

/s/ Mark J. Arndt

Mark J. Arndt

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF LINCOLN

SECOND JUDICIAL CIRCUIT

MARK FIECHTNER,

Plaintiff,

v.

AMERICAN WEST INSURANCE
COMPANY,

Defendant.

41CIV19-000648

RESPONSE TO DEFENDANT'S
STATEMENT OF UNDISPUTED
MATERIAL FACTS, SUPPLEMENTED
WITH ADDITIONAL MATERIAL FACTS

Pursuant to SDCL § 15-6-56(c), Plaintiffs submit the *following Response to Defendant's Statement of Undisputed Material Facts* ("SUMF"). Mark Fiechtner would submit the Additional Material Facts, which must be assumed as true for purposes of the summary judgment hearing, which are not adequately set forth in American West Insurance Company's *Statement of Undisputed Material Facts*.

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted. Additional material facts:

6(a). The accident report documents no injury however Fiechtner did seek medical attention four days post-collision for pain in his neck, head, upper and mid back,

Appx. 011

as well as sudden visual disturbances. (Culhane Aff. ¶ 4, Ex. 3-excerpts from Fiechtner's Active Spine Medical Records (MF0064-MF0071)).

6(b). Fiechtner doesn't recall being asked by law enforcement whether he was injured at the scene. (Culhane Aff. ¶ 3, Ex. 2-excerpts from Fiechtner Trial Deposition p. 28-29.)

7. Admitted.

8. Admitted. Additional material facts:

8(a). Please see 6(a).

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

16. Admitted.

17. Admitted.

18. Admitted. Additional material facts:

18(a). Plaintiff submitted a demand outlining his medical expenses as well as the impact to his life to Belliveau's insurance company. In that demand, plaintiff outlines what he expects is at least a million dollars in damages due to the impact on Fiechtner's life. (Culhane Aff. ¶ 5, Ex. 4-demand from Seamus Culhane to Pat Keenan of IMT Group (FB 57-62)).

Appx. 012

19. Admit.

20. Admit.

21. Denied. Additional material facts:

21(a). American West claims to have evaluated Fiechtner's claim however their review relied in part on the adjuster's "personal experience" that involved Googling things in medical records that she did not understand. (Culhane Aff. ¶ 6, Ex. 5-excerpts from Kramer Trial Deposition).

21(b). American West's UIM adjuster did not consult with any medical providers of Fiechtner concerning his injuries. Id.

21(c). American West's UIM adjuster highlighted "strengths" in her evaluation as items that would limit American West's exposure. (Culhane Aff. ¶ 7, Ex. 6—Kramer UIM evaluation).

21(d). American West's UIM did not request to speak with Fiechtner regarding his impact on life or his medical treatment. (Culhane Aff. ¶ 8, Ex. 7-excerpts from Kramer trial deposition.)

22. Denied in part and admitted in part. See 21(a)-21(d) above.

23. Admitted. Additional material facts:

23(a). Chris Oen has no formal medical training regarding brain injuries.
(Culhane Aff. ¶ 9, Ex. 8-excerpts from Oen Trial Deposition)

Appx. 013

23(b). Chris Oen did not conduct any further investigation into Fiechtner's injuries or their ongoing symptoms. (Culhane Aff. ¶ 10, Ex. 9-excerpts from Oen Trial Deposition)

24. Admitted.

25. Admitted.

26. Denied in part and admitted in part. Fiechtner's chiropractic records indicate that his head did come into contact with the head rest at the time of the accident. (Culhane Aff. ¶ 4, Ex. 3-Active Spine Records 0068). Additional material facts:

26(a). Fiechtner told his chiropractor that at the time of the impact he felt discomfort at the back of head, front of neck, back of neck, left side of neck, right side of neck, central mid back and right low back with complaints of headaches, low energy, soreness, and muscle spasms that have gotten worse since the collision. (Id.)

27. Denied in part and admitted in part. Fiechtner did report some mild improvement the day of treatment but that the pain had returned. ((Culhane Aff. ¶ 4, Ex. 3-Active Spine Records 0072). Additional material facts:

27(a). Fiechtner reported back to work but the quality of his work suffered because of his headaches and memory issues. (SUMF ¶ 27, Culhane Aff. ¶11, Ex. 10).

27(b). Fiechtner reported back to the chiropractor eight days post collision at the instruction of his chiropractor who recommended a conservative form of treatment before referring him to Orthopedic Institute for more invasive care. ((Culhane Aff. ¶ 4, Ex. 3-Active Spine Records).

Appx. 014

28. Admitted.

29. Admitted. Additional material facts:

29(a). On May 16, 2018, Fiechtner's provider noted that care had to be modified due to digression and he was referred to Orthopedic Institute for further care. (Id.)

29(b). Throughout the course of chiropractic treatment, Fiechtner's diagnosis remained the same and any "progress" made was based on subjective assessments. (Id.)

30. Admitted.

31. Admitted.

32. Admitted.

33. Admitted.

34. Admitted.

35. Denied in part and admitted in part. Fiechtner did not require medical transportation at the scene however he later told his chiropractor that he did experience head pain at the scene of the collision. (Id.) He was seen by WorkForce for evaluation of a head injury.

36. Admitted.

37. Admitted in part with additional material facts:

37(a). The MRI performed used conventional MRI technology used to assess traditional injuries. (Culhane Aff. ¶ 17, Ex. 16-Dr. Ammar Chandhry Deposition).

37(b). Fiechtner underwent a second MRI using advanced MRI coding that showed evidence of diffuse axonal injury and volume loss in the right hippocampus. As well as axonal bundles indicative of coup-countercoup pattern

Appx. 015

of axonal shear injury consistent with traumatic brain injury. (Culhane Aff. ¶ 18, Ex. 17-Advanced MRI Findings).

37(c). The advanced MRI was read by a neuroradiologist, Dr. Ammar Chandhry. (Culhane Aff. ¶ 24, Ex. 23-Dr. Ammar Chandhry CV).

37(d). The conventional MRI was read by a radiologist. (Culhane Aff. ¶ 23, Ex. 22-Records from Sioux Falls Specialty Hospital).

38. Admitted. Additional material facts:

38(a). Fiechtner was seen by an ophthalmologist after a referral from Dr. Wingate at Orthopedic Institute following the MRI examination. (Culhane Aff. ¶ 14, Ex. 13-Dakota Vision Center Records).

38(b). Dr. Wingate continued, "I am very concerned about his blurry vision that he has been experiencing. I am going to send him to an ophthalmologist and see if there are any changed in the optic nerve. (Culhane Aff. ¶ 20, Ex. 19-medical records from Orthopedic Institute).

39. Admitted. Additional material facts:

39(a). Fiechtner was diagnosed as having convergence insufficiency as well as presbyopia that he did not have pre-collision. (Culhane Aff. ¶ 14, Ex. 13-excerpts from Fiechtner Trial Deposition.)

40. Admitted.

41. Admitted.

42. Denied. Fiechtner reported not having a headache on occasion but reported by March of 2019 that the headache had resumed at vision therapy. (Culhane Aff. ¶ 15, Ex. 14-excerpts from Dakota Vision Center Records.)

Appx. 016

43. Admitted.

44. Admitted.

45. Admitted.

46. Admitted.

47. Admitted.

48. Admitted.

49. Admitted.

50. Admitted.

51. Admitted.

52. Denied in part and admitted in part. American West agreed to waive \$10,000 in subrogation for med-pay benefits and offered an additional \$10,000 in UIM benefits. (See SUMF 51) Fiechtner continues to suffer from memory issues and loss of enjoyment of life as a result of his injuries. (Culhane Aff. ¶ 11, Ex. 10-excerpts from Fiechtner Trial Deposition.)

53. Admitted.

54. Admitted.

55. Denied. American West declined to negotiate and instead told Fiechtner's counsel to file suit. (Culhane Aff. ¶ 16, Ex. 15-Chain of emails between Seamus Culhane and Abby Kramer).

56. Admitted with additional material facts: Fiechtner continues to suffer from pain and memory issues impacting his enjoyment of the activities he previously engaged in pain-free. (Culhane Aff. ¶ 3, Ex. 2-excerpts from Fiechtner Trial Deposition.)

PLAINTIFF'S ADDITIONAL MATERIAL FACTS

Appx. 017

Plaintiff submits the following additional material facts to fully inform the Court. These additional material facts, and the facts previously cited in response to Defendant's numbered paragraphs, establish the factual basis for Plaintiff's claims in which Defendant attempts to dismiss with its summary judgment motion.

PL1. Fiechtner is employed as a real estate broker in Sioux Falls, SD. (Culhane Aff. ¶ 3, Ex. 2-excerpts from Fiechtner Trial Deposition.)

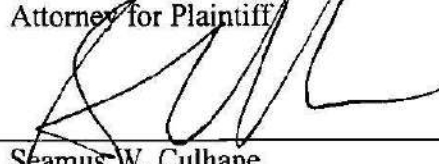
PL2. Fiechtner admitted missing appointments due to memory issues that did not exist before the collision. Id.

PL3. American West knew of a UIM exposure by January of 2019. (Culhane Aff. ¶26, Ex. 25—American West Claim notes).

PL4. Instead of using Mary Jo Dahl's notes and contacts with Fiechtner's doctors, Abby Kramer chose to ignore those notes. (Culhane Aff. ¶27, Ex. 26—Deposition of Kramer).

Dated this 23rd day of September, 2022.

TURBAK LAW OFFICE, P.C.
Attorney for Plaintiff



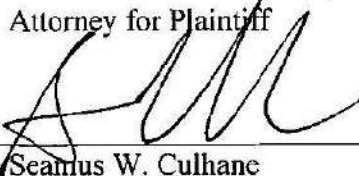
Seamus W. Culhane
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scamus@turbaklaw.com

Appx. 018

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of September, 2022, a true and correct copy of the foregoing Response to Defendant's Statement of Undisputed Material Facts, Supplemented with Additional Material Facts was filed and served using the Court's Odyssey File and Serve system which upon information and belief will send email notification of such filing to Mark J. Arndt of Evans, Haigh & Arndt, LLP, attorney for the Defendant.

TURBAK LAW OFFICE, P.C.
Attorney for Plaintiff



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Appx. 019

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF LINCOLN

SECOND JUDICIAL DISTRICT

MARK FIECHTNER,

Plaintiff,

v.

AMERICAN WEST INSURANCE
COMPANY,

Defendant.

41CIV19

COMPLAINT

Plaintiff, for his Complaint against Defendant American West Insurance Company ("American West"), states as follows:

1. At all times relevant to this action, Mark Fiechtner was an insured under an automobile insurance policy sold by American West that provided underinsured motorist coverage subject to the stated limit of \$1,000,000 per person.

2. On April 14, 2018, Mark Fiechtner was operating a motor vehicle, lawfully crossing an intersection controlled by a traffic light in which Mark had a green light, when a motor vehicle operated by Caitlynn Belliveau illegally and negligently entered the intersection and crashed into the side of the vehicle Mark Fiechtner was operating.

3. Under the circumstances of the crash, Mark Fiechtner was legally entitled to recover compensatory damages from Caitlynn Belliveau for bodily injury Mark Fiechtner sustained in the crash.

4. The vehicle Caitlynn Belliveau was operating was insured under a policy that limited Caitlynn Belliveau' liability insurance coverage to \$100,000.

41CIV19

1

Appx. 020

5. Caitlynn Belliveau' liability insurer paid Mark Fiechtner the full \$100,000 amount of liability insurance coverage available under Caitlynn Belliveau' insurance policy.

6. The amount Caitlynn Belliveau' liability insurer paid Mark Fiechtner was less than the full amount of damages Mark Fiechtner was legally entitled to recover from Caitlynn Belliveau as compensatory damages for bodily injury Mark Fiechtner sustained in the crash.

7. Caitlynn Belliveau was an operator of an underinsured motor vehicle under the terms of the policy American West sold Mark Fiechtner.

8. The policy American West sold Mark Fiechtner requires that, subject to the limits of the underinsured motorist coverage, American West pay Mark Fiechtner underinsured motorist benefits equal to the total compensatory damages Mark Fiechtner was legally entitled to recover from Caitlynn Belliveau for bodily injury Mark Fiechtner sustained in the crash, minus the \$100,000 limits of liability insurance paid by Caitlynn Belliveau' liability insurer.

9. On or about August 28, 2019, Mark Fiechtner submitted to American West a summary and documentation of his claim for underinsured motorist benefits and requested prompt payment of those benefits.

10. The total amount of compensatory damages Mark Fiechtner was legally entitled to recover from Caitlynn Belliveau for bodily injury Mark Fiechtner sustained in the crash exceed \$100,000.

11. Despite several requests by Mark Fiechtner for payment of underinsured motorist benefits, American West has not made any offer of any underinsured motorist benefits.

Count 1 - Breach of Contract

12. Paragraphs 1 through 12 are incorporated by reference as if set forth again here.

13. American West's failure to pay Mark Fiechtner the full amount of underinsured motorist benefits due under the policy, American West sold Mark Fiechtner, is a breach of that contract of insurance.

14. American West's breach of contract has caused Mark Fiechtner damages that include both the loss of money he was entitled to be paid as underinsured motorist benefits, and the loss of use of that money from the time it was due until the time it is paid.

Count 2 - Statutory Entitlement to Attorney's Fees

15. Paragraphs 1 through 15 are incorporated by reference as if set forth again here.

16. American West's failure to pay Mark Fiechtner the full amount of underinsured motorist benefits due under the policy American West sold Mark Fiechtner is vexatious and without reasonable cause, such that Mark Fiechtner is entitled under SDCL §58-12-3 to recover reasonable attorney's fees.

Count 3 – Breach of the Duty of Good Faith and Fair Dealing (Bad Faith)

17. Paragraphs 1 through 17 are incorporated by reference as if set forth again here.

18. At all times relevant to this Complaint, American West has owed its insured, Mark Fiechtner, the duty of good faith and fair dealing.

19. The duty of good faith and fair dealing that American West has owed its insured, Mark Fiechtner, at all times relevant to this Complaint includes the duty to refrain from unfair or deceptive practices as defined by South Dakota law.

20. American West breached the duty of good faith and fair dealing it owed to its insured, Mark Fiechtner.

21. American West's breach of the duty of good faith and fair dealing it owed to its insured, Mark Fiechtner, with regard to his claim for underinsured motorist benefits includes (but is not necessarily limited to): failure to reasonably investigate the claim; failure to reasonably evaluate the claim; failure to give due weight to the insured's interests; failure to pay the full amount of benefits due; and failure to provide a reasonable explanation for denial of the insured's claim for additional benefits due.

22. American West's breach of the duty of good faith and fair dealing it owed to its insured, Mark Fiechtner, caused Mark Fiechtner further damages, including the expenditure of time and the expense of money; feelings of frustration, betrayal, and other emotional distress; and the loss of enjoyment of life.

23. American West's conduct was willful, wanton, and in reckless disregard of the rights of its insured, Mark Fiechtner, and American West acted with malice and oppression toward its insured, Mark Fiechtner, such that Mark Fiechtner also is entitled to punitive and exemplary damages to punish such conduct in his case and deter such conduct in other cases.

THEREFORE, Plaintiff Mark Fiechtner requests that the court enter Judgment against American West as follows:

1. For contractual damages to compensate Mark Fiechtner for the underinsured motorist benefits American West refuses to pay, in the amount of \$900,000 or such other amount the jury decides is just and proper;
2. For attorney's fees and costs pursuant to SDCL §58-12-3;
3. For tort damages to compensate Mark Fiechtner for American West's breach of the duty of good faith and fair dealing, in an amount the jury decides is just and proper;
4. For punitive damages to punish American West's wrongful conduct toward Mark Fiechtner and to deter such conduct in other cases; and

5. For such other and further relief as the court may deem appropriate.

Dated November 13, 2019

TURBAK LAW OFFICE, P.C.
Attorneys for Plaintiff

 
By: Seamus W. Culhane
26 South Broadway, Suite 100
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605-886-8361
seamus@turbaklaw.com

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury on all the issues in this action.

Dated November 13, 2019

TURBAK LAW OFFICE, P.C.
Attorneys for Plaintiff

 
By: Seamus W. Culhane
26 South Broadway, Suite 100
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605-886-8361
seamus@turbaklaw.com

- Page 403 -

1 more money, is that -- I mean, otherwise can you
2 tell me what else they were supposed to do?

3 MR. CULHANE: Object to the form.

4 A. In -- What else can they do is to take care of
5 my -- my issues with whatever means necessary and
6 that involves money. You know, if you have to go
7 to a specialist or if you have to do whatever,
8 you have to make certain adjustments to your
9 life, that requires money. I don't know how else
10 you can boil it down.

11 Q. Sure. I appreciate that. You recognize that
12 part of their evaluation of your claim is to also
13 evaluate what you've already received from
14 Ms. Belliveau's insurance carrier?

15 A. Uh-huh.

16 Q. The hundred thousand dollars?

17 A. (Indicating).

18 Q. Plus the \$10,000 that they paid for your medical
19 expenses?

20 A. (Indicating).

21 Q. Yes?

22 A. Yes.

23 Q. How much more do they need to pay?

24 A. How do I quantify that? I mean, I don't think
25 you have an answer to that question. I sure

Suzanne M. Brudigan, RPR
Freelance Court Reporter
(605) 351-2271

Appx. 026

1 don't. You know, the -- the hundred thousand
2 dollars that I get has to pay my legal counsel.
3 It has to pay for a lot of other things. It's
4 not all going on in my pocket. You know, there's
5 expenses of these things. You're an attorney but
6 you don't work for free so you're charging those
7 guys. Just I don't know how you quantify that.

8 I don't know what adjustments I have to make
9 from this point forward. I don't know what
10 happens the day I go to get out of bed and the
11 pain is too much to proceed with whatever I'm
12 doing that day. I don't know. These are the
13 things that -- these are the things that worry
14 me.

15 Q. So my follow-up question to that would be: If
16 it's difficult to quantify, how is it that
17 American West has acted in bad faith or been
18 deceptive?

19 A. Don't I have a policy for a million dollars? I
20 mean, shouldn't this fall into that category? I
21 mean, why do I pay premiums for a million-dollar
22 policy that I can't receive a benefit from when I
23 need it?

24 Q. And because you have that policy, you think they
25 owe you that one million dollars?

Suzanne M. Brudigan, RPR
Freelance Court Reporter
(605) 351-2271

Appx. 027

1 A. Had a car accident in college but I don't think I
2 was -- I don't think I was injured. And I had a
3 car accident -- was involved in a car accident
4 when I was a sophomore in high school that I had
5 a knee injury but I played football the next --
6 that fall.

7 Q. Otherwise high school/college would have been the
8 last time?

9 A. Yeah, I think so.

10 Q. And how about since this accident in 2018, have
11 you been involved in any car accidents?

12 A. I don't believe so.

13 Q. Were you ever diagnosed with a concussion while
14 you were playing football?

15 A. No.

16 Q. Did you ever feel like you had a concussion or
17 concussion symptoms that might have been
18 undiagnosed?

19 A. No.

20 MR. ARNDT: Okay. I think that's all the
21 questions I have for you, Mark. Thanks.

22 MR. CULHANE: Mark, I've got one question.

23 EXAMINATION BY MR. CULHANE:

24 Q. American West wants to insinuate that there's
25 some argument or debate about whether you're

Suzanne M. Brudigan, RPR
Freelance Court Reporter
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Appx. 028

1 would never choose this direction.

2 Q. Sure. And there was a lot of discussion about
3 difficulty to quantify. Is there any question in
4 your mind that your injuries, when -- whether
5 difficult to quantify or not, exceed a million
6 dollars in value?

7 A. I don't know how to answer that. The unknowns in
8 this situation are the frightening part of it
9 where you just don't know. I mean, I don't know
10 what day my memory doesn't work or what day my
11 neck doesn't work or what day I can't see well
12 enough to do the things I enjoy or the things
13 that I need to do for work. I don't know how to
14 answer that.

15 Q. Do you think a million dollars is enough?

16 A. I don't know how to answer that. I don't know.
17 I don't know.

18 Q. Is there any doubt in your mind that you're
19 entitled to the premiums -- the benefits that you
20 paid to have?

21 A. It would seem like that's the way business is
22 conducted, if you pay for a product, that you're
23 entitled to the full benefit of that product, at
24 least. That's the way I do business, I guess.
25 That's the way I expect people to do business

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Appx. 029

1
2 STATE OF SOUTH DAKOTA)
3 COUNTY OF LINCOLN)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

4
5 _____)
6 MARK FIECHTNER,)
7 Plaintiff,)
8 vs.)
9 AMERICAN WEST INSURANCE)
10 COMPANY,)
11 Defendant.)

JURY TRIAL
DAY #1
(MINUS JURY SELECTION)
CIV 19-648

12
13 BEFORE: THE HONORABLE JOHN PEKAS
14 Circuit Court Judge
Canton, South Dakota
April 9, 2024.

15 APPEARANCES:

16
17 For the Plaintiff: Seamus Culhane
Alison Bakken
18 Attorneys at Law
26 South Broadway Suite 100
19 Watertown, South Dakota 57201

20 For the Defendant: Mark Arndt
21 Attorney at Law
225 East 11th Street Suite 201
22 Sioux Falls, South Dakota 57101

23
24
25
Appx. 030

1 A No, it's not.

2 MR. ARNDT: Judge, before we publish things via the monitor,
3 I'd like to make sure they're admitted into exhibits first.

4 MR. CULHANE: Judge, it's a picture of a dollar.

5 MR. ARNDT: Your Honor, I'm going to object. It has not
6 been properly admitted.

7 THE COURT: Thank you. That's noted for the record.

8 As a matter of fact, we've been going for an hour and a
9 half. I think it's appropriate to let the jury have a brief
10 afternoon opportunity to stretch their legs, so we're going
11 to go ahead and have our afternoon recess. We may have
12 another one depending on how long we go this afternoon.

13 (At which time, Judge Pekas admonished the jury.)

14 THE COURT: Please stand for the jury.

15 (At which time, the jury was excused from the courtroom and
16 a break was taken.)

17 THE COURT: Go ahead, Mr. Arndt.

18 MR. ARNDT: Thank you, Judge.

19 I think just prior to the break, plaintiff's counsel
20 pulled up -- actually flashed it on the screen just for an
21 instant as an exhibit that had not been properly admitted.

22 He's pulling it up now.

23 I guess I'd ask the Court to reflect it looks like a
24 dollar bill. And I think plaintiff's counsel's comment was
25 that he wanted to use it for demonstrative purposes. I

Appx. 031

1
2 STATE OF SOUTH DAKOTA)
3 COUNTY OF LINCOLN)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

4
5 _____)
6 MARK FIECHTNER,)
7 Plaintiff,)
8 vs.)
9 AMERICAN WEST INSURANCE)
10 COMPANY,)
11 Defendant.)

JURY TRIAL
DAY #1
(MINUS JURY SELECTION)
CIV 19-648

12
13 BEFORE: THE HONORABLE JOHN PEKAS
14 Circuit Court Judge
Canton, South Dakota
April 9, 2024.

15 APPEARANCES:

16
17 For the Plaintiff: Seamus Culhane
Alison Bakken
18 Attorneys at Law
26 South Broadway Suite 100
19 Watertown, South Dakota 57201

20 For the Defendant: Mark Arndt
21 Attorney at Law
225 East 11th Street Suite 201
22 Sioux Falls, South Dakota 57101

1 Q Yeah. And, so, there's profit built into that price
2 structure, though, isn't there?

3 A Yes. That would be the goal of the insurance company to
4 have a profit at the end of the year.

5 Q Yeah. And then, meanwhile, you know you're going to have
6 overhead expense every year that's probably not all that
7 similar -- or not all that different than the last year.
8 You still have employees, buildings, paper clips?

9 A Correct.

10 MR. CULHANE: Your Honor, at this time I would present to a
11 demonstrative dollar broken into three components he's now
12 described.

13 THE COURT: Any objection?

14 MR. ARNDT: Same objection, Your Honor. It's -- proper
15 foundation hasn't been laid. Also wasn't exchanged prior to
16 trial.

17 THE COURT: Noted.

18 I'm going to go ahead and allow it as a demonstrative
19 exhibit.

20 What is it marked as?

21 MR. CULHANE: It's just a dollar bill, Judge. It's not
22 going to go to the jury.

23 THE COURT: All right. Well, we're going to need at least
24 something, so go ahead and at least have it marked.

25 MR. CULHANE: Okay. I'll give the jump drive to the Court.

Appx. 033

1 Does that work?

2 THE COURT: What do you want it marked as?

3 MR. CULHANE: The claims dollar.

4 THE COURT: All right. Claims dollar. And what number
5 should it be?

6 MR. CULHANE: I think we're on Number 6 if the Court intends
7 to --

8 THE COURT: That's fine. Number 6 works. Received as a
9 demonstrative exhibit.

10 BY MR. CULHANE:

11 Q Ultimately, we can move the lines on claims to reflect
12 somewhere between 60 and 140 percent, is what you said?
13 True?

14 A Yes. Those lines could be moved anywhere within the dollar
15 and actually completely off the dollar.

16 Q Sure. I mean, right here -- but this is all -- when you
17 said savings account, you know you'll have claims as an
18 insurance company. That's your job?

19 A Correct.

20 Q Right. And you also know that every year you're going to
21 spend some money adjusting claims, paying for the building,
22 and, I mean, you have to buy insurance; right?

23 A We do.

24 Q And then meanwhile there's actually profit built into the
25 transaction I guess that's the first point that I want to

Appx. 034

Video Deposition

1

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2 COUNTY OF LINCOLN) SECOND JUDICIAL CIRCUIT
3 * * * * *
4 MARK FIECHTNER, 41CIV19-0000648
5 Plaintiff,
6 v.
7 AMERICAN WEST INSURANCE COMPANY,
8 Defendant.
9 Zoom Deposition
10 March 3, 2022
11 4:30 p.m.
12 * * * * *
13 DEPOSITION OF
14 Ammar Ahmed Chaudhry, M.D.
15 (Via Zoom)
16 * * * * *
17 APPEARANCES:
18 Mr. Seamus Culhane (Via Zoom)
19 Turbak Law Office
20 26 South Broadway, Suite 100
21 Watertown, South Dakota 57201
22 for the Plaintiff;
23 Mr. Mark J. Arndt (Via Zoom)
24 Evans, Haigh & Arndt
25 225 East 11th Street, Suite 201
Sioux Falls, South Dakota 57104
for the Defendant.

Pat L. Beck, Court Reporter
605.351.8200 stenopat@sio.midco.net

Appx. 035

Video Deposition

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1 So this is the part of the brain that processes
2 visual information with respect to cognition,
3 meaning -- for example, if somebody's reading, how
4 are you, like, sort of processing the sentences and
5 paragraphs as you're reading. I guess reading
6 comprehension, if you will. So that is a bundle
7 called vertical occipital fasciculus. So you can
8 see, like, the fiber tracts are missing on the right
9 side here compared to the left side.

10 Q And is that consistent with someone that might
11 have double vision?

12 A Correct.

13 Q And then on the last page of the CrypNostics
14 report, there's a series of -- I assume those are
15 articles or journals or what are those?

16 A Yeah. These are just reference articles
17 showing, like, use of tractography or DTI in
18 different -- by different disciplines. So like this
19 is neurosurgery, this is a sign of trauma.
20 Neuropsychology, developmental neuropsychology,
21 trauma, so just showing, like, the use cases of TBI
22 across different disciplines.

23 Q Okay. And then moving on to the demonstrative
24 PowerPoint or slide show, whatever you will. Did
25 your office work with my office to prepare a brief

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Appx. 036

Video Deposition

38

1 slide show?

2 A Yup.

3 Q Would that be useful, do you think, in
4 explaining some of the things and kind of pulling
5 this all together?

6 A Yes.

7 Q Would you kindly pull that up and then walk
8 us -- walk us through it, stopping as you see fit to
9 explain?

10 A Sure.

11 MR. ARNDT: I'm going to form an objection at
12 this point regarding -- I guess whatever we're
13 calling this. Are you marking this as an exhibit,
14 Seamus?

15 MR. CULHANE: No. I don't anticipate this
16 going to the jury.

17 MR. ARNDT: Well, that's not my question. Are
18 you marking this as an exhibit?

19 MR. CULHANE: No.

20 MR. ARNDT: Okay. I'm going to object to
21 whatever is on the screen now, that it is hearsay,
22 it lacks foundation, and it's duplicative of any
23 testimony that the witness would be orally providing
24 to the jury.

25 Q (By Mr. Culhane) Okay. Let's go ahead, Doctor.

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Appx. 037

Video Deposition

39

1 We can move forward with it so we can hopefully get
2 everybody out of here sooner.

3 A So, yeah, this is just first slide, patient
4 information. He was involved in a T-bone collision.
5 So after the report, I found out the patient was
6 involved in a car accident. It was a T-bone-type
7 collision.

8 So, yeah, so this is my understanding of
9 the type of T-bone collision. And this is just sort
10 of showing what happens. The middle picture shows,
11 like, what happens biomechanically as patients, you
12 know, are involved in a car accident like this,
13 where there is multiple rotational forces at play.
14 And this third sort of series of images is showing
15 you like how the head is moving. I'll just quickly
16 play it again, and I'm focusing on the person as the
17 head is moving, pieces of the brain lobes are
18 moving.

19 And now this is sort of -- kind of like as
20 the event is happening. If you can focus kindly on
21 the brain, noting that the brain is not stitched on
22 to the skull. The brain is mobile. So I'll hit
23 play now.

24 MR. ARNDT: I'm going to add another objection
25 to this line of question, that it's narrative.

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Appx. 038

Video Deposition

40

1 Q (By Mr. Culhane) Go ahead, Doctor.

2 A Sure. So you can see, like, the brain slip
3 forward with anterior transition and then
4 posteriorly. And the red is identifying the impact
5 the brain feels when it's hitting the inner part of
6 the skull. So it's kind of like, you know, Jell-O
7 or yogurt in a container and as it's being shook,
8 right, it's moving and there's impact.

9 Q Sure. And so let's back up a little bit. In
10 order to have a traumatic brain injury, does a
11 patient have to actually have a physical impact with
12 their skull and some exterior object?

13 A No.

14 Q Is it commonly accepted in your industry that
15 even sudden acceleration or deceleration like may
16 occur in a car crash is adequate to cause a
17 traumatic brain injury?

18 A Correct.

19 Q And so when you say "impact," we're actually
20 talking in this instance about the brain impacting
21 the interior of the skull?

22 A Correct.

23 Q And in Mr. Fiechtner's case you got -- you got
24 the demonstrative showing red on both the forward
25 and rear parts of the brain. And your images -- the

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Appx. 039

Video Deposition

51

1 they are probably related to TBI, but then, you
2 know, I had mentioned I don't know Mr. Fiechtner's
3 history, so excluding migraine or uncontrolled
4 hypertension or diabetes, these would be indicative
5 of traumatic injury because these bright white spots
6 are representative of inflammation in the brain.

7 Q Sure.

8 A I think that's it.

9 Q Is that the end of it?

10 A Yes.

11 Q And just -- I just want to double back a little
12 bit over your training and education and experience.

13 MR. ARNDT: Excuse me. Seamus, before you do
14 that, I just want to renew my objection to the line
15 of questioning, once this PowerPoint or slide show
16 came up, that it was almost entirely narrative.

17 Q (By Mr. Culhane) Okay. Doctor, you can go
18 back to -- let's minimize that.

19 You worked at Johns Hopkins Hospital in
20 the radiology department?

21 A Yes.

22 Q And you worked at Stony Brook University
23 Hospital in the radiology department?

24 A Yes.

25 Q And you also worked as an assistant professor

Pat L. Beck, Court Reporter
605.351.8200 stenopat@sio.midco.net

Appx. 040

Video Deposition

52

1 of anatomy, pathology, microbiology, pharmacology at
2 the USF College of Medicine?

3 A Right. I was a teacher's assistant for -- for
4 those subjects. I was teaching medical students --

5 Q I'm sorry. You've also written three dozen or
6 so different peer-reviewed articles?

7 A Yes.

8 Q And those are all contained within your CV,
9 your most current CV?

10 A Yes.

11 Q Is there anything that we left out here that
12 you feel like would be helpful to the jury to
13 understand sort of how we got here?

14 MR. ARNDT: Objection. Calls for a narrative
15 and speculation.

16 Q (By Mr. Culhane) Go ahead, Doctor.

17 A No. I think we covered, you know, the imaging
18 hallmarks of traumatic injury, lights of hemorrhage,
19 axonal damage, atrophy, and then the FLAIR
20 hyperintensities.

21 MR. CULHANE: Okay. I don't have any further
22 questions, at least at this time, Doctor. I believe
23 Mr. Arndt is going to ask you some questions and I
24 may have a few follow-ups, but thank you.

25 THE WITNESS: Thank you.

Pat L. Beck, Court Reporter
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Appx. 041

WESTLAW CLASSIC

South Dakota Codified Laws

Title 15, Civil Procedure

15-6-50(a). Judgment as a matter of law

SD ST § 15-6-50(a) South Dakota Codified Laws Title 15, Civil Procedure (Approx. 2 pages)

15-6-50--Judgment as a Matter of Law in Jury Trials--Alternative Motion for
New Trial--Conditional Rulings

SDCL § 15-6-50(a)

15-6-50(a). Judgment as a matter of law

Currentness

- (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
- (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

Credits

Source: SDC 1939 & Supp 1960, §§ 33.1314 to 33.1316; SD RCP, Rule 50 (a), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966; SL 2006, ch 318 (Supreme Court Rule 66-44), eff. July 1, 2006.

Notes of Decisions (190)

S D C L § 15-6-50(a), SD ST § 15-6-50(a)

Current through the 2024 Regular Session, 2024 General Election, Ex. Ord. 24-1, and
Supreme Court Rule 24-11

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NOTES OF DECISIONS (190)

In general
Both parties move for judgment
Burden of proof
Conspiracy
Contracts
Counterclaim
Duty of court
Factual disputes
Grounds for motion
Inferences favoring nonmovant
Mortgages
Negligence
No evidence to support claim or defense
Punitive damages
Reasonable minds could differ
Reasons for decision
Review
Sua sponte motion of court
Substantial evidence to sustain claim or defense
Summary judgment distinguished
Test of legal sufficiency of evidence
Time for motion
Waiver of submission to jury
Weight or credibility of evidence

WESTLAW CLASSIC

South Dakota Codified Laws

Title 15. Civil Procedure

15-6-50(b). Renewing motion for judgment after trial--Alternative motion for new trial

SD ST § 15-6-50(b) South Dakota Codified Laws Title 15. Civil Procedure (Approx. 2 pages)

15-6-50--Judgment as a Matter of Law in Jury Trials--Alternative Motion for
New Trial--Conditional Rulings

SDCL § 15-6-50(b)

15-6-50(b). Renewing motion for judgment after trial--Alternative motion for new trial

Correctness

If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than ten days after notice of entry of judgment--and may alternatively request a new trial or join a motion for a new trial under § 15-6-59. In ruling on a renewed motion, the court may:

(1) If a verdict was returned:

- (A) Allow the judgment to stand;
- (B) Order a new trial; or
- (C) Direct entry of judgment as a matter of law; or

(2) If no verdict was returned:

- (A) Order a new trial; or
- (B) Direct entry of judgment as a matter of law.

Credits

Source: SDC 1939, § 33.1705; Supreme Court Order No. 3, 1952; SDC Supp 1960, § 33.1328; SD RCP, Rule 50 (b), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966; Supreme Court Rule 79-4; Supreme Court Rule 82-30; SL 2006, ch 319 (Supreme Court Rule 06-45), eff. July 1, 2006; SL 2008, ch 287 (Supreme Court Rule 08-01), eff. July 1, 2008.

Notes of Decisions (94)

SDCL § 15-6-50(b), SD ST § 15-6-50(b)

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NOTES OF DECISIONS (94)

in general
Advisory verdict
Consideration of evidence and inferences
Contract actions
Counterclaims
Damages award
Failure to move for directed verdict
Federal rule
Grounds for motion
Instructions
Insurance cases
Motion for new trial
Motor vehicle collisions
Powers and duties of court
Purpose
Relationship to motion for directed verdict
Review
Time for motion
Tort actions, generally

WESTLAW CLASSIC

South Dakota Codified Laws
Title 15. Civil Procedure

15-6-59(a). Grounds for new trial

SD ST § 15-6-59(a) South Dakota Codified Laws Title 15. Civil Procedure (Approx. 2 pages)

15-6-59--New Trials--Amendment of Judgments (Refs & Annos)

SDCL § 15-6-59(a)

15-6-59(a). Grounds for new trial

Currentness

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

- (1) Irregularity in the proceedings of the court, jury, or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;
- (2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors;
- (3) Accident or surprise which ordinary prudence could not have guarded against;
- (4) Newly discovered evidence, material to the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;
- (5) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
- (6) Insufficiency of the evidence to justify the verdict or other decision or that it is against law;
- (7) Error of law occurring at the trial; provided, that in the case of claim of error, admission, rejection of evidence, or instructions to the jury or failure of the court to make a finding or conclusion upon a material issue which had not been proposed or requested, it must be based upon an objection, offer of proof or a motion to strike.

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

When the motion be made for a cause mentioned in subparagraphs (1), (2), (3), or (4), it must be made upon affidavits attached to and made a part of the motion, unless as to a cause mentioned in subparagraph (1), the irregularity or abuse of discretion is sufficiently disclosed by the record to support such motion. When the motion is made under subparagraph (6) it shall state the particulars wherein the evidence is claimed to be insufficient.

Credits

NOTES OF DECISIONS (259)

In general
 Alibi, newly discovered evidence
 Arguments of counsel
 Attorney trial strategy
 Burden of proof, newly discovered evidence
 Damages
 Denial of fair trial
 Diligence in procuring evidence, newly discovered evidence
 Discretion of court
 Documents, newly discovered evidence
 Erroneous admission of evidence
 Extraordinary relief in exceptional circumstances, newly discovered evidence
 Handwriting, newly discovered evidence
 Impeachment, newly discovered evidence
 In limine order
 Inferences in favor of nonmovant
 Injustice done by jury verdict
 Instructions
 Insufficiency of evidence
 Irregularity in the proceedings, generally
 Jury instructions
 Misconduct, passion or prejudice of jurors
 Mistaken identity, newly discovered evidence
 Mistrial
 Motion for judgment as a matter of law
 New claim or defense
 Newly discovered evidence
 Objections and waiver of issues
 Partial new trial
 Parties
 Passion or prejudice of jurors
 Pleadings
 Prejudicial error
 Pro se status
 Probability of different result, newly discovered evidence
 Prosecutor's conduct
 Review
 Specificity of grounds
 Statements by court
 Successive motions
 Sufficiency of evidence
 Sufficiency of showing of diligence, newly discovered evidence
 Surety bonds, newly discovered evidence
 Surprise
 Time of discovery, newly discovered evidence
 Time of motion
 Unreasonable or arbitrary verdict
 Waiver of issues

Appx. 044

WESTLAW CLASSIC

South Dakota Codified Laws

Title 19. Evidence (Refs & Annots)

19-19-901. Authenticating or identifying evidence

SD ST § 19-19-901 South Dakota Codified Laws Title 19. Evidence (Approx. 2 pages)

SDCL § 19-19-901

Formerly cited as SD ST § 19-17-1.

19-19-901. Authenticating or identifying evidence

Currentness

(a) In general. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) Examples. The following are examples only—not a complete list—of evidence that satisfies the requirement:

- (1) Testimony of a witness with knowledge. Testimony that an item is what it is claimed to be.
- (2) Nonexpert opinion about handwriting. A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.
- (3) Comparison by an expert witness or the trier of fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.
- (4) Distinctive characteristics and the like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
- (5) Opinion about a voice. An opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.
- (6) Evidence about a telephone conversation. For a telephone conversation, evidence that a call was made to the number assigned at the time to:
 - (A) A particular person, if circumstances, including self-identification, show that the person answering was the one called; or
 - (B) A particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.
- (7) Evidence about public records. Evidence that:
 - (A) A document was recorded or filed in a public office as authorized by law; or
 - (B) A purported public record or statement is from the office where items of this kind are kept.
- (8) Evidence about ancient documents or data compilations. For a document or data compilation, evidence that it:
 - (A) Is in a condition that creates no suspicion about its authenticity;

NOTES OF DECISIONS (47)

In general
Academic records
Audiotapes
Bank books and return slips
Charts
Checks
Computer animation
Computer records
Containers
Criminal records
Diagrams
Driver's license manuals
Hotel registration cards
Insurance claims
Insured mail receipts
Letters and correspondence
Medical reports
Notes
Pawn tickets
Phone records
Price lists
Product manuals
Review
Silent witness theory, videos and photographs
Stolen property
Summary judgment
Telephone conversations
Videos and photographs
Voice identification

(B) Was in a place where, if authentic, it would likely be; and

(C) Is at least 20 years old when offered.

(9) Evidence about a process or system. Evidence describing a process or system and showing that it produces an accurate result.

(10) Methods provided by a statute or rule. Any method of authentication or identification allowed by a state statute or a rule prescribed by the Supreme Court.

Credits

Source: SL 1979, ch 358 (Supreme Court Rule 78-2, Rule 901); SDCL § 19-17-1; SL 2016, ch 239 (Supreme Court Rule 15-52), eff. Jan. 1, 2016.

Notes of Decisions (47)

SDCL § 19-19-901, SD ST § 19-19-901

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South Dakota Codified Laws
Title 19. Evidence (Refs & Anns)

19-19-903. Subscribing witnesses
SD ST § 19-19-903 South Dakota Codified Laws Title 19. Evidence [Appendix 2 (pages)]

SDCL § 19-19-903
Formerly cited as SD ST § 19-17-12.

19-19-903. Subscribing witnesses

Currentness

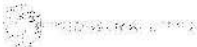
A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Credits

Source: SL 1979, ch 358 (Supreme Court Rule 78-2, Rule 903); SDCL § 19-17-12; SL 2016, ch 239 (Supreme Court Rule 15-34), eff. Jan. 1, 2016.

S D C L § 19-19-903, SD ST § 19-19-903
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South Dakota Codified Laws
Title 21. Judicial Remedies

21-1-4.1. Discovery and trial of exemplary damage claims
SD ST § 21-1-4.1 South Dakota Codified Laws Title 21. Judicial Remedies (Approx. 1 page)

SDCL § 21-1-4.1

21-1-4.1. Discovery and trial of exemplary damage claims

Currentness

In any claim alleging punitive or exemplary damages, before any discovery relating thereto may be commenced and before any such claim may be submitted to the finder of fact, the court shall find, after a hearing and based upon clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party claimed against.

Credits

Source: SL 1986, ch 161.

Notes of Decisions (72)

S D C L § 21-1-4.1, SD ST § 21-1-4.1
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NOTES OF DECISIONS (72)

- In general
- Admissibility of evidence
- Amount of damages
- Attorney and client
- Banks and banking
- Brokers
- Corporate officers and agents
- Deceit
- Discovery
- Driving while intoxicated
- Due process
- Evidentiary hearing
- Federal procedure
- Fraud and deceit
- Instructions
- Insurance
- Malice
- Negligence
- Pleadings
- Presumptions and burden of proof
- Prima facie case
- Protective orders
- Purpose of statute
- Retrospective application of statute
- Review
- Summary judgment



WESTLAW CLASSIC

South Dakota Codified Laws
Title 21. Judicial Remedies

21-3-2. Punitive damages in discretion of jury

SD ST § 21-3-2 South Dakota Codified Laws Title 21. Judicial Remedies (Approx. 2 pages)

SDCL § 21-3-2

21-3-2. Punitive damages in discretion of jury

Currentness

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.

Credits

Source: CivC 1877, §§ 1946, 1974; CL 1887, §§ 4580, 4607; RCivC 1903, §§ 2292, 2319; RC 1919, §§ 1965, 1991; SDC 1939 & Supp 1960, § 37.1902.

Notes of Decisions (277)

SDCL § 21-3-2, SD ST § 21-3-2

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NOTES OF DECISIONS (277)

In general
Actual malice
Admissibility of evidence
Alienation of affections
Amount of exemplary damages
Assault and battery
Bad faith, insurance claims
Bankruptcy
Banker and banking
Breach of contract
Compensatory damages
Construction with other laws
Controlled substances
Conversion
Corporate issues and shareholders
Death of wrongdoer
Defamation
Degree of reprehensibility
Discretion of jury, amount of exemplary damages
Due process
Elements of punitive damages
Employment issues
Excessive damages
False imprisonment
Fence removal or destruction
Fraud and deceit
Implied malice
Independent cause of action
Instructions
Insurance claims
Intentional infliction of emotional distress
Interference with business relationship
Landlord and tenant
Libel and slander
Livestock sales
Malice
Medical malpractice
Mistake, inadvertence or inattention
Mitigating circumstances
Motor vehicles
Necessity for malice
Negligence
Nursing homes
Oil and gas leases
Personal representatives
Pleadings
Preemption
Presumed malice
Presumptions and burden of proof
Purpose of punitive damages
Respondent superior
Review
Seizure of property
Senior care facilities
Stockbrokers and securities

NOTES OF DECISIONS (93)

[In general](#)
[Administrative proceedings](#)
[Agents](#)
[Amount recoverable](#)
[Appellate attorney fees](#)
[Assignees](#)
[Bad faith claim](#)
[Blanket bond](#)
[Commercial insurance](#)
[Coordination with other laws](#)
[Declaratory judgment action](#)
[Duty to investigate claim](#)
[Federal diversity action](#)
[Flood insurance](#)
[Homeowner policies](#)
[Liberal construction](#)
[Motor vehicle insurance](#)
[Performance bond](#)
[Pleadings](#)
[Presumptions and burden of proof](#)
[Public entity liability pool](#)
[Purpose](#)
[Questions of law or fact](#)
[Reasonable dispute as to coverage](#)
[Refusal to pay](#)
[Renewal](#)
[Review](#)
[Sovereign immunity](#)
[Validity](#)
[Workers' compensation](#)

South Dakota Codified Laws
 Title 58. Insurance (Refs & Annots)

58-12-3. Attorney fees--Recovery in action against self-insured employer or insurer failing to pay loss--Other remedies not barred
 SD ST § 58-12-3 South Dakota Codified Laws Title 58. Insurance (Approx. 2 pages)

SDCL § 58-12-3

58-12-3. Attorney fees--Recovery in action against self-insured employer
 or insurer failing to pay loss--Other remedies not barred

Currentness

In all actions or proceedings hereafter commenced against any employer who is self-insured, or insurance company, including any reciprocal or interinsurance exchange, on any policy or certificate of any type or kind of insurance, if it appears from the evidence that such company or exchange has refused to pay the full amount of such loss, and that such refusal is vexatious or without reasonable cause, the Department of Labor and Regulation, the trial court and the appellate court, shall, if judgment or an award is rendered for plaintiff, allow the plaintiff a reasonable sum as an attorney's fee to be recovered and collected as a part of the costs, provided, however, that when a tender is made by such insurance company, exchange or self-insurer before the commencement of the action or proceeding in which judgment or an award is rendered and the amount recovered is not in excess of such tender, no such costs shall be allowed. The allowance of attorney fees hereunder shall not be construed to bar any other remedy, whether in tort or contract, that an insured may have against the same insurance company or self-insurer arising out of its refusal to pay such loss.

Credits

Source: SL 1966, ch 111, ch 32, § 7; SL 1971, ch 264; SL 1972, ch 262; SL 1976, ch 311; SL 1988, ch 397; SL 2011, ch 1 (Ex. Ord. 11-1), § 33, eff. Apr 12, 2011.

Editors' Notes

COMMISSION NOTE

A reference to § 62-5-4 in the first sentence of this section was deleted by the Code Commission to reflect the repeal of that section by SL 1996, ch 36, § 2.

Notes of Decisions (93)

SDCL § 58-12-3, SD ST § 58-12-3

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State of South Dakota)	
)SS	Second Judicial Circuit
County of Lincoln)	
)	
MARK RALPH FIECHTNER VS.)	Circuit Court Docket # 41CIV19-000648
AMERICANWEST INSURANCE)	
COMPANY)	Supreme Court Docket #
)	
)	Physical Exhibit List
)	

Plaintiff's Exhibits

File Date	Plaintiff Exhibit Name	Exhibit #
4/15/24	Flash Drive Chaudhry Deposition	10
04/15/24	FLASH DRIVE CLAIMS DOLLAR ANIMATION	6
04/15/24	FLASH DRIVE PARDY DESPOSITION	7

Defendant's Exhibits

File Date	Defendant Exhibit Name	Exhibit #



STATE OF SOUTH DAKOTA INVESTIGATOR'S MOTOR VEHICLE TRAFFIC ACCIDENT REPORT		Mail to: Office of Accident Records, 118 W. Capitol Ave., Pierre, SD 57501	
		TraCS ID: DMALONE-44A14	TraCS Sequence: 1804150673
Form DPS - AR1 12/12/2014		Agency Use 18-02048	Report Type 18-02048
<input type="checkbox"/> Is this only a Wild Animal Hit Report?	Agency Name LINCOLN COUNTY SHERIFF	Date of Accident 04/14/2018	Time of Accident 11:17 Hrs.
Reporting Officer Last Name MALONE	Reporting Officer First Name DEREK	Reporting Officer Middle Name	Reporting Officer # 44A14

LOCATION	Location Description ON SD HWY 115 AT ITS INTERSECTION WITH 271 ST				
	Latitude 43.460657			Longitude -96.727534	
	County 42	County Name 42 - LINCOLN	City or Rural 0000 - Rural	Roadway Surface Condition 03 - Snow	
	On Road, Street, or Highway SD HWY 115			Roadway Surface Type 01 - Concrete	
	At Intersection with 271 ST			Roadway Align/Grade 01 - Straight and level	
	Distance 0.3324	Units Miles/Tenths	Direction of North	MRM (milepost) 078.00	Relation to Junction 01 - Four-way intersection
	Distance	Units	Direction and	Distance	Units Direction of
	Junction or Intersecting Street			Name of Junction, Road, Street, or Highway	

EXHIBIT 1
 Appx. 052
 FB0785 MF0723

UNIT 001	Unit Type 01 - Motor vehicle in transport with driver				Hit and Run 02 - No	
	Driver's Name - Last BELLIVEAU		First CAITLYNN	Middle JADE		
	Address 205 N CHRIS ST			Address (Line 2)		
	City WORTHING	State SD	Zip 57077	Date of Birth 01/29/1981	Sex 2 - Female	
				Non - Motorist Location 96 - Not Applicable		
	Phone 6034026441	DL State SD	DL Class 1	Non - Motorist Action 96 - Not Applicable		
	DL Status 01 - Normal within restrictions			Non - Motorist Contributing Circumstances (Up to Two) 96 - Not Applicable		
	Driver Contributing Circumstances (Up to Two) 05 - Driving too fast for conditions					
	Vision Contributing Circumstance 01 - Weather condition			Drug Use 00 - None used	Drug Test 02 - Test not given	
				Alcohol Use 00 - None used	Alcohol Test 91 - Test not given	
	Injury Status 05 - No injury			Ejection 00 - Not ejected		
	Saftey Equipment 03 - Lap belt and shoulder harness used					
	Seating Position 01 - Operator			Citation Charge? 02 - No		
	Air Bag Deployed 04 - Deployed-combination			Citation #1		
	Transported To			Citation #2		
	Source of Transport 00 - Not Transported			Citation #3		
	Is Driver the Owner Yes			Citation #4		
	Owner's Name - Last BELLIVEAU		First CAITLYNN	Middle JADE		
	Address 205 N CHRIS ST			Address (Line 2)		
	City WORTHING	State SD	Zip 57077	Red Tag A492079		
	Year 2016	Make Toyota - TOYT	Model COROLLA	VIN 5YFBURHE4GP435024		
	License Plate # 1F3085	State SD	Year 2019	Estimated Travel Speed 40	Speed - How Estimated? 02 - Driver Statement	
	Speed Limit 55	Total Occupants 3	Damage Extent 03 - Disabling Damage		Vehicle Towed 01 - Yes	
	Damage Amount (Vehicle and Contents) 1001		Insurance Co. Name 12528 - WADENA INSURANCE COMPANY			
	Insurance Policy # WAP4VR5			Effective Date 03/15/2018	Expiration Date 09/02/2018	
	Emergency Vehicle Use?			Vehicle Configuration 01 - Passenger car		
	Trailer Type 00 - No trailer/attachment			Cargo Body Type 00 - No cargo body		
	Direction of Travel Before Crash 02 - Southbound		Trailer LP #	Attached to Power Unit	State	Year
Initial Point of Impact 03 - Position 3	Most Damaged Area 03 - Position 3	Trailer 2 License Plate #	State	Year		
Underride/Override 00 - No underride or override		Trailer 3 License Plate #	State	Year		

Appx. 053
FB0786 MF0724

Traffic Control Device Type 01 - Traffic control signal			Vehicle Contributing Circumstance 00 - None		
Vehicle Maneuver 01 - Straight ahead			Road Contributing Circumstance 01 - Road surface condition (wet, icy, snow, slush, etc.)		
First Event 25 - Motor vehicle in transport			Second Event		
Third Event			Fourth Event		
Most Harmful Event for this Vehicle 25 - Motor vehicle in transport					
Does the accident involve one or more of the following: <ul style="list-style-type: none"> a truck having a GCWR of 10,001 or more pounds; OR a vehicle displaying a hazardous material placard; OR a vehicle designed to transport 9 or more people, including driver 			Did the accident result in one or more of the following: <ul style="list-style-type: none"> a fatality; OR an injury requiring transportation for immediate medical attention; OR a vehicle was disabled requiring a towaway from the scene 		
Accident Involved Vehicle - Purpose			Carrier Name		
Street Address			Street Address (Line 2)		
City	State	Zip	US DOT # 98	GVWR	GCWR
Hazardous Material Released?	Hazardous Material Content Code	Hazardious Material Class Code	Hazardous Materials Description		

Appx. 054
FB0787 MF0725

UNIT 002	Unit Type 01 - Motor vehicle in transport with driver				Hit and Run 02 - No	
	Driver's Name - Last FIECHTNER		First MARK	Middle RALPH		
	Address 6909 S WESTFIELD TRL			Address (Line 2)		
	City SIOUX FALLS	State SD	Zip 57108	Date of Birth 11/01/1966	Sex 1 - Male	
				Non - Motorist Location 96 - Not Applicable		
	Phone 6055201773	DL State SD	DL Class 1	Non - Motorist Action 96 - Not Applicable		
	DL Status 01 - Normal within restrictions			Non - Motorist Contributing Circumstances (Up to Two) 96 - Not Applicable		
	Driver Contributing Circumstances (Up to Two) 00 - None			Drug Use		
	Vision Contributing Circumstance 01 - Weather condition			00 - None used		Drug Test 02 - Test not given
				Alcohol Use 00 - None used		Alcohol Test 91 - Test not given
	Injury Status 05 - No injury			Ejection 00 - Not ejected		
	Safety Equipment 03 - Lap belt and shoulder harness used			Citation Charge? 02 - No		
	Seating Position 01 - Operator			Citation #1		
	Air Bag Deployed 00 - Not deployed			Citation #2		
	Transported To			Citation #3		
	Source of Transport 00 - Not Transported			Citation #4		
	Is Driver the Owner Yes					
	Owner's Name - Last FIECHTNER		First MARK	Middle RALPH		
	Address 6909 S WESTFIELD TRL			Address (Line 2)		
	City SIOUX FALLS	State SD	Zip 57108	Red Tag A492081		
	Year 2017	Make Ford - FORD	Model F250 SUPER DUTY	VIN 1FT7W2BT4HEC09272		
	License Plate # RELEST8	State SD	Year 2018	Estimated Travel Speed 40	Speed - How Estimated? 02 - Driver Statement	
	Speed Limit 55	Total Occupants 1		Damage Extent 01 - Minor Damage		Vehicle Towed 02 - No
	Damage Amount (Vehicle and Contents) 1001			Insurance Co. Name 44270 - AMERICAN WEST INSURANCE COMPANY		
Insurance Policy # PASD00004381			Effective Date 03/09/2018	Expiration Date 09/09/2018		
Emergency Vehicle Use?			Vehicle Configuration 15 - Light truck (2-axes, 4 tires)			
Trailer Type 00 - No trailer/attachment			Cargo Body Type 00 - No cargo body			
Direction of Travel Before Crash 03 - Eastbound		Trailer LP #	Attached to Power Unit	State	Year	
Initial Point of Impact 11 - Position 11	Most Damaged Area 11 - Position 11	Trailer 2 License Plate #	State	Year		
Underride/Override 00 - No underride or override		Trailer 3 License Plate #	State	Year		

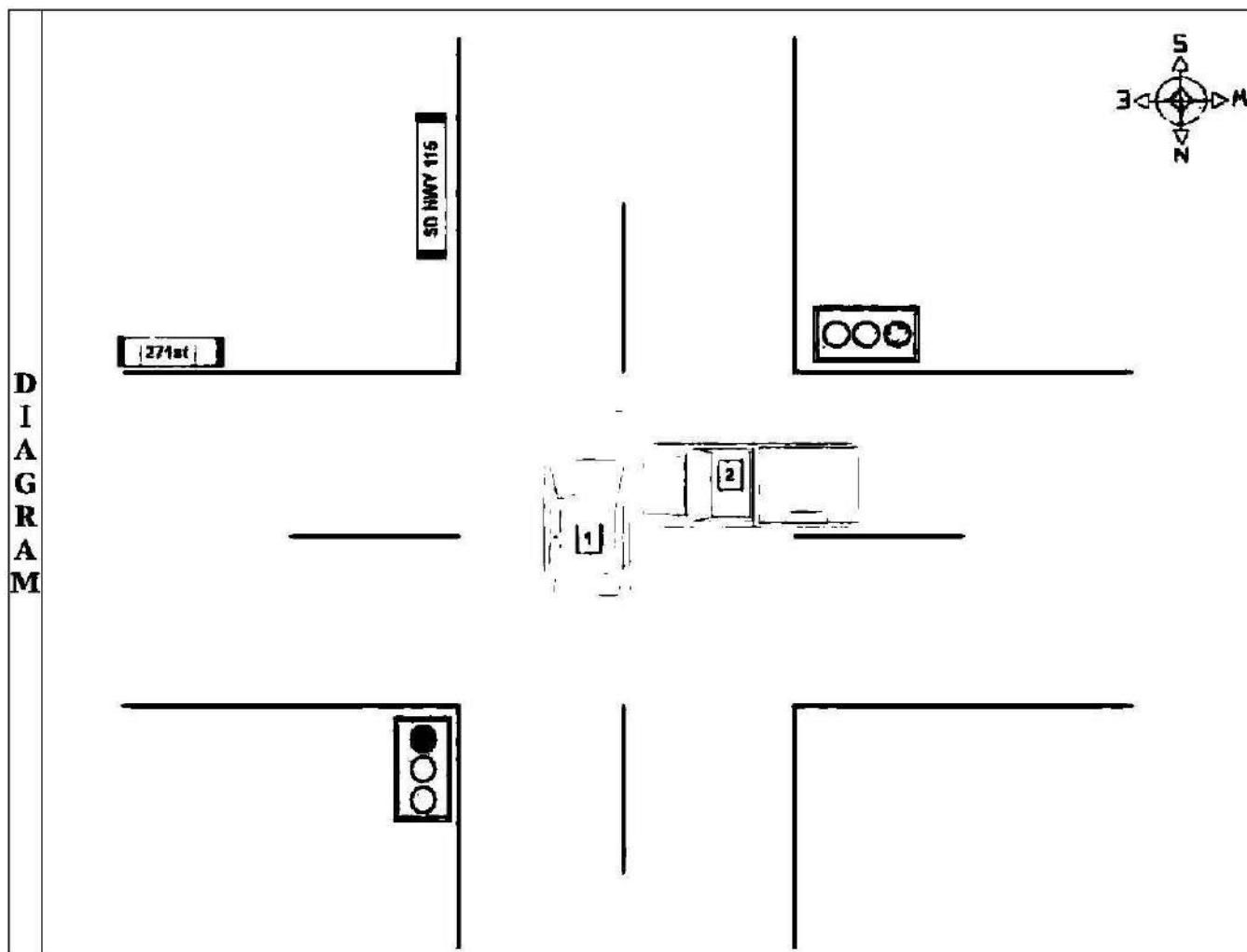
Appx. 055
FB0788 MF0726

Traffic Control Device Type 01 - Traffic control signal			Vehicle Contributing Circumstance 00 - None		
Vehicle Maneuver 01 - Straight ahead			Road Contributing Circumstance 01 - Road surface condition (wet, icy, snow, slush, etc.)		
First Event 25 - Motor vehicle in transport			Second Event		
Third Event			Fourth Event		
Most Harmful Event for this Vehicle 25 - Motor vehicle in transport					
Does the accident involve one or more of the following: <ul style="list-style-type: none"> a truck having a GCWR of 10,001 or more pounds; OR a vehicle displaying a hazardous material placard; OR a vehicle designed to transport 9 or more people, including driver 			Did the accident result in one or more of the following: <ul style="list-style-type: none"> a fatality; OR an injury requiring transportation for immediate medical attention; OR a vehicle was disabled requiring a towaway from the scene 		
Accident Involved Vehicle - Purpose			Carrier Name		
Street Address			Street Address (Line 2)		
City	State	Zip	US DOT # 98	GVWR	GCWR
Hazardous Material Released?	Hazardous Material Content Code	Hazardous Material Class Code	Hazardous Materials Description		

Work Zone Related? 02 - No	First Harmful Event? 25 - Motor vehicle in transport
Workers Present?	Location of First Harmful Event 01 - On roadway
Work Zone 96 - Not Applicable	
Work Zone Location 96 - Not Applicable	Trafficway Description 01 - Two-way, not divided
Manner of Collision 03 - Angle	Light Condition 01 - Daylight
School Bus Related? 00 - No	Weather Conditions (up to two) 04 - Sleet, hail (freezing rain or drizzle), 05 - Snow

D O	Damaged Object (Property Other Than Vehicles) TRAFFIC POLE		Estimate of Damage 500
A B	Owner's Full Name - Last STATE	First Name SOUTH DAKOTA	Middle Name LC
M J	Address LINCOLN COUNTY		Address (Line 2)
A E	City HARRISBURG	State SD	Zip 57032
G C			
E T			
D			

I P	Unit #	Last Name	First Name		Middle Name
N E	Address		Address (Line 2)		
J R	City	State	Zip	Date of Birth	Sex
U S	Injury Status		Ejection		
R O	Seating Position		Safety Equipment		
E N	Air Bag Deployed		Source of Transport		
D	Transported to		EMS Trip #		



NARRATIVE

ON 4/14/18 AT AROUND 1118 HRS, I RESPONDED TO HWY 115 AND 271 FOR A REPORT OF A INJURY ACCIDENT. WHEN I ARRIVED ON SCENE I SPOKE TO CAITLYNN BELLIVEAU AND ASKED HER TO EXPLAIN WHAT HAPPENED. CAITLYNN EXPLAINED THAT SHE WAS HEADING SOUTH ON HWY 115 APPROACHING A RED LIGHT AT INTERSECTION WITH 271. SHE ATTEMPTED TO STOP BUT DO TO SNOWY ROAD CONDITIONS SHE SLID OVER 100 FT INTO THE INTERSECTION WHERE SHE WAS STUCK BY A STRUCK. I THEN SPOKE TO THE OTHER DRIVER MARK FIECHTNER WHO HE WAS EAST BOUND ON 271 AND HAD A GREEN LIGHT THROUGH THE INTERSECTION WHEN THE OTHER VEHICLE SLID OUT IN FRONT OF HIM AND HE COULD NOT AVOID IT. IT SHOULD BE NOTED THAT CAITLYNN HAD HER TWO SONS IN THE VEHICLE WITH HER FINNEGAN AND WESTLEY. BOTH WERE CHECKED OUT BY MEDICAL PERSONNEL AND EVENTUALLY TAKEN TO AVERA HOSPITAL AS A PRECAUTION. I TOOK PICTURES OF THE SCENE AND PROVIDED BOTH PARTIES WITH RED TAG, MARSY CARD, AND THE CASE NUMBER. CAITLYNN ELECTED TO LEAVE HER VEHICLE AT THE SCENE TO HAVE IT TOWED LATER AND MARK WAS ABLE TO DRIVE AWAY FROM THE SCENE. IT SHOOULD ALSO BE NOTED THAT THERE WAS DAMAGE TO THE TRAFFIC POLE CABLES ON THE SOUTH EAST SIDE OF THE INTERSECTION. EOR

Appx. 057
FB0790 MF0728

W I T N E S S	Last Name		First Name		Middle Name	
	Address					
	Address (Line 2)					
	City		State	Zip	Phone #	

Date Notified 04/14/2018	Time Notified 11:17 Hrs.	Date Arrived 04/14/2018	Time Arrived 11:20 Hrs.
Agency Type 02 - Sheriff department	Investigation Made at Scene? 01 - Yes	Photos Taken? Y	Date Approved 04/17/2018
Approval Officer	Last Name BARTSCHER	First Name AARON	Middle Name

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

NO. 30841

MARK FIECHTNER,
Plaintiff and Appellee,
v.
AMERICAN WEST INSURANCE COMPANY,
Defendant and Appellant.

Appeal from Circuit Court
Second Judicial Circuit
Lincoln County, South Dakota

The Honorable John R. Pekas, Circuit Court Judge

BRIEF OF APPELLEE MARK FIECHTNER

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Notice of Appeal of Defendant and Appellant American West Insurance Company
filed September 13, 2024, and Amended Notice of Appeal filed November 11, 2024.

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JURISDICTIONAL STATEMENT

American West Insurance Company, (“American West”) appeals from portions of a judgment in favor of Fiechtner entered by the trial court on August 9th, 2024. The judgment followed a jury trial held from April 9th-12th, 2024 and flowed from a jury verdict entirely in Fiechtner’s favor. The trial court denied American West’s Motion for Judgment Notwithstanding the Verdict and Motion for New Trial on September 11th, 2024, (SR 2940 - 2941) and later awarded attorneys’ fees to Fiechtner on October 31, 2024, (SR 2958 – 2959) adding that component to the original judgment.

STATEMENT OF LEGAL ISSUES

I. Was American West entitled to a Verdict as a Matter of Law or a New Trial following the Verdict in favor of Fiechtner?

The trial court decided American West was not entitled to judgment in American West's favor nor a new trial.

- *Jacobs v. Dakota, Minnesota & Eastern R.R. Corp.*, 806 N.W.2d 209, 2011 S.D. 68 (S.D. 2011).
- *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 2003 S.D. 80 (S.D. 2003).

A. Was American West's denial of insurance benefits to Fiechtner fairly debatable as a matter of law?

The trial court decided that American West's denial of insurance benefits was not fairly debatable as a matter of law, and the jury verdict should stand.

- *Dakota, Minnesota & Eastern Railroad v. Acuity*, 771 N.W.2d 623, 2009 S.D. 69 (S.D. 2009).
- *Champion v. U. S. Fid. & Guar. Co.*, 399 N.W.2d 320 (S.D. 1987).

B. Did American West act with at least presumed malice or reckless disregard making punitive damages appropriate?

The trial court found American West was properly subjected to punitive damages.

- *Hannahs v. Noah*, 83 S.D. 296, 158 N.W.2d 678 (S.D. 1968).
- *Flockhart v. Wyant*, 467 N.W.2d 473 (S.D. 1991).

C. Did the trial court abuse its discretion in dealing with evidentiary issues during trial?

The trial court did not abuse its discretion in dealing with the use of demonstratives during trial.

- *State v. Henry*, 554 N.W.2d 472, 1996 S.D. 108 (S.D. 1996).
- *State v. Hartman*, 256 N.W.2d 131 (S.D. 1977).
- *Kaiser v. University Physicians Clinic*, 724 N.W.2d 186, 2006 S.D. 95 (S.D. 2006).
- *Blue v. Blue*, 916 N.W.2d 131, 2018 S.D. 58 (S.D. 2018).

D. Did the trial court err in awarding Fiechtner attorneys' fees?

The trial court did not err in finding that American West acted unreasonably or vexatiously in denying Fiechtner insurance benefits making attorneys' fees appropriate for the recovery thereof.

- SDCL§ 58-12-3.
- *Biegler v. American Family Mut. Ins. Co.*, 621 N.W.2d 592, 2001 S.D. 13 (S.D. 2001).
- *All Nation Ins. Co. v. Brown*, 344 N.W.2d 493 (1984)

STATEMENT OF THE CASE

Fiechtner sued his own insurance company, American West, for its failure to pay insurance benefits after an injury-causing automobile crash in Lincoln County, SD, Second Circuit. Trial judge John Pekas presided. Fiechtner's claim was for breach of contract pursuant to a \$1,000,000 underinsured motorist ("UIM") coverage he purchased from American West. Fiechtner also brought a claim for insurance bad faith. Fiechtner sought tort damages, exemplary damages, attorneys' fees, and interest. (SR 2 - 6) Fiechtner was successful at trial on all counts (SR 2678 - 2680) and this appeal follows.

Fiechtner instituted suit against American West on November 13th, 2019 (SR 1 - 6), after American West refused to offer any more than 1% of the insurance coverage Fiechtner purchased to resolve his UIM claim. By then, American West knew that Fiechtner had experienced permanent damages to his person and had attempted many different medical remedies which offered limited recovery to his body and brain. (SR 3224 – 3228) Instead of engaging in a fair claims handling approach, American West actively misled Fiechtner and his medical providers claiming there was no additional coverage available for Fiechtner to treat his injuries sending multiple letters claiming there were no additional benefits available when there was at least \$890,000 left to pay for potential treatment. (SR 2430; 3420 – 3423; 3427 – 3429)

At trial, American West offered the same arguments it did in its brief and also attempted to create other non-crash related explanations for Fiechtner's injury complaints. The jury did not believe American West. The jury found that American West breached its contract with Fiechtner, found that his insurance claim was denied in bad faith, and found that punitive damages were appropriate. The trial court agreed.

STATEMENT OF THE FACTS

Fiechtner was in an automobile crash at no fault of his own in April of 2018. (SR 3213) He was injured in the crash and did what he could to treat his injuries. He collected the full extent of the underlying tortfeasor's liability limits (\$100,000) and made a UIM claim to his own insurer. (SR 3219) American West granted permission to release the underlying tortfeasor. (SR 2426) American West knew from the time it chose to not pay any UIM benefits that based upon Fiechtner's medical treatment records, Fiechtner struggled with discomfort in the back of his head including stabbing pain in the back of his neck and in his forehead, muscle spasms, and headaches. American West knew he also had a sudden onset of blurry vision after the crash, a sudden decrease in near-sign vision, and double vision. American West knew Fiechtner experienced numbness in both his hands and that Fiechtner was suffering from short term memory problems, persistent fatigue, mental fog, and difficulty concentrating. (SR 3223 - 3228)

American West confirmed that Fiechtner dutifully paid his full auto insurance premium on the highest limit auto policy it sold to anyone. (SR 3209; 3416 - 3417) He had a clean insurance claim history. (SR3218 - 3219) After Fiechtner was injured, American West's representatives confirmed that there was no reason to think that Fiechtner was feigning nor exaggerating his injury complaints. (SR 3221) Nor was there any basis to believe there were any other causes of his complaints, i.e. pre-existing injuries. (SR 3221)

American West's adjuster, Abby Kramer, knew Fiechtner had a brain injury at the time she adjusted the claim. (SR 3229) Kramer did not attempt to contact Fiechtner to ask him about his injuries. (SR 3231) Kramer copied some social media posts (SR 3213) and concluded Fiechtner was not impacted by the crash nor the resultant injuries due to the social media snapshots she saved. (SR 3360 - 3361) Kramer created a UIM evaluation indicating a less-than-liability-limits valuation for Fiechtner's claim and filed it. (SR 1755 - 1762) When Kramer was specifically asked how she came to the conclusion that Fiechtner was owed nothing, or perhaps \$10,000 she indicated, "facts of loss, police report, impacts to both vehicles, bills and records for his treatment, diagnosed injuries, and impact to life." (SR 1741)

American West knew then based on submissions from Fiechtner that he sought and received chiropractic care for several visits before he was referred to an orthopedic surgeon (SR 3365) who identified a disc bulge in his neck through an MRI. That surgeon then sent Fiechtner to physical therapy, a pain specialist, and a

concussion specialist. (SR 3364 - 3366) Fiechtner did a variety of therapies including receiving five series of injections into his neck and back from a physiatrist, Dr. K.C. Chang, MD. (SR 3225-3226; SR 3366)

A concussion specialist Fiechtner went to believed Fiechtner's vision issues to be brain, rather than eye related. That specialist sent Fiechtner to vision therapy, of which he attended at least 21 visits. (SR 3227; 3366 - 3367) One of the few issues Kramer cited in her UIM evaluation was whether Fiechtner's eye-related complaints were trauma related, or degenerative. (SR 3360 - 3362) There was nothing truly outstanding about that issue as American West already had the answer in its own file – it was related to the crash per Fiechtner's treating eye doctor. (SR 3222 - 3223) In fact, American West had accepted that doctor's opinion and paid for some of the treatment for the same injury from the same provider under the Medical Payments coverage. (SR 1747)

American West knew this was related to the crash because American West's medical payments adjuster, Mary Jo Dahl, had already inquired specifically about this before paying medical payments benefits for the same injury, and had confirmation in writing from Fiechtner's treating eye doctor that his eye issues were likely related to trauma, i.e. a motor vehicle crash. (SR 3222 - 3223)

The corporate representative at trial who worked as the claims manager at American West, Chris Oen, knew about Dahl's findings but decided to not consider Dahl's investigation nor resultant medical opinions of a treating provider when he

reviewed Kramer's action on Fiechtner's file. (SR 3126 - 3127) This allowed the UIM adjuster's suspicion about the relatedness of Fiechtner's eye issues to linger when the contrary answer was already in American West's file. This is part of how American West, through Kramer, arrived at the low valuation of Fiechtner's injuries and resultant UIM claim.

The jury awarded \$400,000 in contract damages and determined that Fiechtner's claim should have been paid on or before October 23rd, 2018. (SR 2678) The trial court added pre-judgment interest based upon those two figures and entered judgment against American West. (SR 2720 - 2721) The contract damages and pre-judgment interest thereon are not subject to this appeal as those amounts are conceded. This appeal deals only with the jury tort damage award of \$250,000, the jury punitive damage award of \$890,000, and the trial court attorneys' fee award of \$101,999.79.

ARGUMENT

The jury and the trial court confirmed that Fiechtner made adequate submissions at trial to demonstrate that his insurance contract was breached in bad faith by American West causing \$250,000 in tort damages. Both the trial court and jury concluded that Fiechtner demonstrated an appropriateness of punitive damages, which the jury found in the amount of \$890,000. (SR 2678 - 2680) The trial court

made its finding of attorneys' fees after trial and after a hearing. (SR 2958 - 2959)¹
These findings by the trier of fact should not be upset.

American West is not Entitled to a New Trial nor a Favorable Judgment

American West offers nothing on appeal entitling it to any recourse that has not already been considered and rejected by the trial court and the jury. Motions for judgment as a matter of law and a renewed motion for judgment as a matter of law are reviewed for an abuse of discretion. *Jacobs v. Dakota, Minn. & E.R.R. Corp.*, 2011 SD 68, ¶ 9. We "view the evidence and testimony in a light most favorable to the verdict." *Jacobs*, 2011 SD 68, ¶ 9. "Then, 'without weighing the evidence, the [C]ourt must decide if there is evidence which would have supported or did support a verdict.'" *Selle*, 2010 S.D. 64, ¶ 14, 786 N.W.2d at 752. "If sufficient evidence exists so that reasonable minds could differ, [judgment as a matter of law] is not appropriate." *Roth v. Farner-Brocken Co.*, 2003 SD 80, ¶ 8. Here, competent and substantial evidence supports the verdict.

Fiechtner's Claim Was Denied in and Remains Denied in Bad Faith

American West has paid nothing to Fiechtner² since April of 2018 pursuant to his UIM claim. Despite being told via jury verdict in April of 2024 what it owes,

¹ There was an erroneously entered Judgment that included attorneys' fees before hearing on that matter that was later vacated, and then subsequent attorneys' fees were entered on 10/31/2024. (SR 2776/ SR 2959)

² American West did pay \$10,000 in medical payments coverage to some medical providers prior to making the UIM claim.

conceding the same in front of the trial court during post-trial motions, and now conceding the same thing in front of this Court, American West continues to withhold all money from Fiechtner representing contract damages and pre-judgment interest on the contract damages. This sort of feigned cooperation backed by steadfast obstinance is what permeated the claim process and trial.

Bad Faith Failure to Pay Benefits

South Dakota has recognized the independent tort of insurance “bad faith” at least since 1969, when the Supreme Court held that insurers have a “duty to exercise good faith” and noted that “[g]ood faith is a broad and comprehensive term.” *Kunkel v. United Sec. Ins. Co.*, 84 S.D. 116, 122.

For an insurer to be liable for bad faith denial of an insured’s claim for benefits, the insured must prove two things: (1) absence of a reasonable basis for denying the claim, and (2) the insurer’s knowledge of the absence of a reasonable basis for denial or its reckless disregard of whether a reasonable basis existed. *Bertelsen v. Allstate Ins. Co.*, 2013 SD 44, ¶ 17; *Walz v. Fireman’s Fund Ins. Co.*, 1996 SD 135, ¶7. The core inquiry is whether the insurer lacked a *reasonable basis* for denying the claim, and whether the insurer knew of (or showed reckless disregard for) the lack of a reasonable basis. An insurer’s knowledge of the lack of a reasonable basis to deny benefits “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 v. Dakota Truck Underwriters*, 2016 SD 70, ¶9.

The idea that American West did not act consciously is unsupported by the evidence. Specific instances of misconduct as it applies to Fiechtner's insurance claim together with institutional factors that are designed by American West to reduce or entirely avoid claim payouts make it obvious that what American West is doing is consciously intended and not some accident. There is no question American West is bound by requirements to perform a reasonable investigation. Statutes, case law, and American West's own admissions during trial confirm as much.

American West, and Chris Oen, its head of the claims department, knows that when an insured pays premiums, part of that premium payment goes toward performing an investigation at the insurer's expense. (SR 3113; SR 3209) A full and fair investigation favors both insurer and insured because sometimes things are discovered that support the denial of an insurance claim. (SR 3209) Other times insurers investigate and find reasons to pay claims. Either way, American West knows that it is supposed to investigate reasons to pay claims, not just reasons to deny claims. (SR 3210) These are all standards common to all insurance companies and first party insurer/insured relationships. There is no dispute about these standards being true. There is no dispute that what an insured pays for through premiums is in part, service.

American West cites to *Anderson v. W. Nat'l. Mut. Ins. Co.*, 857 F.Supp.2d 896 (D.S.D. 2012), in support of its fairly debatable argument. This reliance is misplaced. In *Anderson*, the Court contrasted the facts of *Anderson* with those in

Tripp v. W. Nat'l. Mut. Ins. Co., No. 09-4023, 2010 U.S. Dist. LEXIS 11283, 2010 WL 547181 (D.S.D. Feb. 9, 2010). The *Anderson* claim was found to be fairly debatable because Western National Mutual Insurance Company had conducted an investigation, retained outside counsel to render an opinion on whether the value of the claim exceeded the UIM threshold, and consulted with a CPA on a loss of earnings claim. *Anderson v. W. Nat'l. Mut. Ins. Co.*, 857 F.Supp.2d 896, 906 (D.S.D. 2012).

Unlike the investigation in the *Anderson* decision, the American West UIM adjuster did not conduct a reasonable investigation. American West's records are devoid of any investigation into the injuries or the longevity of the symptoms Fiechtner experiences absent notes from the adjuster supplemented by her Google search. Fiechtner's injuries were effectively conceded but rather than properly valuing those injuries, American West chose to conclude the injuries were not particularly detrimental to Fiechtner.

Failing to Perform a Reasonable Investigation

South Dakota law requires an insurer to perform a reasonable investigation. This is because an insurer's duty of good faith also includes the duty to "conduct a reasonable investigation concerning a claim" made under the policy. *Dakota, Minn. & E.R.R. Corp. v. Acuity*, 2009 SD 69, ¶19. "It is appropriate, in applying the test, to determine whether a claim was properly investigated and whether the results of the investigation were subjected to a *reasonable evaluation and review*...." (emphasis

added) *Champion v. U. S. Fid. & Guar. Co.*, 399 N.W.2d 320, 323-324 (S.D. 1987).

There are often disagreements in the context of insurance claims. If there is a reasonable disagreement, and the claim is fairly debatable, the insurer is not liable for the intentional tort. However, insurers are not free to ignore their duty to fully and fairly investigate and then rely on the lacking results of their failed investigation to create a “fair debate.”

“Courts which apply the fairly debatable standard have held that the adequacy of the investigation and consideration of the claim by the insurer is relevant in determining whether a claim is fairly debatable. [. . .]

Because of the meager investigation it is unclear what facts were available to suggest the claim was fairly debatable at the time Acuity denied the claim.”

Dakota, Minnesota & E.R.R. Corp. v. Acuity, 2009 S.D. 69, ¶¶ 23, 26.

Likewise, South Dakota law mandates that an insurer must not refuse to pay claims without conducting a reasonable claim investigation. *See* SDCL § 58-12-34(6).

American West’s UIM adjuster chose to not investigate outside of its own file that was produced largely by Fiechtner with the exception of a few social media posts and a quick Google search. Had American West contacted its own insured, some or all of his medical treatment providers, or an independent physician, perhaps American West would have more closely estimated what it owed Fiechtner. It chose not to.

American West’s own medical payments adjuster, Mary Jo Dahl, contacted Fiechtner’s eye doctor when she had questions about the relatedness of Fiechtner’s

eye issues to the crash. This illustrates the unreasonableness of American West's UIM claim handling – when there is \$10,000 to pay in medical benefits, American West's adjuster looks for support to pay the claim. But when American West has a \$900,000 UIM exposure and claim, it does nothing of the sort. This is not what a reasonable investigation and fair claim handling looks like.

Failing to Properly Process a Claim

Except in the work comp setting, an insurer can be liable for “wrongdoing during its *processing or* paying of policy benefits....” (emphasis added) *Hein v. Acuity*, 2007 SD 40, ¶10. Yet when American West gets a claim, it takes a different approach. Mary Jo Dahl's active, effortful investigation during the processing and payment of the medical payments claim provides an insightful backdrop of what should happen to communicate with providers and insureds. However, American West intentionally segregates their Medical Payments first party coverage from their first party UIM adjusters so there is no chance that the claim supporting information from medical payments coverage would be used in supporting payment of a UIM claim. (SR 3097; 3217)

Instead, when asked what American West relied upon in making a \$10,000 offer to Fiechtner's \$900,000 UIM claim, it just claimed that the offer was based upon “facts of loss, police report, impacts to both vehicles, bills and records for his treatment, diagnosed injuries, and impact to life.” (SR 3381) When pressed, it changed the subject. “Our company does not use any software such as Colossus. This

offer was based on experience and a review with my manager. To be honest, I believe Mark was fully compensated for the underlying carrier's \$100,000 settlement and our waiver of subrogation right for the \$10,000 med pay. However, since Mark is our insured, we want to give him the benefit and try to resolve this matter with an offer of \$10,000.” *Id.*

American West intentionally created a firewall to prevent supportive information from leaking into the UIM claim evaluation (SR 3097; 3216 - 3218) and it actively hid the eight-page UIM evaluation that Kramer completed from Fiechtner’s submissions. The evaluation remained a secret until litigation was instituted, and it only was discovered during depositions when Kramer referred to it. It was not provided before litigation when the topic was specifically raised with Kramer, and it did not come during litigation with more than 1,000 pages of other discovery documents. (SR 3233)

Not only did American West segregate supportive information and otherwise hide the UIM evaluation, American West wrote letters to Fiechtner and to his medical providers claiming that his benefits had been exhausted, which was false. (SR 1803; 3423) This is not fair processing of an insurance claim.

American West cites to a Federal Court UIM claim that was dismissed in favor of the insurer in support of the idea that because the jury did not find that Fiechtner was owed the entirety of his policy coverage, the claim denial was defacto “reasonable.” *Anderson v. W. Nat’l. Mut. Ins. Co.*, 857 F.Supp.2d 896, 906

(D.S.D. 2012). This is not what *Anderson* stands for. The reality of both South Dakota law and the *Anderson* decision is that the question is whether the liability policy limit was *exceeded*. "In short, the question of whether the value of the claim *exceeds* \$100,000 is fairly debatable." (emphasis added) *Anderson* at 905-906. The question is not whether the UIM coverage was *exhausted*, which is effectively what American West argues.

And, attempting to use a jury verdict after years of litigation in order to justify what it did five years earlier is another sleight of hand. This is because whether an insurer acted in bad faith is "determined based upon the facts and law available to the insurer at the time it made the decision to deny coverage." *Dakota, Minn. & E.R.R. Corp*, 2009 SD 69 at ¶19; ¶21. Claimants should not have to even hire an attorney to get benefits, let alone go through trial and an appeal to get paid. (SR 3230)

American West's business model foreshadows what occurs with all UIM claims such that it was predictable that Fiechtner's claim would be mishandled the way it was. This is because Fiechtner's claim was just one of hundreds of claims a year that American West assigned to Kramer (SR 3206), who had no medical training nor experience. (SR 3207) Kramer had more claims than she could possibly handle. She entirely lacked medical expertise to opine on any medical matters. This is no accident, either. It is all by design. American West and its parent company intentionally create these sorts of internal mechanisms and controls which all operate

to reducing claim payouts. First, adjusters cannot possibly get all their work done. And, if they do get through everything they are supposed to, because they do not have medical experience, it is unlikely that they will even understand what they are looking at, let alone be able to appreciate what it means to the human being who is claiming entitlement to benefits.

This was not a one-off. American West does not contact *any* doctors in other cases, either; no treating doctors, nor any IME doctors. (SR 3095 - 3096) It simply denies claims and makes insureds litigate to recover benefits. At no point did American West have any medical opinion contrary to anything Fiechtner claimed until years after American West had already denied Fiechtner's claim and required litigation. The only thing bordering on evidence American West had was when American West's counsel hired a neuropsychologist who ended up confirming under cross exam that Fiechtner did indeed have a brain injury, just not a "closed head" injury – something Fiechtner never claimed. (SR 3453 – 3456)

Part of what the jury learned during cross examination of Kramer and Oen is that American West creates a financially lucrative situation for itself when it pits its claims handlers directly against insureds by creating a bonus and salary increase opportunity for claims handlers who have the power to reduce claims expenses and reduce claim payouts thereby increasing American West's parent company's corporate profits. (SR 3122 – 3123) Both Kramer and Oen confirmed during trial that these bonuses regularly occur on an annual basis and have occurred over the last

decade. (SR 3122) This illicit bonus structure explains why UIM adjusters like Kramer do not fully and fairly investigate nor fairly process and pay claims. Investigations cost money. Medical opinions cost money. Worse yet, if the adjusters reasonably investigated claims, those same adjusters would be working against their own financial best interests because they would have to pay more out in claims, indemnity expense, which in turn reduces their own income. This is what makes this particular bonus structure illicit. (SR 3106 – 3110)

Consideration by someone who was actually able to pay Fiechtner's claim was never even an option for American West. Oen, the head of claims, never talked to the only person in the entire company who actually had that authority – Pat Duncan. (SR 3105) One adjuster from American West indicated that there was "limits exposure," (SR 3415) i.e. \$1,000,000, on the Fiechtner claim. Yet, no one from American West with more than \$500,000 in authority ever reviewed Fiechtner's file and no one with more authority came to trial. While American West sells a \$1,000,000 UIM policy, the head of the claims department, a Vice President of the Company, only has half that much authority. (SR 3411) Oen knew there might not be exposure of limits were high enough, but the underlying carrier's limits of \$100,000 were not "high" per Oen's own review. (SR 3416 – 3418)

Trial, and appeal is just another institutional hurdle that American West uses to avoid paying insurance claims. It still has not paid anything and this case is not

about a fair debate for American West, it is about intentional institutional delay and claim avoidance.

Fiechtner's Claim for Insurance Benefits was not Fairly Debatable.

Denial of benefits does not automatically create liability, as insurers are entitled to challenge "fairly debatable" claims. *Walz*, 1996 SD 135 at ¶7. "The question of whether a claim was "fairly debatable" is supposed to happen at the time the claim is denied. The parties are sharply divided over whether the claim was fairly debatable and when that determination should be made. Our case law requires that the insurer's decision and actions must be reviewed "at the time it made the decision to deny coverage." *Dakota, Minn. & E.R.R. Corp. v. Acuity* at ¶21 (citations omitted). The questions of whether the insurer's actions were unreasonable or whether the claim was fairly debatable must be viewed at the time the insurer made the decision to deny or litigate the claim, rather than pay it." *Id. supra*.

American West spent much time at trial arguing about things that it never raised during the claim process. As a starting point, the UIM claim evaluation was not disclosed, (SR 3216) and therefore could not have been discussed at the time American West chose to deny the claim. Hiding this and other supportive information, like the letter from Dr. Oakland that American West had, but Fiechtner did not have, does not lend itself to a fairly debatable scenario. Apparently sensing that it did not have adequate support for its denial, American West created new issues to argue about at trial, like Fiechtner's alleged heart problems and alcohol

consumption, issues that American West had not previously raised as a basis for denial. (SR 3273 – 3274)

Untimely, American West wants to focus on the “subjective” nature of UIM claims. But, subjective to whom? If American West is suggesting that it be Kramer’s subjective valuation that excuses its misconduct, then that valuation must be viewed through the lens of a medically untrained, over-worked adjuster, who did not even bother to seek to contact nor interview Fiechtner and who had a vested interest in *not* contacting any medical professionals to save on claims adjustment expense and claims indemnity expense. This subjective view does not create a fair debate.

From American West’s “subjective” view, it is tasked with the knowledge of its adjusters – which included information that Mary Jo Dahl put in the file that the head of claims, Oen, reviewed *confirming portions of Fiechtner’s injury*. American West also *knew* it had a lot more coverage to support Fiechtner’s medical care and recovery, but it chose to write letters misleading Fiechtner and misleading Fiechtner’s medical providers about this fact. American West knew it had a potential “limits exposure.” Its claim manager/corporate representative simply chose to stick with its below-liability-limits valuation. Staking out an absurd valuation does not make an insurance claim denial defacto “fairly debatable.” This is particularly true when the insurer sticks to this unreasonably low valuation in the face of a lacking investigation and contrary information. American West got its day in court. The jury did not

believe it. There is no question that the jury was correctly instructed on the law in South Dakota as it applies to Fiechtner's claims.

The Jury was Properly Instructed on Bad Faith and Punitive Damages.

American West ignores the law in making its argument about "conscious wrongdoing" being a necessary precursor to a bad faith or punitive damages verdict. The jury could well have determined that American West *was* consciously aware of its wrongdoing based upon a variety of things indicating actual knowledge of facts and circumstances. The jury could have also found that American West was recklessly indifferent.

Either way, the jury was properly instructed on "fairly debatable" and found Fiechtner's claim not to be fairly debatable despite American West's presentation at trial of the same facts and evidence it now relies upon. We presume the jury follows a trial court's instructions. *Braun v. Wollman*, 2024 SD 83. "A trial court may set aside a jury's verdict only 'if the jury's conclusion was unreasonable and a clear illustration of its failure to impartially apply "the reasoning faculty on the facts before them."'" *Lewis v. Sanford Medical Center*, 2013 S.D. 80, ¶ 16. American West has not and cannot make such a showing here.

In particular, jury instruction no. 22 states "As an insurance company, the Defendant is permitted to challenge first-party claims made by an insured such as Plaintiff when that claim is fairly debatable. However, a frivolous or unfounded refusal to comply with a duty under an insurance contract constitutes bad faith." Five

additional jury instructions were given to the jury all of which explain what bad faith is. While a circuit court "has discretion in the wording and arrangement of its jury instructions," courts do not have "discretion to give incorrect, misleading, conflicting, or confusing instructions [. . .]" *Excel Underground v. Brant Lake Sanitary Dist.*, 2020 SD 19, ¶31. American West has not even alleged that the Court improperly instructed the jury.

In *Excel Underground*, the Court concluded that "the jury considered [the testimony] and other evidence regarding the relationship and conduct of the parties and fashioned a verdict accordingly" with the jury instructions they were presented. ¶38. In *Excel*, the judge gave an entirely incorrect jury instruction, however, when The Court looked at all of the instructions the Court concluded it was harmless. *Excel*, ¶37.

Here, jury instructions 20, 21, 22, 23, 24, 25 and 26, (SR 1703-1735) all deal with insurance bad faith and the alleged "fairly debatable" circumstances American West wished to argue about and rely upon in not paying Fiechtner anything. After, three days of trial and hours of deliberation the jury concluded that American West did, in-fact, commit bad faith, and the claim was not debatable. A new trial should not be granted for bad faith. Much of the same misconduct that supports the independent tort claim of insurance bad faith also supports the jury's finding that punitive damages were appropriate.

American West Acted with Malice or Reckless Disregard.

The jury found that American West acted with at least presumed malice or reckless disregard, making punitive damages appropriate. The jury determined the appropriate amount of punitive damages and entered its verdict. In post-trial motions, the trial court agreed with the jury's findings and concluded that American West was properly subjected to punitive damages. Now, American West claims that the standard is "conscious wrongdoing" instead of the presumed malice standard that has long governed punitive damages awards in South Dakota.

Actual malice is a positive state of mind, evidenced by a positive desire and intention to injure another, actuated by hatred or ill-will towards that person. Malice is so defined in *Gamble v. Keyes*, 43 S.D. 245 (1920). Presumed, legal malice, on the other hand, is malice that the law infers from or imputes to certain acts. *Hannahs v. Noah*, 83 S.D. 296, 303 (1968). Thus, even while a person may not act out of hatred or ill-will, malice may nevertheless be imputed if the person acts willfully or wantonly to the injury of another.

Punitive damages also are recoverable in South Dakota in cases involving willful and wanton misconduct that indicates a reckless disregard for one's rights. *Hannahs Id.* The Court has discussed this concept in other cases involving punitive damages.

"It is conduct which partakes to some appreciable extent, though not entirely, of the nature of a deliberate and intentional wrong. There must be facts that would show that defendant intentionally did something in the operation of the motor vehicle which he should not have done or

intentionally failed to do something which he should have done under the circumstances that it can be said that he consciously realized that his conduct would *in all probability, as distinguished from possibility*, produce the precise result which it did produce and would bring harm to the plaintiff.

Willful and wanton misconduct demonstrates an affirmative, reckless state of mind or deliberate recklessness on the part of the defendant. Such state of mind is determined by an objective standard rather than the subjective state of mind of the defendant. *Flockhart v. Wyant*, 467 N.W. 2d 473 at 478.

American West acted willfully, wantonly, and in reckless disregard for Fiechtner's rights. Punitive damages are not a new concept in South Dakota in insurance bad faith cases.

Punitive Damages in the Context of Wrongfully Denied Insurance Claims

Punitive damages are regularly allowed by Courts and awarded by juries in South Dakota. The same facts that support the independent, intentional tort support the finding of at least presumed malice. This has become commonplace in South Dakota.

Punitive damages are regularly allowed by Courts and awarded by juries in South Dakota. Just a few examples of punitive awards that have been affirmed on appeal in insurance bad faith cases include the following: In *Biegler v. American Family Mut. Ins. Co.*, 2001 S.D. 13, a jury awarded, and the South Dakota Supreme Court upheld \$100,000 for an insurer's bad faith breach of its insurance contract obligations by refusing to defend an insured. In *Sawyer v. Farm Bureau Mut. Ins. Co.*, 2000 SD 144, a jury awarded \$125,000 in punitive damages against an insurer and the

South Dakota Supreme Court upheld the award citing an insurer's improper reading of an undefined and ambiguous term in an insurance policy. In *Isaac v. State Farm Mut. Auto. Ins. Co.*, 522 N.W.2d 752 (1994) a jury awarded \$20,000 in punitive damages and the South Dakota Supreme Court affirmed citing the insurer's unfair treatment of the insured.

In a diversity case, *Athey v. Farmers Ins. Exchange*, 234 F.3d 357 (2000), a jury awarded and the 8th Circuit Court of Appeals affirmed a punitive award of \$450,000 against an insurer for ignoring an insured's proofs of loss and other unfair treatment. In *Bertelsen v. Allstate Ins. Co.*, 2011 SD 13, the trial court erred by not submitting the issue of a punitive damages remedy to the jury. After remand at the trial, the jury awarded \$1,500,000 in punitive damages, and that award was upheld on appeal because the insurer did not apply the clear meaning of South Dakota law, recklessly disregarding its obligations to its insured and ignored its insured for a year. *Bertelsen v. Allstate Ins. Co.*, 2013 SD 44. This is to just name some cases where juries in South Dakota found that insurers acted in bad faith and found punitive damages to be appropriate. Nothing in the law requires the conscious awareness that *American West* suggest is a necessary precursor to punitive damages.

The Trial Court Exercised Discretion Regarding Evidentiary Issues.

As with most jury trials, there were evidentiary issues during trial. Here, the trial court made correct calls. And, even if the trial court erred, it did not cause a different outcome, as there was no demonstrable prejudice to *American West*.

American West complains that a picture of a dollar bill was inappropriate. As a starting point, the Court required counsel to lay foundation with the adverse witness, which occurred but was left out of American West's briefing (SR 3116 - 3119). Further, in order to confuse the issues, American West uses the term "demonstrative exhibit" rather than calling the dollar bill what it was - a demonstrative aid. This demonstrative DID NOT go to the jury with the balance of the admitted evidence.

All admitted exhibits, by their nature, are demonstrative. However, all aids, are not by their nature, exhibits. "The practice of using these demonstrative aids should be encouraged since they give the jury and the court a clear comprehension of the physical facts, certainly much clearer than one would be able to describe in words." *State v. Henry*, 1996 SD 108, ¶18. The South Dakota Court has long recognized the admissibility of demonstrative evidence *State v. Hartman*, 256 N.W.2d 131, 137 (S.D. 1977).

The purpose of a demonstrative is not its standalone probative value but rather making other admitted evidence easier for the jury to comprehend. See Robert P. Mosteller, *et al.*, *McCormick on Evidence* § 214 (8th ed. 2020). "A demonstrative or illustrative exhibit 'is admissible if it clearly depicts the factual situations and will allow the trier of facts to more clearly understand a witness's descriptions.'" *Kaiser v. University Physicians Clinic*, 2006 S.D. 95, ¶ 24 n.3. Fiechtner never intended nor even attempted for the demonstrative aids to be received by the jury and instead was using it to help clarify the witness's description of the underlying business of

insurance and how the payment of premiums by an insured are pre-allocated by underwriters and managers – including money that is set aside to pay claims. Unlike case law cited by American West, this was a generic picture of a dollar bill – it was not some withheld scientific exhibit that changed the facts in the case.

Additionally, American West has failed to show how it was prejudiced. To the extent that the trial court erred in allowing the use of the demonstrative aid, in order to prove reversible error, American West has to establish that its rights were substantially prejudiced, and the result would have been different. *Braun v. Wollman*, 2024 SD 84, ¶ 42. In *Henry*, supra. the Court stated “*Henry* must show prejudicial error, which is error “that which in all probability must have produced some effect upon the final result and affected rights of the party assigning it. It is error ‘without which the jury would have probably returned a different verdict’.” ¶ 22, supra. The trial court did not error. If it did, American West has not shown that in all probability the demonstrative aid produced some effect upon the final result which would have been different for American West.

Similarly, the Court did not abuse its discretion by allowing Dr. Chaudhry to testify in the manner that he did both in the fashion he did and with the aid that he relied upon. SDCL § 19-19-611 grants the court “reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) [m]ake those procedures effective for determining the truth; [and] (2) [a]void wasting time.” *Blue v. Blue*, 2018 SD 58, ¶ 22. The South Dakota Supreme Court in *Blue* stated, “[t]he

court's restriction in limiting narrative answers was a perfectly reasonable control over the method of examining witnesses and presenting evidence.” *Id.* In this case the Court considered the video recorded testimony before trial and did not feel the need to limit Dr. Chaudhry’s testimony.

The trial occurred April 9-12, 2024. This testimony that American West complains about existed already as of March 3rd, 2022, and was in American West’s possession as soon as the court reporter completed the transcript. That means that the insurer had two years to deal with any alleged prejudice arising from any “narrative” answers before trial. It simply chose to dismiss Dr. Chaudhry as a gun-for-hire, over-paid, out-of-state expert. American West has not shown how it was prejudiced by admitting the testimony, nor how the result would have been different. It had more than two years to remedy any potential prejudice before the video and slide show were played to the jury. And, American West asked its hired expert, Dr. Tranel, about the Dr. Chaudhry testimony. The jury did not believe Dr. Tranel.

The Trial Court Awarded Fiechtner Attorneys’ Fees

American West claims that the trial court erred in granting attorneys’ fees. However, the trial court did not err in finding that American West acted unreasonably or vexatiously in denying Fiechtner insurance benefits making attorneys’ fees appropriate.

Statutory attorneys’ fees are available to insured claimants who have their insurance benefits unreasonably or vexatiously denied. Many South Dakota trial

courts have entered attorney fee awards in cases similar to this one against insurance company defendants, often without the companion findings that occurred in this case of both insurance bad faith and punitive damages.

Fiechtner Prevailed at Trial

Fiechtner prevailed in obtaining a verdict for \$400,000 in UIM contract benefits wrongly denied of him due by American West on October 23, 2019. Pre-judgment interest on those contract damages amount to an additional \$189,369.86. That totals \$589,369.86 that Fiechtner had to fight, all the way through trial, just to obtain a judgment from his own insurance company that the jury determined he was owed from years earlier. American West still has not paid *any* benefits that a jury determined Fiechtner was entitled to. Part of the remedy in South Dakota for this sort of conduct by recalcitrant insurance companies is statutory attorneys' fees.

Fiechtner sought Attorneys' Fees

Attorneys' fees are available in South Dakota to an insurance policy claimant who demonstrates that the insurer's denial of insurance policy benefits was unreasonable *or* vexatious. Unreasonable or vexatiousness is a separate but similar standard to the finding of insurance bad faith. Even in the absence of a bad faith finding by a jury, South Dakota trial courts have consistently ruled that a finding of bad faith is unnecessary to sustain an award of attorneys' fees in cases where an insurance company unreasonably or vexatiously denies its insured benefits that are later obtained. In this case, the jury found that American West committed bad faith

and found misconduct to support punitive damages. The same conduct that supports the jury's verdict also supports an award of attorneys' fees. While it only need be one or the other, American West's conduct in handling Fiechtner's claim was both unreasonable and vexatious.

Attorneys' Fees Allowed by SDCL§ 58-12-3.

Attorney fees . . . if it appears from the evidence that such company or exchange has refused to pay the full amount of such loss, and that such refusal is vexatious or without reasonable cause . . . the trial court . . . *shall*, if judgment or an award is rendered for plaintiff, allow the plaintiff a reasonable sum as an attorney's fee to be recovered and collected as a part of the costs . . . (emphasis added)

SDCL§ 58-12-3. The trial court's attorneys' fee award is reviewed under the abuse of discretion standard. *Brooks v. Milbank Ins. Co.* 2000 SD 16 at ¶ 20.

This statute requires the trial court to determine three things. First, whether the insurance company refused to pay the full amount of a loss. Second, whether the refusal was vexatious or without reasonable cause. And third, what is a reasonable charge for the work performed to enforce the insurance contract claim, vis-à-vis any other claims jointly brought." *Biegler v. American Family Mut. Ins. Co.*, 2001 SD 13 at ¶ 56.

Before making these determinations, it is important to understand why this attorneys' fees statute exists in a court system that ordinarily requires litigants to bear their own attorneys' fees.

Purposes of Statutory Attorneys' Fees

The objective of SDCL§ 58-12-3 is two-fold. It is to discourage the insurer from contesting insurance coverage and to reimburse an insured for any reasonable

attorney's fees necessarily incurred in defending or enforcing a valid insurance contract right. *All Nation Ins. Co. v. Brown*, 344 N.W.2d 493, 494 (1984). A party requesting an award of attorneys' fees has the burden to show the basis for the request by a preponderance of the evidence. *Stern Oil Co. v. Brown*, 2018 S 15, ¶45. Both discouragement and reimbursement are purposes that apply to this claim and case.

Discouragement and Reimbursement

Depending on the situation, attorneys' fees can be awarded related to a contingency based analysis or an hourly. This situation depends on which type of approach best meets both purposes of attorneys' fees. In situations where the contract damages are small, i.e. *Brooks v. Milbank Ins. Co.*, 2000 SD 16, ¶22 trial courts are to evaluate and award time invested and multiply that by a reasonable hourly rate, even if it exceeds the contingency fee rate.

[Insurer] also contends that this award is disproportionate to the result obtained and is, therefore, unreasonable. [Insurer] argues that the amount allowed for reasonable attorney's fees should never exceed what would be collected by an attorney under a contingency fee agreement. We reject this argument out of hand as it would encourage insurers to be recalcitrant and would discourage attorneys from representing persons who have been wrongfully denied coverage and/or a reasonable sum as compensation for a covered loss. This would be contrary to the best interests of the general public. *Brooks v. Milbank Ins. Co.*, 2000 SD 16, ¶22.

In other situations, where the contract damages are more significant, courts can use a contingency-based approach described in *All Nation*. The result makes sense because an award based upon the contingency amount alone would have been

insignificant and ineffective in discouraging “recalcitrant” insurers from contesting insurance coverage. *Brooks*, supra.

However, Fiechtner deserves to be fully reimbursed and American West needs to be discouraged from similar conduct in the future. This was not a small contract damage award, and a contingent fee reimbursement makes sense, and is reasonable as it is *exactly the amount of money* that the insurer’s misconduct required Fiechtner to incur.

American West Refused to Pay the Full Amount of Fiechtner’s Loss

The South Dakota Supreme Court has said this in the context of why insurers have to pay statutory attorneys’ fees:

We do not mean to imply in any way that an insurance company ipso facto subjects itself to liability for attorney's fees under SDCL 58-12-3 by reason of refusing to pay a claim by a policy holder, no matter how unfounded or unreasonable such claim may appear to be. We emphasize the fact that our holding is based upon the fact that there was no adequate, good faith investigation of plaintiff's claim [...] [T]he record reveals a lackadaisical, if not an outright cavalier, attitude on the part of the adjustor. Certainly the claim was not processed by the adjustor with that degree of speed and attention that one paying a premium for property insurance could fairly expect to receive.” *Eldridge v. Northwest G. F. Mut. Ins. Co.*, 88 S.D. 426 at 435 (1974).

In this case, American West paid *nothing* toward \$890,000 in UIM coverage that Fiechtner had available to him. American West maintained throughout the trial that it owed *nothing* in the form of additional insurance contract benefits. The jury unanimously disagreed, finding that American West owed Fiechtner \$400,000 for contract benefits. Nothing short of a jury trial followed by a jury verdict was enough

to obtain a judgment for the full amount of Fiechtner's loss – and even that has not yet actually disgorged the benefits owed. The denial of Fiechtner's benefits was unreasonable or vexatious, making him entitled to attorneys' fees under SDCL § 58-12-3.

American West was Unreasonable and Vexatious in Denying Insurance Benefits

The same misconduct described above illustrates how American West's misconduct was unreasonable and vexatious. There is more. In South Dakota, the result in this case amounts to a *defacto* unfair claims practice in South Dakota, which is further evidence of the unreasonableness and vexatiousness of American West's misconduct. The South Dakota legislature has defined some things that are unfair insurance claims practices: SDCL § 58-12-34 (5) & (6):

It is unfair claims practice if an insurer:

- “(5) Compels an insured or beneficiary to institute a suit to recover an amount due under its policies by offering substantially less than the amount ultimately recovered in a suit brought by the insured or beneficiary;
- (6) Refuses to pay claims without conducting a reasonable claim investigation[.]”

Fiechtner has a judgment for \$400,000 in contract benefits plus statutory pre-judgment interest since October 23rd, 2019, on this amount. The best American West *ever* offered was \$10,000 before the verdict. After interest, now in excess of \$189,000, that is fifty-eight (58) times more recovery than American West ever offered (\$10,000) and is therefore *unfair*, § 58-12-34 (5) *supra*. Meanwhile, the Court is now well versed in American West's lacking investigation. Nothing about the

Fiechtner claim was a one-off. Testimony from American West confirmed that this is *usually* what happens. That lackadaisical, if not outright cavalier attitude is exactly what the Supreme Court found to be appropriate in finding attorneys' fees. *Eldridge*, *supra*.

In total, this corporate mal-feasance dilutes the available purchased insurance coverage by requiring extensive costs to be expended to even get to trial in the form of expert fees and testimony – something that is never recouped by a claimant. Furthermore, it forces claimants like Fiechtner to hire attorneys. Attorneys are expensive, especially when they have to work for over four years to obtain benefits that should have been paid in the first instance as part of routine insurance business. That is why SDCL § 58-12-3 provides a remedy for situations just as this one – to *reimburse* insureds for attorneys' fees actually expended in the recovery of their benefits. *All Nation*, *supra*. The request for attorneys' fees in this case is not out of line with other awards of attorneys' fees in South Dakota.

Attorneys' Fees in Similar South Dakota Insurance Denial Cases

South Dakota trial courts and some appellate courts have reviewed cases where no bad faith was found by the jury but still found an unreasonable and vexatious denial of benefits. Some of the cases where attorneys' fees were awarded by trial courts pursuant to SDCL § 58-12-3 occurred in the absence of a finding of insurance bad faith by the jury. *Tripp* and *Bjornestad* are two such instances.

In *Tripp v. W. Nat'l Mut. Ins. Co.*, No. 09-4023, 2010 U.S. Dist. LEXIS 11283, 2010 WL 547181 (D.S.D. Feb. 9, 2010), *Tripp* demonstrated entitlement to attorneys' fees in total of \$65,000 absent any finding of insurance bad faith. According to the opinion, that is in part because *Tripp* had to file a suit and go through trial in order to recover the full amount of their UIM coverage of \$150,000. The United States Court of Appeals for the Eighth Circuit affirmed an award in *Tripp v. Western Nat'l Mut. Ins. Co.*, 664 F. 3d 1200 of \$65,000.

Bjornestad v. Progressive N. Ins. Co., 4:08-cv-04105-JBJ Dkt. 118 (UIM Award of \$75,000 + interest and accompanying attorney's fees of \$45,780.60) had a similar outcome; no insurance bad faith finding, only breach of contract with a comparatively significant attorneys' fee award. The United States Court of Appeals for the Eighth Circuit affirmed an award of \$45,780.60 in *Bjornestad v. Progressive Northern Ins. Co.*, 664 F.3d 1195. The insurer misconduct is more recalcitrant in Fiechtner's case than both *Bjornestad* and *Tripp*, as the jury found *both* bad faith and punitive damages.

In several other South Dakota cases, the contract benefits wrongly withheld or denied were outweighed by the claimed and granted attorney's fees. In *Bertelsen v. Allstate Ins. Co.*, 2013 S.D. 44 the claimed contract benefits were \$33,000 but the trial court allowed \$180,561.51 in attorney's fees which were upheld on appeal by The Court.

In *Biegler v. American Family Mut. Ins. Co.*, 621 N.W.2d 592 (2001), The Court affirmed a \$40,000 award of attorney's fees on the breach of a \$25,000 insurance contract. In *Eagle Ridge Estates*, for example, after a recovery of \$8,011.64, The Court affirmed an award of \$43,263.37 in attorneys' fees *and* remanded the case for further hearing on whether *another* \$8,628.69 should be awarded. In this case, the actual attorneys' fees chargeable to Fiechtner pursuant to the now uncontested judgment for contract damages and pre-judgment interest and the contingency fee agreement was \$196,632.86. The trial court reduced that request relying upon an hourly estimation and calculation, concluding something less than full reimbursement was appropriate finding \$96,045 in statutory recoverable attorneys' fees and sales tax of \$5,954.97. That totals less than half of what Fiechtner is contractually obligated to pay.

Attorney's Fees of \$196,632.86 would have been Reasonable Reimbursement.

Today, based upon a contract award of \$400,000, interest of \$189,369, the contingent fee agreement provides that Fiechtner owes \$196,632.86 – and that does not even include sales tax. That is the amount that Fiechtner *actually had to incur* to just get to this point of obtaining a judgment. Meanwhile, Fiechtner will owe sales tax in the amount of \$12,191.24 on those fees, whether The Court awards them, or not.

When considering the deterrent and reimbursement purposes of attorneys' fees and other factors for attorneys' fees, a substantial sum is warranted to satisfy the

public policy considerations embodied in SDCL § 58-12-3. “It is in the best interest of the general public that an amount awarded for attorneys’ fees be sufficient to not ‘encourage insurers to be recalcitrant,’ and to encourage attorneys to represent insured who have been wrongfully denied.” *Brooks* at 179. This request is not out of line with concepts of fairness and satisfies the public policy considerations outlined by the courts as the purpose of SDCL § 58-12-3. Meanwhile, it was subjectively reasonable in that it is what Fiechtner *had* to do just to get to this point.

While American West complains about paying Fiechtner’s attorneys’ fees, the reality is that it received about a 50% discount on the actual fees Fiechtner incurred from the trial court. The amount the trial court awarded is only about half the “reimbursement” that *All Nation*, *supra*. indicated is appropriate.

CONCLUSION

American West breached its contract of insurance in bad faith. Now, American West admits to owing amounts pursuant to that breach but still refuses to pay. American West’s denial of insurance benefits was not fairly debatable. American West’s denial of insurance benefits to Fiechtner caused additional damage, which the jury accounted for in its verdict for \$250,000 compensatory tort damages. American West’s actions and misconduct were interpreted by the jury to include at least presumed malice or reckless disregard, making punitive damages appropriate in the amount of \$890,000 and attorneys’ fees of at least \$96,045 appropriate, plus sales tax.

Dated: 2/14/2025

TURBAK LAW OFFICE, P.C.
Attorneys for Plaintiff/Appellee



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CERTIFICATE OF COMPLIANCE

I hereby certify that the above Brief of Appellees has been produced in Microsoft Word using a 12.5 point proportionally spaced typeface for the text of the Brief and a 12.5 point proportionally spaced typeface for footnotes; that the Brief contains 8,764 words, and that this complies with the Court's type volume limitation under SDCL 15-26A-66(b)(2).

Dated: 2/14/2025

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CERTIFICATE OF SERVICE

The undersigned, attorney for the Plaintiff/Appellee, hereby certifies that on this 14th day of February 2025, the Appellee's Brief, and this Certificate of Service in the above-entitled action was duly served upon the interested parties as follows:

Attorneys for Appellant:

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VIA Odyssey File and Serve

and that he mailed the original of Appellee's Brief to:

Shirley Jameson-Fergel
Clerk, South Dakota Supreme Court
500 East Capitol
Pierre, SD 57501-5070

by United States Postal Service, postage prepaid.

TURBAK LAW OFFICE, P.C.
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STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF LINCOLN

SECOND JUDICIAL DISTRICT

MARK FIECHTNER,

Plaintiff,

v.

AMERICAN WEST INSURANCE
COMPANY,

Defendant.

41CIV19

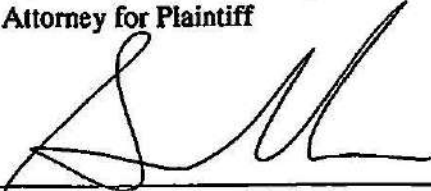
SUMMONS

TO THE ABOVE-NAMED DEFENDANT, AMERICAN WEST INSURANCE COMPANY:

You are hereby summoned and required to serve upon Seamus W. Culhane and Nancy J. Turbak Berry, Plaintiff's attorneys, whose address is 26 S. Broadway, Suite 100, Watertown, South Dakota, 57201, an *ANSWER* to the *COMPLAINT* which is herewith served upon you, within thirty (30) days after service of this *SUMMONS* upon you, exclusive of the day of service. If you fail to do so, Judgment by Default will be taken against you for the relief demanded in the Complaint.

Dated November 13, 2019

TURBAK LAW OFFICE, P.C.
Attorney for Plaintiff



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41CIV19

1

Appendix001

Instruction No. 2

It is your duty as a jury to determine the facts, and you must do this from the evidence that has been produced here in open court. This consists of the testimony of the witnesses and the exhibits which have been received. This evidence is governed by various rules of law. Under these rules, it has been my duty as judge to rule on the admissibility of the evidence from time to time. You must not concern yourselves with the reasons for these rulings, and you must not consider any exhibit which was not received in evidence or any testimony which has been ordered stricken. Such things you must put out of your mind. And you must not consider anything you may have heard or read about this case other than the evidence which has been properly admitted herein.

Instruction No. 3

The attorneys for the respective parties will present to you their arguments of the case for your assistance in coming to a decision. The order of their appearance and the length of the time of their arguments are regulated by the court. While the final argument of counsel is intended to help you in understanding the evidence and applying the law as set forth in these instructions, final argument is not evidence. You should disregard any argument, statement, or remark of counsel which has no basis in the evidence. However, an admission of fact by an attorney for a party is binding on that party.

Instruction No. 4

The fact that one of the parties to this action is a corporation is immaterial. Under the law of this state, a corporation is an individual party to the lawsuit, and all parties are entitled to the same impartial treatment.

Instruction No. 5

Defendant American West Insurance Company is a corporation and can act only through its officers and employees. Any act or omission of an officer or employee within the scope of his or her employment is the act or omission of the corporation for which the officer or employee was then acting.

Instruction No. 6

In weighing the evidence in this case, you have a right to consider the common knowledge possessed by all of you, together with the ordinary experiences and observations in your daily affairs of life.

You are the sole judges of all facts and credibility of witnesses. In deciding what testimony to believe, you may consider:

- (1) the witnesses' ability and opportunity to observe;
- (2) their intelligence;
- (3) their memories;
- (4) their manner while testifying;
- (5) whether they said or did something different at an earlier time;
- (6) their qualifications and experience;
- (7) any apparent interest, bias, or prejudice they may have; and
- (8) the reasonableness of their testimony in light of all the evidence in the case.

If you believe that any witness testifying in this case has knowingly sworn falsely to any material matter in this case, then you may reject all of the testimony of the witness.

A witness may qualify as an expert and give an opinion on a matter at issue if the witness has special knowledge, skill, experience, training, or education concerning the matter on which the expert testifies. In deciding the weight to give to the opinion, you should consider the expert's qualifications, credibility, and reasons for the opinion. You are not bound by the opinion. If you decide that the reasons for the expert's opinion are unsound, or that other evidence outweighs the opinion, you may disregard the opinion entirely.

During the trial certain evidence was presented to you by deposition. The witness testified under oath at the deposition, just as if the witness was in court. You should consider this testimony together with all other evidence received.

Instruction No. 7

The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness made a statement or acted in a manner inconsistent with the witness's testimony in this case on a matter material to these issues. You may consider evidence of this kind in connection with all the other facts and circumstances in evidence in deciding the weight to give to the testimony of that witness.

Instruction No. 8

You may have heard the terms “direct evidence” and “circumstantial evidence.” Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eye witness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

The law makes no distinction between direct and circumstantial evidence.

The jury must determine the facts from the greater convincing force of all the evidence in the case, both direct and circumstantial.

Instruction No. 9

A witness may qualify as an expert and give an opinion on a matter at issue if the witness has special knowledge, skill, experience, training, or education concerning the matter on which the expert testifies. In deciding the weight to give to the opinion, you should consider the expert's qualifications, credibility, and reasons for the opinion. You are not bound by the opinion. If you decide that the reasons for the expert's opinion are unsound, or that other evidence outweighs the opinion, you may disregard the opinion entirely.

Instruction No. 10

Plaintiff claims to have been injured and sustained damages as a legal result of the acts or omissions of Defendant by breaching a contract of insurance providing coverage for underinsured motorist benefits.

Plaintiff also claims that Defendant breached the duty of good faith and fair dealing by committing acts and omissions of bad faith.

Defendant denies these allegations and also denies the nature and extent of the injuries and damages claimed by Plaintiff.

Instruction No. 11

A legal cause is a cause that produces some harm or harmful result in a natural and probable sequence, and without which the harm or harmful result would not have occurred.

A legal cause does not need to be the only cause of the harm or harmful result. A legal cause may act in combination with other causes to produce the harm or harmful result.

The term “legal cause” means an immediate cause which, in the natural or probable sequence, produces the harm or harmful result complained of.

The legal cause need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it causes the harm or harmful result. However, for legal cause to exist, you must find that the conduct complained of was a substantial factor in bringing about the harm or harmful result.

Liability cannot be based on mere speculative possibilities or circumstances and conditions remotely connected to the events leading up to the harm or harmful result. The Defendant’s conduct must have such an effect in producing the harmful result as to lead reasonable people to regard it as a cause of the Plaintiff’s the harm or harmful result.

Instruction No. 12

The issues to be determined by you in this case are these:

First, did Defendant breach its contract, as forth in the insurance policy, with regard to Plaintiff's claim for underinsured motorist coverage benefits?

Second, did Defendant act in bad faith when handling Plaintiff's claim for underinsured motorist coverage benefits. If you determine that Defendant's acted in bad faith, then you may consider the issue of punitive damages.

You should first determine the questions of liability before you consider the question of damages.

Instruction No. 13

As to his first claim, Plaintiff claims that Defendant breached its contract with regard to his underinsured motorist coverage benefit.

A contract is an agreement to do or not to do a certain thing. In an express contract, the terms are stated in words.

Subject to the terms and conditions of such underinsured motorist coverage, the insurance company agrees to pay its own insured for uncompensated damages as its insured may recover on account of bodily injury or death arising out of an automobile accident. Coverage shall be limited to the underinsured motorist coverage limits on the vehicle of the party recovering less the amount paid by the liability insurer of the party recovered against.

Instruction No. 14

To establish liability for breach of contract, Plaintiff must prove all of the following by the greater convincing force of the evidence:

- 1. Plaintiff and Defendant had a contract for underinsured motorist benefits;
- 2. That Defendant breached that contract; and
- 3. Plaintiff suffered damages legally caused by that breach.

Instruction No. 15

The measure of damages for breach of contract is the amount that will compensate the aggrieved party for all detriment legally caused by the breach, or that in the ordinary course of things, would be likely result from the breach.

Damages for a breach of contract that are not clearly ascertainable in both their nature and origin are unrecoverable.

Instruction No. 16

In order to evaluate a claim for underinsured motorist benefits, the amount of uncompensated damages for personal injury sustained by the insured must be determined. In order to make this evaluation, you must ascertain the amount of money which will reasonably and fairly compensate Plaintiff for any of the following elements of loss or harm suffered in person or property proved by the evidence to have been legally caused by the motor vehicle accident with Ms. Belliveau, taking into consideration the nature, extent, and duration of the injury, whether such loss or harm could have been anticipated or not, namely:

- The aggravation of any pre-existing ailment or condition;
- The pain, suffering, mental anguish, disability, and loss of capacity of the enjoyment of life experienced in the past as a result of the injury;
- The pain, suffering, mental anguish, disability, and loss of capacity of the enjoyment of life reasonably certain to be experienced in the future as a result of the injury;
- The reasonable value of necessary medical care, treatment, and services received.

Whether any of these elements or damages has been proved by the evidence is for you to determine. Your determination must be based on evidence and not upon speculation, guesswork or conjecture.

Instruction No. 17

If you find that the Plaintiff had injuries or conditions prior to the 2018 car accident at issue in this case, you may not award damages for any previous or subsequent injuries or conditions unrelated to the defendant's conduct.

However, if you find that the 2018 car accident caused an aggravation of Plaintiff's pre-existing injury or condition, you may award damages for that aggravation. Before awarding these damages, Plaintiff must prove that the 2018 car accident was a substantial factor in bringing about the harm alleged.

An aggravation of a pre-existing injury is a worsening of that pre-existing injury.

Instruction No. 18

The law allows damages for detriment reasonably certain to result in the future. By their nature, all future happenings are somewhat uncertain. The fact and cause of the loss must be established with reasonable certainty. Once future detriment is established, the law does not require certainty as to the amount of such damages. Thus, once the existence of such damages is established, recovery is not barred by uncertainty as to the measure or extent of damages, or the fact that they cannot be measured with exactness. On the other hand, an award of future damages cannot be based on conjecture, speculation, or mere possibility.

Instruction No. 19

According to the mortality table, the life expectancy of a 57 year old person is 22 additional years.

The court takes judicial notice of this fact, which is now evidence for you to consider.

You should note the restricted significance of this evidence. Life expectancy shown by the mortality table is merely an estimate of the probable average length of life of all persons of a given age in the United States. It is an estimate because it is based on a limited record of experience.

Because it reflects averages, the table applies only to one who has the same health and exposure to danger as the average person that age.

Therefore, in connection with the mortality table evidence, you should also consider other evidence bearing on life expectancy. For example, you should consider the occupation, health, habits, and activities of the person whose life expectancy is in question.

Instruction No. 20

Plaintiff also seeks to recover damages based upon a claim of breach of the duty of good faith and fair dealing, or bad faith, against Defendant.

Every insurance contract includes the duty of good faith and fair dealing.

This duty means that neither party will do anything to injure the rights of the other in receiving the benefits of the agreement. The breach of that duty is called bad faith.

Instruction No. 21

Your determination of whether Defendant acted in bad faith must be based upon the facts and law available to Defendant at the time of that conduct.

Instruction No. 22

Plaintiff's claim against Defendant is known as a first-party claim because the Plaintiff is making a claim for underinsured (UIM) benefits against his own insurance carrier, the Defendant. Because it is a first-party insurance claim, the Plaintiff and the Defendant are adversaries.

As an insurance company, the Defendant is permitted to challenge first-party claims made by an insured such as Plaintiff when that claim is fairly debatable. However, a frivolous or unfounded refusal to comply with a duty under an insurance contract constitutes bad faith.

Instruction No. 23

The Defendant is required to conduct a reasonable investigation, but is not required to conduct a perfect investigation.

Instruction No. 24

To establish liability for bad faith breach of an insurance contract Plaintiff must prove each of the following by the greater convincing force of the evidence:

1. Defendant did not have a reasonable basis not paying underinsured motorist coverage benefits; and
2. Defendant either knew it did not have a reasonable basis or acted recklessly in determining whether it had a reasonable basis for not paying underinsured motorist coverage benefits; and
3. As a result of Defendant's bad faith conduct, Plaintiff suffered damage.

If you find by a greater convincing force of evidence that Defendant recklessly failed to pay Plaintiff underinsured motorist coverage benefits, then you may find Defendant knew that it had no reasonable basis to deny payment of benefits.

Instruction No. 25

If you decide for Plaintiff on the question of liability on the claim that Defendant acted in bad faith, then you must determine the amount of money which will reasonably and fairly compensate Plaintiff for any of the following elements of loss or harm suffered in person by the evidence to have been legally caused by Defendant's conduct, whether such loss or harm could have been anticipated or not, namely:

1. Financial harm caused to Plaintiff by insurance payments wrongfully withheld, unreasonably delayed and/or partially denied by Defendant, if any;
2. Emotional distress and mental anguish caused to Plaintiff by insurance payments wrongfully withheld, unreasonably delayed and/or partially denied by Defendant, if any;
3. Physical pain and suffering caused to Plaintiff by insurance payments wrongfully withheld, unreasonably delayed and/or partially denied by Defendant, if any.

Whether any of these elements of damages has been proven by the evidence is for you to determine. Your verdict must be based upon evidence and not upon speculation, guesswork, or conjecture.

Instruction No. 26

In civil actions, the party who asserts the affirmative of an issue must prove that issue by greater convincing force of the evidence.

Greater convincing force means that after weighing the evidence on both sides there is enough evidence to convince you that something is more likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater convincing force, then your finding upon the issue must be against the party who has the burden of proving it.

Regarding the claim for breach of contract, Plaintiff has the burden of proving:

1. That Defendant's breach of contract was a legal cause of damages to Plaintiff, and;
3. The nature and extent of Plaintiff's damages that resulted from said breach of contract.

Regarding the claim for bad faith, Plaintiff has the burden of proving:

1. That Defendant breached its duty of good faith and fair dealing by committing acts and omissions of bad faith;
2. That Defendant's breach of the duty of good faith and fair dealing was a legal cause of damages to Plaintiff, and
3. The nature and extent of Plaintiff's damages that resulted from said breach of good faith and fair dealing.

In this action, the Defendants do not have the burden of proving any issue.

In determining whether or not an issue has been proved by greater convincing force of the evidence, you should consider all of the evidence bearing upon the issue, regardless of who produced it.

Instruction No. 27

In addition to any actual damages that you may award to Plaintiff as to her bad faith claim, you may also, in your discretion, award punitive damages against Defendant American West Insurance Company if you find that Plaintiff suffered injury to person or property as a result of the oppression, fraud, malice, intentional misconduct, or willful and wanton misconduct of Defendant American West Insurance Company. The Plaintiff has the burden of proof on the issue of punitive damages. The purpose of awarding punitive damages is to set an example and to punish the Defendants.

Oppression is conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

Fraud in relation to contracts consists of any of the following acts committed by a party to the contract with intent to deceive another:

1. The suggestion as a fact of that which is not true by one who does not believe it to be true;
2. The positive assertion, in a manner not warranted by the information of the person making it, or of that which is not true, though the person believes it to be true;
3. The suppression of that which is true by one having knowledge or belief of the fact;
4. A promise made without any intention of performing it; or
5. Any other act designed to deceive.

Malice is not simply the doing of an unlawful or injurious act; it implies that the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations. Malice may be inferred from the surrounding facts and circumstances.

Actual malice is a positive state of mind, evidenced by the positive desire and intention to injure another, actuated by hatred or ill will toward that person. Presumed, or legal, malice is malice which the law infers from or imputes to certain acts. Legal malice may be imputed to an act if the person acts willfully or wantonly to the injury of the other in reckless disregard of the other's rights. Hatred or ill will is not always necessary.

Conduct is intentional when a person acts or fails to act for the purpose of causing injury or knowing that injury is substantially certain to occur.

Willful and wanton misconduct is more than negligent conduct, but less than intentional conduct. Conduct is willful and wanton when a person acts or fails to act when the person knows, or should have known, that injury is likely to occur.

Instruction No. 28

If you find that punitive damages should be awarded, then in determining the amount, you must consider the following five factors:

1. The intent of the Defendant American West Insurance Company.

In considering the Defendant American West Insurance Company's intent, you should examine the degree of reprehensibility of the Defendant American West Insurance Company's misconduct, including, but not limited to, the following factors:

- (a) Whether the harm caused was physical as opposed to economic;
- (b) Whether the tortious conduct evinced an indifference to, or reckless disregard of, the health or safety of others;
- (c) Whether the target of the conduct was vulnerable financially;
- (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.

2. The amount awarded in actual damages.

In considering this factor, you should consider:

- (a) Whether Plaintiff has been completely compensated for the economic harm caused by the insurer;
- (b) The relationship between the harm (or potential harm) suffered by the Plaintiff and the punitive damages award;

- (c) The magnitude of the potential harm, if any, that the insurer's conduct would have caused to its intended victim if the wrongful plan had succeeded; and
 - (d) The possible harm to other victims that might have resulted if similar future behavior were not deterred. The amount of punitive damages must bear a reasonable relationship to the actual damages.
- 3. The nature and enormity of the wrong.
- 4. The insurer's financial condition.
- 5. All of the circumstances concerning the insurer's actions, including any mitigating circumstances which may operate to reduce, without wholly defeating, punitive damages.

Instruction No. 29

There are certain rules you must follow as you deliberate and return your verdict. I will list those rules for you now.

First, when you go to the jury room, you must select one of your jurors as foreperson. That person will preside over your discussions and speak for the jury here in court.

Second, in order to reach a verdict in this case, ten or more jurors must agree with that verdict. It is your duty to discuss this case with one another in the jury room. Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors and listened to the views of your fellow jurors. Do not be afraid to change your opinions if the discussion persuades you, but do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the bailiff, signed by one or more jurors. I will respond as soon as possible either in writing or in open court. Remember that you should not tell anyone, including me, how your vote stands numerically or otherwise, until after you have reached a verdict and reported the same into court.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. You will be provided a copy of these instructions. You will return these instructions to me with your verdict and the exhibits in this case. Nothing I have said or done is intended to suggest what your verdict should be. That is entirely for you to decide.

A form of Special Verdict will be submitted to you. You will be required to provide written answers to certain questions in this Special Verdict. The questions are to be answered with "Yes" or "No" or other brief answer. When the same ten or more jurors have agreed to all of the answers

to the questions, that will be the verdict of the jury. The foreperson will write the answers of the jury in the space provided opposite the question. You will refrain from answering any question that has become moot by your answer to a previous question.

You will then be conducted into court where your verdict will be received and announced.

Dated this 12 day of April, 2024.



John R. Pekas
Circuit Judge

STATE OF SOUTH DAKOTA)
COUNTY OF LINCOLN)
:SS)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

MARK FIECHTNER,,
Plaintiff,

vs.

AMERICAN WEST INSURANCE
COMPANY,
Defendant.

CIV. 19-648

SPECIAL VERDICT

Provide answers to the following questions. The same ten or more jurors must agree to all required answers, which will then be the jury's answers. The foreperson will mark the jury's answer to each question required to be answered, then sign and date the form.

Breach of Contract Claim:

1. Did Defendant breach its insurance contract with Plaintiff by failing to pay underinsured motorist benefits to which Plaintiff was entitled?

YES X

NO _____
2. If you answer "NO" to Question 1, Defendant is not liable to Plaintiff for damages on the breach of contract claim, and no damages may be awarded on that claim. Skip paragraphs 2-7 and sign the verdict form.

If you answer "YES" to Question 1, answer the following two questions:

- a. What additional amount of money is necessary to compensate Plaintiff for his injuries or damages from the April 14, 2018 collision?

\$ 400,000
- b. On what date should Defendant have paid Plaintiff those additional underinsured motorist benefits? 10/23/2019

Regardless of how you answered the questions above, proceed to answer the next question.

FILED
APR 15 2024
Lincoln County, S.D.
Clerk Circuit Court

Bad Faith Claim:

3. Did Defendant breach its duty of good faith and fair dealing?

YES ✓

NO _____

If you answered "NO" to Question 3, Defendant is not liable to Plaintiff on the bad faith claim. Have the foreperson sign this form and notify the bailiff that you have finished your deliberations.

If you answered "YES" to question 3, answer the next question:

4. Was Defendant's conduct a legal cause of damages to Plaintiff?

YES ✓

NO _____

If you answered "NO" to Question 4, Defendant is not liable to Plaintiff on the bad faith claim. Do not answer any further questions. Have the foreperson sign the form and notify the bailiff that you have finished your deliberations.

If you answered "YES" to Question 4, answer the next two questions:

5. What amount of money is necessary to compensate Plaintiff for all damages caused by the bad faith on the part of Defendant?

\$ 250,000

6. Are punitive damages appropriate or necessary to punish Defendant or to set an example to others?

YES ✓

NO _____

If you answered "NO" to Question 6, Defendant is not liable to Plaintiff for punitive damages. Have the foreperson sign this form and notify the bailiff that you have finished your deliberations.

If you answered "YES" to Question 6, answer the final question:

7. What amount of money is appropriate as punitive damages?

\$ \$ 890,000

Dated this 12 day of April, 2024.

Matthew Kung
Foreperson

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF LINCOLN

SECOND JUDICIAL CIRCUIT

MARK FIECHTNER,

Plaintiff,

v.

AMERICAN WEST INSURANCE
COMPANY,

Defendant.

41CIV19-000648

JUDGMENT

The above-captioned action having been tried to a jury on April 9-12, 2024, the Honorable John Pekas, presiding, and the Jury having entered a verdict for the Plaintiff:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Plaintiff shall have and recover from the Defendant the sum of four hundred thousand dollars (\$400,000) in contract damages together with prejudgment interest from October 23, 2019, in the amount of \$189,369.86.

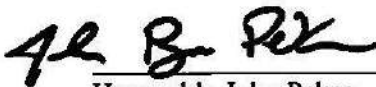
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Plaintiff shall have and recover from the Defendant the sum of two hundred and fifty thousand dollars (\$250,000) for tort damages related to the claims for insurance bad faith together with post-judgment interest here forward to be determined when paid.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Plaintiff shall have and recover from the Defendant the sum of eight hundred and ninety thousand dollars (\$890,000) in punitive damages together with post-judgment interest here forward to be determined when paid.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Plaintiff shall have and recover from the Defendant the sum of _____ representing statutory attorneys' fees costs to be determined at a later date and entered by the Clerk.

8/9/2024 10:11:38 AM

BY THE COURT:



Honorable John Pekas
Circuit Court Judge

Attest:
Baker, Teresa
Clerk/Deputy



STATE OF SOUTH DAKOTA		IN CIRCUIT COURT	
COUNTY OF LINCOLN		SECOND JUDICIAL CIRCUIT	
MARK FIECHTNER, Plaintiff,		41CIV19-000648	
v.		ORDER ON MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND MOTION FOR NEW TRIAL	
AMERICAN WEST INSURANCE COMPANY, Defendant.			

On September 11, 2024, at the Lincoln County Courthouse, this matter came on for hearing the following motions:

- 1. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT
- 2. MOTION FOR NEW TRIAL

Plaintiff was represented by Seamus W. Culhane, Turbak Law Office, P.C., Watertown, SD; Defendant was represented by Mark J Arndt, Evans, Haigh & Arndt, LLC, Sioux Falls, SD. The Court, having read and considered the motions, briefs, pleadings, and filings in this matter, and having considered the arguments of counsel.

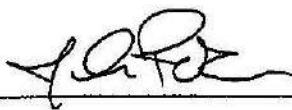
Now therefore,

IT IS HEREBY ORDERED:

- 1. DEFENDANT’S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT is hereby DENIED in its entirety.
- 2. DEFENDANT’S MOTION FOR NEW TRIAL is hereby DENIED in its entirety.

Date:

BY THE COURT:



Attest:
Baker, Teresa
Clerk/Deputy



11/20/2019 10:33:11 AM - Chris Oen (adjchris)
CLMS - 0000211521

No conflict with Mark Arndt. Task to Erica to send file to his office.

11/20/2019 8:45:49 AM - Chris Oen (adjchris)
CLMS - 0000211521

Received summons & complaint through certified mail at Fargo office. Mark Fiechtner v. American West Ins.
Sent to Mark Arndt for conflict check.

11/13/2019 2:39:56 PM - Mary Jo Dahl (maryjo)
CLMS - 0000211521

REVD FILE - CONTINUE TO MONITOR SUBRO.

9/26/2019 8:16:13 AM - Abby Kramer (akramer)
CLMS - 0000211521

Email from ins atty Seamus on 9/23/19: Mark has what appears to be an obvious brain injury that has been noted as a concussion w/corresponding amnesia, ongoing problems w/his vision, and a cervical disc bulge. He bought and paid for \$1,000,000 in UIM cov, and the underlying carrier has tendered \$100,000 limits. That leaves another \$900,000 in coverage. Meanwhile, I don't know any young people who would go through what Mark has or what he will have to in the future for \$120,000 nor can I imagine a jury thinking that is anywhere adequate. I've corresponded w/Mark and obtained authority to re-offer to resolve this claim for the remaining \$900,000 in coverage before filing suit. If this is not agreed to along with an agreement to tender soon, we will be forced to file suit in the next few days.

Reviewed w/Chris. We feel good about our evaluation and he advised to respond that we are too far apart in our evaluation right now and they can file suit if they must. Sent email to Seamus advising the same

9/23/2019 11:25:08 AM - Rich Laber (rich)
CLMS - 0000211521

Approved UIM reserve for claimant 1.

9/23/2019 10:54:25 AM - Abby Kramer (akramer)
CLMS - 0000211521

Email from atty Seamus: "Sure, I can imagine those things were included, but how did you arrive at this number"

Email response to atty: "Our company does not use any software such as Colossus. This offer was based on experience and a review with my manager. To be honest, I believe Mark was fully compensated by the underlying carrier's \$100,000 settlement and our waiver of subrogation rights for the \$10,000 med pay. However, since Mark is our insured, we want to give him the benefit and resolve this matter with an offer of \$10,000"

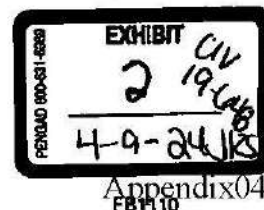
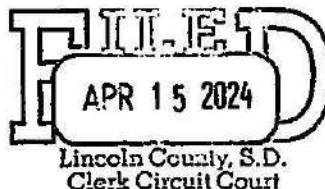
9/23/2019 10:30:01 AM - Abby Kramer (akramer)
CLMS - 0000211521

Rec'd email from Seamus: "What is this offer based upon? I.e. How did you come up with an offer of \$110,000 or total damages of \$120,000?"

Emailed my response: "This offer was based on: facts of loss, police report, impacts to both vehicles, bills and records for his treatment, diagnosed injuries, and impact to life."

9/23/2019 10:20:01 AM - Abby Kramer (akramer)
CLMS - 0000211521

Completed Initial Liab Report in case one was needed



Appendix 042

9/27/2018 1:34:59 PM - Lindsay Walters (lwalters)
CLMS - 0000211521

lwalters - Imported File Note

Payee name: CENTER FOR VISUAL LEARNING
Address . : 5021 S BUR OAK PL
SIOUX FALLS SD 57108
Draft amt : 450.00
Issued . : 09/27/18
Draft# . : 304274

9/26/2018 4:23:55 PM - Mary Jo Dahl (maryjo)
CLMS - 0000211521

ISSUE PYMT TO CENTER FOR VISUAL LEARNING IN THE AMT OF \$450.00 FOR OFFICE VISIT ON 9/5/18 WITH JEFFREY OAKLAND OD.

9/26/2018 3:01:00 PM - Mary Jo Dahl (maryjo)
CLMS - 0000211521

REC'D CORRESPONDENCE FROM JEFFREY OAKLAND OD ADVISING THAT HE BELIEVES VISUAL DEFICITS THAT MARK FIECHTNER IS EXPERIENCING CAN OCCUR AFTER A HEAD INJURY AND THAT CONVERGENCE INSUFFICIENCY IS ONE OF THE MOST COMMON FINDINGS THAT THEY SEE AFTER A HEAD INJURY.

9/12/2018 3:20:12 PM - Mary Jo Dahl (maryjo)
CLMS - 0000211521

REC'D RECORDS FROM CENTER FOR VISUAL LEARNING FOR MARK FIECHTNER FOR DOS OF 9/5/18 - REV'D THE SAME - DIPLOPI AND CONVERGENCE ISSUES - IT APPEARS THAT DIPLOPI CAN BE CAUSED FROM TRAUMA BUT NOT SURE ON CONVERGENCE ISSUE AND I WILL WRITE TO JEFFREY OAKLAND LD AND INQUIRE ON CARE RELATEDNESS.

9/10/2018 1:28:37 PM - Mary Jo Dahl (maryjo)
CLMS - 0000211521

REC'D EMAIL FROM MARK FIECHTNER FORWARDING STATEMENT OF CENTER FOR VISUAL LEARNING FOR DOS OF SERVICE OF 9/5/18 AND ADVISING THAT HE IS STARTING THERAPY FOR HIS DOUBLE VISION WHICH THE DR IS OF THE OPINION WAS A RESULT OF TRAUMA FROM MVA.

I HAVE ALSO RECEIVED CALL FROM KELLY OF CENTER FOR LEARNING VISUAL (PHONE #605-271-5000) AND KELLY INQUIRED ON COVERAGE FOR MARK FIECHTNER AS HE WILL BE HAVING 6 MONTHS OF VISION THERAPY FOR HEADACHES AND DOUBLE VISION - HE WILL HAVE WEEKLY VISITS WITH THERAPIST - DISCUSSED MEDICAL EXP COVERAGE FOR MARK FIECHTNER - DISCUSSED THAT I CANNOT PRE AUTHORIZE CARE UNDER THE MEDICAL EXP COVERAGE AND THAT SERVICES NEED TO BE INCURRED AND THEN WE LOOK TO SEE THAT ALL CARE IS ACCIDENT RELATED AND MEDICALLY NECESSARY. DISCUSSED I WILL NEED NOTES FROM DOCTOR FOR VISIT OF 9/5/18 ALREADY FORWARDED AND SHE WILL FAX THE SAME TO ME FOR REVIEW.

8/21/2018 11:43:15 AM - Mary Jo Dahl (maryjo)
CLMS - 0000211521

EMAIL FROM MARK FIECHTNER ADVISING HE IS GOING TO SCHEDULE VISION THERAPY AS HAVING DIFFICULTY SEEING AND HE WILL BE FORWARDING THE INVOICES FOR REVIEW.

Appendix043

UIM Evaluation 9/20/19

Injured Party: Mark Fiechtner (6'0", 210, right handed, 11/01/1966)

Claim #: 211521 State: SD

CURRENT RANGE OF VALUE (CROV):

- Generals: \$40,000 - \$70,000
- Wage Loss: not specified in demand
- Medical Bills: \$18,435.47 (hard to tell if all related or if some included the unrelated injuries)
- TOTAL: \$58,435.47 - \$88,435.47
- OIC Limits - \$100,000
- Med Pay Limits - \$10,000
- Don't have it valued at over what they have already received

NEGOTIATION POINTS:

- Assertions:
 - Demand claims neck pain & visual disturbances ongoing
 - Visual disturbance & neck pain both claimed starting 2 days after MVA
 - Diagnosed w/concussion
 - Treated for visual disturbances
 - Moderate Impact (more damage to V2 than to V1)
- Strengths:
 - No fx
 - Only degenerative findings on cervical MRI
 - No ER
 - It is questionable whether neck pain & even vision changes were from MVA or degenerative in nature
 - Per ins social media, he was walking around taking video of the accident. In one post he said "everyone was ok"
 - Social media check shows he was using a bobcat on 4/15 clearing snow, on a boat on 5/25, on vacation in AZ on 5/31/18, video showing him throwing boiling water 1/30/19

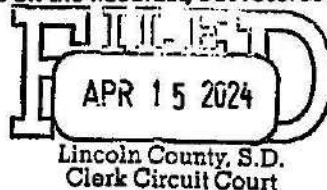
INJURIES:

- Pain in base of skull, neck, mid back and low back
 - Primary complaint per records was neck
- Visual disturbance
 - Double vision & problems with nearsightedness
- Headaches

MECHANISM OF INJURY (MOI):

- Left front impact, body would move toward the impact then possibly back again
- Demand says he hit his head on the headrest, but records say "no direct impact"

PRIOR INJURIES:



- Heart condition, bilateral shoulder, elbow, knee, fx collarbone
- Records "pt says no prior hx of neck pain or headaches"

OTHER UNRELATED INJURIES/TREATMENT

- Heart condition which he continued to F/u w/after MVA
- Left shoulder which he fell while in AZ in Aug 2018 while painting on ladder
- Big toe which he had a procedure on

TREATMENT RECAP:

- No ER
- Chiro Active Spine 6 visits (4/18/18 – 5/02/18) was then referred to Ortho
- Ortho for neck pain. Ortho institute for pain management & PT. 5 sets of injections. Tx 5/24/18 – 11/28. Referred to Workforce for concussion symptoms
- Workforce 2 visits (6/15/18 & 7/27/18), ordered brain MRI, diagnosed w/concussion w/out LOC
- Avera McGreevy clinic, there to establish care 8/02/18
- Dakota Vision Center 21 visits (6/19/18 – 3/19/21)

IMPACT TO LIFE:

- Was an avid weight lifter, now struggles to work out
- Riding motorcycle causes back pain & headaches

GENERALS:

- | | |
|-----------------------------------|--|
| • Neck sprain/strain w/injections | \$10,000 - \$20,000 (last tx in Nov 2018) |
| • Concussion w/memory issues | \$5,000 - \$10,000 (not mentioned after June 2018) |
| • Vision Disturbances/Changes | \$20,000 - \$30,000 (incl. future/permanency) |
| • Possible future for neck | \$5,000 - \$10,000 |

SPECIALS:

Wage Loss

- Operating bobcat, traveling/driving, lifting, sitting, reaching

Medical Bills

- | | |
|---------------------------|---|
| • Active Spine | \$1,105 (4/18, 4/20, 4/23, 4/25, 4/30, 5/02, 5/16) – 7 visits |
| • Avera McKennan | \$4,209 (6/11, Cervical MRI) |
| • Avera Med Gro Rad | \$420 (what dates are these for?) |
| • Dakota Vision | \$3,865 (9/05/18 – 3/19/19) – |
| • Ortho Institute | \$3,742 |
| • Sioux Falls Specialty H | \$4,336.75 |
| • Workforce | \$657.72 |
| • Total: | \$18,435.47 |

Medical Record Review

Active Spine Chiro (Dr. Brian Dozark, DC) 4/18/18 – 5/02/18 6 visits

4/18/18

- Pain in base of skull, neck, across shoulders, headaches low energy
- Pain has worsened since accident
- Has not missed any work since accident, has obtained legal council
- Having vision disturbances worse in AM but improves later midday, denies migraines
- Has family hx of Parkinsons
- Does weight training
- Wore seatbelt, airbags did not deploy, says no head injury
- Diagnosis:
 - Somatic/segmental dysfunction of cervical, thoracic, lumbar, sacral and upper extremity region
 - Cervicalgia
 - Headache
 - Myalgia
 - Differential diagnosis of degenerative arthrosis possibility

4/20/18

- Headaches, stiffness, aching, of neck, upper back, lower back, pelvic region
- Improved after last visit, but slowly returned
- Headaches less severe

5/16/18

- Pt reports of add'l subjective comments would like to explore other potential tx options that may give him quicker and more relief

Orthopedic Institute (Pain Management & PT)

5/24/18

- Chief complaint, neck pain, base of skull. Pain comes up over his ears to his temples and sometimes have problem w/his vision (referral from Active Spine)
- Has a little numbness and tingling in his fingertips. No coordination issues or balance issues
- Reviewed past med hx. He did have a previous visit with Dr. Heather in Jan of this year
- Xrays cervical
 - No fx or dislocations. Trace listhesis at C6-7. Listhesis at C3-4 and C4-5 (taken at chiro)
- Impression/Plan:
 - Could represent whiplash inj & possibly even concussion type symptoms
 - Has minimal instability on flexion and extension radiographs that could represent mild ligamentous injury in neck as well
 - Recommend MRI® of cervical spine, recommend PT, anti-inflammatory

6/14/18

Appendix046

- Referral to workforce & Brunz
- Cervical MRI reviewed, Spondylolisthesis noted at C3-4 & C4-5. No sign of ligamentous inj. Mild nerve pinching at 3-4 and 4-5. Will refer to pain management. Trigger point injections
- Some concussive symptoms, some memory issues, headaches, blurry vision. PT

6/19/18

- Neck problem mostly into right side that radiates into the shoulder. Problems of blurry vision and headaches, temporary loss of memory
- Never had any neck symptoms prior to accident
- MRI – minimal bulging disk identified (degenerative)
- Impression: whiplash type inj indicating cervical sprain/strain
- No evidence of any neurologic deficit other than possibility of closed head trauma w/possibility of head concussion and blurry vision
- Very concerned about his blurry vision, going to send to ophthalmologist to see if any changes in optic nerve and would like him to continue PT
- Trigger points in 5 diff areas

7/24/18

- F/U, trigger point injections gave him 85% relief. Some pain had come back on the side of his neck. He would like to reconsider repeating injection. He has not started recommended vision therapy
- 8/10/18 – right & left shoulder, right elbow (date of onset 8/07/18, left shoulder fall. Right shoulder & reoccurring right elbow). Was in AZ 8/08/18 where he was up on a ladder, painting a 20 ft ceiling and fell on his left shoulder
- 8/10/18 – Dr. Chang: Some neck symptoms are noted still & some back of the shoulder. Here for a recheck of problems in neck. 2nd trigger point injection w/out steroid helped but was temporary. Recommended 3rd Trigger Point injection
- 8/29/18 – calling to give report on trigger point injection on neck between shoulders. 50% relief for 1 week
- 9/05/18 – recheck of neck. 2-3 weeks of good relief. Still having some double vision and getting vision therapy. 4th round of trigger point injections
- 10/01/18 – big toe from 2016
- 10/02/18 – getting response from last trigger point injection, but would like to continue. Also seeing therapist for double vision
- 10/09/18 – big toe procedure, 10/19/18 thinks toe is infected
- 10/26/18 – toe F/U, unrelated
- 11/26/18 – left shoulder from fall, unrelated, 11/27 MRI left shoulder
- 11/28 – phone call & chart review for left shoulder
- 11/28 – neck F/U, cortisone injections (5th round)
- 3/13/19 – referral to athletic trainer for bilateral shoulder pain & right wrist pain (doesn't appear related) – unrelated

Appendix047

- 6/14/18 – c spine neck pain & headaches. Has been doing some chiro w/out much improvement. MRI mild degen of his discs but no significant stenosis or neural impingement. Some vision & memory issues.
- 6/19/18 – referral to ophthalmologist/optometrist

Workforce

6/15/18 – reason for visit, concussion initial. Pt comes in for eval. MVA 2 mo ago. He tboned another car w/front end of his. No LOC. He was referred to ortho by his chiro who was tx him for neck pain. Cassie Swan PA referred him here for eval of vision changes and memory loss. Ortho will continue to manage neck, he has been referred to PT for neck

- Pt states short term memory loss several times a day. He can't remember appointment dates and often struggles to remember what he is talking about in middle of a conversation. He can't tell them who prescribed the rx for neck pain. Has affected word duties tremendously. No direct impact, likely whiplash injury. Headache every day 2-8/10 worse in the morning. Doesn't believe them to be migraines. Denies HA prior to MVA, thinks they stem from neck pain
- No nausea, no balance or vertigo. Has had a sudden decrease in his near sight vision since MVA. Denies visual difficulties before MVA or hx of corrective lenses. Poor sleep due to neck pain
- Assessments: Injury of head
- Pt symptoms and physical exam findings are consistent w/a contre-coup concussion. It is likely his neck is contributing to symptoms but would like head MRI for eval. If negative, pt may benefit from vision therapy. In meantime, he is to limit physical activity

7/27/18

- Concussion F/U
- Headaches are better which he attributes to two neck injections
- Continues to see double vision. Recommended vision therapy, he has not been there as unsure if insurance will pay. He will call insurance company
- He stopped w/chiro and PT as didn't feel they helped
- Not sleeping well due to neck pain and headaches
- Headaches continues most days of the week
- Assessment: concussion w/out LOC

MRIs

Cervical MRI 6/11/18 (Avera McKenna)

- Mild cervical degenerative disc disease w/very mild disc bulging

Brain MRI 6/20/18 (Sioux Falls Specialty Hospital)

- scattered areas of punctate white matter T2 hyperintensity are nonspecific, but likely reflect mild microangiopathic changes. Seminal r findings have been reported in the setting of migraine headaches
- No intracranial mass, intracranial hemorrhage or acute or subacute infarction

- Mild bilateral ethmoid air cell maxillary sinus mucosal thickening with a left maxillary sinus mucous retention cyst or polyp

Avera McGreevy Clinic 8/02/18

- Here to establish care. Has been doctoring w/ortho, and pain medicine after accident. Now has whiplash symptoms
- Hx of heart rhythm, has hx of diverticulosis, decreased libido, hemorrhoids, scoliosis
- Dr. change has given him epidural shots on neck. Also have complaints of what he thinks may be turf toe and right lateral elbow (no inj).
- Divorced, has daughter, current girlfriend
- Neck pain 5/10
- Denies any vision changes
- Injection for right tennis elbow
- He is to see orthopedics and pain clinic for remainder of his problems related to MVA

9/26/18

- Left great tow pain, 2 years.

12/14/18

- Couldn't have shoulder surgery due to heart fib
- Hasn't felt good for 9 mo
- Experiencing pain "no"

Dakota Vision Center (Jeffrey Oakland, OD) 6/19/18 – 3/19/19 21 visits

- Suffering insufficiency and presbyopia
- Rx for corrective lenses
- 3 mo later no improvement in symptoms
- Lenses were adjusted and began 6 mo visual therapy program
- 21 appointments
- *****

6/19/18 – vision has been blurry near every since accident. More in mornings. Getting headaches. Dr thinks he may have a concussion. Memory is failing a bit. Forgot 2 appointments recently. Having issues w/dry eyes. Using eye drops 2-3 days. Complains of eye health. No abnormal breaks, tears, lesions..

- **Assessment:**
 - **Convergence Insufficiency is a condition in which your eyes are unable to work together when looking at nearby objects. This condition causes one eye to turn outward instead of inward with the other eye creating double or blurred vision. Causes unknown**
 - **Presbyopia - farsightedness caused by loss of elasticity of the lens of the eye, occurring typically in middle and old age.**
 - **Plan:**
 - **Discussed findings & VT**

Appendix049

- See above
- Spectable correction

9/05/18

- Was referred to workforce for possible concussion eval who then referred for possible vision therapy eval 2ndary to visual complaints. Experiencing double vision up close, headaches, fluctuating vision, eye strain, eye fatigue, difficulty reading
- Plan: near pls lenses for use. Pt has a clear vision issue that VT will be beneficial for. Recommend a 6 mo program care
- 9/18/18 – first VT visit. Eyes tired, vision blurry
- 10/03/18 – had cortisone shot yesterday, no headache
- 10/10/18 – no headache today
- 10/14/18 – pt engaged and wants to be challenged
- 11/14/18 – continue w/current plan
- 2/6/19 - on vacation, didn't due any therapy
- 2/13/19 - double vision decreased, no headache
- 2/27/19 - headache free except when he spends a lot of time in bobcat
- 3/06/19 - came in w/headache. Encouraged home exercises

PRIOR RECORDS

- 3/24/2008 – Sanford neck pain. Has sore throat for 2 weeks when he swallows. Also has an area on his anterior neck where he points that is tender
- 2/14/12 – Ortho Institutes. Strained his shoulder on the rope tow and Great Bear while going up the cable while riding an inner tube. Shoulder hyperextended. Has had chronic achy-type sensation. He is an avid weightlifter. Has hx of right rotator cuff repair 2-3 yrs ago. This feels different
- 10/20/14 – Ortho Institutes, right knee. Epidural block
- 1/08/15 – Ortho Institutes, left elbow. States bilateral shoulders 2003
- 1/17/15 – ER for chest pain
 - Has been sleeping poorly as excessive caffeine during the day
 - Has been on testosterone and anabolic steroids for muscle gain
 - Past surgical history, multiple orthopedic procedure
- 7/14/16 – left olecranon bursitis (left elbow) and impingement of right shoulder. Had previous injections
- 12/20/16 – right shoulder impingement, previous injections
- 5/25/17 – right shoulder impingement, requested another injection
- 11/22/17 – requested right shoulder injection
- 1/03/18 – bilateral shoulder pain, right worse than left. Wants another shot. Had last in May 2017. Fell and broke his clavicle in June. Healed w/out surgical intervention. Ortho Institute

UNRELATED (shoulder, toe, heart)

Avera Med Group, Radiology

- 9/26/18 – xray of left big toe, no acute

Appendix050

Aaron Prestbo MD

- 9/27/18 – over read shows some arthritis, possible osteochondral defect? Previous inj to cartilage and underlying bone. Otho should be able to eval further, maybe not turf toe
- 2/07/19 – dealing w/atrial fib every day, concerned w/having stroke
- 5/21/19 –

2/26/19 – Avera Cardiology

- 12/14/18 PCP notes that he was going to have shoulder surgery (rotator cuff tear) but found to be in atrial fibrillation
- Does weight training for exercise but denies any cardio type exercise
- In real estate business
- Is pt in pain, “no”
- Decreased vision in both eyes

3/28/19

- Sleep apnea
- No mention of “memory issues”
- Atrial fibrillation for 4 years

4/24/19 – right eye vision getting worse

Appendix051

11/27/2018 7:39:04 AM



November 2, 2018

Center for Visual Learning
5021 S Bur Oak Pl
Sioux Falls SD 57108

Re: Named Insured: Mark Fiechtner
 Our Claim No.: 211521
 Date of Accident: 4/14/18
 Patient: Mark R Fiechtner
 Date of Service: 9/18/18 thru 10/24/18
 Patient Acct. No.: 174883

Dear Billing Dept.:

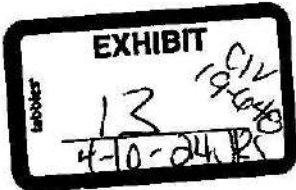
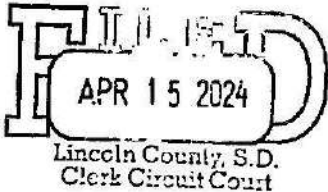
This letter is to notify you that American West Insurance Company paid its full \$10,000 policy limits, on behalf of Mark R. Fiechtner, for medical charges stemming from the above-referenced automobile accident. We have no further benefits available for payment of additional medical expenses.

Your medical billing should be submitted to other insurances available for the patient at this time for consideration. Should you have any questions, please feel free to contact me directly at 701-298-4231.

Sincerely,


Mary Jo Dahl
Claims Representative

Cc: Mark Fiechtner
 6909 S Westfield Trail
 Sioux Falls SD 57108



9/23/2019

Nodak Insurance Company Mail - Mark Feichtner, Claim #211521

 W-8 Turbak Law Office, PC.pdf
228K

Kim Diadrich <kim@turbaklaw.com>
To: "akramer@bcmutual.com" <akramer@bcmutual.com>
Cc: Seamus Culhane <seamus@turbaklaw.com>, Deb Wiedman <deb@turbaklaw.com>

Wed, Sep 4, 2019 at 2:51 PM

Abby,

My apologies, I confused your company with the underlying carrier.

I look forward to hearing from you regarding the UIM claim.

Kim

[Quoted text hidden]

Abby Kramer <akramer@bcmutual.com>
To: Seamus Culhane <seamus@turbaklaw.com>

Mon, Sep 23, 2019 at 9:58 AM

I have reviewed the Underinsured Motorist demand including the bills and records for Mark Feichtner.

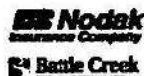
As previously stated, we have waived our subrogation rights for the \$10,000 that we paid towards Mark's medical bills. We have also given our permission for Mark to settle with the underlying carrier for their \$100,000 limits.

I am offering \$10,000 for a full and final settlement under Mark's Underinsured Motorist Claim.

Please present this offer to your client, then respond to me.

On Wed, Aug 28, 2019 at 9:21 AM Seamus Culhane <seamus@turbaklaw.com> wrote:
[Quoted text hidden]

--
ABBY KRAMER, AIC, CPCU
Sr. Claim Representative
Nodak Insurance Group | PO Box 2502 Fargo, ND 58108
Phone: 402-347-0475 | Fax: 701-298-4201
Email: akramer@nodakins.com or akramer@bcmutual.com



Seamus Culhane <seamus@turbaklaw.com>
To: Abby Kramer <akramer@bcmutual.com>
Cc: Seamus Culhane <seamus@turbaklaw.com>

Mon, Sep 23, 2019 at 10:03 AM

Ms. Kramer,

What is this offer based upon? I.e. How did you come up with an offer of \$110,000 or total damages of \$120,000?

<https://mail.google.com/mail/u/0/?ik=12ea70d306&view=pt&search=s&permthid=thread-F%3A1643120780308119467&siml=msg-F%3A1643120780308119467>

Appendix 053
4/5
FEB039

October 3, 2018

Sioux Falls Specialty Hospital
910 E 20th St
Sioux Falls SD 57105-5355

Re: Named Insured: Mark Fiechtner
 Our Claim No.: 211521
 Date of Accident: 4/14/18
 Patient: Mark R Fiechtner
 Date of Service: 6/20/18
 Patient Acct. No.: 392190 0002

Dear Billing Dept.:

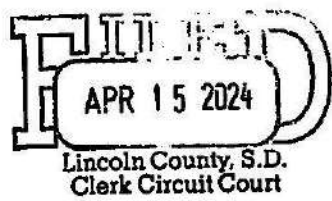
This letter is to notify you that American West Insurance Company paid its full \$10,000 policy limits, on behalf of Mark R. Fiechtner, for medical charges stemming from the above-referenced automobile accident. We have no further benefits available for payment of additional medical expenses.

Your medical billing should be submitted to other insurances available for the patient at this time for consideration. Should you have any questions, please feel free to contact me directly at 701-298-4231.

Sincerely,

Mary Jo Dahl
Claims Representative

Cc: Mark Fiechtner
 6909 S Westfield Trail
 Sioux Falls SD 57108



Appendix054
FB1003

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STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
)	
COUNTY OF LINCOLN)	SECOND JUDICIAL CIRCUIT
MARK FIECHTNER,)	
)	
Plaintiff,)	
)	JURY TRIAL
vs.)	DAY #1
)	(MINUS JURY SELECTION)
AMERICAN WEST INSURANCE)	CIV 19-648
COMPANY,)	
)	
Defendant.)	

BEFORE: THE HONORABLE JOHN PEKAS
Circuit Court Judge
Canton, South Dakota
April 9, 2024.

APPEARANCES:

For the Plaintiff:	Seamus Culhane
	Alison Bakken
	Attorneys at Law
	26 South Broadway Suite 100
	Watertown, South Dakota 57201
For the Defendant:	Mark Arndt
	Attorney at Law
	225 East 11th Street Suite 201
	Sioux Falls, South Dakota 57101

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1 Q Ms. Kramer will, though, tomorrow when she comes?

2 A I assume so.

3 Q Well, there's all kinds of records from OI in your file.

4 A Yes. I believe I reviewed some of that.

5 Q Dr. Chang, Mr. Wingate, Dr. Otto, potentially even others?

6 A Yes.

7 Q So the idea that somehow Mr. Otto was prevented from talking
8 to Ms. Kramer isn't realistic or true, is it?

9 MR. ARNDT: Objection. Argumentative.

10 MR. CULHANE: It's a leading witness, Judge.

11 THE COURT: Yeah. I'm going to allow him to ask a leading
12 question because it is adversary.

13 So at this point you can answer.

14 A My answer would be it would be in the process of handling
15 claims, it would be extremely uncommon for us to directly
16 contact a provider treating one of the people making a claim
17 against our company.

18 BY MR CULHANE:

19 Q Yeah. And the things that I said in opening, you were
20 sitting here; right?

21 A Yes.

22 Q I mean, you don't contact treating doctors, generally?

23 A We do not.

24 Q And you did not contact treating doctors in Mark Fiechtner's
25 case?

Appendix057

1 A We did not.

2 Q You didn't contact an independent medical examiner in this
3 case?

4 A We did not.

5 Q You don't generally do that?

6 A No. As a matter of -- no, we don't.

7 Q And it's true that you had releases from Mary Jo Dahl. Who
8 is Mary Jo Dahl?

9 A She was the specific claim handler that handles the medical
10 payments portion of the claim.

11 Q She actually did go outside of her file to look for evidence
12 supporting payment by getting release from Mr. Fiechtner,
13 didn't she?

14 A Yes. We need a release to be able to contact the providers
15 to get billings and get references to support those billings
16 to process that part of the claim.

17 Q But you -- when I say "you", American West -- let me back
18 up. Is there anybody higher up at American West in the
19 claim department than you?

20 A No. I'm the vice president of claims.

21 Q Then you report to who?

22 A Our senior vice president of operations.

23 Q You've been there about 15 years?

24 A 17 now.

25 Q Okay. Last time we spoke was 15?

Appendix058

1 A Yes.

2 Q I got that wrong.

3 American West doesn't let their UIM adjustors use what
4 the med pay adjustors already have in the file?

5 A We do not.

6 Q I mean, so even though there was a release in the file to
7 talk to providers that Mary Jo Dahl hasn't got, when Abby
8 Kramer got involved, she wasn't allowed to even use that
9 stuff?

10 A Not without a specific release from Mr. Fiechtner to be able
11 to view those records.

12 Q And as far as you know, she never saw it?

13 A I don't know what she did or didn't do. I said I wasn't the
14 primary handler at the time.

15 Q Right. I understand that. And, I mean, I also understand
16 that you reviewed the claim notes in this file periodically
17 as part of your job supervising Abby Kramer; right?

18 A Yes. I believe my first attention to the claim was brought
19 after the demand for UIM came so this would have been 2019.

20 Q Let's back up and get the documents so we can talk about
21 exact dates. I'm not trying to memory quiz you here.

22 But let me show you what's been marked as Exhibit 1.

23 Does that appear to be a true and accurate copy of the
24 insurance declaration page?

25 A Can I grab my glasses? I forgot them.

Appendix059

1 A Um, current authority is \$500,000.

2 Q Okay. So where would you have to go to resolve a claim that
3 is larger than that? Who do you have to speak with?

4 A I would have to speak with the senior vice president of
5 operations.

6 Q What is his or her name?

7 A Pat Duncan. He's a him. Patrick Duncan.

8 Q Okay. Did you do that in this case?

9 A I did not.

10 Q You -- neither you nor Ms. Kramer had authority to meet Mr.
11 Fiechtner's standards for UIM benefits. True?

12 A If his demand was the, if I remember, \$890,000, that would
13 be over my authority.

14 Q Sure. I think I said \$900,000 to begin with, but the
15 \$10,000 med pay credit off of the UIM endorsement, we're
16 talking about 890,000 remaining coverage available today.
17 True?

18 A True.

19 Q At this point in time, as far as you know, has American West
20 ever paid Mark any benefits besides the medical payments
21 benefits?

22 A We have not. My -- other than, I would say, the -- I can't
23 remember how the collision part of his truck worked out, who
24 paid or I'm not sure if we did -- if the other company did,
25 or we did or...

Appendix060

1 Q And you're here as the corporate representative for Nodak --
2 or I'm sorry -- American West?

3 A Yes.

4 Q As a Nodak employee?

5 A Yes.

6 Q Okay. You are eligible for a company-wide incentive plan.
7 Is that true?

8 A That's true.

9 Q And the company-wide incentive plan incentivizes both you
10 and claims handlers like Ms. Kramer?

11 A It does.

12 Q And it bases -- potentially a benefit on financial strength
13 of the company?

14 A Yes.

15 Q Bases financial incentives on meeting loss ratio goals?

16 A It does.

17 Q What are lost ratios?

18 A Essentially take the money that we take into premiums versus
19 the money payout in claims throughout the year. That's the
20 simple way of doing it. We also have to add in adjusting
21 expenses, you know, just fees renting a building all the way
22 to commissions for our agents, so -- so it's, kind of, the
23 losses we pay plus the expenses to run the company versus
24 the premium we receive during a calendar year.

25 Q So when we talk about pure loss ratio, we're talking about

Appendix061

1 only claims going out versus money coming in in the form of
2 premiums. True?

3 A I'm not really sure what you mean by "pure loss ratio".

4 Q Combined loss ratio that includes loss of adjustment
5 expense; right?

6 A True. Yes.

7 Q And loss of adjustment expenses like money you paid to hire
8 a lawyer or a doctor at trial? Those things?

9 A There's hundreds of different things that go in that, yes.

10 Q Those are included in the combined loss ratio, but the
11 incentive plan actually breaks up loss ratio from loss
12 adjustment expense. True?

13 A They're broken apart, but they're added together to -- my
14 understanding is our short-term incentive plan is what we're
15 talking about. You know, we look at that whole amount
16 because, you know, controlling expenses is important to a
17 company as well.

18 Q Oh, sure. It's up -- you and Ms. Kramer are eligible for up
19 to 10 percent bonus at the end of the year if the various
20 goals are met on financial strength, customer satisfaction,
21 loss ratio, loss adjustment expense. True?

22 A True.

23 MR. ARNDT: Objection. Compound.

24 THE COURT: Sustained. I'm going to have to sustain that.
25 I think you can ask it again and not make it compound.

Appendix062

1 BY MR. CULHANE:

2 Q You're eligible for a 10 percent annual bonus. True?

3 MR. ARNDT: Objection. Calls for form. 10 percent of what?

4 THE COURT: I think you'll have to identify the 10 percent.

5 MR. CULHANE: Okay.

6 BY MR. CULHANE:

7 Q The 10 percent is broke down into various things including
8 financial strength?

9 A Yes. I said that, yes.

10 Q Loss adjustment expenses?

11 A I believe that would be part of it.

12 Q Loss ratio goals?

13 A Sure.

14 Q Growth of the company?

15 A Yes. I believe that's part of it as well.

16 Q Customer satisfaction?

17 A I'm not sure that customer satisfaction was directly related
18 to the short-term incentive plan you were talking about. I
19 think those three things is -- the first three were.

20 Q Okay. So that's -- if claims handlers meet those goals,
21 they're eligible for up to 10 percent in annual bonus on
22 their salary?

23 A Yeah. But along with everybody that's employed with Nodak
24 insurance.

25 Q Sure. But the adjustors aren't selling policies; right?

Appendix063

1 A Correct.

2 Q Adjustors aren't the ones determining which -- whether to
3 insure this guy and this part -- or this gal -- are they?
4 That's the underwriter's job?

5 A Typically, yes.

6 Q I mean, ultimately, the adjustors have, kind of, control of
7 two things and that's how much gets paid in claims. True?

8 A That's one thing, yes.

9 Q And the other thing is how much do we spend in that process?

10 A Small part of that part -- it would be involved in the
11 expense ratio. As I've explained, there's hundreds of
12 things.

13 Q So what else does the adjustor have control over?

14 A Well, we do have control over customer service, which, you
15 know, we expect as an insurance company. People have
16 claims. We want to treat them as fairly as possible, so we
17 directly attribute to retention of policies within the
18 company.

19 Q But I thought you just said that doesn't come back into the
20 metrics of how much to grant in bonuses?

21 A It directly relates to the amount of premium we have during
22 the year. If somebody leaves us after a claim, we lose that
23 premium that they've taken with them.

24 Q Ultimately, you have met with Abby Kramer -- how often do
25 you meet with your people you supervise?

Appendix064

1 A Informally, definitely weekly if not daily.

2 Q I'm showing you what's been marked as Exhibit 5. Will you
3 take a look at this, please.

4 Does that appear to be a true and accurate copy of the
5 2020 salary review for Abby Kramer?

6 A Yes.

7 Q Abby Kramer was the adjustor who handled Mr. Fiechtner's
8 claim?

9 A The UIM portion of it, yes.

10 Q That's what we're all here for --

11 A Yeah.

12 Q -- today? Okay.

13 Ultimately, how much did Ms. Kramer make in 2020 as a
14 result of her salary with Nodak?

15 A As of April 1, 2020, her salary \$64,739.

16 Q And that would have been eligible for up to the 10 percent
17 bonus we talked about?

18 A Yes.

19 Q And that would have been for the year prior, which would
20 have been the year of Mr. Fiechtner's UIM claim?

21 A My understanding is Mr. Fiechtner's UIM -- or accident
22 happened in 2018, and 2019 would have been her previous
23 salary, which is not on this page; so...

24 Q Okay. Sure. But ultimately, the claim for UIM benefits
25 wasn't presented in 2018, was it?

Appendix065

1 Q She acted within what she was supposed to do at American
2 West and Nodak Insurance Company?

3 A I do.

4 Q You've looked at the file closely. We've been in litigation
5 for several years?

6 A I have.

7 Q Part of the premium payment when insured like Mark pays to
8 have insurance coverage includes services. True?

9 A Yes.

10 Q Customer service I think is first and foremost and maybe
11 something you had previously testified to?

12 A Yes.

13 Q And that includes performing an investigation at the
14 company's expense of claims?

15 A That's part of it, yes.

16 Q I mean, like, an old self-service gas station versus today's
17 station where you buy the gas and get help pumping it?

18 A Simple analogy. I don't know if I necessarily agree with
19 it; but, yeah, we expect to be able to service the claims
20 that our insured present.

21 Q Um, and, ultimately, when -- I mean, you understand the
22 business of insurance pretty well, don't you?

23 A I'd like to think so.

24 Q Well, I think a lot of people think that companies have to
25 deny claims to make money, but that's not true, is it?

Appendix066

1 objection or agree to have it admitted and then go ahead
2 and, once again, I believe properly publish for the jury.

3 MR. CULHANE: Okay. Thank you, Judge.

4 THE COURT: All right. I think you can do it. You just
5 have to ask the questions to lay foundation.

6 MR. CULHANE: Perfect. Thank you, Judge.

7 THE COURT: Yep.

8 MR. ARNDT: Before that happened, I'd also note that this is
9 not something that's been produced to counsel prior to
10 trial.

11 THE COURT: Yeah. Noted. Thank you.

12 The other thing is I'm not happy with this TV that's 30
13 feet from the jury. We have another one in the back over
14 here, and I'd like to use that for the video depositions. I
15 think we can get a little closer to the jury so it won't be
16 all the way across the courtroom. I'm hoping we can get
17 that lined up. I can see it back there in the hallway, so I
18 don't know why they didn't use it but...

19 MR. CULHANE: Would you like the witness back on the stand?

20 THE COURT: You can come back up when the jury comes back
21 in, yeah. Might want to bring your water this time. It's
22 up here.

23 (At which time, the jury was escorted into the courtroom.)

24 THE COURT: Mr. Oen, come on back up to the witness stand,
25 please.

Appendix067

1 Please continue, Mr. Culhane.

2 MR. CULHANE: Thank you, Your Honor.

3 BY MR. CULHANE:

4 Q When we left off, we were talking about insurance company
5 profits. Do you remember that?

6 A Yeah. Finances, I believe, yes.

7 Q Generally finances and the most -- in the simplest sense,
8 when the insurance company collects a dollar, somebody
9 called an actuary has already told your company how much is
10 likely to be coming in in claims on any respective book of
11 business. True?

12 A No.

13 Q How do you price your policies?

14 A We primarily use historical data -- long-term historical
15 data -- to -- to, kind of, predict what trends may be in
16 coverage lines, and so, all of those lines are broken down
17 too.

18 We also try to anticipate what allowances might be in a
19 year, which primarily for an insurance company like ours,
20 weather-related losses, which is hard to do.

21 Q Sure. Then when you back out, you presume every year you're
22 going to have to pay money to settle claims; right?

23 A Certainly know we're going to have to, yes.

24 Q That varies somewhere between how much? 50 to 70 percent,
25 say, of any dollar?

Appendix068

1 A The lowest I've seen in my 27 years in insurance on just
2 straight claims ratio has been, probably, about 60 percent;
3 the highest I've seen is about 140 percent.

4 Q Sure. So on the front end, you -- over time, you're able to
5 develop a pretty good data about how much you're likely to
6 have to pay. Your customers don't change that much year to
7 year. True?

8 A We're subject to all kinds of market conditions, yes, so
9 there can be changes. Again, we try to do our best to
10 predict a fair rate, but it's not that simple.

11 Q Well, on one hand -- you set aside money as a company to pay
12 claims. True?

13 A Yes.

14 Q I mean, and those sometimes are what's called policy
15 reserves when talking about a lot of different policies;
16 right?

17 A Correct.

18 Q Claim reserves if there's a specific claim that you know is
19 coming and money set aside to pay it; right?

20 A There are two parts to that question.

21 Q Okay. Fair. That's true.

22 So the first part, you have policy reserves. Second
23 part is claim reserves. Is that the two parts?

24 A I'm not really familiar with the term "policy reserves". I
25 think you're talking about do we have an overall savings

Appendix069

1 account as an insurance company to have to pay claims if we
2 get an extremely high volume or whatever? Yes, we're
3 required to make sure we have a savings account in case
4 something catastrophic would happen.

5 Q Part of what I want to -- I'm headed towards is that you
6 don't have to reduce claim payments to make profits. The
7 profit is actually priced into how much you charge the
8 policyholders to begin with; true?

9 A No.

10 Q You've -- your testimony here today is that you have to
11 reduce claims to make money?

12 A We can't reduce the number of claims we receive and we don't
13 -- necessarily cannot always control the amount of those
14 claims that are presented to us because we don't know the
15 severity until after a claim happens.

16 Q Sure. But annually over time, you develop data; right?
17 It's the form of percentages and dollar amounts and so
18 forth?

19 A We have data, yes.

20 Q And you know over time that you might not be exact on where
21 your loss ratios are, but you have a pretty good idea,
22 absent a massive storm or something. True?

23 A That's true. We price to what we can reasonably predict
24 that can happen, but it's -- there is a lot of uncertainty
25 built into it.

Appendix070

1 make with you. I took a long way to get there. I
2 appreciate it.

3 A I would -- I would -- I would -- by your example up there, I
4 would testify to this: On January 1st of the year, this
5 might be accurate to what we look at as an insurance company
6 similar to anybody who budgets for their household or any
7 business. This is probably a goal that we would have a
8 profit throughout the year on January 1st.

9 Q Well, we talked about the financial strength of the company
10 and this is the kind of thing. If the company can meet its
11 goals, its goals are going to be profitable?

12 A Correct.

13 Q How many years of the last five have you gotten a bonus
14 pursuant to being profitable of AM West Company?

15 A Three? Four? Three.

16 Q Do you recall testifying before that you've gotten a bonus
17 every year?

18 A That testimony was in 2022.

19 Q Okay. So going back to 2022, do you recall testifying that
20 you got a bonus every year?

21 A We did, yes. When I testified in 2022 at my deposition that
22 you did take, the five years prior to that we had achieved a
23 bonus.

24 Q So if you missed one or two in the last five years, you've
25 gotten a bonus based on corporate profitability eight times?

Appendix071

1 Seven times?

2 A Somewhere in there, yes.

3 Q Okay. And while that money is in your savings account, it's
4 actually reinvested and generated as more money; right?

5 A Yes.

6 Q And those -- investment income does actually make the money
7 grow while it's sitting there; right?

8 A Again, it's subject to market conditions and is hopeful.

9 Like, a lot of it is in equity and stock markets, your basic
10 savings account interest. I mean, that all can fluctuate.

11 Q Sure. But right now we know that, if you take a basic CD,
12 we can get 5 percent on money that's sitting in the savings
13 account; right?

14 A In 2024, yes.

15 Q I understand. But when you say market fluctuation, this is
16 a really good time to be sitting on a lot of money?

17 A I'm not an expert on the stock market or equity. I mean, I
18 don't get involved in that. That's not part of my job. But
19 yes, there is investment income that's added into the profit
20 and loss statement of an insurance company on a yearly
21 basis.

22 Q And do you recall testifying that you don't even have -- I
23 mean a company doesn't even have to -- you can pay more than
24 a dollar in this -- in how things are combined -- loss
25 ratio -- and I still make money because of investment

Appendix072

1 Oakland, O.D., advising that he believes visual deficits
2 that Mr. Fiechtner's experiencing can occur after a head
3 injury and that convergence insufficiency is one of the most
4 common findings that they see after a head injury.

5 Q And that was in response to her saying I will write to
6 Jeffrey Oakland and inquire on care relatedness a couple of
7 weeks earlier; right?

8 A I'm not -- is there a note referencing --

9 Q The note right before that -- if you look at the bottom
10 line, I will write...

11 A Thank you. Yes. Yes. She wrote in her medical payments
12 coverage claim asking some more input in regards to the
13 treatment from Jeffrey Oakland.

14 Q So in order for Mark to be paid \$10,000, Mary Jo Dahl went
15 through the effort of writing a letter to a doctor -- eye
16 doctor -- to confirm that it was indeed related to the
17 crash; true?

18 A True.

19 Q But when it came to the \$890,000 in remaining benefits, when
20 you had -- Abby Kramer looked at it on September 20, 2019,
21 you both just said it's questionable if it's related; true?

22 A Sorry. I'm going back to the notes to see if I can see
23 that.

24 In her 9-2019 notes, Abby Kramer was talking about all
25 of the issues that were brought to -- within the demand,

Appendix073

1 including the neck pain, memory, visual disturbances. I
2 guess what I would say is that I think she was questioning
3 all of the injuries as a whole if they were related, not
4 specifically one specific injury.

5 Q So Mary Jo Dahl had already investigated the vision issues
6 and those were confirmed those would be related; true?

7 A In order to process the medical payments.

8 Q Right. In the file that you reviewed before you reviewed
9 the claim notes with Abby; right?

10 A It was in the file, yes.

11 Q From, I don't know, a year earlier or so, something like
12 that?

13 A About a year earlier, yeah.

14 Q But when it came to investigating into paying for continuous
15 neck pain and memory issues, what did Abby Kramer do? Did
16 she investigate?

17 A I believe she went through your demand that your company
18 sent, which was inclusive of the medical records that were
19 sent, and formed her own opinion.

20 Q Which is different than the one Mary Jo had formed on behalf
21 of American West a year -- year at least in -- of the
22 conditions?

23 A I guess you can say in the writing it appears there's
24 differing opinions, yes.

25 Q And she didn't do anything to figure out if the continuous

Appendix074

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	10-7	4	41	Demo
9	11	4	33	33
	12-1	4	33	Demo
10	12-2	4	33	Demo
	12-3	4	94	Demo
11	13	4	94	Demo
	14	4		
12	14B	4		
	15	4		
13	16	4		
	17	4		
14	A	Previously	113	114
	B	Previously	118	118
15	C	Previously	119	119
	D	Previously	122	122
16	E	Previously	120	120
	F	Previously	137	137
17	I	Previously	127	127
	P	Previously	123	123
18	R	128	129	129
	S	130	131	131
19	T	133	134	134
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25				

1 deposition?

2 A I didn't think to. I just thought of the amount of claims
3 that are assigned to me.

4 Q Okay. So you're assigned between 350 and 400 claims. Some
5 of those might go to somebody else?

6 A Yes.

7 Q That doesn't include the UIM claims in addition to the
8 liability claims? There's between 20 and 30 more UIM claims
9 you're expected to handle?

10 A No. I would consider those 20 to 30 underinsured claims or
11 uninsured claims within those 350 to 400 claims.

12 Q What other kinds of claims do you handle?

13 A The liability claims. So that could be car accidents. It
14 could be a dog bite, a slip and fall, things of that nature.

15 But, quite honestly, a lot of the majority of them are
16 hit parked cars. Those are the type of claims I might not
17 have to do anything on. Deer hit or a rear-end collision
18 with no injuries.

19 Q What was the last one?

20 A Rear-end collision where there's no injuries.

21 Q So how many claims a year do you handle -- actively handle?

22 A If I gave you the number of 300 to 400, I would probably say
23 half of them require more than a day's worth of work and
24 those would be more long-tailed claims.

25 Q So 200 -- 175 to 200 claims a year you are expected to

Appendix078

1 handle that require more than one day's worth of work?

2 A Yes.

3 Q And despite handling that many claims that involve injuries
4 or a significant portion of those, you do not have any
5 medical training?

6 A No formal training, correct.

7 Q I mean, you've picked some stuff up along the way over the
8 last 20 years?

9 A Yes. With experience and just modules through different
10 insurance courses.

11 Q Within that experience and those modules, you also don't
12 have any formal training in brain injuries?

13 A No formal training, correct.

14 Q While you have learned over time that a person need not
15 strike their head on anything to cause a brain injury?

16 A To cause a significant brain injury, you do not need to
17 strike your head.

18 Q When you say "significant", what distinction are you trying
19 to draw?

20 A A concussion. Typically we can see where you're not
21 striking your head, and usually those symptoms would resolve
22 within the first few or several weeks. And anything beyond
23 that with permanent injury that might have more
24 debilitating, I guess, effects would be the ones that you
25 would see a blow to the head.

Appendix079

1 claim?

2 A Yes.

3 Q Together with his other coverage, Mark paid about \$2800 a
4 year for coverage with American West?

5 A I'd have to look at the declaration page again to see that
6 amount, but I recall that that could be the correct amount.

7 Q So if the declaration page, Exhibit 1, has that listed on
8 that, that would be accurate?

9 A Yes.

10 Q Do you agree when a person is paying premiums they're paying
11 for both indemnity coverage that will repay them for their
12 losses and also service that includes claim investigation?

13 A Yes.

14 Q That's part of the -- what goes into every premium dollar?

15 A Yes.

16 Q And it's not optional for insurance companies to investigate
17 claims, is it?

18 A No.

19 Q But actually good practice?

20 A Absolutely.

21 Q Because sometimes you investigate claims and find things
22 helpful to the insurance company?

23 A Yes.

24 Q Saves money for the company?

25 A It would help me accurately evaluate a claim.

Appendix080

1 Q Yeah. On the other hand, you're supposed to look for things
2 that not only support nonpayment or denial of claims, but
3 you're also supposed to look for things that support
4 payment?

5 A Correct.

6 Q And it's not appropriate in your business to deny any
7 portion of any claim without a reasonable basis?

8 A Correct.

9 Q And when you deny or fail to pay a claim, you're supposed to
10 explain why?

11 A Yes.

12 Q And that's part of both good claim handling and fairness?

13 A Yes.

14 Q That's what you do every day all day? That's your job?

15 A Yes.

16 Q It's not okay to deny a claim based upon speculation or
17 biased information?

18 A Correct.

19 Q By the time that American West appointed you -- or Chris Oen
20 appointed you to handle the UIM claim, there had already
21 been medical payments claim that Mary Jo Dahl handled?

22 A Yes.

23 Q You were aware of that?

24 A I was aware there was a claim, yes.

25 Q You don't have access as a UIM adjustor to the things that

Appendix081

1 completed or yours and my correspondence?

2 A First one, initial liability report, which I completed. And
3 then, yes, this is a comprehensive report completed on the
4 at-fault claimant.

5 Q Did you complete that?

6 A Yes.

7 Q When you talk about comprehensive report, you want to look
8 and see if there's a way that it makes sense for American
9 West to go after Kaitlyn Bellabo for the injuries caused to
10 Mark. True?

11 A Yes.

12 Q I mean, if there's money you can go get, it -- because the
13 crash wasn't Mark's fault; right?

14 A Yes.

15 Q So you do an asset check on the other driver before allowing
16 Mark to accept the underlying \$100,000 in coverage?

17 A Yes.

18 Q Okay. Keep going.

19 A The police report, which I had access to, probably first
20 notice of the last page that comes directly into the claim.
21 And these are the claim notices that come generated. I
22 haven't seen them in printed form before -- but claim
23 notices and then the declaration page.

24 Q Facebook posts. Did you investigate Mr. Fiechtner's
25 Facebook page?

Appendix082

1 Q And when you did that, did you also complete a UIM
2 evaluation?

3 A Yes.

4 Q That doesn't -- UIM evaluation does not appear anywhere in
5 this, does it?

6 A In this, it does not, but there is one.

7 Q Okay. And then if you'll move that stack of paperwork to
8 the right, would you take a quick look at the remaining
9 stack of papers, which is page number -- what's the first
10 page on the top that you're looking at?

11 A FB0811.

12 Q Then that goes all the way to FB1124?

13 A Yes.

14 Q And that is work that occurred on the file prior to your
15 involvement by either Jay Hortness or Mary Jo Dahl?

16 A I couldn't say for certain if it was or not.

17 Q Okay. Well, would you take a just a quick gander. Let me
18 know where else it would have come from.

19 A I just don't want to speculate if I'm not the one who did
20 the work.

21 Q That's what I want to -- I guess, we can maybe short-circuit
22 this. You didn't do that. You didn't compile that
23 information. True?

24 A True.

25 Q But it existed in your file -- American West's file; right?

Appendix083

1 A More than likely a portion I didn't have access to.

2 Q That's -- of that portion, some of it is the claim notes,
3 some additional medical records, bills, and so forth, which
4 would be what the medical payments adjustor would have done.
5 True?

6 A True.

7 Q So the stack on your left is what you did and the stack in
8 the middle is what I provided you?

9 A Yes.

10 Q That was another compound question. I caught myself this
11 time. The stack on the left -- your left -- is what you
12 did?

13 A Yes.

14 Q Stack in the middle is what I sent -- or my office?

15 A And I reviewed it, yes.

16 Q Then the stack on the right is what Mary Jo Dahl had had
17 done before either of those things occurred?

18 A Yes.

19 Q But it's your testimony that much, if not most, of what the
20 underlying medical payments adjustor does is not acceptable
21 to the UIM adjustor? Have you ever asked American West to
22 correct that?

23 A It's intentionally separated.

24 Q Why?

25 A Because the coverages that should be investigated

Appendix084

1 separately.

2 Q Why?

3 A Because, um, I don't know. That's just the -- what even at
4 State Farm -- that's just the way they've always said it
5 needs to be separate and completed on its own. State Farm
6 did it that way too.

7 Q So aside from what's on Mark's Facebook page, getting to the
8 police reports, did you do any investigation otherwise?

9 A Yes. I reviewed this entire stack.

10 Q By investigation, you looked at what was in the file; right?

11 A Yes.

12 Q You never asked me for any additional records?

13 A I relied based on what our insured and his counsel would
14 have provided to us that, if you felt we needed something
15 else, you would have provided something else.

16 Q I understand. I just want to confirm what you did.

17 A Correct.

18 Q One of the things that you did do is you check to see
19 whether one of the insured file's a claim, whether they're a
20 habitual insured; true?

21 A Yes.

22 Q You check other claims information to see?

23 A Yes.

24 Q When did you find out about Mr. Fiechtner's claim?

25 A Sorry. No prior claims with us or that we found with other

Appendix085

1 carriers.

2 Q So there was no evidence that he was habitual or serial
3 claimant?

4 A Correct.

5 Q The next -- well, one of the next things you need to do is
6 figure out whether the underlying driver's policy has or is
7 willing to pay?

8 A Yes.

9 Q And in this case, we know that that occurred?

10 A Yes.

11 Q And that occurred after you were provided the middle stack
12 of papers from my office? So I would have provided that
13 stack of paper to you and the underlying carrier at the same
14 time?

15 A I believe so.

16 Q And then shortly thereafter, the underlying carrier offered
17 the limits of the policy to release Ms. Bellabo?

18 A Yes.

19 Q At that point in time, there was remaining \$900,000 in
20 coverage?

21 A Yes.

22 Q When you opened Mark's UIM claim, you knew that the records
23 contained within them -- within that folder indicated that
24 Mark had neck pain with headaches?

25 A Yes.

Appendix086

1 Q Do you recall when I asked you if there was anything
2 suspicious about this claim when I took your deposition?

3 A Yes.

4 Q What did you tell me?

5 A That there's nothing suspicious.

6 Q But today you come to trial and you change that answer to
7 say the impact of the vehicles are suspicious?

8 A The injuries itself that are being claimed: The headache,
9 the concussion, that's not suspicious. It was just the
10 longevity of it.

11 Q You also researched whether or not Mark had any prior or
12 preexisting injuries. True?

13 A True.

14 Q To blame the symptoms or longevity of symptoms on?

15 MR. ARNDT: Objection. Argumentative.

16 THE COURT: Sustained. I think there's another way you can
17 ask it, Counsel.

18 BY MR. CULHANE:

19 Q Um, was there anything in Mr. Fiechtner's prior medical
20 history that was also being claimed as a result of a UIM
21 claim?

22 A No.

23 Q So there's no preexisting history of neck pain or vision
24 disturbances? Nothing?

25 A Correct.

Appendix087

1 Q Did you contact any of the treating personnel Mr. Arndt --
2 or I'm sorry -- Mr. Fiechtner treated with?

3 A I would not have been able to.

4 Q Did you ever ask me if we could?

5 A No.

6 Q Did you ever ask for a release to contact them?

7 A No.

8 Q Did you ever know there was a letter in Mary Jo Dahl's file
9 that confirmed the vision issues were likely trauma related?

10 A No.

11 Q You didn't know that?

12 A I did not know that.

13 Q That's one of the main things that you cited in your
14 response to the UIM claim, was that it's unknown whether
15 those are related to the trauma or something else?

16 A Based on records that I had, the records did not indicate
17 what caused them.

18 Q Yeah. Records I provided you. I didn't even know that, did
19 I? I mean, it's not in those medical stack of records that
20 Jeff Oakland's letter confirming the vision issues are
21 related didn't even appear in the Jeff Oakland records, did
22 it?

23 A Correct.

24 Q But either way, it was one of the major things that was a
25 question in your mind that you had that you discussed --

Appendix088

1 I'm sorry -- just about did it again. A question you had in
2 your mind?

3 A Yes.

4 Q And it was something you discussed with your supervisor?

5 A Yes.

6 Q What's your limits -- at the time of this evaluation, what
7 was the limits of your authority?

8 A 25,000.

9 Q And so because of the size of the claim, you also involved
10 your manager?

11 A Not just a size, but the fact it was an underinsured claim.
12 So first-party coverage, I always want to double-check and
13 consult with my manager.

14 Q Was there ever anything that you wanted that was not
15 provided to you?

16 A No.

17 Q And you had plenty of time to review your records and bills?

18 A Yes.

19 Q You knew based on that that Mark went to the chiropractor on
20 the fourth day after the crash?

21 A Yes.

22 Q He had discomfort in the back of his head and headaches.

23 A I would have -- yes.

24 Q Also aware he was reporting vision changes and muscle spasms
25 on the fourth day of -- after the crash?

Appendix089

1 A I'd have to look at the records again.

2 Q What if I show you a copy of your deposition where last time
3 I asked you this, you agree? Would that help?

4 THE COURT: Counsel, why don't you just go ahead and read
5 the question and what her answer was. That's proper for
6 using a deposition for refreshing someone's recollection.
7 And I need page and line.

8 MR. CULHANE: Sure.

9 BY MR. CULHANE:

10 Q On page 27 of your testimony, you testified in this case
11 much like we are today except no jury or no judge. True?

12 A True.

13 Q And that was recorded?

14 A Yes.

15 Q Question -- line 13. Okay, you were aware, though, that he
16 was also reporting things like vision changes, muscle
17 spasms, went to chiropractor on the fourth day after the
18 crash? Answer, yes.

19 A That deposition was two years ago and the last time I
20 reviewed the records were four years ago. If I said yes
21 there, my memory was probably more fresh then.

22 Q You were also aware that the chiropractor refers Mark to an
23 orthopedic surgeon, Dr. Wingate?

24 A Yes.

25 Q You were aware that Dr. Wingate did what he could for Mark?

Appendix090

1 MR. ARNDT: Objection to the form. How can she testify to
2 what a doctor did for a patient?

3 THE COURT: Yeah. I'm going to sustain that. I think
4 there's another way you can approach it.

5 MR. CULHANE: Thank you.

6 BY MR. CULHANE:

7 Q Did the records indicate to you that Mark exhausted his
8 options with Dr. Wingate?

9 A I don't know if they were exhausted options.

10 Q Do you have any specific criticism of those records or the
11 treatment there?

12 A No. I just don't remember the finality of saying that they
13 went through this course of treatment and it hasn't worked.

14 Q Do you recall also documenting that Mark was having numbness
15 in both of his hands?

16 A Yes.

17 Q You were aware that Dr. Wingate ordered an MRI?

18 A Yes.

19 Q And you were aware that that confirmed other degenerative
20 changes in his neck?

21 A Yes.

22 Q And then you were also aware that Dr. Wingate sent Mark to
23 Dr. Chang for -- the physical pain and rehab doctor for
24 injection?

25 A Yes.

Appendix091

1 Q Dr. Chang gave Mark a series of -- five or six series of
2 injections to his back and neck?

3 A Yes.

4 Q There was no question in your mind that Mark Fiechtner's
5 neck and back injuries were as a result of the motor vehicle
6 crash?

7 A Correct.

8 Q In addition, Mark Fiechtner started physical therapy?

9 A Yes.

10 Q Mark continued to have vision issues and headaches that he
11 spoke with Dr. Wingate about?

12 A Yes.

13 Q Dr. Wingate referred Mark to another PA at WorkFORCE named
14 Chelsea Wright (phonetic)?

15 A Yes.

16 Q For a variety of symptoms associated with a concussion?

17 A Yes.

18 Q Including a sudden decrease in sight/vision?

19 A Yes.

20 Q Specifically fatigue?

21 A Yes.

22 Q Mental fog?

23 A Yes.

24 Q Difficulty concentrating?

25 A Yes.

Appendix092

1 Q And there's never any indication in any records that Mark's
2 concussion for the symptoms thereof have resolved?

3 A Correct.

4 Q You're also aware that Mark went through 21 vision therapy
5 appointments?

6 A Yes.

7 Q He tried to treat it with convergence insufficiency?

8 A Yes.

9 Q Headaches?

10 A Yes.

11 Q Double vision?

12 A Yes.

13 Q Eye fatigue and difficulty reading?

14 A I don't recall that part, but if it's in the records, yes.

15 Q Well, if it's in your deposition -- I can read it again.

16 A (Indicating.)

17 Q Page 46, lines 9 through 12. Question, yeah, he continued
18 to report headaches, double vision, up close fluctuating
19 vision, eye strain, eye fatigue, difficulty reading, and
20 other visual tasks?

21 Answer, yes.

22 A Again, that was two years ago and the last time I reviewed
23 records was four years ago, so, if I said, yes, then, my
24 memory was probably better two years ago.

25 Q So two years ago, what I'm gathering, when you went to

Appendix093

1 testify about this case, you didn't even review any of the
2 records or any of the bills that you relied on to begin
3 with?

4 A I reviewed my medical evaluation because I didn't want to, I
5 guess, change my opinion by reviewing everything again.

6 Q When you say "medical evaluation", you mean the UIM
7 evaluation?

8 A Yes.

9 Q You don't -- I mean there was never any doctor that you
10 worked with that had a medical opinion about this case?

11 A Correct.

12 Q And to this day there's not been any doctor -- medical
13 doctor who has an opinion that supports anything that you've
14 said?

15 MR. ARNDT: Objection to that. I'll object to the form of
16 that. Post-litigation conduct violates the rule we've
17 already heard from Dr. Pardony.

18 THE COURT: It's noted. I'm going to sustain that. I think
19 there's another way you can ask it, Counsel.

20 BY MR. CULHANE:

21 Q Prior to deciding not to pay Mark for his claim to damages,
22 there was never any medical opinion from any person. True?

23 MR. ARNDT: Objection, again, to the form of that. There's
24 medical records that the witness reviewed.

25 THE COURT: I'm going to sustain that.

Appendix094

1 BY MR. CULHANE:

2 Q You believe as the adjustor that Mark Fiechtner did have a
3 brain injury?

4 A In the form of concussion, yes.

5 Q Well, when I asked you just -- do you recall saying yes?

6 A Well, a brain injury or a concussion can be considered a
7 brain injury, so, yes.

8 Q Okay. That's what you were referring to?

9 A Yes.

10 Q And you believe that that brain injury was the cause of the
11 double vision problems and the headaches he was having?

12 A It could have been.

13 MR. CULHANE: Do you mind if I approach, Judge?

14 THE COURT: Sure.

15 Q If you look at page 43, lines 6 through 9. Would you read
16 that, please? Are you on the right page?

17 A I believe that the brain injury was a cause of the double
18 vision problems and headaches he was having. Yes.

19 Q You never said anything about this qualifying of his
20 concussion. That's something that just happened today for
21 the first time?

22 A It might be the first time I've verbalized it. It's easy to
23 give, I guess, a yes answer without explaining it.

24 Q Okay. What did you do to prepare for your testimony today?

25 You can close that up.

Appendix095

1 A I reviewed my -- the initial liability report, the vehicle
2 damage photos, the police report, my UIM evaluation, and we
3 also met with our attorney.

4 Q Did you review any of these documents? Did you review your
5 deposition?

6 A I did review it real quickly, but it was, like, 80 pages.
7 There's no way to remember everything from that.

8 Q Ultimately, insurance companies' job is to fully evaluate an
9 insurance claim?

10 A Yes.

11 Q And claiming -- individuals like Mark Fiechtner -- UIM
12 claims, they're not supposed to have to hire a lawyer.

13 A Correct.

14 Q It's not part of the coverage -- there's nothing in the
15 coverage that requires them to have a judgment or go to the
16 jury verdict?

17 A Correct. There's nothing in the policy that says that or
18 they have to get an attorney.

19 Q And when you realize -- once a lawyer becomes involved, just
20 to get the coverage, that that dilutes the coverage?

21 MR. ARNDT: Objection to the form. It's argumentative.

22 THE COURT: I think it's argumentative and there's another
23 way you can ask it.

24 MR. CULHANE: I'll try. Thank you.

25 BY MR. CULHANE:

Appendix096

1 Q Lawyers cost money?

2 A Yes.

3 Q Litigation costs money?

4 A Yes.

5 Q And if a person has to hire a lawyer and go through
6 litigation to receive the same benefits that he should have
7 received, that reduces the ultimate coverage that they get.
8 Isn't that true?

9 A I don't know how the attorney fee breakdown works because
10 when I evaluate a claim, I evaluate based on injuries and
11 what's present, not if they have an attorney or not.

12 Q Right. I'm asking when you make the choice to deny or not
13 pay a claim, you know that if you have an injured UIM
14 claimant and they have to start spending money to get their
15 benefits, that that reduces how much they take home?

16 MR. ARNDT: Objection. Compound and argumentative.

17 THE COURT: It is compound.

18 MR. CULHANE: Thank you.

19 BY MR. CULHANE:

20 Q When you figured -- when you're trying to figure out the
21 impacts to Mark's life, did you ever seek to contact Mark?

22 A No.

23 Q Did you seek to contact any of his family or friends?

24 A No.

25 Q Did you seek to contact any treating physicians?

Appendix097

1 Q I mean different times blurry vision shows up or some of
2 that kind of stuff? Any one that was all the same thing or
3 different?

4 A No. It's -- it's just two -- I mean, when I hold a finger
5 up, I see two of them, but when you get things far enough
6 away, they can get back together.

7 Q Um, what do you have for on-going physical problems?

8 A My neck hurts a lot. That's probably the main thing. I
9 mean, I got lots of physical problems, but I mean...

10 Q One related to the crash?

11 A The neck is the main thing.

12 Q And what kinds of things or how do you deal with that?

13 A Um, I used to be able to just manipulate it and crack it or,
14 you know, stretch it or whatever, and try to achieve some
15 comfort. When it's bad, I have to go to -- I found a
16 chiropractor that does pretty well that I went -- started
17 going to again. That pretty -- gets pretty rough with me
18 and generally gets things -- I find some comfort in that.

19 Q Have you treated for heart problems in the last few years?

20 A I had a heart procedure a few years ago that they went and
21 cauterized the valves in my heart so I don't have AFib.

22 Q That's not related to the crash?

23 A No.

24 Q At any time through any of this, do you recall any doctor
25 telling you that your heart problems were causing your

Appendix098

1 vision issues?

2 A No.

3 Q Have you ever heard that ever before today in court?

4 A No.

5 Q There's also some insinuations -- do you drink? Do you
6 drink alcohol?

7 A Yeah.

8 Q Have you been told by your heart doctor to either slow down
9 or stop?

10 A Probably all my doctors said that. You know, I don't really
11 drink that much anymore. Probably a day when I used to, but
12 it's not an issue anymore.

13 Q Do you feel like the drinking causes your vision issues to
14 be worse?

15 A No.

16 Q Any correlation?

17 A I can't possibly get to that conclusion, no.

18 Q We've talked a lot about you not receiving the contract
19 benefits the last two days, 89,000 left after you get
20 credit. But beyond that, what does it feel like to have the
21 company that you paid premiums to not pay your claim?
22 What's that like?

23 A You know, I've been self-employed since four years out of
24 college when I bought my first business, and, honestly, for
25 15 years I did contracts on a handshake and mutual agreement

Appendix099

1 didn't -- I didn't have it evaluated for more than what he
2 received, and so I wanted to consult with Chris Oen to make
3 sure that we were considering everything.

4 Q Sure. What I asked you specifically -- how did you arrive
5 at this number. You never provided the UIM evaluation, did
6 you?

7 A I believe I referred to it.

8 Q When?

9 A In -- at some point during our deposition, I referred to it.

10 Q Yeah. Your deposition was two years ago. That came up
11 during that for the first time. True?

12 A That was our first, really, conversation.

13 Q You and I had exchanged emails in response to the \$10,000
14 offer. Right?

15 A Yes.

16 Q In those emails I asked you how did you arrive at this
17 number?

18 A Yes.

19 Q And you never provided me the UIM evaluation, which was how
20 you arrived at the number?

21 A I did not provide it to you, correct.

22 Q And it didn't get provided at all as far as you know until
23 we took your deposition?

24 A I was unaware that it wasn't provided, but, yes.

25 Q Do you recall that all occurring?

Appendix100

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2)
3 COUNTY OF LINCOLN) SECOND JUDICIAL CIRCUIT
4
5 _____)
6 MARK FIECHTNER,)
7)
8 Plaintiff,)
9)
10 vs.) JURY TRIAL
11) DAY #3
12) CIV 19-648
13 AMERICAN WEST INSURANCE)
14 COMPANY,)
15)
16 Defendant.)
17 _____

18
19
20 BEFORE: THE HONORABLE JOHN PEKAS
21 Circuit Court Judge
22 Canton, South Dakota
23 April 11, 2024.

24 APPEARANCES:

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EXHIBIT	MARKED	OFFERED	RECEIVED
14		55	56
15		49	Refused
16	89	89	89
17	121	182	182
K	95	95	95

1 A Correct.

2 Q Next bullet point?

3 A Only degenerative findings on the cervical MRI.

4 Q And why is that in the category as strengths?

5 A Because I believe that they were claiming spinal injury and
6 the only findings were degenerative in nature.

7 Q In your view, did that mean -- did that -- did you draw a
8 conclusion as to whether or not this neck pain would have
9 been caused by the accident or something else? I mean,
10 maybe everyone knows what the degenerative means, but what
11 does it mean to you?

12 A Um, I guess, was that two questions? Sorry.

13 Q Yes.

14 THE COURT: Yeah, maybe break it up, Counsel.

15 Q What does degenerative mean to you as the concept of your
16 UIM evaluation?

17 A Something that occurs over time or as somebody gets older,
18 it often happens.

19 Q Okay. The next bullet point, what is that?

20 A No emergency room.

21 Q And the next?

22 A It is questionable whether neck pain and even vision changes
23 were from the accident or degenerative in nature.

24 Q And the next bullet point?

25 A Per the insured social media, he was walking around taking

Appendix103

1 video of the accident. One post he said everybody was okay.

2 Q Next bullet point?

3 A Social media checks shows he was using a Bobcat on April
4 15th clearing snow. On a boat on May 25, on vacation in
5 Arizona on May 31st, and video showing him on the ground
6 boiling water on January 30, 2019.

7 Q Couple of follow-ups on those dates. The last one
8 referencing Arizona as the year. How about 4-15 clearing
9 snow. What year would that have been?

10 A 2019. Or sorry that -- that would have been 2018.

11 Q All right. To your recollection, did you see a social media
12 post from Mr. Flechtner indicating he was clearing snow the
13 day after the accident?

14 A Yes.

15 Q And then the 5-25 that would also be 2018?

16 A Yes.

17 Q All right. Video showing him throwing boiling water. I'm
18 not sure there's been testimony or evidence on that topic.
19 Do you recall what that was?

20 A Yeah. It's actually pretty cool. We've tried it. When
21 it's really, really cold outside, like, the temperature, you
22 get a pot of boiling water and throw it up in the air and
23 it's really cool for the kids to see. It freezes or mists
24 in the air.

25 Q Okay.

Appendix104

1 THE COURT: Be very careful.

2 Q As it relates to social media in general, do you on occasion
3 use social media as your evaluation or investigating the
4 claim?

5 A If there's ever anything that I feel like a I want
6 additional inside on, I'll do a quick check.

7 Q Do you ever check information that's not publicly available?

8 A No.

9 Q You didn't friend Mr. Fiechtner in this case or anything
10 like that to access his social media?

11 A No.

12 Q Okay. Let's go to the next category. It may have been the
13 three categories towards the bottom of that page. Just with
14 your evaluation, Abby, under the topic of injuries, what
15 does that say?

16 A Pain at the base of the skull, neck, midback, and low back.

17 Q And the sub bullet points?

18 A Primary complaint records was neck.

19 Q Next?

20 A Visual disturbance.

21 Q Then that sub bullet?

22 A Double vision and problems with nearsightedness.

23 Q Then the next bullet point?

24 A Headaches.

25 Q Are these all things that you considered as part of the

Appendix105

1 A Yes.

2 Q What do those state?

3 A A heart condition, bilateral shoulder, elbow, knee,
4 fractured collarbone.

5 Q Those are all the conditions that were provided in the
6 medical records or referenced in the medical records that
7 you reviewed?

8 A Yes.

9 Q Then the next bullet point?

10 A Records say patient says no prior history of neck pain or
11 headaches.

12 Q Okay. And then the next topic states what?

13 A Other or unrelated injuries and treatment.

14 Q What does the first bullet point say?

15 A Heart condition which he continued to follow up with after
16 motor vehicle accident.

17 Q You had records that referenced that?

18 A Yeah.

19 Q Next bullet point?

20 A Left shoulder, which he fell in Arizona in August of 2018
21 while painting on a ladder.

22 Q Then the final bullet point?

23 A Big toe which he had a procedure on.

24 Q Although, those conditions may not be directly related to
25 the car accident, do they affect your evaluation of someone

Appendix106

1 who is claiming decreased lifestyle or nuisance as a result
2 of the car accident?

3 A They can, but didn't give any sort of indication to him just
4 more noted them.

5 Q Okay. The next topic is what?

6 A Treatment recap.

7 Q All right. So with treatment recap, are you summarizing for
8 yourself the post-accident medical treatment that Mr.
9 Fiechtner had that, at least, was provided in the records to
10 you by his attorney?

11 A Yes.

12 Q And what does the first bullet point say?

13 A No emergency room.

14 Q Next bullet point?

15 A Chiropractive spine, six visits from April 18, 2018, to May
16 2, 2018. Was then referred to ortho.

17 Q So at least for the records that were provided to you, it
18 looked like Mr. Fiechtner had a total of six visits with his
19 chiropractor for the few weeks following the accident?

20 A Yes.

21 Q Then he was referred to an orthopedic -- or I think in this
22 case Orthopedic Institute; is that right?

23 A Yes.

24 Q And what does it say in the bullet point for ortho?

25 A Ortho for neck pain, Ortho Institute for pain management,

Appendix107

1 and PT, 5 sets of injections, treated from May 24, 2018 to
2 November 28. Referred to WorkFORCE for concussion symptoms.

3 Q All right. So after that treatment at Orthopedic Institute
4 and the injections that he had, they refer him to someplace
5 called WorkFORCE?

6 A Yes.

7 Q And then what does your reference to the WorkFORCE records
8 indicate?

9 A That he had two visits. They ordered a brain MRI, diagnosed
10 him with a concussion without loss of consciousness.

11 Q Then the next bullet point?

12 A Atrial fibulation, McGreevy Clinic. There to establish
13 care. August 2, 2018.

14 Q When you say "there to establish care", would that, like, a
15 primary care provider? Or do you know?

16 A Um, I don't want to assume because I don't remember
17 specifically.

18 Q Okay. Fair enough.

19 Then the next bullet point?

20 A Dakota Vision Center, 21 visits. June 19, 2018, through
21 March 19, 2021. I believe that 21 is a typo because I
22 completed this report in 2019. So that was more likely
23 March of 2019.

24 Q Do you see another date referencing Dakota Vision Care
25 treatment on your report that reflects what you think is the

Appendix108

1 correct date?

2 A Yes. Down on the medical bills, Dakota Vision, I have
3 September 5, 2018, through March 19, 2019.

4 Q All right. We will get there.

5 Do you feel like -- no, you answered my question, I
6 appreciate that. I guess, I was asking are you confident
7 that the 3-19-21 reference was a mistake and it should have
8 been 3-19-19?

9 A Yes.

10 Q Did you receive any other medical records when you reviewed
11 this claim in August and September of 2019 to indicate that
12 Mr. Fiechtner was continuing to treat for his
13 accident-related injuries after March of 2019?

14 A No.

15 Q Did you have any reason to believe that he would continue to
16 treat after that -- after March of 2019?

17 A No.

18 Q What's the next category?

19 A Impact to life.

20 Q What does the first bullet point say?

21 A Was an weight lifter. Now struggles to workout.

22 Q That was part of what his attorney was telling you in his
23 demand?

24 A Yes.

25 Q Then what was the next category?

1 A That, um -- I don't mention that ever. That's, again, my
2 personal notes and we did mention that -- how I came up with
3 it was reviewable on the records and the demand and the
4 police report.

5 Q I'm looking at page 39 offering exchange between you and I.
6 When I asked you what's this often based upon, how do you
7 come up with an offer of 110,000 in total damages? Do you
8 recall what you responded?

9 A Probably based on my experience and review of the demand.

10 Q Sure. That's what you told me. You didn't say I have
11 notes. I've done an eight-page evaluation that would
12 directly answer the question; right?

13 A Well, in my opinion that's the same thing. That was my
14 review of the demand.

15 Q Your response was -- this offer was based on facts of loss,
16 the police reports, impacts both vehicles, bills, and
17 records for treatment; true?

18 A Yes.

19 Q And then I respond, sure. I can imagine those things were
20 included, but how do you arrive at this number?

21 And that was back in September of 2019; right?

22 A Yes.

23 Q At no point did you ever offer your good faith evaluation
24 that you now talked to Mr. Arndt about this morning to me
25 when directly pressed for it, did you?

Appendix110

1 documents that are already existing in the file?

2 A Are UIM adjustors, the ones that handle bodily injury, are
3 not able to access medical payments -- records in the file?

4 Q So that's still intentionally segregated?

5 A Yes.

6 Q Okay. What about your authority? Today, as you sit here,
7 what's your claim authority?

8 A I believe I testified yesterday 500,000.

9 Q I couldn't remember if I read that in your deposition or if
10 you did say that, but that's what I thought too.

11 Thank you.

12 Ultimately, how does -- so does American West have any
13 employees at all?

14 A I don't know that for sure. I can -- I believe I testified
15 yesterday there are no claims employees employed by American
16 West that I know of. I'm sure on that. I don't know about
17 other employees.

18 Q But, ultimately, there's salespeople, but those are not
19 in-house and not actually employed by Nodak or American West
20 people that are selling the policies?

21 A Are you asking with our agents?

22 Q Yeah. I mean, you said "our agents", but that's my
23 question. Are they yours?

24 A No, no. We market our product through independent agents,
25 so, essentially, it could be the name of the -- your

Appendix111

1 indicating that we do have a limits exposure for UIM?

2 MR. ARNDT: I think it would help, Your Honor, if we can
3 establish which exhibit plaintiff is referencing.

4 MR. CULHANE: Um, it's in the claim notes.

5 THE COURT: Would that be 2?

6 MR. CULHANE: It's also on the screen.

7 THE COURT: Thank you.

8 BY MR. CULHANE:

9 Q Do you recall that?

10 A On page -- Exhibit 2 page 1113, what date and file date are
11 you referring to?

12 Q January 19, 2019.

13 A I see it. Okay.

14 Q We have -- we do have a limits exposure?

15 A Yes. That's in that there.

16 Q That was seven months -- six months before my office
17 produced anything to your office?

18 A The timing is, yeah, that's correct.

19 Q Says that whatever everybody calling the demand wasn't
20 actually sent -- the records that are contained in those
21 binders weren't sent until August. They weren't received
22 until about August 5th is what we know from your earlier
23 review?

24 A That's what I understand the testimony to be, yep.

25 Q Your testimony?

Appendix112

1 A Yep.

2 Q Okay.

3 A Yep.

4 Q And upon review of that, the page before, page FB 1112, do
5 you recall saying, obviously, we need to find the underlying
6 limits. We may not have exposure if those limits are high?

7 A Correct.

8 Q What are high limits?

9 A Typically, um, we start at what the state requires somebody
10 to have when it comes to insurance limits and look at your
11 policy. That would be 2550, 25, it depends on. Most common
12 in the industry is -- UIM or bodily injury limits of 100,000
13 per person and 300,000 per accident.

14 Q Do you consider those high?

15 A I think they're common.

16 Q Okay. When does it get to be high limits before you
17 consider it high?

18 A Any -- probably I would say any amount over that. The fact
19 that we had one million dollar limits, they're high.
20 They're not as common.

21 Q Well, I guess, I may be lost on that yesterday, but does
22 American West sell a bigger policy? More than one million
23 dollars?

24 A On a personal auto policy?

25 Q Personal auto and UIM. That's the biggest they sell?

Appendix113

1 A It is, yes.

2 Q Is it -- do any of your other companion companies sell
3 bigger UIM personal policy?

4 A I'm not -- I don't know how to answer that. I don't know.

5 Q Okay. Well, you're in charge of claims for all of them;
6 right?

7 A Oh, I'm sorry. I thought you meant other companies in the
8 industry.

9 Q No. No.

10 A No.

11 Yes. Correct. That's the highest we sell. Then you'd
12 have to buy a separate umbrella policy to get more coverage
13 over that.

14 Q So it's your testimony that this is the highest policy a
15 person can buy from the Nodak Holdings Group?

16 A Yes.

17 Q And you're saying here on August 5th after you've reviewed
18 the demand of -- to the underlying carrier, which is what I
19 said with those records; right? When you received the
20 demand we've been talking about; right?

21 A Yes.

22 Q And Jay's identification of potential UIM disclosure that we
23 just looked at earlier on the claims notes?

24 A Yes.

25 Q Right. Then down here you're saying we may not have an

Appendix114

1 exposure if those limits are high. True?

2 A That's what that sentence says, yes.

3 Q Well, you wrote it?

4 A Yes.

5 Q But here today you're saying hundred thousand dollars is not
6 a high limit, is it?

7 A We didn't know what the limits were at that time.

8 Q True.

9 A So...

10 Q My question was, those aren't high limits, are they?

11 A No.

12 Q Earlier you talked about the contract language "legally and
13 entitled to recover", and I think you said that's what a
14 jury would have to -- ultimately you're trying to figure out
15 what a jury would do?

16 MR. ARNDT: Your Honor, just for the record can we establish
17 which exhibit plaintiff is referring to?

18 MR. CULHANE: Exhibit 1, the insurance policy, the insurance
19 language, Judge.

20 THE COURT: Thank you. I'm following along. I recall the
21 testimony, so please continue.

22 BY MR. CULHANE:

23 Q Do you recall testifying about that earlier? I think it's
24 still this morning.

25 A I do.

Appendix115

1 do a full fair investigation and then you do full fair
2 evaluation, and then you pay. True?

3 MR. ARNDT: Objection to the form of an automatic process.

4 THE COURT: Yeah. I'm going to sustain that automatic
5 process.

6 Why don't you ask it again, Mr. Culhane.

7 MR. CULHANE: Thank you. I'll move on.

8 BY MR. CULHANE:

9 Q Either way, yesterday there was a letter -- I don't recall
10 exactly what -- the exhibit it was, but I'll find it for
11 you. I think it's the one right dead center there. What
12 number is that?

13 A 13.

14 Q So on Exhibit 13 yesterday, there was some discussion about
15 how Mark alleged that he was cut off by his insurance
16 company and Mr. Arndt said that that letter didn't say that.
17 Do you recall that testimony yesterday?

18 A I recall there was testimony about that, yeah. I don't
19 specifically.

20 Q So on November 2, 2018, you're aware that your adjustors are
21 telling your insured medical providers that we have no
22 further benefits available for payment of additional medical
23 expenses?

24 A I'm aware today? You asked me if I'm aware. I'm aware
25 today.

Appendix116

1 Q You're aware now?

2 A Yes.

3 Q Is there anything wrong with that?

4 A No.

5 Q I mean, even though there's at least 890 more thousand
6 dollars available, it's okay with you when your claims
7 handlers are telling people this?

8 A We were communicating in this letter to the Center for
9 Visual Learning and that's who was presenting us with bills.

10 Q Yeah. And Mark wanted to continue to get treatment there.
11 True? This was in November and we know the treatment
12 continued until March.

13 A I believe his testimony was that he continued, yes.

14 Q So for five more months he went on his own, but your company
15 told Mark's provider -- and this isn't the only provider
16 they told this to either; right?

17 A Correct.

18 Q They told all the providers that we have no further benefits
19 available for the payment of additional medical expenses.
20 True?

21 A True in the fact of the medical payments coverage of
22 \$10,000.

23 Q Not what it says, though, is it?

24 A It is. It's not spelled out specifically other coverages
25 that may be available to Mr. Fiechtner.

Appendix117

1 Q So there was some question about whether Mark ever made a
2 UIM claim. Do you think it's fair to not tell Mark that he
3 had additional 890 or perhaps \$900,000 in available
4 coverage?

5 MR. ARNDT: I'd object to the form to the extent of what he
6 told Mr. Fiechtner. I think he would have to establish they
7 had those communications first.

8 THE COURT: I'll sustain the objection.

9 I think you can ask it another way, Mr. Culhane.

10 MR. CULHANE: Thank you, Judge.

11 BY MR. CULHANE:

12 Q What's CC mean in your world at the bottom of
13 correspondence?

14 A Carbon copy.

15 Q So does that mean a copy of this letter would have gone to
16 Mark Fiechtner?

17 A Yes.

18 Q So via this letter would Mark Fiechtner have been told there
19 was no further benefits available for the payment of
20 additional medical expenses?

21 A By this letter, no.

22 Q Even though it went to him?

23 A I'm sorry. Maybe I misstated (sic) your question. I'm
24 agreeing with you that the letter went to him. He would
25 have read that said there was no further benefits available

Appendix118

1 to him.

2 Q But that's false, isn't it?

3 A In the context of the medical payments --

4 Q But, that's not what it says. It says benefits.

5 A Counsel, I'll agree with you. Yeah. I mean, it -- it is
6 very contained in with the language that it says in this
7 letter.

8 Q You said the insurance business is highly regulated. Do you
9 recall that?

10 A I do.

11 Q There's no real federal regulation you have to abide by.
12 True?

13 A I wouldn't say that's necessarily true.

14 Q What regulation are you thinking of?

15 A One I can think of off the top of my head is we deal a lot
16 with private personal information from people that make
17 claims with us.

18 Q HIPPA?

19 A HIPPA is one of that private personal stuff. So HIPPA laws.
20 Quickly, it means that we have to have a higher standard of
21 protecting medical records from being made available or
22 leaked or seen by people that don't -- shouldn't see it, so
23 that's one federal regulation that, as we do claims, we're
24 require to follow them.

25 Q As far as the insurance portion, I mean anybody that's on --

Appendix119

1 Q In your view, was Mr. Hortness indicating that the bodily
2 injury claim was worth \$900,000?

3 A It was completely unknown.

4 Q On to Plaintiff's Exhibit Number 13. Who is the letter
5 addressed to?

6 A Center For Visual Learning.

7 Q Does the Center For Visual Learning have the ability to make
8 an underinsured motorist claim on behalf of Mr. Fiechtner?

9 A No.

10 Q He has to do that himself?

11 A Correct.

12 Q At any point did American West hide from Mr. Fiechtner that
13 he had underinsured motorist coverage?

14 A No.

15 MR. ARNDT: I think that's all I have, Judge.

16 RECROSS-EXAMINATION

17 BY MR. CULHANE:

18 Q Do you have any idea how many providers American West told
19 there was no further benefits available?

20 A As I sit here today, without reviewing the claim file, I
21 cannot, but I know it was more than Center For Visual
22 Learning. There were multiple.

23 Q Told WorkFORCE that -- the place where he went to have his
24 concussion -- head injury evaluated?

25 A I believe their limits were exhausted, yes.

Appendix120

1 Q Do you recall that they told the Sioux Falls Specialty
2 Hospital that we have no further benefits available?

3 A I would say that's probably accurate.

4 Q And again, CCed Mark in that correspondence indicating the
5 same -- at a minimum miscommunicating statement?

6 A I don't --

7 MR. ARNDT: I'd object as to form.

8 THE COURT: Sustained.

9 Q Is this -- if you look at page FB 1003, if you'd like to
10 follow along with me here. Do you recall that he's told
11 Sioux Falls Specialty Hospital, we have no further benefits
12 available?

13 MR. ARNDT: Your Honor, can we understand what the exhibit
14 is? What number exhibit are we --

15 MR. CULHANE: Page 113 -- or 1003.

16 THE COURT: So 1003. Do you know which --

17 MR. CULHANE: I believe in the claims file.

18 THE COURT: Claims file. That would be --

19 MR. CULHANE: Perhaps not. I can offer it.

20 THE COURT: Just a moment. Would that be Exhibit 6? No.

21 MR. CULHANE: It was in with the Mary Jo Dahl records.

22 THE COURT: Okay.

23 MR. CULHANE: I'll present the witness with it shortly here.

24 THE COURT: All right. Thank you.

25 BY MR. CULHANE:

Appendix121

1 Q Does this look like a true and accurate copy of an October
2 3, 2008, order to Sioux Falls Specialty Hospital?

3 A Um, yes.

4 Q Does it also indicate that there's no further benefits
5 available?

6 A Yes. And I will just say that last couple of questions
7 being similar, there were multiple facilities that were
8 billing under the medical payments coverage to us, but once
9 we hit the 10,000, we had to stop paying because that was
10 the policy -- that particular part of the policy's limit so
11 Mary Jo Dahl would have sent as bills continued to come in,
12 essentially saying, sorry, we don't have any more coverage
13 for this and copied Mr. Fiechtner in. So you may have
14 multiple. I did peruse the file notes and there's multiple.

15 Q All kinds of these.

16 MR. CULHANE: I'm going to mark this letter as Exhibit 16
17 and move to admit it.

18 THE COURT: Thank you. Exhibit 16.

19 Do you have any objection to the Court receiving
20 Exhibit 16?

21 MR. ARNDT: No, Your Honor.

22 THE COURT: Received.

23 BY MR. CULHANE:

24 Q I think you just said something we had to stop paying. Why
25 did you have to stop paying?

Appendix122

1 A Um, June of '23, I believe.

2 Q Was that during a brain injury trial where Mr. Arndt and I
3 argued and you evaluated one of my clients?

4 A Yes.

5 Q Have you testified since then?

6 A Yes.

7 Q Where?

8 A In Clinton, Iowa, and I believe in Des Moines, Iowa.

9 Q So two different cases?

10 A Couple different cases. Two or three, Mr. Culhane. I don't
11 have that information in front of me, but that -- I think
12 about that many times.

13 Q American West never consulted you. True?

14 A American West?

15 Q American West.

16 A American West. I don't understand that question. Who is
17 American West?

18 Q They would be the defendant in this case.

19 A No.

20 Q So you were never involved in the claims process? You're
21 aware that -- for example, you're shaking your head yes, but
22 you're aware the crash was in April of 2018?

23 A Yes.

24 Q You weren't consulted until November of 2021?

25 A That's when I did my testing. I would have been contacted a

Appendix123

1 little earlier than that.

2 Q Oh, yeah. That's a good point. But you never -- you were
3 never involved in the decision whether to pay benefits under
4 this insurance contract or not?

5 A No. No. No.

6 Q I want to show you something here, Doctor. Do you recognize
7 that document?

8 A I can't say for sure, Mr. Culhane. I have another one that
9 is more detailed about the justification for doing the
10 evaluation in Iowa City, but I don't remember -- I'm not
11 sure I've seen this before.

12 Q What's the date of that document?

13 A What's the date of it?

14 Q What's the date of it?

15 A September 30, 2021.

16 Q Who's it signed by?

17 A Signed by Mark Arndt.

18 Q And if you back up to the first page, does Mr. Arndt
19 indicate in this expert witness disclosure -- I mean it's
20 disclosing you as a witness; right?

21 A Yes.

22 Q And does it indicate that you're going to be a witness to
23 generally rebut the plaintiff's expert witnesses who believe
24 there's a closed head injury?

25 A Yes.

Appendix124

1 Q So a month before you even tested Mr. Fiechtner, you already
2 knew that you were going to rebut the plaintiff's treating
3 doctors expert witnesses?

4 A Well, I think this is Mr. Arndt's language in this, not
5 mine.

6 Q Well, you said you maybe perhaps consulted with him before
7 actually completing your report. What I'm wondering is how
8 Mr. Arndt would know that you were going to rebut to
9 something when you hadn't seen any documents and you hadn't
10 tested the patient?

11 A Well, let's see. Let's try to match up the dates here of
12 this. This is September 30, 2021.

13 Q Which is how many months before your report?

14 A About two. And by then I would have had the medical records
15 that we talked about. And the specific rebuttal opinion
16 mentioned here is the claim of a closed head injury. The
17 records are very clear that there was not a closed head
18 injury.

19 Q How do you define closed?

20 A So that's in the records. That's not my opinion. That's
21 just in the records.

22 Q How do you define closed head injury?

23 A Striking your head on something.

24 Q Okay. So we know he didn't presumably strike his head?

25 A Well, I think the records are pretty clear that he did not

Appendix125

1 strike his head. Not presumably, but not.

2 Q Okay.

3 A That's my understanding of the record.

4 Q Okay. But that doesn't ever mean that someone doesn't have
5 a brain injury, does it?

6 A Correct. Absolutely not.

7 Q I mean, you testified to that the last time you came into
8 trial. True?

9 A True.

10 Q In fact, you don't need to lose consciousness either in
11 order to sustain a lasting brain injury?

12 A Correct.

13 Q Around 75 to 80 percent of all brain injuries in the United
14 States every year are classified as mild brain injuries?

15 A I'm going to defer to your knowledge of that, Mr. Culhane.
16 You asked me about that before and that sounds about right,
17 but I don't have direct knowledge of those statistics.

18 Q I asked you about it and you agreed in front of the last
19 jury, I mean --

20 A Yeah, and I'm agreeing again, but it's not a number that I
21 know firsthand.

22 Q Okay. The whole definition of mild, moderate, and severe
23 and is an acute definition. True?

24 A Yes.

25 Q Acute means two or three or four days after an injury?

Appendix126

19-19-611. Mode and order of examining witnesses and presenting evidence.

(a) **Control by the court; purposes.** The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

- (1) Make those procedures effective for determining the truth;
- (2) Avoid wasting time; and
- (3) Protect witnesses from harassment or undue embarrassment.

(b) **Scope of cross-examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as on direct examination.

(c) **Leading questions.** Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

- (1) On cross-examination; and
- (2) When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Source: SL 1979, ch 358 (Supreme Court Rule 78-2, Rule 611); SDCL §§ 19-14-18, 19-14-19, 19-14-20; SL 2016, ch 239 (Supreme Court Rule 15-44), eff. Jan. 1, 2016.

19-19-611.1. Address of witness--Release in open court restricted.

The courts of the State of South Dakota shall not require that witnesses, at time of questioning in open court, release their specific addresses unless it is required by due process or is in the interest of justice.

Source: SL 1985, ch 410 (Supreme Court Rule 85-5); SDCL § 19-14-18.1.

58-12-3. Attorney fees--Recovery in action against self-insured employer or insurer failing to pay loss--Other remedies not barred.

In all actions or proceedings hereafter commenced against any employer who is self-insured, or insurance company, including any reciprocal or interinsurance exchange, on any policy or certificate of any type or kind of insurance, if it appears from the evidence that such company or exchange has refused to pay the full amount of such loss, and that such refusal is vexatious or without reasonable cause, the Department of Labor and Regulation, the trial court and the appellate court, shall, if judgment or an award is rendered for plaintiff, allow the plaintiff a reasonable sum as an attorney's fee to be recovered and collected as a part of the costs, provided, however, that when a tender is made by such insurance company, exchange or self-insurer before the commencement of the action or proceeding in which judgment or an award is rendered and the amount recovered is not in excess of such tender, no such costs shall be allowed. The allowance of attorney fees hereunder shall not be construed to bar any other remedy, whether in tort or contract, that an insured may have against the same insurance company or self-insurer arising out of its refusal to pay such loss.

Source: SL 1966, ch 111, ch 32, § 7; SL 1971, ch 264; SL 1972, ch 262; SL 1976, ch 311; SL 1988, ch 397; SL 2011, ch 1 (Ex. Ord. 11-1), § 33, eff. Apr. 12, 2011.

58-12-3.1. Separate hearing on attorney fees--Adding to judgment--Time allowed to request hearing.

The determination of entitlement to an allowance of attorney fees as costs and the amount thereof under § 58-12-3 shall be made by the court or the Department of Labor and Regulation at a separate hearing of record subsequent to the entry of a judgment or award in favor of the person making claim against the insurance company; and, if an allowance is made, the amount thereof shall be inserted in or added to the judgment or award. Such hearing shall be afforded upon the request of the claimant made within ten days after entry of the judgment or award.

Source: SL 1973, ch 298; SL 2011, ch 1 (Ex. Ord. 11-1), § 33, eff. Apr. 12, 2011.

58-12-34. Acts constituting unfair claims practices.

Any of the following acts by an insurer, if committed in violation of § 58-12-33, is an unfair claims practice:

- (1) Knowingly misrepresents to a claimant or an insured a relevant fact or policy provision relating to coverages at issue;
- (2) Fails to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies;
- (3) Fails to adopt and implement reasonable standards to promptly complete claim investigations and settlement of claims arising under its policies;
- (4) Fails to make a good faith attempt to effectuate prompt, fair, and equitable settlement of claims submitted in which liability coverage, and causation of claims have become reasonably clear;
- (5) Compels an insured or beneficiary to institute a suit to recover an amount due under its policies by offering substantially less than the amount ultimately recovered in a suit brought by the insured or beneficiary;
- (6) Refuses to pay claims without conducting a reasonable claim investigation;
- (7) Fails to affirm or deny coverage of claims within a reasonable time after having completed a claim investigation related to the claim;
- (8) Attempts to settle a claim for less than the amount that a reasonable person would believe the insured or beneficiary is entitled to by reference to written or printed advertising material accompanying or made part of an application;
- (9) Attempts to settle a claim on the basis of an application that was materially altered without notice to, and knowledge or consent of, the insured;
- (10) Makes a claim payment to an insured or beneficiary without indicating the coverage under which each payment is being made;
- (11) Unreasonably delays a claim investigation or payment of a claim by requiring both a formal proof of loss form and subsequent verification that would result in duplication of information and verification appearing in the formal proof of loss form;
- (12) Fails, in the case of a claim denial or offer of compromise settlement, to promptly provide a reasonable and accurate explanation of the basis for such action; or
- (13) Fails to provide forms necessary to present a claim within fifteen days of a request with reasonable explanations regarding their use.

Source: SL 2014, ch 235, § 4.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30841

MARK FIECHTNER,

Plaintiff and Appellee,

vs.

AMERICAN WEST INSURANCE COMPANY,

Defendant and Appellant.

Appeal from the Circuit Court
Second Judicial Circuit
Lincoln County, South Dakota

The Honorable John R. Pekas, Circuit Court Judge

REPLY BRIEF OF APPELLANT AMERICAN WEST INSURANCE COMPANY

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Notice of Appeal of Defendant and Appellant American West Insurance Company
filed September 13, 2024, and Amended Notice of Appeal filed November 11, 2024.

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ARGUMENT

I. The Jury's Verdict Confirms that Fiechtner's Breach of Contract/UIM Claim was Fairly Debatable.

Via the "Special Verdict" (R. 2678-2680, Appx. 059-061), the first topic the jury was asked to consider was Plaintiff Fiechtner's Breach of Contract/UIM claim. The jury concluded that American West breached its insurance contract with Fiechtner, and the value of that Breach of Contract/UIM claim was \$400,000.

American West accepts the jury's Verdict regarding Fiechtner's Breach of Contract/UIM claim, and that the value of the UIM claim was \$400,000. This Breach of Contract/UIM topic required the jury to determine the value of Fiechtner's personal injuries from the car accident (Jury Instruction No. 16, R. 1719, Appx. 062), including Fiechtner's claims of past and future "pain and suffering", "mental anguish", and "loss of capacity of the enjoyment of life". Those damage claims are highly subjective and can only be determined by a jury.

American West also acknowledges that pre-trial, American West under-valued Fiechtner's Breach of Contract/UIM claim by offering Fiechtner \$10,000 to settle the UIM claim. American West's \$10,000 UIM offer represented a total value of \$120,000 for Fiechtner's personal injury claim. (Recall that Fiechtner already received \$110,000 in insurance benefits: \$100,000 from the tortfeasor, and \$10,000 in medical payment benefits from American West = \$110,000, which American West was entitled to offset when considering Fiechtner's UIM claim (*see* SDCL 58-11-9.5)). American West under-valued Fiechtner's Breach of Contract/UIM claim by \$390,000. (American West's pre-trial settlement offer was \$10,000 – \$400,000 Breach of Contract/UIM Verdict = under-evaluation of \$390,000.)

However, there is also no factual dispute that Fiechtner over-valued his Breach of Contract/UIM claim by \$500,000. Pre-litigation, Fiechtner demanded that American West pay Fiechtner \$900,000 for his Breach of Contract/UIM claim. (E-mail exchange between Fiechtner's counsel and American West, R. 314-316, Appx. 084-086.) Per Fiechtner, if American West did not meet Fiechtner's \$900,000 demand for UIM benefits, Fiechtner would sue American West. (E-mail exchange between Fiechtner's counsel and American West, R. 401, Appx. 087.) American West did not agree to pay Fiechtner \$900,000 for his Breach of Contract/UIM claim. Fiechtner never lowered his \$900,000 UIM settlement demand. Instead, Fiechtner brought the current lawsuit, which culminated in the jury trial that is the subject of this appeal.

Per the jury's Verdict, the parties now know that Fiechtner over-valued his personal injury/Breach of Contract/UIM claim by \$500,000 (\$900,000 UIM demand – \$400,000 UIM Verdict = \$500,000 over-evaluation). Fiechtner's Brief does not attempt to explain how his pre-trial \$500,000 over-evaluation, by a degree greater than American West's \$390,000 under-evaluation, does not render his Breach of Contract/UIM claim to be fairly debatable.

As cited in American West's initial Brief (pp. 17-18, string citation not repeated here), the difference in the parties' respective evaluations reflects what many jurisdictions have recognized—evaluating personal injury/UIM/UM claims that contain general damage components (pain and suffering, loss of enjoyment of life, mental anguish) is highly subjective.

Enrique would have us invoke a hindsight presumption that the failure to offer policy limits or seek remittitur after a verdict in excess of those limits constitutes bad faith. No such presumption exists. Further, such a presumption would ignore the reality of valuing personal injury claims:

putting a dollar value on general damages and pain and suffering is inherently subjective. The range of values of the various people who reviewed Enrique's claim makes the point. State Farm offered to settle for \$45,000, Enrique's final demand was \$90,000, and the jury found \$260,000 in damages. Without more, rational differences in claim valuations do not lead to an inference of bad faith. Here, the record shows that State Farm and Enrique had different views of the value of the claim; State Farm sought advice from two attorneys, attempted to reach a settlement with Enrique, and failed. State Farm had bases for its claim valuations, and there is no evidence that creates an inference that those reasons were pretextual. State Farm thus was not 'clearly without any reasonable justification' for its valuations.

Enrique v. State Farm Mut. Auto. Ins. Co., 142 A.3d 506, 513-14 (Del. 2016).

As further cited in American West's initial Brief, during his deposition (R. 244, 247, 409-410, 413; Appx. 025-028, 029), Fiechtner himself was unable, or at least unwilling, to place a monetary value on his UIM claim. Fiechtner's responses to questions asked by American West's counsel, and his own counsel, were candid. Fiechtner's answers reflected his own uncertainty about placing a monetary value on his UIM claim that contained a general damage component.

If Fiechtner, the person living with his injuries, was not able to determine the value of his own UIM claim, and Fiechtner and his counsel over-valued his UIM claim by \$500,000, American West's under-valuing of Fiechtner's UIM claim by \$390,000 cannot be an act of bad faith. The parties' pre-trial evaluations are simply a reflection of the inherent subjectivity of evaluating personal injury claims. The fact that American West under-valued Fiechtner's claim (although, by a margin less than Fiechtner's over-evaluation) is not an act of bad faith.

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. The fact that the insurer's position is ultimately found to lack merit is not sufficient by itself to establish that the insurer had a reasonable basis to deny the claim. The focus is on the existence of a debatable issue, not on which party was correct.

Johnson v. United Parcel Serv., Inc., 2020 S.D. 39, ¶ 32, 946 N.W.2d 1, 10 (quoting *Dakota, Minnesota & Eastern R.R. v. Acuity*, 2009 S.D. 69, ¶ 20, 771 N.W.2d 623, 630).

American West accepts, and was always willing to accept, the jury's discretion of awarding Fiechtner \$400,000 for his subjective Breach of Contract/UIM claim.

American West does not appeal the jury's Verdict on the Breach of Contract/UIM claim.

American West appeals the second (bad faith) and third (punitive damages) topics the circuit court asked the jury to consider. Given that the jury's Verdict determined the subjective value of Fiechtner's Breach of Contract/UIM claim was an amount in between the parties' pre-trial settlement offers, Fiechtner's Breach of Contract/UIM claim was necessarily fairly debatable. If Fiechtner's Breach of Contract/UIM claim was fairly debatable, the jury's Verdict regarding Bad Faith and Punitive Damages should not stand.

II. American West Conducted a Reasonable Investigation.

At page nine of his Brief, Fiechtner makes his argument that American West failed to perform a reasonable investigation. Insurance companies have an obligation to conduct a reasonable investigation. However, perfect investigations are not required.

"A reasonable investigation is required, but a perfect one is not mandated. Plaintiff failed to support her claim that Progressive conducted an inadequate investigation." *LeBeau v. Progressive N. Ins. Co.*, No. CIV. 12-5044-JLV, 2015 WL 5697364, at *9 (D.S.D. Sept. 28, 2015) (citing *Dakota, Minnesota & Eastern R.R.*, 2009 S.D. 69, ¶¶ 19-21).

American West's eight-page "UIM Evaluation 9/20/19" (Plaintiff's Trial Ex. #3, R. 1755-1762, Appx. 063-070) is evidence of American West's deliberate and detailed consideration of Fiechtner's UIM claim. The "UIM Evaluation" provides a

comprehensive review of Fiechtner's post-accident medical treatment, post-accident medical expenses, Fiechtner's lack of a wage loss claim, estimated range of general damages from the accident (estimated by American West at \$40,000-\$70,000), the \$100,000 of liability limits paid to Fiechtner via the tortfeasor, and the \$10,000 of post-accident medical payments paid to Fiechtner's medical providers by American West via Fiechtner's medical payments coverage. After reviewing American West's eight-page "UIM Evaluation 9/20/19", a straight-faced argument cannot be made that American West failed to consider, investigate, or evaluate the details of Fiechtner's UIM claim prior to Fiechtner suing American West. If this Court has any doubt about that issue, American West respectfully requests that the Court review Plaintiff's Trial Ex. #3, "UIM Evaluation 9/20/19" (R. 1755-1762, Appx. 063-070).

During litigation, American West hired a neuropsychologist, Dr. Daniel Tranel (head of neuropsychology at the University of Iowa), as a defense expert witness to determine any ongoing cognitive effect from Fiechtner's alleged head injury claim. (Keep in mind that the Accident Report indicates Fiechtner did not claim to be injured at the accident scene (R. 251-257; Appx. 052-058), and Fiechtner self-reported that he did not incur a head injury from the accident (R. 326, Appx. 073).) Dr. Tranel's curriculum vitae was introduced as Defense Exhibit K (R. 2446). Dr. Tranel's full report may be found at R. 448-457, Appx. 074-083.

Dr. Tranel testified on the third day of trial. His trial testimony can be found beginning at R. 3432. Dr. Tranel testified that he conducted an independent neuropsychological exam of Fiechtner, and testified to the results of Fiechtner's performance per numerous neuropsychological categories. Dr. Tranel testified to his

overall conclusion that, “[h]e (Fiechtner) did not have any cognitive defects as of November 10, 2021.” (R. 3451-3452.)

On appeal, American West does not dispute whether Dr. Tranel’s testimony was accepted or rejected by the jury. Perhaps the jury concluded that Dr. Tranel’s testimony was unpersuasive. However, the expense American West incurred in hiring Dr. Tranel, and his findings that Fiechtner did not show any signs of cognitive impairment as of November 10, 2021, weighs heavily against any argument by Fiechtner that American West did not properly consider Fiechtner’s head injury claim.

III. Punitive Damages

In any claim alleging punitive or exemplary damages, before any discovery relating thereto may be commenced and before any such claim may be submitted to the finder of fact, the court shall find, after a hearing and *based upon clear and convincing evidence*, that there is a reasonable basis to believe that there has been *willful, wanton or malicious conduct* on the part of the party claimed against.

SDCL 21-1-4.1 (emphasis added).

Some precedence interpreting SDCL 21-1-4.1, both from this Court and the South Dakota Federal District Court, has arguably watered down the proof required by a plaintiff seeking punitive damage *discovery*. However, at *trial*, SDCL 21-1-4.1’s higher evidentiary standard (“...clear and convincing evidence that there is a reasonable basis to believe that there has been of willful and wanton conduct...”) remains the standard.

The trial record in this case does not contain clear and convincing evidence of willful, wanton, or malicious conduct by American West. American West properly moved for a Motion for a Directed Verdict regarding Fiechtner’s punitive damage claim following Fiechtner’s case-in-chief. The circuit court erred when it denied American

West's Motion for a Directed Verdict on punitive damages (TT Day 2 (R. 3310-3318)), and erred when it instructed the jury on punitive damages.

Fiechtner makes his punitive damage argument on pages 20-22 of his Brief. Those pages of Fiechtner's Brief cite South Dakota punitive damage precedence, but are devoid of a single piece of evidence admitted at trial that would support a finding, by any standard, let alone clear and convincing evidence, that American West acted willfully, maliciously, or wantonly. Fiechtner's Brief on this issue is nothing more than an argument that lacks evidentiary support.

Via SDCL 21-1-4.1, the South Dakota legislature has determined that juries should not be charged with deciding punitive damages simply because punitive damages are alleged. The "clear and convincing" standard contained within SDCL 21-1-4.1 is legislative intent. In this case, the danger of charging the jury with punitive damages was acute. American West, an insurance company, is likely to be perceived by a jury to have significant financial resources, which was argued by Fiechtner via the improper publication of the "Claims Dollar Exhibit" (further discussed below). The fact that a defendant is an insurance company is not a reason to remove the blindfold from lady justice. Similar to any defendant, American West is entitled to the enforcement of SDCL 21-1-4.1.

American West respectfully requests that the clear and convincing evidence of willful, wanton, or malicious conduct standard provided by SDCL 21-1-4.1 be applied to this case. No evidence was presented to the jury that American West acted maliciously. The circuit court erred when it denied American West's Motion for a Directed Verdict regarding punitive damages. The question of punitive damages should not have been submitted to the jury by the circuit court.

IV. Medical Payment Letter of American West

Fiechtner's Brief alleges that, "... American West wrote letters to Fiechtner and his medical providers claiming that his benefits had been exhausted, which was false."

The letter that Fiechtner is referring to is a November 2, 2018, letter from American West medical payment claims handler, Mary Jo Dahl, to one of Fiechtner's medical providers, which was introduced as Plaintiff's Trial Exhibit # 13. (R. 1803, Appx. 071.)

When considering the merits of Fiechtner's argument on this issue, American West respectfully requests that the Court review the subject letter (R. 1803, Appx. 071). At the time the letter was written, Fiechtner had just recently exhausted his \$10,000 of post-accident medical payments coverage. That medical payment coverage is referenced by the author of the letter (Mary Jo Dahl) indicating that the medical payment coverage had been exhausted. "We have no further benefits available for payment of additional medical expenses." (R. 1803, Appx. 071.)

The letter can only be stated to be "false", as alleged by Fiechtner in his Brief, if it is read in the context of remaining UIM coverage, which was not the topic of the letter. UIM coverage was not even referenced in the letter. Fiechtner's \$10,000 medical payments coverage was exhausted. A fair reading of this letter indicates the same.

Even if the Court were to find the letter to be ambiguous, it cannot be considered malicious. Fiechtner retained counsel before he sought his first bit of medical treatment, which was a chiropractic appointment four (4) days post-accident. (R. 326, Appx. 073.) No danger existed, and no evidence was presented at trial, that Fiechtner was deceived about his various coverages under his American West policy, including his medical payments coverage, or his UIM coverage. Only the most strained reading of the letter could ever be construed to be an act of willful, wanton, or malicious conduct by

American West. *If* the letter could be interpreted as ambiguous—not properly distinguishing between various coverage forms, such as medical payments coverage and UIM coverage—such ambiguity would have been a mistake by American West, not malice.

Perfect conduct by an insurance carrier is not required.

V. Bonus of American West Claims Handlers

Fiechtner's Brief also runs a familiar play from the bad faith playbook—that American West personnel were financially incentivized, via the company's bonus system, to under-value Fiechtner's UIM claim. Abby Kramer, the American West employee who evaluated Fiechtner's UIM claim, specifically testified at trial that she did not have a financial incentive to under-evaluate Fiechtner's UIM claim.

Q (By Fiechtner's counsel): So, ultimately, if you reduce claim payouts and don't spend money on claims, you stand to get a greater financial recovery at the end of the year?

A (By Abby Kramer): I don't believe so because that would be a bad business model. There would be a lot of complaints and unhappy people.

TT Day 2 p. 73 (R. 3238).

Any theory advanced by Fiechtner that Kramer was incentivized by American West's bonus system to under-value Fiechtner's UIM claim lacks evidentiary support for a finding that American West acted maliciously.

VI. Evidentiary Errors

American West relies on its arguments in its initial Brief regarding evidentiary errors committed by the circuit court by allowing Fiechtner to publish non-disclosed, attorney created exhibits to the jury. Fiechtner continues to argue that since the exhibits

were not provided to the jury during deliberations, but only published to the jury as “demonstrative aids” during trial, no error was committed.

There is no factual dispute that both the “Claims Dollar Exhibit”, and Dr. Chaudhry’s “PowerPoint or slide show”, were both published to the jury during trial for lengthy periods of time as Fiechtner’s counsel questioned witnesses. There is also no dispute that these two exhibits, or “demonstrative aids”, were not disclosed to American West or the circuit court prior to trial. There is also no dispute that the exhibits were created, at least in part, by Fiechtner’s counsel.

If Fiechtner’s argument is accepted, a new trial standard will be set. Counsel will be permitted to create their own exhibits (PowerPoint presentations, or other “demonstrative aids” that contain counsel’s own markings and arguments), not disclose those “demonstrative aids” to the opposing party or the circuit court prior to trial (Fiechtner’s Brief does not even address his violation of the Court’s Amended Order for Jury Trial requiring the parties to exchange trial exhibits), and spring the “demonstrative aids” on unsuspecting witnesses by suddenly flashing them on a screen or wall for all to view, including the jury, without first seeking permission from the circuit court to publish these “demonstrative aids”. Trial by ambush should not be permitted. “However, the discovery statutes exist to eliminate trial by ambush.” *City of Sioux Falls v. Missouri Basin Mun. Power Agency*, 2004 S.D. 14, ¶ 16, 675 N.W.2d 739, 744 (citing *State v. Sorenson*, 2000 S.D. 127, ¶ 9, 617 N.W.2d 146, 148).

State v. Henry, 1996 S.D. 108, 554 N.W.2d 472, cited by Fiechtner, is not on point. A picture of an anatomical drawing of a human body part, used as a demonstration with an expert witness, is not the same as the “Claims Dollar Exhibit”, which was created

by Fiechtner's counsel, contained Fiechtner's counsel's markings and wording ("too little, too late"), and was not used when examining an expert witness. The "Claims Dollar Exhibit" also was not disclosed by Fiechtner to American West, or the circuit court, prior trial. Fiechtner simply published the "Claims Dollar Exhibit" to the jury and American West witness without first seeking permission to do so. No one other than Fiechtner and his counsel was even aware the "Claims Dollar Exhibit" existed until it was displayed on the wall, for the jury to see, during trial.

Similarly, the exhibit (a map) referenced in *State v. Hartman*, 256 N.W.2d 131, 137 (S.D. 1977), as cited by Fiechtner, was verified, by witnesses, as an accurate, though not to scale, map. Although the drafter of the map was not present at trial to establish foundation, no one in *State v. Hartman* argued or suggested that the map was inaccurate, or drafted by *counsel* for either party. Through Fiechtner's counsel's own responses to American West's objections to these exhibits, there is no factual dispute that both the "Claims Dollar Exhibit", and Dr. Chaudhry's "PowerPoint or slide show", was drafted by, or partially drafted by, Fiechtner's counsel.

Calling these exhibits "demonstrative aids" does not save Fiechtner's improper disclosure of the exhibits or the lack of foundation of the exhibits. Fiechtner's counsel cannot be both a witness and advocate at trial. Although the circuit court may be permitted discretion regarding certain evidentiary rulings at trial, no precedence exists that would support a ruling that counsel for one of the parties can create their own evidence, spring that evidence upon the adverse party and the circuit court for the first time during trial, while simultaneously publishing the exhibit to the jury without the circuit court's permission to publish the exhibit. That scenario happened during this trial.

If permitted, this new trial strategy would result in nothing short of a trial free-for-all, ungoverned by rules of evidence.

As to prejudice, although neither party nor this Court can be sure what evidence the jury relied upon when rendering its Verdict, given the jury's excessive damage awards for bad faith and punitive damages, and based upon the lack of evidentiary support for those damage awards, it is reasonable for this Court to conclude that the improper publication of these two exhibits during trial was prejudicial to American West. The image of the "Claims Dollar Exhibit" was provided on page 24 of American West's initial Brief. It includes words, which are essentially arguments that were placed on the exhibit by Fiechtner's counsel, such as "Investment Income", "Profit", "Overhead", "Too Late", "Too Little".

"To prove substantial prejudice, a party must prove that there exists 'a reasonable probability that, but for the error, the result of the proceeding would have been different.' This requires an examination of the overall record to determine if there exists a reasonable probability the jury would have reached a damages verdict that was more favorable to Braun had the improper evidence not been admitted." *Braun v. Wollman*, 2024 S.D. 83, ¶ 42, 16 N.W.3d 237, 248-49 (quoting *State v. Carter*, 2023 S.D. 67, ¶ 25, 1 N.W.3d 674, 686).

"As we noted earlier, this Court will not interfere with a trial court's denial of a motion for a new trial unless we are convinced that prejudicial error has occurred. Whether or not error is prejudicial generally depends on the circumstances of the particular case." *Loen v. Anderson*, 2005 S.D. 9, ¶ 15, 692 N.W.2d 194, 199 (citing *Schoon v. Looby*, 2003 S.D. 123, ¶ 18, 670 N.W.2d 885, 891).

CONCLUSION

The jury's award of \$400,000 for Fiechtner's Breach of Contract/UIM claim, an amount in-between the parties' pre-litigation settlement offers, confirms that Fiechtner's Breach of Contract/UIM claim was fairly debatable.

Fiechtner's Appellee Brief does not cite to any evidence that supports a clear and convincing claim of willful, wanton, or malicious conduct that would support a punitive damage claim per SDCL 21-1-4.1.

Fiechtner's lack of disclosure of two exhibits prior to trial, both published to the jury by Fiechtner during trial, violated the Court's Amended Order for Jury Trial and basic rules of evidence. Given the lack of any other evidence supporting a finding that American West acted with malice, the improper publication of these two exhibits to the jury were prejudicial to American West.

American West respectfully requests that this Court reverse the decision of the circuit court's denial of American West's Motion Notwithstanding the Verdict, and set aside the jury's \$250,000 award for bad faith, \$890,000 award for punitive damages, and \$101,999.79 for attorneys' fees.

Dated at Sioux Falls, South Dakota, this 17th day of March, 2025.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Brief of Appellant American West Insurance Company complies with the type volume limitations set forth in SDCL 15-26A-66(b)(2). Based on the information provided by Microsoft Word 2016, this Brief contains 3,655 words, excluding the Table of Contents, Table of Authorities, any addendum materials, and any Certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2016.

Dated at Sioux Falls, South Dakota, this 17th day of March, 2025.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Reply Brief of Appellant American West Insurance Company was filed and served using the Court's Odyssey File and Serve system which upon information and belief will send e-mail notification of such filing to:

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**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

No. 30841

MARK FIECHTNER,

Plaintiff and Appellee,

vs.

AMERICAN WEST INSURANCE COMPANY,

Defendant and Appellant.

Appeal from the Circuit Court
Second Judicial Circuit
Lincoln County, South Dakota

The Honorable John R. Pekas, Circuit Court Judge

APPELLANT'S SECOND APPENDIX

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(f) Special Verdict (R. 2678-2680)	Appx. 059-061
(g) Relevant portions of the pleadings, instructions, and transcripts:	
• Jury Instruction No. 16 (R. 1719)	Appx. 062
• Plaintiff’s Trial Ex. #3 (“UIM Evaluation 9/20/19”) (R. 1755-1762)	Appx. 063-070
• Plaintiff’s Trial Ex. #13 (Medical Payment Letter of American West) (R. 1803)	Appx. 071
(h) Items enumerated in § 15-26A-65:	
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(i) Any other parts of the record to which the parties wish to direct the particular attention of the Court:	
• Fiechtner “Chart Notes” from Brian Dozark, DC (R. 326)	Appx. 073
• Dr. Tranel’s Neuropsychological Assessment of Fiechtner (R. 448-457)	Appx. 074-083
• E-mail exchange between Fiechtner’s counsel and American West demanding \$900,000 (Exhibit 9 to Affidavit of Mark J. Arndt) (R. 314-316)	Appx. 084-086
• E-mail exchange between Fiechtner’s counsel and American West threatening to initiate lawsuit (Exhibit 15 to Affidavit of Mark J. Arndt) (R. 401)	Appx. 087

STATE OF SOUTH DAKOTA)
)SS
 COUNTY OF LINCOLN)

IN CIRCUIT COURT
 SECOND JUDICIAL CIRCUIT

MARK FIECHTNER,,
 Plaintiff,

vs.

AMERICAN WEST INSURANCE
 COMPANY,
 Defendant.

CIV. 19-648

SPECIAL VERDICT

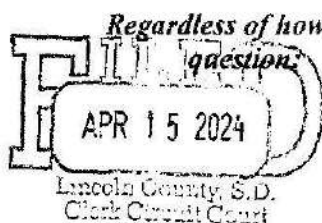
Provide answers to the following questions. The same ten or more jurors must agree to all required answers, which will then be the jury's answers. The foreperson will mark the jury's answer to each question required to be answered, then sign and date the form.

Breach of Contract Claim:

1. Did Defendant breach its insurance contract with Plaintiff by failing to pay underinsured motorist benefits to which Plaintiff was entitled?
 YES X
 NO _____
2. If you answer "NO" to Question 1, Defendant is not liable to Plaintiff for damages on the breach of contract claim, and no damages may be awarded on that claim. Skip paragraphs 2-7 and sign the verdict form.

If you answer "YES" to Question 1, answer the following two questions:

- a. What additional amount of money is necessary to compensate Plaintiff for his injuries or damages from the April 14, 2018 collision?
 \$ 400,000
- b. On what date should Defendant have paid Plaintiff those additional underinsured motorist benefits? 10/23/2019



Appx. 059

Bad Faith Claim:

3. Did Defendant breach its duty of good faith and fair dealing?

YES ✓

NO _____

If you answered "NO" to Question 3, Defendant is not liable to Plaintiff on the bad faith claim. Have the foreperson sign this form and notify the bailiff that you have finished your deliberations.

If you answered "YES" to question 3, answer the next question:

4. Was Defendant's conduct a legal cause of damages to Plaintiff?

YES ✓

NO _____

If you answered "NO" to Question 4, Defendant is not liable to Plaintiff on the bad faith claim. Do not answer any further questions. Have the foreperson sign the form and notify the bailiff that you have finished your deliberations.

If you answered "YES" to Question 4, answer the next two questions:

5. What amount of money is necessary to compensate Plaintiff for all damages caused by the bad faith on the part of Defendant?

\$ 250,000

6. Are punitive damages appropriate or necessary to punish Defendant or to set an example to others?

YES ✓

NO _____

If you answered "NO" to Question 6, Defendant is not liable to Plaintiff for punitive damages. Have the foreperson sign this form and notify the bailiff that you have finished your deliberations.

If you answered "YES" to Question 6, answer the final question:

7. What amount of money is appropriate as punitive damages?

\$ \$ 890,000

Dated this 12 day of April, 2024.


Foreperson

Instruction No. 16

In order to evaluate a claim for underinsured motorist benefits, the amount of uncompensated damages for personal injury sustained by the insured must be determined. In order to make this evaluation, you must ascertain the amount of money which will reasonably and fairly compensate Plaintiff for any of the following elements of loss or harm suffered in person or property proved by the evidence to have been legally caused by the motor vehicle accident with Ms. Belliveau, taking into consideration the nature, extent, and duration of the injury, whether such loss or harm could have been anticipated or not, namely:

- The aggravation of any pre-existing ailment or condition;
- The pain, suffering, mental anguish, disability, and loss of capacity of the enjoyment of life experienced in the past as a result of the injury;
- The pain, suffering, mental anguish, disability, and loss of capacity of the enjoyment of life reasonably certain to be experienced in the future as a result of the injury;
- The reasonable value of necessary medical care, treatment, and services received.

Whether any of these elements or damages has been proved by the evidence is for you to determine. Your determination must be based on evidence and not upon speculation, guesswork or conjecture.

UIM Evaluation 9/20/19

Injured Party: Mark Flechtner (6'0", 210, right handed, 11/01/1966)

Claim #: 211521 State: SD

CURRENT RANGE OF VALUE (CROV):

- Generals: \$40,000 - \$70,000
- Wage Loss: not specified in demand
- Medical Bills: \$18,435.47 (hard to tell if all related or if some included the unrelated injuries)
- TOTAL: \$58,435.47 - \$88,435.47
- OIC Limits - \$100,000
- Med Pay Limits - \$10,000
- Don't have it valued at over what they have already received

NEGOTIATION POINTS:

- Assertions:
 - Demand claims neck pain & visual disturbances ongoing
 - Visual disturbance & neck pain both claimed starting 2 days after MVA
 - Diagnosed w/concussion
 - Treated for visual disturbances
 - Moderate Impact (more damage to V2 than to V1)
- Strengths:
 - No fx
 - Only degenerative findings on cervical MRI
 - No ER
 - It is questionable whether neck pain & even vision changes were from MVA or degenerative in nature
 - Per ins social media, he was walking around taking video of the accident. In one post he said "everyone was ok"
 - Social media check shows he was using a bobcat on 4/15 clearing snow, on a boat on 5/25, on vacation in AZ on 5/31/18, video showing him throwing boiling water 1/30/19

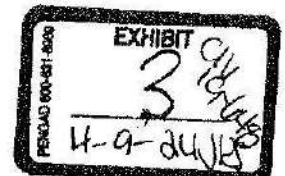
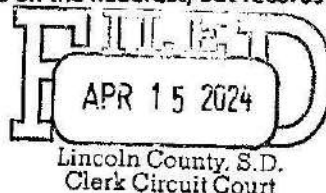
INJURIES:

- Pain in base of skull, neck, mid back and low back
 - Primary complaint per records was neck
- Visual disturbance
 - Double vision & problems with nearsightedness
- Headaches

MECHANISM OF INJURY (MOI):

- Left front impact, body would move toward the impact then possibly back again
- Demand says he hit his head on the headrest, but records say "no direct impact"

PRIOR INJURIES:



Appx. 063

- Heart condition, bilateral shoulder, elbow, knee, fx collarbone
- Records "pt says no prior hx of neck pain or headaches"

OTHER UNRELATED INJURIES/TREATMENT

- Heart condition which he continued to F/u w/after MVA
- Left shoulder which he fell while in AZ in Aug 2018 while painting on ladder
- Big toe which he had a procedure on

TREATMENT RECAP:

- No ER
- Chiro Active Spine 6 visits (4/18/18 – 5/02/18) was then referred to Ortho
- Ortho for neck pain. Ortho institute for pain management & PT. 5 sets of injections. Tx 5/24/18 – 11/28. Referred to Workforce for concussion symptoms
- Workforce 2 visits (6/15/18 & 7/27/18), ordered brain MRI, diagnosed w/concussion w/out LOC
- Avera McGreevy clinic, there to establish care 8/02/18
- Dakota Vision Center 21 visits (6/19/18 – 3/19/21)

IMPACT TO LIFE:

- Was an avid weight lifter, now struggles to work out
- Riding motorcycle causes back pain & headaches

GENERALS:

- | | |
|-----------------------------------|--|
| • Neck sprain/strain w/injections | \$10,000 - \$20,000 (last tx in Nov 2018) |
| • Concussion w/memory issues | \$5,000 - \$10,000 (not mentioned after June 2018) |
| • Vision Disturbances/Changes | \$20,000 - \$30,000 (incl. future/permanency) |
| • Possible future for neck | \$5,000 - \$10,000 |

SPECIALS:

Wage Loss

- Operating bobcat, traveling/driving, lifting, sitting, reaching

Medical Bills

- | | |
|---------------------------|---|
| • Active Spine | \$1,105 (4/18, 4/20, 4/23, 4/25, 4/30, 5/02, 5/16) – 7 visits |
| • Avera McKennan | \$4,209 (6/11, Cervical MRI) |
| • Avera Med Gro Rad | \$420 (what dates are these for?) |
| • Dakota Vision | \$3,865 (9/05/18 – 3/19/19) – |
| • Ortho Institute | \$3,742 |
| • Sioux Falls Specialty H | \$4,336.75 |
| • Workforce | \$657.72 |
| • Total: | \$18,435.47 |

Medical Record Review

Active Spine Chiro (Dr. Brian Dozark, DC) 4/18/18 – 5/02/18 6 visits

4/18/18

- Pain in base of skull, neck, across shoulders, headaches low energy
- Pain has worsened since accident
- Has not missed any work since accident, has obtained legal council
- Having vision disturbances worse in AM but Improves later midday, denies migraines
- Has family hx of Parkinsons
- Does weight training
- Wore seatbelt, airbags did not deploy, says no head injury
- Diagnosis:
 - Somatic/segmental dysfunction of cervical, thoracic, lumbar, sacral and upper extremity region
 - Cervicalgia
 - Headache
 - Myalgia
 - Differential diagnosis of degenerative arthrosis possibility

4/20/18

- Headaches, stiffness, aching, of neck, upper back, lower back, pelvic region
- Improved after last visit, but slowly returned
- Headaches less severe

5/16/18

- Pt reports of add'l subjective comments would like to explore other potential tx options that may give him quicker and more relief

Orthopedic Institute (Pain Management & PT)

5/24/18

- Chief complaint, neck pain, base of skull. Pain comes up over his ears to his temples and sometimes have problem w/his vision (referral from Active Spine)
- Has a little numbness and tingling in his fingertips. No coordination issues or balance issues
- Reviewed past med hx. He did have a previous visit with Dr. Heather in Jan of this year
- Xrays cervical
 - No fx or dislocations. Trace listhesis at C6-7. Listhesis at C3-4 and C4-5 (taken at chiro)
- Impression/Plan:
 - Could represent whiplash inj & possibly even concussion type symptoms
 - Has minimal instability on flexion and extension radiographs that could represent mild ligamentous injury in neck as well
 - Recommend MRI* of cervical spine, recommend PT, anti-inflammatory

6/14/18

- Referral to workforce & Brunz
- Cervical MRI reviewed, Spondylolisthesis noted at C3-4 & C4-5. No sign of ligamentous inj. Mild nerve pinching at 3-4 and 4-5. Will refer to pain management. Trigger point injections
- Some concussive symptoms, some memory issues, headaches, blurry vision. PT

6/19/18

- Neck problem mostly into right side that radiates into the shoulder. Problems of blurry vision and headaches, temporary loss of memory
- Never had any neck symptoms prior to accident
- MRI – minimal bulging disk identified (degenerative)
- Impression: whiplash type inj indicating cervical sprain/strain
- No evidence of any neurologic deficit other than possibility of closed head trauma w/possibility of head concussion and blurry vision
- Very concerned about his blurry vision, going to send to ophthalmologist to see if any changes in optic nerve and would like him to continue PT
- Trigger points in 5 diff areas

7/24/18

- F/U, trigger point injections gave him 85% relief. Some pain had come back on the side of his neck. He would like to reconsider repeating injection. He has not started recommended vision therapy
- 8/10/18 – right & left shoulder, right elbow (date of onset 8/07/18, left shoulder fall. Right shoulder & reoccurring right elbow). Was in AZ 8/08/18 where he was up on a ladder, painting a 20 ft ceiling and fell on his left shoulder
- 8/10/18 – Dr. Chang; Some neck symptoms are noted still & some back of the shoulder. Here for a recheck of problems in neck. 2nd trigger point injection w/out steroid helped but was temporary. Recommended 3rd Trigger Point injection
- 8/29/18 – calling to give report on trigger point injection on neck between shoulders. 50% relief for 1 week
- 9/05/18 – recheck of neck. 2-3 weeks of good relief. Still having some double vision and getting vision therapy. 4th round of trigger point injections
- 10/01/18 – big toe from 2016
- 10/02/18 – getting response from last trigger point injection, but would like to continue. Also seeing therapist for double vision
- 10/09/18 – big toe procedure, 10/19/18 thinks toe is infected
- 10/26/18 – toe F/U, unrelated
- 11/26/18 – left shoulder from fall, unrelated, 11/27 MRI left shoulder
- 11/28 – phone call & chart review for left shoulder
- 11/28 – neck F/U, cortisone injections (5th round)
- 3/13/19 – referral to athletic trainer for bilateral shoulder pain & right wrist pain (doesn't appear related) – unrelated

Appx. 066

- 6/14/18 – c spine neck pain & headaches. Has been doing some chiro w/out much improvement. MRI mild degen of his discs but no significant stenosis or neural impingement. Some vision & memory issues.
- 6/19/18 – referral to ophthalmologist/optometrist

Workforce

6/15/18 – reason for visit, concussion initial. Pt comes in for eval. MVA 2 mo ago. He tboned another car w/front end of his. No LOC. He was referred to ortho by his chiro who was tx him for neck pain. Cassie Swan PA referred him here for eval of vision changes and memory loss. Ortho will continue to manage neck, he has been referred to PT for neck

- Pt states short term memory loss several times a day. He can't remember appointment dates and often struggles to remember what he is talking about in middle of a conversation. He can't tell them who prescribed the rx for neck pain. Has affected work duties tremendously. No direct impact, likely whiplash injury. Headache every day 2-8/10 worse in the morning. Doesn't believe them to be migraines. Denies HA prior to MVA, thinks they stem from neck pain
- No nausea, no balance or vertigo. Has had a sudden decrease in his near sight vision since MVA. Denies visual difficulties before MVA or hx of corrective lenses. Poor sleep due to neck pain
- Assessments: injury of head
- Pt symptoms and physical exam findings are consistent w/a contre-coup concussion. It is likely his neck is contributing to symptoms but would like head MRI for eval. If negative, pt may benefit from vision therapy. In meantime, he is to limit physical activity

7/27/18

- Concussion F/U
- Headaches are better which he attributes to two neck injections
- Continues to see double vision. Recommended vision therapy, he has not been there as unsure if insurance will pay. He will call insurance company
- He stopped w/chiro and PT as didn't feel they helped
- Not sleeping well due to neck pain and headaches
- Headaches continues most days of the week
- Assessment: concussion w/out LOC

MRIs

Cervical MRI 6/11/18 (Avera McKenna)

- Mild cervical degenerative disc disease w/very mild disc bulging

Brain MRI 6/20/18 (Sioux Falls Specialty Hospital)

- scattered areas of punctate white matter T2 hyperintensity are nonspecific, but likely reflect mild microangiopathic changes. Seminal findings have been reported in the setting of migraine headaches
- No intracranial mass, intracranial hemorrhage or acute or subacute infarction

- Mild bilateral ethmoid air cell maxillary sinus mucosal thickening with a left maxillary sinus mucous retention cyst or polyp

Avera McGreevy Clinic 8/02/18

- Here to establish care. Has been doctoring w/ortho, and pain medicine after accident. Now has whiplash symptoms
- Hx of heart rhythm, has hx of diverticulosis, decreased libido, hemorrhoids, scoliosis
- Dr. change has given him epidural shots on neck. Also have complaints of what he thinks may be turf toe and right lateral elbow (no inj).
- Divorced, has daughter, current girlfriend
- Neck pain 5/10
- Denies any vision changes
- Injection for right tennis elbow
- He is to see orthopedics and pain clinic for remainder of his problems related to MVA

9/26/18

- Left great tow pain, 2 years.

12/14/18

- Couldn't have shoulder surgery due to heart fib
- Hasn't felt good for 9 mo
- Experiencing pain "no"

Dakota Vision Center (Jeffrey Oakland, OD) 6/19/18 – 3/19/19 21 visits

- Suffering Insufficiency and presbyopia
- Rx for corrective lenses
- 3 mo later no improvement in symptoms
- Lenses were adjusted and began 6 mo visual therapy program
- 21 appointments
- *****

6/19/18 – vision has been blurry near every since accident. More in mornings. Getting headaches. Dr thinks he may have a concussion. Memory is failing a bit. Forgot 2 appointments recently. Having issues w/dry eyes. Using eye drops 2-3 days. Complains of eye health. No abnormal breaks, tears, lesions...

- Assessment:
 - **Convergence Insufficiency** is a condition in which your eyes are unable to work together when looking at nearby objects. This condition causes one eye to turn outward instead of inward with the other eye creating double or blurred vision. Causes unknown
 - **Presbyopia** - farsightedness caused by loss of elasticity of the lens of the eye, occurring typically in middle and old age.
 - Plan:
 - Discussed findings & VT

- See above
- Spectable correction

9/05/18

- Was referred to workforce for possible concussion eval who then referred for possible vision therapy eval 2ndary to visual complaints. Experiencing double vision up close, headaches, fluctuating vision, eye strain, eye fatigue, difficulty reading
- Plan: near pls lenses for use. Pt has a clear vision issue that VT will be beneficial for. Recommend a 6 mo program care
- 9/18/18 – first VT visit. Eyes tired, vision blurry
- 10/03/18 – had cortisone shot yesterday, no headache
- 10/10/18 – no headache today
- 10/14/18 – pt engaged and wants to be challenged
- 11/14/18 – continue w/current plan
- 2/6/19 - on vacation, didn't due any therapy
- 2/13/19 - double vision decreased, no headache
- 2/27/19 - headache free except when he spends a lot of time in bobcat
- 3/06/19 - came in w/headache. Encouraged home exercises

PRIOR RECORDS

- 3/24/2008 – Sanford neck pain. Has sore throat for 2 weeks when he swallows. Also has an area on his anterior neck where he points that is tender
- 2/14/12 – Ortho Institutes. Strained his shoulder on the rope tow and Great Bear while going up the cable while riding an inner tube. Shoulder hyperextended. Has had chronic achy-type sensation. He is an avid weightlifter. Has hx of right rotator cuff repair 2-3 yrs ago. This feels different
- 10/20/14 – Ortho Institutes, right knee. Epidural block
- 1/08/15 – Ortho Institutes, left elbow. States bilateral shoulders 2003
- 1/17/15 – ER for chest pain
 - Has been sleeping poorly as excessive caffeine during the day
 - Has been on testosterone and anabolic steroids for muscle gain
 - Past surgical history, multiple orthopedic procedure
- 7/14/16 – left olecranon bursitis (left elbow) and impingement of right shoulder. Had previous injections
- 12/20/16 – right shoulder impingement, previous injections
- 5/25/17 – right shoulder impingement, requested another injection
- 11/22/17 – requested right shoulder injection
- 1/03/18 – bilateral shoulder pain, right worse than left. Wants another shot. Had last in May 2017. Fell and broke his clavicle in June. Healed w/out surgical intervention. Ortho Institute

UNRELATED (shoulder, toe, heart)

Avera Med Group, Radiology

- 9/26/18 – xray of left big toe, no acute

Aaron Prestbo MD

- 9/27/18 – over read shows some arthritis, possible osteochondral defect? Previous inj to cartilage and underlying bone. Otho should be able to eval further, maybe not turf toe
- 2/07/19 – dealing w/atrial fib every day, concerned w/having stroke
- 5/21/19 –

2/26/19 – Avera Cardiology

- 12/14/18 PCP notes that he was going to have shoulder surgery (rotator cuff tear) but found to be in atrial fibrillation
- Does weight training for exercise but denies any cardio type exercise
- In real estate business
- Is pt in pain, “no”
- Decreased vision in both eyes

3/28/19

- Sleep apnea
- No mention of “memory issues”
- Atrial fibrillation for 4 years

4/24/19 – right eye vision getting worse

11/27/2018 7:39:04 AM



November 2, 2018

Center for Visual Learning
5021 S Bur Oak Pl
Sioux Falls SD 57108

Re: Named Insured: Mark Fiechtner
 Our Claim No.: 211521
 Date of Accident: 4/14/18
 Patient: Mark R Fiechtner
 Date of Service: 9/18/18 thru 10/24/18
 Patient Acct. No.: 174883

Dear Billing Dept.:

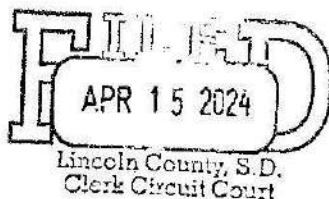
This letter is to notify you that American West Insurance Company paid its full \$10,000 policy limits, on behalf of Mark R. Fiechtner, for medical charges stemming from the above-referenced automobile accident. We have no further benefits available for payment of additional medical expenses.

Your medical billing should be submitted to other insurances available for the patient at this time for consideration. Should you have any questions, please feel free to contact me directly at 701-298-4231.

Sincerely,

Mary Jo Dahl
Claims Representative

Cc: Mark Fiechtner
 6909 S Westfield Trail
 Sioux Falls SD 57108



WESTLAW CLASSIC

South Dakota Codified Laws

Title 58. Insurance (Refs & Annos)

58-11-9.5. Payment to insured for portion of judgment not collected from underinsured motorist--Coverage limits

SD ST § 58-11-9.5 South Dakota Codified Laws Title 58. Insurance (Approx. 2 pages)

SDCL § 58-11-9.5

58-11-9.5. Payment to insured for portion of judgment not collected from underinsured motorist--Coverage limits

Currentness

Subject to the terms and conditions of such underinsured motorist coverage, the insurance company agrees to pay its own insured for uncompensated damages as its insured may recover on account of bodily injury or death arising out of an automobile accident because the judgment recovered against the owner of the other vehicle exceeds the policy limits thereon. Coverage shall be limited to the underinsured motorist coverage limits on the vehicle of the party recovering less the amount paid by the liability insurer of the party recovered against.

Credits

Source: SL 1975, ch 315, § 2; SL 1981, ch 359, § 2; SL 1986, ch 418, § 2; SL 1988, ch 394, § 2.

Notes of Decisions (40)

SDCL § 58-11-9.5, SD ST § 58-11-9.5

Current through laws of the 2025 Regular Session effective March 11, 2025 and Supreme Court Rule 25-16.

End of

Document

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NOTES OF DECISIONS (40)

In general
Admissibility of evidence
Bodily injury or death of insured
Construction with uninsured motorist statute
Coverage limits
Exhaustion clause
Fraud
Instructions
Insured vehicle exclusion
Insureds and covered autos
Law governing
Other insurance clause
Owned but not insured exclusion
Public entity liability pool
Questions of law or fact
Single vehicle accidents
Time for recovery

Chart Notes

Mark Flechtner

Phone: 605-271-8277
Fax: 605-988-8130

Patient:	Flechtner, Mark	DOB:	11/01/1986
Ins Co	American West Insurance Company	Pol #	Insured ID 211521
Date	04/18/2018		
Provider:	Brian Dozark, DC		

Subjective:

Mr. Mark Flechtner entered the office today for complaint(s) resulting from automobile vs. automobile incident and has completed the patient intake questionnaire. Mark was a driver of a large pickup (> 4000 lbs) while the other vehicle was described as a midsize car (3001-3500 lbs). The questionnaire was reviewed and annotated by the examining provider as needed. The completed questionnaire is in the patient's permanent digital file and available for review.

Mechanism of Injury:

Mark was positioned as the driver of the vehicle, and when questioned about wearing seat belts, he replied he was restrained. An air bag did not deploy. Mark confirmed the seat he was sitting in at the time of the collision did not break and recalled prior to impact the headrest was in a mid position relative to the head and the head did come in contact with head restraint. Mark reports that he was looking ahead, but cannot be certain at the time of the impact. Mark did not strike no body parts made contact against any object in the car. Patient related he did not receive a head injury and did not lose consciousness.

The patient's vehicle impact location was on the front left side. The patient's vehicle movement was moving forward. Estimated speed of patient's vehicle was moving at a moderate speed (between 25 and 40 MPH). Did the patient's vehicle impact another vehicle Yes- Passenger Rear Side. Did the patient's vehicle strike a structure? No Patient indicates their hands were placed on steering wheel. Patient indicates left foot floor, right foot brake. Patient indicates Surprised at the time of the impact. The damage assessment of the patient's vehicle was moderate visible damage.

The other vehicle's movement was described as moving forward with an estimated speed noted as moving at a moderate speed (between 25 and 40 MPH). Estimated damage assessment of the other vehicle was heavy visible damage.

Police did arrive at the scene and an accident report was completed. The patient's vehicle was not towed from the scene. EMS was at the scene. Mark drove home from the scene and the following has occurred: not treated since accident.

Patient complains at the time of the accident he felt discomfort at the back of head, front of neck, back of neck, left side of neck, right side of neck, central mid back and right low back and supplemental complaints of headaches, low energy, soreness and muscle spasm. Mark states that since the date of the accident the overall condition and complaints have worsened.

Patient states they have not missed work since the accident. Patient has obtained legal council. Name of Firm Burns Law Office - Watertown, SD.

Objective:

Cervical/Upper Extremity Neurological Exam:

- Motor: Within Normal Limits and Symmetrical
- Sensory: Within Normal Limits and Symmetrical
- Deep Tendon Reflexes: Within Normal Limits and Symmetrical
- Cranial Nerves: I to XII were examined revealing normal function to the following: I through XII.

Cervical ROM (seated)

- Flexion- mild to moderately restricted range of motion with stiffness bilaterally
- Extension- mildly restricted range of motion with ache locally at base of skull

Printed: Tuesday, January 22, 2019 2:35:47 PM

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Neuropsychology Clinic 319/356-2671
FAX 319/384-7199
Dr. Tranel 319/384-6050*

NEUROPSYCHOLOGICAL ASSESSMENT

Patient: Mark R. Fiechtner
UIHC #: 18007584
Date of Injury: April 14, 2018
Date of Evaluation: November 10, 2021
Date of Report: November 25, 2021

INTRODUCTION AND BACKGROUND

Mark R. Fiechtner (DOB: 11/1/66) was referred for neuropsychological evaluation pursuant to a motor vehicle accident on April 14, 2018. Mr. Fiechtner was traveling through an intersection on icy roads, and his large pickup truck (F-250) ran into a Toyota Corolla that failed to stop at a red light due to the icy conditions. The South Dakota DOT report indicates that he did not receive medical attention at the scene, and was able to drive away in his vehicle. He did not appear to have any acute injuries. A social media post by Mr. Fiechtner on 4/14/18 indicated that "everyone is ok" (in regard to the accident). Several days later, Mr. Fiechtner sought care from a chiropractor for neck pain and headaches. He reported that he did not receive a head injury and did not have loss of consciousness (LOC) in the accident. Subsequently, Mr. Fiechtner developed complaints of blurred vision and memory deficits. He was assessed with possible postconcussion-type problems by some local providers, and a PA-C provider diagnosed him with concussion from the accident. He was treated for convergence insufficiency, with limited success. Brain MRI on 6/20/18 showed nonspecific punctate white matter T2 hyperintensities, consistent with mild microangiopathic changes.

Mr. Fiechtner has continued to report vision and memory problems, which he states have not improved over time. He eventually underwent another brain MRI on 5/18/21, interpreted by Dr. Chaudhry as showing findings consistent with traumatic brain injury (TBI).

Mr. Fiechtner has an extensive pre-accident history, including atrial fibrillation associated with excessive alcohol and caffeine use. He was assessed and treated extensively for this condition prior to and after the 2018 accident. Problems with binge drinking and alcohol use disorder are well documented in pre-accident records. Mr. Fiechtner has been married several times. He currently lives in Sioux Falls, SD, and works as a realtor.

FIECHTNER, Mark
Benton Laboratory Neuropsychological Report
Date of Injury: April 14, 2018
Date of Evaluation: November 10, 2021
Date of Report: November 25, 2021

Page 2

Mr. Fiechtner has not been formally evaluated for his complaints of memory problems. To determine Mr. Fiechtner's long-term recovery from the April 2018 accident, we were asked to evaluate his cognitive and behavioral functioning. Our evaluation was requested by Mark J. Arndt of the Evans, Haigh & Hinton Law Firm in Sioux Falls, South Dakota.

Medical Records

Pre-accident Records

Mr. Fiechtner was seen on 3/4/10 for palpitations and chest pain. These problems happen "after he drinks excessively up to 15 drinks or so every other week or so." He "admits to excessive alcohol consumption." He works in real estate. He was instructed to reduce his alcohol intake to no more than 2 drinks a day. Other notes from March 2010 indicate that he has palpitations, chest pain, and SOB, "always following excessive alcohol drinking." Numerous records from this time period indicate excessive alcohol use.

He was seen on 6/30/12 for tachycardia and irregular heartbeat, associated with heavy alcohol use. It was noted that for treatment, "the easy way is to stop binge drinking. He says he will think about that."

A note from 1/14/15 indicated a diagnosis of "excessive drinking alcohol."

Mr. Fiechtner was seen at Avera – Sioux Falls on 1/17/15 for chest pressure complaints. He has been feeling poorly for the past few weeks. He has a history of intermittent Aflutter, over the past 10 years. He "admits he has been drinking." He was drinking the night before. He drinks excessive caffeine during the day. He has been taking testosterone, and anabolic steroids, for muscle gain. EKGs showed atrial flutter and variable AV block to normal sinus rhythm. He was advised to decrease his caffeine and alcohol intake.

Accident on April 14, 2018

South Dakota DOT records indicate that on 4/14/18, there was a collision at the intersection of highways 115 and 271. A woman driving a 2016 Toyota Corolla was approaching an intersection and attempted to stop at a red light (she had her two sons in the backseat; both were transported to the hospital for further medical attention). The roadway was snowy and she was not able to stop. An F250 super duty Ford pickup truck being driven by Mr. Fiechtner collided with her vehicle. There was minor damage to his truck and it was not towed. The report indicates that Mr. Fiechtner was able to drive away from the scene. His airbags did not deploy. He did not claim to have any injuries and was not treated for any injuries. He did not require any medical attention.

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Post-accident Records

A social media post by Mr. Fiechtner on 4/14/18 indicated that, "If you live in South Dakota today....don't drive if you absolutely don't have to. I just got in an accident with a young lady who slid through an intersection with her two infant children....everyone is ok, but could've been much worse."

Mr. Fiechtner sought care from a chiropractor (Dr. Dozark) on 4/18/18. This was the first medical attention he received after the accident. He reported vision changes and headaches since the accident. He denied dizziness, memory problems, and anxiety/depression. Dr. Dozark's report indicates that "Mark did not strike no body parts made contact against any object in the car. Patient related he did not receive a head injury and did not lose consciousness." Mr. Fiechtner drove home from the scene and has not been treated since the accident. Currently, he complained of discomfort in his head, neck, and back. He has obtained legal counsel at the Burns Law Office in Watertown, SD. Dr. Dozark outlined a plan of care. Mr. Fiechtner received regular treatments from Dr. Dozark, about 2x weekly, for a period of time.

Mr. Fiechtner was seen at the Orthopedic Institute on 5/24/18 by Dr. Wingate, for neck pain. Dr. Wingate noted that "this could represent whiplash injury and possibly even concussive type symptoms with his vision changes, headaches."

Cervical spine x-ray on 6/11/18 was negative for acute changes.

Cassandra Swann, PA-C, spoke via telephone to Mr. Fiechtner on 6/14/18. She noted that he is continuing to report some "concussive type" symptoms, some memory issues, some headaches, and blurry vision.

Chelsea Reich, PA-C, saw him on 6/15/18 for "possible concussion symptoms." He reported that his symptoms are getting worse. He has memory difficulties, e.g., forgetting appointments. He forgets what he is talking about in the middle of a conversation. His memory problems have "affected his work duties tremendously." She assessed him with: injury of head, initial encounter, and noted that his history and presentation were consistent with "a contre-coup concussion." Brain MRI was recommended. Follow-up on 7/27/18 indicated improvement in his headaches. She assessed "concussion without LOC." He was started on Amitriptyline.

Ryan Otto, DPT, saw him for a PT intake on 6/15/18. A course of PT was pursued.

Dr. Chang saw him on 6/19/18 for complaints of blurry vision, headaches, and "temporary loss of memory." Whiplash and possible concussion injury were noted. On 7/24/18, Dr. Chang's impression stated "Whiplash type injury mostly into the right side and closed head trauma."

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Brain MRI on 6/20/18 was interpreted as showing scattered areas of punctate white matter T2 hyperintensity, nonspecific but likely representing mild microangiopathic change. It was noted that these findings are common in persons with a history of migraine. No other parenchymal abnormalities were noted; there were no acute findings.

Dr. Prestbo saw him on 8/13/18 to establish care. ROS noted under psychiatric that "He denies any anxiety, depression, sleep, or memory problems." He was well and fully oriented. Diagnoses included: paroxysmal atrial flutter; tennis elbow; erectile dysfunction; right elbow pain; toe pain, left; cervical muscle pain. Dr. Prestbo eventually trialed him on Viagra for erectile dysfunction. A note from Dr. Prestbo from 12/16/18 indicated that, "He has a lot of stress at his job, he drinks a lot of caffeine, he drinks too much alcohol." Dr. Prestbo concluded that Mr. Fiechtner's heavy alcohol use (especially on the weekends) was very likely contributing to his medical problems, especially the cardiac issues.

Mr. Fiechtner was treated at Vision Therapy beginning 2/6/19, for blurry vision. The records indicate that he reported problems with forgetfulness. He is a "social drinker." He was diagnosed with convergence insufficiency, headaches, and presbyopia. Treatment notes from the Center for Visual Learning indicated improvement over time. Dr. Oakland diagnosed convergence insufficiency (per letter on 9/6/18).

He was seen on 2/26/19 for atrial fibrillation (preexisting condition). EKG was normal. He does weight training and works in real estate. He noted that caffeine and alcohol can exacerbate his cardiac problems. He was advised to stop alcohol intake. He is very concerned about a stroke. Various follow-up tests were recommended, and he was started on a blood thinner. A note from Dr. Prestbo indicated that, "I suspect that the paroxysmal atrial fibrillation is related to his alcohol use, which we are trying to curb."

He was evaluated on 4/10/19 for paroxysmal atrial fibrillation (preexisting condition). He underwent surgical intervention for this condition on 4/22/19.

Brain MRI was conducted on 5/18/21, and interpreted by Ammar Chaudhry, MD. The report indicates that the study shows multiple scattered foci of hemosiderin near the gray-white junction in bilateral cerebral hemispheres, corpus callosum, and cerebellum. These findings "are consistent with diffuse axonal injury." There is "asymmetric volume loss in the right hippocampus." DTI demonstrates findings consistent with "coup-counter coup pattern of axonal shear injury." Overall, "these findings are most consistent with traumatic brain injury." Dr. Chaudhry also noted multiple subcentimeter white matter hyperintense foci in bilateral frontal subcortical white matter, which "could be related to TBI." Migraine and chronic microvascular ischemic changes were other possible causes.

Legal Records

Deposition of Mark Fiechtner (taken 4/13/21): His attorney is Seamus Culhane. Mr. Fiechtner attended Northern State University and earned a BS in industrial technology. He

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started a real estate company ca. 2009. His company is Dynamic Reality and he works as a realtor. He has been married 3 times. He currently has one child with his girlfriend.

Mr. Fiechtner testified that he did not have any obvious injuries at the accident scene. He did not receive any acute medical attention. He sought medical attention about 3-4 days later. He does not remember any LOC. He does not think he struck his head, but he wasn't entirely sure. Currently, his main problems are vision and memory. He continues to have double vision, and this has not improved over time. He has problems with both short term memory and long term memory. These problems have not improved over time.

BENTON NEUROPSYCHOLOGY CLINIC

Identifying Information

Mark Fiechtner is a 55-year-old, right-handed (+100) man. He has 16 years of formal education and has worked as a real estate broker since 2009. He was unaccompanied to the evaluation. Mr. Fiechtner was referred for neuropsychological evaluation of cognitive and emotional functioning after a motor vehicle accident in April 2018. Premorbid medical history is notable for HLD, HTN, and a heart ablation procedure several years ago. Current medications include Bystolic, atenolol, and Aleve as needed for neck pain.

Background Information from the Patient

Mr. Fiechtner reported that on 4/14/2018, he was driving towards an intersection in his pickup truck when he hit a car that went through a red light. He stated that the other vehicle went into the ditch and his truck came to rest on the side of the road. He indicated that immediately following the accident, he was not treated for any injuries at the scene and was not evaluated formally by emergency personnel. He was not certain whether he hit his head. He said that his bumper (which had been damaged) was temporarily mended, and he drove home. Since the accident, he endorsed problems with constant double vision within his near visual field (i.e., about one arm's length), neck pain, and cognitive changes. Specifically, he reported problems with remembering appointments, dates, and birthdays of relatives. He denied having noticed these problems prior to the accident. He also described problems with word-finding, headaches, stamina, and tingling sensation in his hands since the accident.

Management of all IALD's was reported as independent and he denied problems with these. Despite vision changes noted above, he indicated he continues to drive and has not experienced problems as he does not experience double vision outside of his immediate near field of vision. When asked about his mood, Mr. Fiechtner described feeling overwhelmed

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because the current evaluation was outside of his comfort zone; however, he denied any history of sustained periods of depressed mood or anxiety. On average, he indicated that he sleeps 8 hours per night and did not endorse sleep problems. He reported that he drinks 3-5 alcoholic beverages, approximately one day per week. After receiving news that a friend had been diagnosed with cancer 5-7 years ago, he indicated that he received a DWI. He stated that typically he does not drink to the point of intoxication more than a few times per year and denied any previous diagnosis of or treatment for an alcohol use disorder. Occasionally, he smokes a cigar but denied all illicit drug use, including marijuana.

Mr. Fiechtner was reportedly an average (mostly B's and C's) student throughout school. He completed college with no reported difficulties. Currently, Mr. Fiechtner reported that he lives with his girlfriend and her two children. He has returned to working full-time as a realtor.

Behavioral Observations

Mr. Fiechtner was pleasant and cooperative throughout the evaluation. Speech was mildly slowed at times with occasional hesitations and he sometimes answered questions with brief responses. Comprehension was intact and word-finding problems were not observed. Mood was described as "a little overwhelmed" and affect was somewhat restricted, but he appeared progressively more interactive throughout the evaluation. Vision problems were observed as he tended to hold stimuli away from his face to see clearly. He appeared to put forth good effort during testing.

Clinical Assessment Procedures

Mr. Fiechtner was administered the following tests and procedures:

Clinical Interview

Orientation Questionnaire

- Orientation to personal information
- Orientation to place
- Orientation to temporal information

Wechsler Adult Intelligence Scale-IV:

- Similarities
- Information
- Block Design
- Matrix Reasoning
- Digit Span
- Arithmetic
- Symbol Search
- Coding

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Wide Range Achievement Test 5th Edition:

Word Reading

Rey Auditory Verbal Learning Test

Rey Auditory Verbal Learning Test-X

Rey-Osterrieth Complex Figure Test

Benton Visual Retention Test

Wechsler Memory Scale-IV

Logical Memory I

Logical Memory II

Logical Memory II – Delayed recognition

Multilingual Aphasia Exam:

Controlled Oral Word Association Test

Boston Diagnostic Aphasia Exam:

Boston Naming Test

Complex Ideational Material Test

Category Fluency Test (Animals)

Rosenbaum Visual Acuity Screen

Clock Drawing Test

Trail Making Test (Parts A & B)

Beck Depression Inventory II

Beck Anxiety Inventory

Minnesota Multiphasic Personality Inventory – 2

Test of Memory Malingering

Structured Inventory of Malingered Symptomatology

Results

Validity:

Mr. Fiechtner's performances were within expectations on all formal and embedded measures of performance validity. Our results are considered a valid estimation of current cognitive abilities.

Orientation:

Mr. Fiechtner was normally oriented to date, time, location, and basic personal information.

Intellectual Function:

Performance on a measure of premorbid intellectual functioning was in the high average range (84th %ile). His general intellectual functioning was within the average range (68th %ile). The verbal comprehension index (48th %ile) and perceptual reasoning index (63rd %ile) were average. His general fund of knowledge (50th %ile) and abstract verbal reasoning and concept formation (37th %ile) were average. The findings indicate normal intellectual functioning, without evidence of acquired impairments.

Appx. 080

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Attention, Working Memory, and Processing Speed:

An overall measure of working memory was superior (95th %ile). Auditory attention and working memory as assessed by digit repetition and sequencing was in the very superior range (98th %ile). Performance on a complex measure of auditory attention involving mental arithmetic was in the high average range (84th %ile). A composite score of processing speed was average (42nd %ile). Speeded digit-symbol substitution (50th %ile) and speeded search and match to sample (37th %ile) were average. Speeded visual scanning under focused attention was average, as was speeded scanning with the addition of executive demands for mental set-shifting and response inhibition. Overall, the findings indicate normal attention, working memory, and processing speed.

Visuospatial and Visuoperceptual Function:

Visual acuity without correction was 20/30 to Rosenbaum screening. Performance on a broad index of perceptual reasoning was in the average range (63rd %ile). Two-dimensional constructional copying of a complex geometric figure was average. Construction of a clock was normal. Visuoconstruction of simple designs using blocks was average (63rd %ile) as was performance on a measure of analysis of abstract visuospatial information (63rd %ile). The performances in this domain were normal, and not indicative of any acquired deficits in visuospatial or visuoperceptual functioning.

Language:

Verbal letter fluency was low average to average. Confrontation naming was average. Oral comprehension of questions and paragraph length stories was within expectations. Semantic fluency was high average. His language abilities are normal. Speech is normal.

Learning and Memory:

Immediate verbal recall of a word list over trials was average. Delayed recall of the list was average. Immediate and delayed recall of paragraph-length narrative information was average with high average recognition.

Immediate visual memory for geometric designs was within normal limits. Memory of a complex geometric figure copied earlier was below expectations, and he noted feeling overwhelmed with being asked to freely recall the figure. Overall, his learning and memory are within normal expectations.

Executive Function:

Rapid cognitive shifting was average on a speeded visual scanning task. Complex figure copy was average. Verbal letter fluency was low average to average, and without notable rule violations. His executive functioning is normal.

Mood & Personality:

Mr. Fiechtner endorsed minimal symptoms of depression and anxiety on brief self-report questionnaires. Suicide risk screening was completed without positive results.

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Mr. Fiechtner completed a comprehensive measure of personality and emotional functioning. He responded consistently without evidence of attempts to over-report or underreport cognitive or emotional symptoms. On this measure, his response style was consistent with those who sometimes develop physical symptoms during times of increased stress. There is no indication of a major psychological disorder. Elevated depression and anxiety were not evident.

SUMMARY AND CONCLUSIONS

Mark R. Fiechtner was referred for neuropsychological evaluation pursuant to a motor vehicle accident on April 14, 2018. Mr. Fiechtner was traveling through an intersection on icy roads, when he collided with a car that failed to stop at a red light due to the icy conditions. He did not receive medical attention at the scene, and was able to drive away in his vehicle. He did not appear to have any acute injuries. Several days later, Mr. Fiechtner sought care from a chiropractor for neck pain and headaches. He reported that he did not receive a head injury and did not have loss of consciousness (LOC) in the accident. Subsequently, Mr. Fiechtner developed complaints of blurred vision and memory deficits. He was assessed with possible postconcussion-type problems by some local providers, and a PA-C provider diagnosed him with concussion from the accident. He was treated for convergence insufficiency, with limited success. Brain MRI on 6/20/18 showed nonspecific punctate white matter T2 hyperintensities, consistent with mild microangiopathic changes. Mr. Fiechtner has continued to report vision and memory problems, which he states have not improved over time. He eventually underwent another brain MRI on 5/18/21, interpreted by Dr. Chaudhry as showing findings consistent with traumatic brain injury (TBI). To determine Mr. Fiechtner's long-term recovery from the April 2018 accident, we were asked to evaluate his cognitive and behavioral functioning.

Our neuropsychological assessment indicates that Mr. Fiechtner has normal, intact cognitive and behavioral functioning. He has average to above average intellectual abilities and a strong baseline as indicated by his educational and occupational background. His memory, speech and language, attention, concentration, orientation, visuospatial and visuoconstructional abilities, and executive functioning are normal. He is not reporting clinically elevated depression or anxiety, and psychological assessment does not indicate a psychological disorder. In summary, our findings indicate that he does not have any permanent cognitive or behavioral deficits related to the April 2018 accident.

The issue of alcohol use is a preexisting concern that appears to have continued into the post-accident epoch. Per the report Mr. Fiechtner provided to us, this is not a current concern.

We do not have any treatment recommendations. Mr. Fiechtner is working successfully in the same occupation he was in prior to the April 2018 accident. He is

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psychologically healthy and well adjusted. He can be reassured that his cognitive functioning is normal and he is well recovered.



Daniel Tranel, PhD, ABPP/Cn
Chief, Benton Neuropsychology Laboratory
Professor, Neurology and Psychological and Brain Sciences

9/23/2019

Nodak Insurance Company Mail - Mark Feichtner, Claim #211521

 W-9 Turbak Law Office, PC.pdf
228K

Kim Dledrich <kim@turbaklaw.com>
To: "akramer@bcmutual.com" <akramer@bcmutual.com>
Cc: Seamus Culhane <seamus@turbaklaw.com>, Deb Wiedman <deb@turbaklaw.com>

Wed, Sep 4, 2019 at 2:51 PM

Abby,

My apologies, I confused your company with the underlying carrier.

I look forward to hearing from you regarding the UIM claim.

Kim

[Quoted text hidden]

Abby Kramer <akramer@bcmutual.com>
To: Seamus Culhane <seamus@turbaklaw.com>

Mon, Sep 23, 2019 at 9:58 AM

I have reviewed the Underinsured Motorist demand including the bills and records for Mark Feichtner.

As previously stated, we have waived our subrogation rights for the \$10,000 that we paid towards Mark's medical bills. We have also given our permission for Mark to settle with the underlying carrier for their \$100,000 limits.

I am offering \$10,000 for a full and final settlement under Mark's Underinsured Motorist Claim.

Please present this offer to your client, then respond to me.

On Wed, Aug 28, 2019 at 9:21 AM Seamus Culhane <seamus@turbaklaw.com> wrote:

[Quoted text hidden]

--
ABBY KRAMER, AIC, CPCU

Sr. Claim Representative

Nodak Insurance Group | PO Box 2502 Fargo, ND 58108

Phone: 402-347-0475 | Fax: 701-298-4201

Email: akramer@nodakins.com or akramer@bcmutual.com



Seamus Culhane <seamus@turbaklaw.com>
To: Abby Kramer <akramer@bcmutual.com>
Cc: Seamus Culhane <seamus@turbaklaw.com>

Mon, Sep 23, 2019 at 10:03 AM

Ms. Kramer,

EXHIBIT 9

What is this offer based upon? I.e. How did you come up with an offer of \$110,000 or total damages of \$120,000?

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Filed: 5/20/2022 4:22 PM CST Lincoln County, South Dakota 41CIV19-000648

9/23/2019

Nodak Insurance Company Mail - Mark Feichtner, Claim #211521

SWC

From: Abby Kramer <akramer@bcmutual.com>
Sent: Monday, September 23, 2019 9:59 AM
To: Seamus Culhane <seamus@turbaklaw.com>
Subject: Re: Mark Feichtner, Claim #211521

I have reviewed the Underinsured Motorist demand including the bills and records for Mark Feichtner.

As previously stated, we have waived our subrogation rights for the \$10,000 that we paid towards Mark's medical bills. We have also given our permission for Mark to settle with the underlying carrier for their \$100,000 limits.

I am offering \$10,000 for a full and final settlement under Mark's Underinsured Motorist Claim.

Please present this offer to your client, then respond to me.

On Wed, Aug 28, 2019 at 9:21 AM Seamus Culhane <seamus@turbaklaw.com> wrote:

Ms. Kramer,

As of yesterday, the underlying carrier tendered their limits of liability.

First, please confirm whether American West intends to substitute its draft or waive any claim(s) against the underlying driver and allow Mark to accept payment. The sooner, the better.

Second, because the underlying driver was carrying only \$100,000 in coverage and Mr. Feichtner has \$1,000,000 in coverage, let this serve as formal notice of a UIM claim for the remaining \$900,000 in UIM coverage and benefits. I believe you already have adequate proof of loss. Please let me know if there is any more information that you need.

Best Regards,

SWC

—
ABBY KRAMER, AIC, CPCU

Sr. Claim Representative

Nodak Insurance Group | PO Box 2502 Fargo, ND 58108

<https://mail.google.com/mail/u/0?ik=12ea70c306&view=pt&search=all&permthid=thread-f%3A1643120780308119467&siml=msg-f%3A1643120780308119467> 5/6

Filed: 5/20/2022 4:22 PM CST Lincoln County, South Dakota 41CIV19-000648

9/23/2019

Nodak Insurance Company Mail - Mark Feichtner, Claim #211521

Phone: 402-347-0475 | Fax: 701-298-4201

Email: akramer@nodakins.com or akramer@bcmutual.com

[Quoted text hidden]

Abby Kramer <akramer@bcmutual.com>
To: Seamus Culhane <seamus@turbaklaw.com>

Mon, Sep 23, 2019 at 10:30 AM

This offer was based on: facts of loss, police report, impacts to both vehicles, bills and records for his treatment, diagnosed injuries, and impact to life.

[Quoted text hidden]

[Quoted text hidden]



Seamus Culhane <seamus@turbaklaw.com>
To: Abby Kramer <akramer@bcmutual.com>
Cc: Seamus Culhane <seamus@turbaklaw.com>

Mon, Sep 23, 2019 at 10:31 AM

Ms. Kramer,

Sure, I can imagine that those things were included, but how did you arrive at this number?

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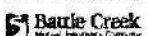
Abby Kramer <akramer@bcmutual.com>
To: Seamus Culhane <seamus@turbaklaw.com>

Mon, Sep 23, 2019 at 10:54 AM

Our company does not use any software such as Colossus. This offer was based on experience and a review with my manager. To be honest, I believe Mark was fully compensated by the underlying carrier's \$100,000 settlement and our waiver of subrogation right for the \$10,000 med pay. However, since Mark is our insured we want to give him the benefit and try to resolve this matter with an offer of \$10,000.

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9/23/2019

Nodak Insurance Company Mail - Mark Feichtner, Claim #211521



Abby Kramer <akramer@bcmutual.com>

Mark Feichtner, Claim #211521

Seamus Culhane <seamus@turbaklaw.com>
To: Abby Kramer <akramer@bcmutual.com>
Cc: Seamus Culhane <seamus@turbaklaw.com>

Mon, Sep 23, 2019 at 11:08 AM

Ms. Kramer,

Mark has what appears to be an obvious brain injury that has been noted as a concussion with corresponding amnesia, ongoing problems with his vision, and a cervical disc bulge. He bought and paid for \$1,000,000 in UIM coverage, and the underlying carrier has tendered \$100,000, the full extent of their limits. That leaves another \$900,000 in coverage. Meanwhile, I don't know any young people who would go through what Mark has or what he will have to in the future for \$120,000 nor can I imagine a jury thinking that is anywhere near adequate in the context of these kinds of injuries.

I've corresponded with Mark, and obtained authority to re-offer to resolve this claim for the remaining \$900,000 in coverage before filing suit. If this is not agreed to along with an agreement to tender it soon, we will be forced to file suit in the next few days.

Best Regards,

[Quoted text hidden]

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EXHIBIT 15

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