**Nos. 16-4070 and 16-4210**

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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LAURA DZIADEK,

Appellee,

vs.

THE CHARTER OAK FIRE INSURANCE COMPANY, d/b/a TRAVELERS,

Appellant.

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF SOUTH DAKOTA**

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# APPELLANT THE CHARTER OAK FIRE INSURANCE COMPANY'S OPENING BRIEF

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## SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This is an insurance coverage case in which *every claim* was based on the performance of alleged duties under an insurance policy that Appellant The Charter Oak Fire Insurance Company issued to named insured Billion Empire Motors, Inc. The Policy included Underinsured Motorist coverage.

Appellee Laura Dziadek, a passenger in a Billion vehicle, qualified as a UIM insured after she exhausted all sources of recovery and established the amount of UIM damages on January 17, 2012. Charter Oak paid the $900,000 UIM limits on February 21, 2012. In spite of this limits payment, Dziadek alleged the Policy had been breached, and that Charter Oak deceived her lawyers by not anticipating potential UIM coverage sooner and highlighting that possibility for them.

The District Court erred as a matter of law by allowing Dziadek to try a case which alleged the exact same conduct by Charter Oak constituted breach of contract, bad faith, fraud and deceit. At most, this case should have been limited to whether Charter Oak breached the Policy by not anticipating and affirmatively highlighting for Dziadek's lawyers potential UIM coverage before they provided notice of a UIM claim, and whether Dziadek could prove her bad faith allegations. All other claims should have been dismissed.

Charter Oak requests 30 minutes per side for oral argument.

## CORPORATE DISCLOSURE STATEMENT

Appellant The Charter Oak Fire Insurance Company is 100% owned by The Travelers Indemnity Company, which is 100% owned by Travelers Insurance Group Holdings, Inc., which is 100% owned by Travelers Property Casualty Corp., which is 100% owned by The Travelers Companies, Inc. The Travelers Companies, Inc. is the only publicly held company in the corporate family. No individual or corporation owns 10% or more of the stock of The Travelers Companies, Inc.

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## JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. § 1332, and entered final judgment on September 30, 2016. Appellant The Charter Oak Fire Insurance Company ("Charter Oak") filed a timely notice of appeal on October 28, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## STATEMENT OF ISSUES PRESENTED

1. Did the District Court err in failing to dismiss Appellee Laura Dziadek's ("Dziadek") breach of contract claim when Charter Oak (a) complied with the terms of its Policy and South Dakota law by paying its $900,000 UIM Policy limits within weeks after Dziadek's lawyers first requested payment and established the amount of UIM insurance, and (b) did not cause breach of contract damages?

- *Farmland Ins. Cos. v. Heitmann*, 498 N.W.2d 620 (S.D. 1993).
- *Gloe v. Union Ins. Co.*, 694 N.W.2d 252 (S.D. 2005).

2. Did the District Court err in failing to dismiss Dziadek's extra-contractual statutory tort claim for deceit when the Policy was the sole basis for her relationship with Charter Oak, and her deceit claim was based on the same operative facts as her breach of contract claim?

- *Schipporeit v. Khan*, 775 N.W.2d 503 (S.D. 2009).
- *O'Neill v. Blue Cross of Western Iowa*, 366 N.W.2d 816 (S.D. 1985).
- *Fisher Sand & Gravel Co. v. S.D. DOT*, 558 N.W.2d 864 (S.D. 1997).
- *Bertelsen v. Allstate Ins. Co.*, 796 N.W.2d 685 (S.D. 2011).

3. Did the District Court err in failing to (a) dismiss Dziadek's punitive damage claim because her deceit claim is barred by the independent duty rule, (b) vacate the award because Dziadek failed to establish willful, wanton, or malicious conduct, or alternatively, (c) remit the award as unconstitutionally excessive?

- *Bierle v. Liberty Mut. Ins. Co.*, 992 F.2d 873 (8th Cir. 1993).
- *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).
- *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004).
- *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005).

## STATEMENT OF FACTS

Charter Oak issued an auto dealership insurance contract (the "Policy") to Billion Empire Motors, Inc. ("Billion") as the named insured. In 2009, Billion provided notice of a liability claim against a customer, Lori Peterson ("Peterson"), who had an accident while driving a loaner vehicle. The question in 2009 was whether Peterson, as a Billion customer, was an insured and had excess liability coverage under the Policy for a claim against her by Laura Dziadek, who was a passenger in the vehicle. Charter Oak investigated and determined that Peterson was not an insured under the Policy for Dziadek's liability claim.

Dziadek had previously hired her own lawyers, the Zimmer, Duncan & Cole law firm ("ZDC"). Charter Oak informed ZDC on February 12, 2009 there was no liability coverage under the Policy for Peterson, and in response to ZDC's request provided documentation on March 5, 2009 explaining the basis for its no-coverage determination. That documentation also informed ZDC that the Policy provided up to $1,000,000 in Underinsured Motorist ("UIM") coverage. Charter Oak told ZDC "[s]hould you have any questions or concerns, please contact [us]." ZDC did not follow up with any questions or concerns for over two years.

On July 15, 2011, ZDC followed up and requested the UIM Endorsement after reviewing the information Charter Oak had sent to ZDC in March 2009. Charter Oak provided the UIM Endorsement on July 22, 2011, and ZDC provided

notice of a potential UIM claim on July 28, 2011. ZDC subsequently assembled and provided Charter Oak with proof of the amount of UIM damages, and made its first demand for UIM benefits on January 17, 2012. Charter Oak acknowledged coverage and paid the $900,000 UIM limits on February 16, 2012, and sent the checks on February 21, 2012.

**A. The Policy.**

Charter Oak insured Billion, a Sioux Falls automobile dealership, under a Commercial Insurance Policy, effective from July 1, 2008 to July 1, 2009. App. 511. Billion paid the premiums. App. 513; App. 1336, 596:15-20.

The Policy insured multiple auto dealership risks, including Liability, Physical Damage, Garagekeepers, and other supplemental coverages such as UIM and Auto Medical Payments ("AMP"). App. 512, 533. In material part the UIM Endorsement stated:

> **COVERAGE**
>
> > We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an…"underinsured motor vehicle.". . .The owner or driver's liability for these damages must result from the ownership, maintenance or use of the . . . "underinsured motor vehicle."
> >
> > * * *
> >
> > [W]e will pay *only after all liability bonds or policies have been exhausted*….
> >
> > * * *

**LIMIT OF INSURANCE**

> *No one will be entitled to receive duplicate payments*….
> We will not make duplicate payments [when]…payment has been made by or for *anyone who is legally responsible*….
>
> We will not pay…if a person is entitled to receive payment…under any workers' compensation…or similar law.
>
> * * *
>
> *With respect to damages resulting from an "accident" with an "underinsured motor vehicle," the limit of liability shall be reduced by all sums paid by or for anyone who is legally responsible ...*

App. 559-560 (emphasis added).

**B. Dziadek Was Injured As A Passenger In A Billion Vehicle.**

In September 2008, Billion loaned a vehicle to a customer, Lori Peterson. App. 1334, 557:13-18. On September 22, 2008, Peterson was driving the Billion vehicle and had an accident in a highway construction zone. App. 19, ¶¶6-8. Dziadek was a passenger and was seriously injured. *Id.*

**C. Dziadek Hired ZDC To Represent Her Interests.**

Dziadek hired ZDC to represent her. App. 991-993. Dziadek relied exclusively on ZDC to evaluate and pursue her personal injury claims and insurance issues. App. 1337, 602:15-18.

ZDC made a workers' compensation insurance claim, which resulted in payment of her medical expenses and temporary wage loss through Liberty Mutual Insurance Company. App. 1335, 585:1-4.

ZDC determined Dziadek had a claim against Peterson, who had a $100,000 liability policy with Progressive Insurance Company ("Progressive"). App. 1079. Progressive investigated the accident on Peterson's behalf to identify other potentially responsible parties, including Billion. App. 1018-1030. Progressive investigated whether Billion had excess liability coverage for Peterson. App. 1028, 1030.

**D. Billion Notified Charter Oak Of A Liability Claim.**

On January 29, 2009, Billion reported the accident to Charter Oak. App. 1347, 759:22-760:2. Charter Oak opened an auto liability claim file and assigned the matter to Faith Styles, who began investigating "to find out what happened...and to see if...Peterson would be provided coverage." App. 1358, 1294:25-1295:16.

In her first conversation with Billion, Styles learned that Peterson had been driving a Billion vehicle when Dziadek was injured as a passenger and that "Peterson was looking for *liability coverage*" under the Policy. App. 1358, 1293:8-18 (emphasis added). Billion was "looking to see if the driver of that vehicle would be afforded *liability coverage* under [Billion's] [P]olicy." App. 1358, 1292:1-10; App. 1359, 1303:3-10 (emphasis added).

On February 6, 2009, Styles conferred with her supervisor about whether Peterson qualified as "an insured" "for liability coverage in excess of what her own

[Progressive] policy would cover." App. 1359, 1303:16-1304:9. Styles reviewed the Policy's liability provisions with Billion's agent and told him that she and her supervisor had preliminarily concluded Peterson was not an insured and had no excess liability coverage. App. 1360, 1304:15-1305:8.

### E. Styles Determined And Informed ZDC That Peterson Had No Excess Liability Coverage.

On February 6, 2009, Styles spoke to ZDC attorney Jeff Cole. App. 1348, 764:9-765:1. Cole, a licensed South Dakota lawyer with 18 years of experience, regularly practiced in the area of automobile personal injury law. App. 1346, 757:20-758:2. This was Cole's only conversation with Styles, and it lasted just a few minutes. App. 1348, 765:2-6. Cole could not remember exactly what was discussed. App. 1348, 765:10-13. Styles recalled that Cole asked her "what [Charter Oak's] position was." App. 1363, 1324:10-19. Styles understood Cole to be asking whether "Ms. Peterson [had]...*liability coverage* under…[the] [P]olicy."; App. 1361, 1310:10-17 (emphasis added).

Styles told Cole what she had told Billion's agent earlier that same day: "[I]t appear[ed] [Peterson]...would not be an insured under...[the] [P]olicy" and there was "no excess coverage for [Peterson] under [the] [P]olicy." App. 1360, 1306:9-1307:11; App. 1130. Cole's contemporaneous documentation of this conversation was consistent with Styles' recollection—his billing entry for February 6 described a phone conference "w/Faith Hopkins [sic] re: *excess insurance*," and his

handwritten note of the same date referenced Styles and her statement that there was "*no excess coverage*." App. 1052-1053 (emphasis added).

The subject of UIM insurance was not discussed in Styles' February 6 phone conversation with Cole or in any 2009 correspondence. App. 1361, 1310:23-1311:12.

On February 12, 2009, Styles and her supervisor met with in-house counsel to discuss whether Peterson was an insured under the Policy for third-party liability claims. App. 1362, 1316:8-23. Based on their review of the facts and the Policy, the in-house lawyer agreed there was no excess liability coverage for Peterson. App. 1362, 1317:2-19.

Styles informed Billion that Peterson was not an insured. App. 1362, 1316:8-19; App. 1130. Styles also informed Cole in a voicemail that "a denial letter" was forthcoming because Peterson was not an insured under the Policy. App. 1362, 1316:5-19; App. 1130.

That same day–February 12, 2009–Styles sent a denial letter to Cole, explaining that "Peterson...would not qualify as an insured under this [P]olicy" and therefore there was "no coverage for [Dziadek] … under this [P]olicy." App. 1054. Styles did not address UIM coverage because "UIM coverage had never come up in any conversation." App. 1363, 1326:12-18. Styles concluded her February 12

letter by asking Cole to contact her if he had "any additional questions." App. 1054.

**F. ZDC Knew The Policy Provided Up To $1,000,000 In UIM Coverage.**

To verify the basis for Styles' February 12, 2009 coverage determination, ZDC requested the declarations and a copy of the insurance policy on February 18, 2009. App. 1076. Styles understood this to be a request to provide the basis for her February 12 coverage decision.

On March 5, 2009, Styles sent ZDC the Policy information she relied on to determine that Peterson was not an insured. App. 1082-1125. Styles' letter included the Policy language she had relied on, which demonstrated that Peterson was not an excess liability insured under the "Liability" definition of an insured because Peterson had her own liability policy with limits higher than South Dakota's mandatory minimum. App. 1109-1110. Styles highlighted the language that explained the basis for her February 12 no-liability coverage determination for Peterson. *Id*.

Styles' March 5 letter also enclosed other Policy information, including: (i) a Listing of Forms and Endorsements, which identified a separate UIM Endorsement; (ii) Garage Part Declarations, which disclosed that UIM coverage was provided in a separate Endorsement; and (iii) a Supplementary Schedule, which disclosed $1,000,000 in UIM limits. App. 1085, 1091, 1106. The

Supplementary Schedule explicitly stated that UIM coverage terms were contained in the UIM Endorsement:

**BUSINESS AUTO/TRUCKERS/GARAGE/ MOTOR CARRIER COVERAGE PART**
**SUPPLEMENTARY SCHEDULE**

**POLICY NO.:** GA-4049M260-08-CAG
**ISSUE DATE:** 07-10-08

**ITEM TWO**
**COVERAGE AND LIMITS OF INSURANCE**
**UNINSURED MOTORISTS COVERAGE AND UNDERINSURED MOTORISTS COVERAGE**

The LIMIT OF INSURANCE for the coverages shown below is the LIMIT OF INSURANCE shown for the State where a covered "auto" is principally garaged. Refer to the specific coverage endorsement for description of the coverage provided for each State listed below.

* * *

UNDERINSURED MOTORISTS — LIMIT OF INSURANCE
(When Underinsured Motorists is a separate coverage)

| State | "Bodily Injury" and "Property Damage" Combined Single Limit | "Bodily Injury" Each "Accident" | "Bodily Injury" Each Person | "Bodily Injury" Each "Accident" | "Property Damage" Each "Accident" |
|---|---|---|---|---|---|
| SD | | $ 1,000,000 | | | |

App. 1106 (emphasis added).

Cole admitted he reviewed the information provided and knew UIM coverage was provided by a separate endorsement that had not been included with the March 5 letter. App. 1343, 720:25-721:6; App. 1351, 799:14-19.

Styles closed her March 5 letter by stating, "Should you have any further questions or concerns, please contact me." App. 1082. Despite knowing the UIM Endorsement had not been included, ZDC did not follow up with any questions. App. 1349-1350, 789:15-792:2; App. 1364, 1341:1-7.

## G. ZDC Pursued Personal Injury Claims Against Potential Tortfeasors.

In September 2009, Dziadek sued Peterson, who denied liability for Dziadek's damages. App. 214; App. 1354, 864:6-13. Peterson claimed the accident was Billion's fault, and that the steering in the vehicle was defective. Dziadek also thought Billion was at fault. Because both Dziadek and Peterson believed Billion was responsible, ZDC investigated that potential claim. App. 1338, 606:13-21. Among other things, ZDC hired an expert to inspect the car. App. 1341, 705:23-706:8. When Progressive tendered its policy limits on behalf of Peterson, it also sought full release for any claims against Billion, and that demand caused ZDC to reject the offer. App. 1339, 658:1-23.

ZDC also sent statutory notice to the State of South Dakota on February 3, 2009—*before* the firm ever communicated with Charter Oak—informing the State that Dziadek suffered injuries in a car accident that was caused by several "negligent acts." App. 1048. Nineteen months after sending statutory notice, Dziadek filed suit against the State, the South Dakota Department of Transportation, five State officials, the highway construction contractor, and the traffic control subcontractor. App. 1316-1322. It was not until ZDC took depositions in that case in June or July 2011 that ZDC determined Dziadek was not likely to recover from the State. App. 1368, 1466:23-1467:12.

## H. ZDC Pursued UIM Coverage In 2011 After Determining Dziadek Was Not Likely To Recover All Damages From Responsible Tortfeasors.

In July 2011, ZDC again reviewed the Policy information that Styles had previously sent on March 5, 2009. App. 1369, 1471:4-9. ZDC determined that the Policy provided UIM coverage by separate endorsement, and followed up with a request to Charter Oak for the UIM Endorsement on July 15, 2011. App. 1369, 1471:21-24; App. 1370, 1473:11-17. Styles sent it on July 22, 2011. App. 1370-1371, Tr. 1476:9-1477:14.

ZDC notified Charter Oak of a potential UIM claim on July 28, 2011. ZDC sought "confirmation" that Dziadek *would qualify* as a UIM insured under the Policy. App. 1173. ZDC did not make a claim at that time because the amount of her UIM damages was undetermined, Dziadek was still pursuing claims, and she had ongoing treatment with anticipated future medical expenses. App. 1297. In its July 28, 2011 letter, ZDC stated it was still evaluating a claim against Billion. App. 1172.

## I. Dziadek Sought Declaratory Judgment In 2011.

In September 2011, Dziadek filed suit against Charter Oak even though she had not made a UIM claim. Dziadek had not resolved her lawsuits against Peterson or the State. The extent to which she was underinsured had not yet been quantified or documented. App. 1299-1308. Similarly, ZDC was still contemplating a claim against Billion. App. 1172. Even two months later when she filed an Amended

Complaint, Dziadek sought only a declaration that she was entitled to "up to" the UIM Policy limits. App. 31.

In response to the lawsuit, Charter Oak investigated and admitted Dziadek would qualify as an insured under the UIM Endorsement, with the existence and amount of coverage to be later determined under the Policy terms. App. 33-40.

On October 19, 2011, ZDC sent a letter to Charter Oak providing some "partial information" regarding Dziadek's medical bills, including an Impairment Rating that it had "recently" received. App. 1297, App. 1355, 899:24-900:3. This was the first time Charter Oak received any medical documentation from Dziadek, who was contractually required to establish the existence and amount of UIM coverage. App. 1355, 899:10-23. Because Dziadek had ongoing medical expenses and had not evaluated the extent of future economic loss and other damages she intended to claim, ZDC promised to "supplement with additional bills" as they became available. App. 1297. The extent of UIM damages was still unknown, and therefore ZDC did not make a demand for payment. *Id.*

On January 17, 2012, for the first time, ZDC demanded that Charter Oak pay UIM benefits. App. 1298. ZDC made a demand for Policy limits based on new medical records it had just received, and for the first time it submitted to Charter Oak a vocational analysis and an economic loss report concerning Dziadek's claimed lost wages. App. 1298; App. 1356, 901:8-902:6.

On February 3, 2012, again for the first time, ZDC requested Charter Oak's consent to a proposed settlement with Peterson for Progressive's $100,000 policy limits. App. 1299-1308.

On February 16, 2012, Charter Oak consented to Dziadek's settlement with Peterson and agreed to pay its UIM policy limits. App. 1309-1311. On February 21, 2012, Charter Oak paid $905,000, which represented the UIM limits, as well as the $5,000 AMP coverage limit. App. 1312-1315.

Notwithstanding full payment, Dziadek continued her lawsuit against Charter Oak, asserting claims for alleged breach of contract, bad faith, fraud, and deceit.

**J. Dziadek's Unsupported Allegations Regarding "Corporate Practices."**

The District Court permitted Dziadek to engage in wide-ranging discovery regarding what her lawyers labeled "corporate practices." Although Charter Oak paid the $900,000 UIM limits, Dziadek's lawyers claimed "corporate practices" would prove Styles "had incentives and pressure upon [her] to deny claims[,] to provide misinformation about policies in order to reduce costs…, and, in theory, increase their pay through bonuses or through promotion." App. 80, 40:9-24. The District Court erroneously allowed this discovery (over objections), even as it warned Dziadek's counsel that, for purposes of trial, Dziadek would have to "*connect* the alleged willful, wanton, malicious…company policy that allegedly

supports a punitive damage claim *to the actual handling of the claim*." App. 52-53, 12:24-13:3 (emphasis added). No such evidence was uncovered in discovery—because none exists.

### K. The District Court Erroneously Denied Charter Oak's Motions To Dismiss Legally Unsupportable Claims.

In 2013, Charter Oak moved for summary judgment on all claims. App. 107-108, 162-209. The District Court denied Charter Oak's motion on the contract claim, holding that the jury should determine whether Charter Oak "prevented" Dziadek from making a UIM claim sooner than she did by not affirmatively informing and highlighting for her lawyers that UIM coverage was a possibility. App. 2220-224. The District Court also refused to dismiss Dziadek's fraud and deceit claims, even though they simply re-stated Dziadek's contract claim. App. 229-233. Finally, the District Court denied summary judgment on Dziadek's claim for punitive damages. App. 233-235.

Before trial, Charter Oak filed several motions for reconsideration to reverse these erroneous rulings, but the District Court refused. App. 238-245, 246-259, 260-270, 335-346. Charter Oak also moved *in limine* to preclude Dziadek from introducing irrelevant "corporate practices" evidence because Dziadek could not identify any "malicious" corporate practice that caused Styles to deny or delay payment of Dziadek's claim. App. 271-283. The Court essentially denied this motion as well. App. 348-349.

At trial, the testimony and evidence confirmed the undisputed facts presented to the District Court on summary judgment—that in 2009 Styles had focused on whether Peterson qualified for liability insurance under the Policy, and that in hindsight she mistakenly failed to anticipate potential UIM coverage. However, the evidence established this had no impact on Dziadek, whose lawyers could not have established her entitlement to UIM coverage, or the amount of her UIM damages, any sooner than she did.

The District Court improperly allowed Dziadek to offer "corporate practices" as support for her improper claims for fraud, deceit and punitive damages. This evidence failed to show a "malicious company policy," let alone a policy that influenced Styles' 2009 coverage determination for Peterson or her 2009 communications with ZDC.

At the end of phase one, the jury found that Charter Oak had breached the Policy as to the UIM claim "by preventing Dziadek from performing a condition precedent; that is, formalizing her UIM and/or AMP claim at an earlier time." App. 388. The jury apparently theorized that Styles had a contract duty in February or March 2009 to identify and affirmatively highlight for ZDC potential UIM coverage, and that had she done so, a "UIM claim would have been formalized" on December 15, 2009. There was no evidence to support that finding. Nonetheless,

the District Court used that arbitrary date to "calculate damages in the form of interest." App. 388.

The jury correctly found that Charter Oak did not commit insurance bad faith or fraud, and did not breach the Policy with respect to AMP coverage. App. 388-389.

But, the jury found that Charter Oak had committed deceit, and that Dziadek was entitled to "[i]nterest on UIM monies," running from December 15, 2009, as well as "[o]ut-of-pocket expenses Dziadek incurred as a result of Charter Oak's conduct, including reasonable attorney's fees and costs" in the amount of $250,000. App. 389. The jury also awarded Dziadek $500,000 for "mental and emotional harm" based on her deceit claim. App. 389.

At the conclusion of the second phase of the trial, the jury awarded Dziadek punitive damages in the amount of $2,750,000. App. 390.

Following the verdicts, Charter Oak timely filed its Motion for Judgment as a Matter of Law and Motion for New Trial. App.391-458. The District Court denied both Motions, but properly vacated Dziadek's $500,000 award for emotional distress damages on her deceit claim as barred as a matter of law. App. 459-507.

This appeal followed.

## SUMMARY OF THE ARGUMENT

Charter Oak paid the full UIM coverage limits owed to Dziadek under the Policy as soon as ZDC presented a UIM claim that established she qualified for that coverage and the amount of UIM damages. Therefore, there was no breach of the Policy and no breach of contract damages. And, as the jury found, there was no bad faith. Dziadek's extra-contractual tort claim for deceit was based on the same facts as her breach of contract claim, and is therefore barred as a matter of law by the "independent duty" rule. The punitive damages claim is likewise barred as a matter of law.

Dziadek claims that Charter Oak breached the Policy by failing to anticipate and tell ZDC about potential UIM coverage. However, it is undisputed that Charter Oak provided ZDC with information disclosing up to $1,000,000 in UIM coverage, and offered to answer any questions ZDC might have regarding the information provided. ZDC did not follow up with questions in 2009. But, in 2011 ZDC notified Charter Oak of a potential UIM claim based on precisely the same information provided by Charter Oak in 2009. ZDC subsequently made a UIM claim. Once that claim was made, and ZDC established Dziadek's entitlement to coverage and the amount of UIM damages, Charter Oak paid the $900,000 UIM limits. Accordingly, there can be no breach of contract or damages.

The independent duty rule precludes a party from asserting tort claims for breach of contract. The conduct upon which Dziadek relied for her deceit claim—alleged delay in anticipating the possibility of UIM coverage and affirmatively informing ZDC in 2009 of that possibility—was a contract duty. Making a coverage determination is a contract duty, nothing more. Even if her deceit claim had not been barred by the independent duty rule, Dziadek failed to prove several elements required for deceit. Yet, the jury improperly awarded as alleged deceit damages attorney's fees that Dziadek was already contractually obligated to pay ZDC *regardless* of when or how she obtained a recovery from any source.

Finally, the District Court erred in submitting Dziadek's claim for punitive damages to the jury since, at most, this was solely a breach of contract case. Alternatively, even if Dziadek had offered evidence sufficient to prevail on her deceit claim, the District Court erred in failing to vacate or, at the very least, substantially reduce the punitive damages award, which vastly exceeded permissible constitutional bounds.

## ARGUMENT

### I. STANDARD OF REVIEW

Whether Dziadek's breach of contract claim fails as a matter of law is subject to *de novo* review. *Speer v. City of Wynne*, 276 F.3d 980, 985 (8th Cir. 2002)("conclusions of law" reviewed *de novo*); *Shelton v. Consumer Prod. Safety Comm'n*, 277 F.3d 998, 1004 (8th Cir. 2002)(questions involving statutory interpretation reviewed *de novo*).

Whether Dziadek's deceit claim fails as a matter of law under the independent duty rule is also subject to *de novo* review. *Schipporeit v. Khan*, 775 N.W.2d 503, 504 (S.D. 2009).

Whether SDCL § 20-10-2(3) created a statutory deceit claim independent of the contract, which was the only relationship between Charter Oak and Dziadek, is a question of law reviewed *de novo*. *Schwartz v. Morgan*, 776 N.W.2d 827, 830 (S.D. 2009).

Whether the District Court erred when it denied Charter Oak's Motion for JMOL based on Dziadek's failure to present legally sufficient evidence to prove other elements of deceit is reviewed *de novo*. *See Williams v. Brinkman*, 883 N.W.2d 74, 81 (S.D. 2016). This Court reviews the District Court's denial of Charter Oak's JMOL as to the award for punitive damages under a *de novo*

standard of review when reviewing the constitutionality of punitive damage awards. *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001).

## II. DZIADEK'S BREACH OF CONTRACT CLAIM FAILS AS A MATTER OF LAW.

Dziadek's breach of contract claim is barred as a matter of law because Charter Oak paid its UIM Policy limits in full, once Dziadek presented a UIM claim and proved the amount of her underinsured damages as required by the Policy.

The District Court erroneously allowed the breach of contract claim to go to the jury. The District Court further erred by instructing the jury to determine whether Charter Oak "prevent[ed] Dziadek from performing a condition precedent; that is, formalizing her UIM...claim at an earlier time." App. 388. Based on improper "hindsight" testimony from Cole, the jury speculated that Dziadek could "have otherwise formalized her...UIM claim" on December 15, 2009. *Id.* The District Court then incorrectly calculated and awarded breach of contract damages to include: (i) interest on the UIM coverage payment of $900,000, accruing from December 15, 2009 until February 21, 2012, the date that Charter Oak actually made that payment, and (ii) prejudgment interest on that interest. App. 459-507.

The breach of contract verdict should be vacated and judgment entered for Charter Oak on that claim because (i) the breach of contract claim is barred as a

matter of law, and (ii) the District Court's application of the prevention doctrine contravened the Policy, South Dakota's UIM statute, and the law.

### A. Charter Oak Did Not Breach The Policy Because It Paid The Full UIM Policy Limits.

For breach of contract, Dziadek had to prove "(1) an enforceable promise; (2) a breach of the promise; and, (3) resulting damages." *Bowes Constr., Inc. v. S.D. DOT*, 793 N.W.2d 36, 43 (S.D. 2010).

Charter Oak promised to pay UIM benefits when Dziadek proved she was entitled to such payment and the amount of UIM damages. It is undisputed that Dziadek, through ZDC, made her first request for payment of UIM benefits on January 17, 2012. App. 1298. On February 3, 2012, when Dziadek sought Charter Oak's consent to resolve her lawsuit against Peterson, Charter Oak promptly consented. App. 1299-1311. And shortly thereafter, on February 16, 2012, Charter Oak agreed to pay the UIM Policy limits of $900,000. App. 1309-1311 Five days later, Charter Oak sent checks to Dziadek totaling $905,000.[1] App. 1312-1315.

Charter Oak cannot be liable for breach of contract when it paid its UIM Policy limits within weeks after Dziadek first established coverage.

[1] That amount included $5,000 on account of Dziadek's AMP claim.

### B. The Prevention Doctrine Does Not Apply.

Even though Charter Oak paid the full amount owed under the Policy, the District Court erroneously applied the "prevention doctrine," which Dziadek used to argue Charter Oak prevented her from "formalizing" her UIM claim sooner.

The prevention doctrine provides that, "[w]here a duty of one party is subject to the occurrence of a condition, the additional duty of good faith and fair dealing imposed on him...may require some cooperation on his part, either by refraining from conduct that will prevent or hinder the occurrence of that condition or by taking affirmative steps to cause its occurrence." *See, e.g., Johnson v. Coss*, 667 N.W.2d 701, 706 (S.D. 2003)(quoting Restatement (Second) of Contracts § 245 cmt. (a) (1981)).

The prevention doctrine does not apply in this case, as a matter of law. It applies only where one party to a contract materially hinders the other from performing conditions precedent, and then relies on the non-performance of those conditions precedent *as a basis for his refusal* to perform his obligations under the contract. *Johnson*, 667 N.W.2d at 706. Charter Oak never invoked Dziadek's non-compliance with Policy conditions *as a basis for its decisions*—either in 2009, when Styles "denied" coverage, or in 2012, when it paid Dziadek's UIM claim once it was made. In other words, Charter Oak never denied coverage based on Dziadek's failure to comply with Policy conditions. Consequently, the prevention

doctrine could not possibly have applied. The District Court's contrary conclusion was incorrect as a matter of law.

### C. Charter Oak Did Not Prevent ZDC From Pursuing Potential UIM Coverage.

In addition, the prevention doctrine could not apply as a matter of law because the undisputed evidence established that Charter Oak did not prevent ZDC from asserting Dziadek's UIM claim and establishing coverage for her.

Dziadek's attorney, Jeff Cole, was a lawyer experienced in personal injury matters and automobile accident cases. App. 1346, 757:20-758:2. On March 5, 2009, Styles provided Cole with the following Policy documents:

- "Listing of Forms, Endorsements and Schedule Number" that identified that UIM Coverage was being provided by endorsement;
- Coverage summary that showed the Policy had UIM coverage limits of $1,000,000; and
- Supplementary Schedule that indicated UIM "Limit of Insurance" was $1,000,000 and instructed "Refer to the specific coverage endorsement for description of the coverage provided for each State listed below."

App. 1085, 1091, 1106.

Cole testified that he read and understood everything Styles sent him in March 2009, and that he simply made a "mistake" in not pursuing UIM coverage at that time. App. 1343, 721:8-722:4; App. 1344, 729:22-23.

Charter Oak did not prevent ZDC from understanding Dziadek may qualify as an "insured" under the UIM Endorsement. Accordingly, the prevention doctrine cannot apply in this case.

### D. Dziadek Could Not Have Qualified For UIM Coverage Any Sooner Regardless Of Any Action Or Inaction By Charter Oak.

Under the Policy's UIM Endorsement, Charter Oak agreed to "pay all sums the 'insured' is legally entitled to recover as compensatory damages...[that] result from 'bodily injury' sustained by the 'insured'...." App. 558. But this obligation was to "pay only after *all liability bonds or policies have been exhausted* by payment of judgments or settlements." *Id*. (emphasis added). The UIM Endorsement also expressly prohibited double recoveries: "No one will be entitled to receive duplicate payments for the same elements of 'loss.' *We will not make a duplicate payment* under this Coverage for any element of 'loss' for which payment has been made by or for *anyone who is legally responsible*...." App. 559 (emphasis added). Dziadek had to satisfy these requirements to be eligible for UIM coverage.

These Policy requirements mirror South Dakota's UIM statute, and the case law construing that statute. *See*, SDCL § 58-11-9.5 (" . . .[UIM][c]overage 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*.")(emphasis added). Accordingly, if "the amount recovered equals or

exceeds the limits of UIM coverage, no UIM benefits are payable." *Id.*; *Friesz v. Farm & City Ins. Co.*, 619 N.W.2d 677, 680 (S.D. 2000). Thus, "[t]he South Dakota statutory scheme *prohibits a double recovery*, and will not permit an insured to collect UIM benefits without *first* deducting the amount paid by the tortfeasor's liability carrier." *Gloe v. Union Ins. Co.*, 694 N.W.2d 252, 258 (S.D. 2005) (emphasis added).

Before February 2012, Dziadek had not established at least two of these UIM coverage requirements: (1) the amounts that she could recover from all "potential tortfeasors" (*i.e.*, Peterson, Billion and the South Dakota defendants), and (2) the amount of her underinsured damages. Charter Oak did not prevent her from establishing either of these coverage requirements.

First, Charter Oak did not prevent Dziadek from establishing the amounts that she could recover from other potential tortfeasors, including, at least, Peterson and Billion. App. 372.

ZDC filed suit against Peterson in September 2009. Thereafter, on Peterson's behalf, Progressive tendered its $100,000 policy limit. ZDC refused the tender because it required Dziadek to release her claims against other potentially liable parties, including Billion. App. 1339, 658:1-23; App. 1341, 705:5-14. At that time, ZDC believed that Billion could have liability for Dziadek's damages due to a possible defect in the loaner vehicle's steering system. App. 1338, 606:13-21.

Moreover, even *before* Cole ever communicated with Charter Oak, ZDC determined that the State of South Dakota was possibly liable for Dziadek's injuries. App. 1048. ZDC filed suit against the State of South Dakota and several other defendants, in September 2010. App. 1316-1322. ZDC did not determine that Dziadek was unlikely to recover in that action until June or July 2011. App. 1368, 1466:23-1467:12.

Having sued these tortfeasors, Dziadek was obligated to resolve their liability before she could establish a claim for UIM benefits under the Policy because "UIM is excess insurance to underlying liability coverage, and a person seeking UIM coverage must satisfy certain…[requirements]…to recover UIM benefits." App. 474. "[U]nderinsured motorist coverage is not an alternative to liability coverage. This is not some optional protection which an injured party can choose in lieu of asserting a claim against an insured tortfeasor." *Farmland Ins. Cos. v. Heitmann*, 498 N.W.2d 620, 626 (S.D. 1993)(Amundson, J., concurring).

But, the District Court erroneously instructed the jury regarding the UIM requirements under the Policy and South Dakota law. The Policy obligated Dziadek to first exhaust "*all* liability bonds or policies" before qualifying for UIM coverage. App. 558 (emphasis added). South Dakota law is consistent: "[T]he maximum liability of the insurer with respect to underinsured motorist coverage is the lesser of the difference between the limits of UIM coverage set out in the

policy declarations or schedules *and the amount which has been paid or will be paid to the insured by or for the tortfeasor or tortfeasors*, or the amount of damages sustained but not recovered." *Heitmann*, 498 N.W.2d at 625 (emphasis added).

The District Court's Jury Instruction No. 15 improperly expanded the Policy language, and construed Dziadek's obligations too narrowly, because it only required her to show that she had resolved her claims with "Peterson, Progressive, and, *if it were liable*, Billion…." App. 372 (emphasis added). This instruction was incorrect because, among other reasons, (i) it allowed the jury to consider the resolution of Billion's liability to Dziadek as an *optional* Policy requirement, and (ii) it omitted any mention of Dziadek's suit against the State, thereby relieving her of the Policy obligation to first exhaust "all liability bonds or policies." This was plain error.[2] *Heitmann*, 498 N.W.2d at 625.

A second and independent coverage requirement of the UIM endorsement obligated Dziadek to establish her underinsured damages "up to the [$1,000,000] limits" of the Policy. App. 372. Meeting this requirement was necessarily dependent upon (i) the progress of Dziadek's medical condition, (ii) when her

[2] The District Court did not address or enforce, either in its Instruction No. 15 or its orders before and after trial, any of the specific language of the Policy including that within the Coverage Agreement or Limit of Insurance clauses of the UIM Endorsement which clearly state that Charter Oak does not provide UIM insurance for any damage for which another is legally responsible.

treatment expenses were incurred, (iii) the amount of those expenses, and (iv) when documentation of those expenses was submitted to Charter Oak. Clearly, Charter Oak had no control over these events and could not have prevented their occurrence.

The District Court misapprehended this coverage requirement and erroneously held that "[h]aving been deceived by Charter Oak into thinking there was no coverage under the Policy, neither Cole nor Dziadek would have any reason to submit medical records to Charter Oak in 2009 or 2010." App. 476. The issue, however, was not whether Dziadek *knew that she had to* submit medical records to Charter Oak in 2009 or 2010 but instead whether, in fact, she *could have*.

Dziadek could not have submitted the required documentation in 2009 or 2010 because she had not yet incurred the medical expenses that later established her underinsured damages "up to the limits" of the Policy. App. 1297. It was not until late 2011 or early 2012 that Dziadek even possessed the documents needed to support a demand for and payment of UIM policy limits. App. 1298. And, it was not until January 17, 2012 that Dziadek first informed Charter Oak that her damages actually exceeded the $1,000,000 limit of UIM coverage. App. 1298.

### E. There Was No Evidence Of UIM Damages Up To The Limits As Of December 15, 2009.

Finally, the District Court's decision to affirm the jury's verdict that Dziadek's UIM claim "would have been" "formalized" on December 15, 2009 was erroneous because there was no substantial evidence (indeed, no evidence at all) to support that finding. Under the District Court's instructions, Dziadek needed to (among other things) establish her underinsured damages "up to the [UIM] limit[s]" of the Policy, and when that amount was owed.

However, there was no testimony from any witness (fact or expert) that Dziadek's underinsured damages—*as of December 15, 2009*—were "up to the limits" of the Policy. Nor did Dziadek introduce into evidence any exhibits (e.g., medical bills, summaries of expenses, expert reports) that might support that finding. Accordingly, there was *no evidentiary basis* for the jury's finding that, on December 15, 2009, underinsured damages were "up to the limits" of the Policy. This UIM damages finding was based on guesswork and speculation, but "[d]amages must be established by facts, not by legal argument alone." *Cable v. Union County Bd. of County Comm'rs*, 769 N.W.2d 817, 830 (S.D. 2009).

In sum, Dziadek's breach of contract claim is barred as a matter of law because Charter Oak honored its obligation in full, and the undisputed evidence demonstrates the prevention doctrine does not apply as a matter of law.

## III. DZIADEK'S DECEIT CLAIM IS BARRED AS A MATTER OF LAW.

Dziadek's tort claim for deceit is barred as a matter of law because (1) it is based on the exact same factual allegations as her breach of contract claim, and (2) it does not arise from a duty independent of the Policy. *Schipporeit*, 775 N.W.2d 503, 504 (S.D. 2009). Additionally, Dziadek failed to prove several elements of her deceit claim.

### A. The Independent Duty Rule Bars Dziadek's Deceit Claim.

Dziadek's deceit claim is barred because "at [its] core" it is "based upon [Charter Oak's] breach of [its] contractual duty to pay benefits due under" the Policy. *O'Neill v. Blue Cross*, 366 N.W.2d 816, 819 (S.D. 1985).

Dziadek's deceit claim is barred as a matter of law because its basis was entirely contractual, *i.e.*, the alleged duty arising from the policy to anticipate potential UIM coverage and affirmatively highlight that possibility for ZDC in 2009. According to Dziadek, Styles knew or should have known that ZDC was relying entirely on her, would not understand the Policy information she sent, did not know South Dakota law, did not know how or when to make a UIM claim, and did not know how to ask follow-up questions or how to ask for a UIM Endorsement that ZDC knew existed and also knew it did not have. According to Dziadek, Styles deceived ZDC by not anticipating all of these things, and by not specifically emphasizing to ZDC that some UIM coverage was possible if ZDC

took certain steps on Dziadek's behalf in the future to "formalize" a UIM claim. Bascially, Dziadek alleges Styles should have done the legal work that Dziadek hired and relied on ZDC to do.

That Dziadek's deceit claim was based on an alleged breach of contract is illustrated by Dziadek's Amended Complaint: Charter Oak "ma[de] untrue statements and material omissions *about the Policy, including the extent of coverage, whether the complete policy had been provided and whether Laura was an insured under it*." App. 29, ¶91 (emphasis added). Indeed, even the damages for breach of contract and deceit were the same. App. 499 ("The jury awarded Dziadek prejudgment interest on the $900,000 of UIM coverage beginning on December 15, 2009 *as damages on both the breach of contract for UIM benefits claim and the deceit claim*.") (emphasis added).

In *O'Neill*, an insured claimed his insurer had breached its contract by wrongfully denying coverage under a health policy, and that his cause of action was predicated in tort, not contract. 366 N.W.2d at 819. This Court affirmed dismissal of the tort claim, holding the insured's "complaints in reality state but a single claim for relief" because the tort allegations "at their core...are based upon defendant's breach of their contractual duty to pay benefits due under their policies." *Id.* (quoting *Ochs v. Northwestern Nat'l Life Ins. Co.*, 254 N.W.2d 163, 167-68 (S.D. 1977))("[T]here could be no recovery under the [tort claim] unless

plaintiff proved a breach of defendants' duty to make such payments" and therefore the tort claim "is not of such a nature that it could have been separately enforced...but rather is so inextricably linked to the cause of action based upon breach of contract as to constitute a single claim.").

Just as in *O'Neill*, Dziadek's deceit claim in this case is barred as a matter of law because it is based on her claim that Charter Oak breached the duties it owed under the Policy.

### B. Dziadek's Deceit Claim Is Barred Because Charter Oak Owed Her No Duty And Had No Relationship With Her Independent Of The Policy.

It is undisputed Charter Oak had no relationship with Dziadek but for the contractual relationship created by the UIM Endorsement. App. 1336, 596:17-20. Charter Oak's only arguable duty to disclose anything to Dziadek regarding UIM coverage arose from the Policy. Charter Oak did not undertake any duties and had no common law or statutory obligation to Dziadek but for the fact she ultimately qualified for UIM coverage when her lawyers established for the first time in 2012 that she was underinsured under the UIM Endorsement and the amount of her UIM damages.

Charter Oak was performing a purely contractual duty when it determined whether insurance coverage existed for Peterson in 2009 and provided documents supporting its determination. *Schipporeit*, 775 N.W.2d at 506-07.

South Dakota follows the independent duty rule whereby a tort claim "must be separate and distinct from [an alleged] breach of contract...." *Fisher Sand & Gravel Co. v. State of S.D. DOT*, 558 N.W.2d 864, 868 (S.D. 1997); *see also Schipporeit*, 775 N.W.2d at 505. An intentional tort "is not committed merely by breaching the contract, even if such action is intentional." *Fisher*, 558 N.W.2d at 868. No independent tort duties exist if "outside of the contract there [is] no relationship" between the parties. *Id*., 558 N.W.2d at 867; *Schipporeit*, 775 N.W.2d at 507 (where "[t]he only basis for the parties' relationship [is a] one-time contract" there are no independent tort duties).

The South Dakota Supreme Court has recognized an extra-contractual remedy for "bad faith" as the single, narrow exception to the "independent duty" doctrine in the first-party insurance context. *See Paulsen v. Ability Ins. Co.*, 906 F. Supp. 2d 909, 913 (D.S.D. 2012)(South Dakota Supreme Court has "effectively creat[ed]...out of necessity" a tort for breach of the implied covenant of good faith by an insurer); *Champion v. United States Fid. & Guar. Co.*, 399 N.W.2d 320 (S.D. 1987)(recognizing extra-contractual tort remedy in first-party insurance cases for breach of the implied contract duty of good faith). Since Dziadek's relationship with Charter Oak arose exclusively from the Policy, her sole potential extra-contractual remedy under South Dakota law was for breach of the implied contract duty of good faith.

In sum, Dziadek's deceit claim was barred as a matter of law because claims for breach of contract, or breach of the implied duty of good faith, "cannot be converted into [an independent] tort merely by attaching to the contract, or to the breach, new labels that sound in tort," such as fraud or deceit. *Schipporeit*, 775 N.W.2d at 507.

### C. In Any Event, Dziadek Failed To Establish Several Elements Necessary To Prove A Deceit Claim.

To prove an independent tort for statutory deceit, Dziadek had to prove by a preponderance of the evidence each element in SDCL § 20-10-2, which codifies the common law. *Jennings v. Jennings*, 309 N.W.2d 809, 812 (S.D. 1981). Even after the claim was wrongly allowed to proceed to trial, Dziadek failed to prove several required elements.

#### 1. Charter Oak Had No Independent Statutory Duty To Disclose.

Under SDCL § 20-10-2(3) deceit requires "[t]he suppression of a fact *by one who is bound to disclose it*…" (emphasis added); *Schwartz*, 776 N.W.2d at 830 ("[w]hether a duty exists is a question of law reviewed *de novo*.").

In this case, the independent duty rule required Dziadek to prove a statutory duty to disclose independent of the Policy. She cannot meet that burden. Dziadek's deceit claim solely was based on the allegation that Styles in 2009 had a duty *because* Dziadek qualified as an insured under the UIM Endorsement, which

according to Dziadek required that Styles affirmatively highlight for ZDC that UIM coverage was a possibility and tell ZDC how to do its job in representing Dziadek. Thus, Dziadek's characterization of the duties allegedly owed in 2009 are based entirely on duties which were allegedly created by the UIM Endorsement. This bars her deceit claim as a matter of law because Charter Oak does not have an independent statutory tort duty to disclose under SDCL § 20-10-2(3).

The District Court nonetheless allowed the deceit claim to proceed and erroneously instructed the jury to decide whether "Charter Oak had a duty to disclose a material fact to Dziadek." App. 380.

The only cases in which the South Dakota Supreme Court "has found a duty to disclose [under SDCL § 20-10-2(3)] have all involved an employment or fiduciary relationship." *Taggart v. Ford Motor Credit Co.*, 462 N.W.2d 493, 499 (S.D. 1990); *Schwartz*, 776 N.W.2d at 831 (South Dakota "has never imposed a duty to disclose information on parties to an arm's-length business transaction, absent an employment or fiduciary relationship").

Dziadek had no employment or fiduciary relationship with Charter Oak. A first-party insurer and its insured, such as Charter Oak and Dziadek, do not have a fiduciary relationship. Instead, "an insurer and insured are adversaries in a first-party coverage situation." *Bertelsen v. Allstate Ins. Co.*, 796 N.W.2d 685, 701

(S.D. 2011). Thus, as a matter of law, there was no fiduciary relationship and no duty to disclose to Dziadek.

The District Court misconstrued *Trouten v. Heritage Mut. Ins. Co.*, 632 N.W.2d 856 (S.D. 2001), when it held that Charter Oak had a "fiduciary-like" duty to tell Dziadek in 2009 that she qualified as a UIM insured. App. 1374, 1656:23-24. *Trouten* involved a materially different relationship between the insured and insurer. *Trouten* held that in the *third-party* context where the insurer is *defending and acting on behalf of* the insured in response to liability claims, the insurer has a relationship "akin to that of a fiduciary since it must give at least as much consideration to the insured's interests as it does to its own." 632 N.W.2d at 864.

The South Dakota Supreme Court has explicitly distinguished *Trouten*'s third-party coverage context, in which "the relationship of an insurer to its insured is like that of a fiduciary," from the first-party coverage context (such as Charter Oak and Dziadek), where the "insurer and insured are adversaries" whose interests necessarily "conflict." *See Bertelsen*, 796 N.W.2d at 700-701 (citing *Trouten*, 632 N.W.2d at 864).

In fact, "South Dakota, like other states, has decided to protect first-party insureds *not by imposing a fiduciary relationship*, but rather, by allowing them to bring bad faith claims." *Haanen v. N. Star. Mut. Ins. Co.*, 1:16-CV-071007-CBK, 2016 U.S. Dist. LEXIS 147435, *9 (D.S.D. Oct. 25, 2016)(emphasis added).

At best, Charter Oak and Dziadek had no more than an arms-length first-party relationship in 2009. Indeed, to the extent Charter Oak had any alleged "quasi-fiduciary" duty in 2009, that was owed to Billion, to protect it from Dziadek's third-party liability claim. *Trouten*, 632 N.W.2d at 864 (because it stood in the shoes of Billion in relation to liability claims, Charter Oak in 2009 had an "adversarial relationship with [Dziadek]…[and could not] be required to serve two masters who [had] antagonistic interests."). Under *Trouten*, Charter Oak could not have had a fiduciary relationship with Dziadek as a *potential* UIM insured, when it already had something akin to a fiduciary relationship with Billion in responding to Dizadek's liability claim against Peterson.

**2. Dziadek's Lawyers Could Have Discovered Potential UIM Coverage in 2009.**

Dziadek also failed to prove that the information Charter Oak allegedly failed to disclose "was something Dziadek could not discover by acting with reasonable care." App. 380.

Styles provided ZDC with information showing the Policy provided up to $1,000,000 of UIM coverage. App. 1371, 1480:7-15. Cole admitted that he reviewed the information in its entirety; that he knew UIM coverage was provided by Endorsement; that the UIM coverage had some separate terms and conditions; and that UIM coverage at least "might" include an occupant as an insured. App. 1351, 799:13-22. Cole also admitted he knew the South Dakota Division of

Insurance states on its website that UIM insurance covers "occupants of [an] auto." App. 1353-1354, 836:22-837:11; App. 990.

There was nothing for Cole to "discover." Cole also admitted, "Obviously I think we could have figured it out earlier than we did." App. 1342, 718:3-11. Cole conceded he made "a mistake" when he failed to recognize that the Policy's definition of an "insured" was different for liability coverage than for UIM coverage. App. 1343, 721:3-722:4.

Moreover, based on the exact same Policy information that Styles sent Cole, his partner Brendtro concluded that Dziadek likely was a UIM insured, and he requested the UIM Endorsement, which Styles promptly provided. App. 1370-71, 1473:11-17, 1476:9-1477:14; App. 1372, 1503:9-16. Brendtro conclusively established that the "undisclosed information" could be "discover[ed] by [acting with] reasonable care." *See Schwartz,* 776 N.W.2d at 831 (before any duty to disclose arises "there must be evidence that the information not disclosed was something not discoverable by reasonable care.")

Thus, Dziadek's deceit claim fails because she failed to show that ZDC could not have reasonably discovered the UIM coverage sooner.

### 3. Dziadek Did Not Suffer Legally Cognizable Damages.

Dziadek was awarded $250,000 in compensatory damages on her deceit claim, which ostensibly reflects attorney's fees she would have "saved" had Charter Oak not "deceived" ZDC.

The undisputed evidence established that ZDC's retainer agreement required Dziadek to pay 33.3% of all sums recovered, no matter how long it took to resolve her claims. App. 991-993. The agreement did not allow Dziadek to pay a reduced fee if litigation proved unnecessary or more expeditious. Because Dziadek paid ZDC the fees that she was contractually obligated to pay, Dziadek suffered no compensable damages based on the alleged delay caused by Charter Oak.

At trial, Cole alleged he "would have" charged Dziadek substantially less had ZDC recognized the existence of potential UIM coverage sooner. App. 1345, 745:1-746:18. This is the same Cole who did nothing in March 2009, neglecting to follow up on the UIM coverage information that Styles sent to him. Yet, Cole claims he "would have" discounted ZDC's fee if he had actually done his job. This hindsight speculation ignores the retainer agreement terms that obligated Dziadek to pay what she did—33.3%.

## IV. THE PUNITIVE DAMAGES AWARD SHOULD BE VACATED.

Dziadek's claim for punitive damages is barred as a matter of law because Dziadek established nothing more than a breach of contract claim (and for the reasons stated above, not even that). South Dakota law is clear that punitive damages cannot be awarded for breach of contract. *Schipporeit*, 775 N.W.2d at 504.

Here, while the jury found there was a breach of contract, it found also there was no bad faith or fraud. Moreover, as Charter Oak has established above, Dziadek's claim for deceit is barred as a matter of law. Accordingly, there is no tort claim upon which an award for punitive damages can be based.

Dziadek also was precluded from recovering punitive damages because she failed to establish that Charter Oak's actions were willful, wanton, or malicious. Conduct is willful or wanton "when a person acts or fails to act, with a conscious realization that injury is a probable, as distinguished from a *possible*…result of such conduct." *Gabriel v. Bauman*, 847 N.W.2d 537, 541 (S.D. 2014) (emphasis added). Willful or wanton conduct "signif[ies] an actor's mental state and looks to whether the actor intended to do an act that was of an unreasonable character, *in disregard of a known or obvious risk, which risk was so great as to make it highly probable that harm would result." Id*. at 542 (emphasis added).

At most, the evidence showed that Styles made an innocent mistake by not affirmatively highlighting possible UIM coverage for Dziadek's lawyers, who themselves were experienced and fully responsible for protecting her interests. Dziadek was not damaged, because she was paid the $900,000 UIM policy limits when her lawyers actually made a UIM claim and established the amount of her UIM damages. App. 1367, 1427:7-12; App. 1309-1311. Punitive damages are not warranted in this situation. *See Bierle v. Liberty Mut. Ins. Co.*, 992 F.2d 873, 876 (8th Cir. 1993)(vacating punitive damage award against insurer that "made errors in handling the [insureds'] requests for information about their underinsured motorist coverage" because no evidence that the insurer had acted willfully or wantonly); *see also Fed. Beef Processors, Inc. v. Royal Indem. Co.*, CIV. 04-5005-KES, 2008 U.S. Dist. LEXIS 80658, *17-18 (D.S.D. Oct. 9, 2008)(no tort action when insurer failed to initially disclose availability of payment, subsequently disclosed it, and then paid full amount).

For each of these reasons, punitive damages are barred in this case as a matter of law.

## V. EVEN IF NOT VACATED, THE PUNITIVE DAMAGES AWARD IS EXCESSIVE AND MUST BE SUBSTANTIALLY REDUCED.

Even if the Court affirms the punitive damages award, the $2,750,000 amount is grossly excessive and violates federal constitutional jurisprudence and South Dakota law. For the reasons set forth below, the amount of punitive damages

in this case, if any, should not exceed $250,000, and justice demands substantially less than that amount.

### A. Prejudgment Interest And Contract Damages Must Be Excluded From The Punitive Damages Analysis.

As a threshold matter, in order to evaluate the constitutional propriety of the punitive damages award, the Court must first establish the correct amount of compensatory damages, to compare its relative size to the punitive damages award. To do that, the Court must exclude prejudgment interest and contract damages from the compensatory damages amount used to evaluate the punitive damages award.

#### 1. Prejudgment Interest Must Be Excluded From The Punitive Damages Analysis.

Here, the prejudgment interest award was disputed by the parties in post-trial briefing and ultimately calculated by the District Court. App. 499-505. In *BMW of N. Am. v. Gore*, 517 U.S. 559, 582 (1996), the Supreme Court compared the punitive damages award to "the amount of [plaintiff's] actual harm as determined by the jury." Therefore, the prejudgment interest awarded to Dziadek should not be included because it was not "actual harm as *determined by the jury*."

*Campbell* illustrated this principle by excluding from its ratio calculation attorney fees and costs which, like interest, are "extracompensatory" damages. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 419 (Utah 2004)(on

remand, recognizing that Supreme Court's ratio analysis included only $1,000,000 awarded by jury and did not include, among other things, attorney fees).

Moreover, prejudgment interest must be excluded because it is already, by definition, punitive in nature. Prejudgment interest "can constitute a form of punishment, particularly when state statutes set prejudgment interest rates that significantly exceed inflation." Mark A. Behrens et al., *Calculating Punitive Damages Ratios with Extracompensatory Attorney Fees and Judgment Interest: A Violation of the United States Supreme Court's Due Process Jurisprudence?*, 48 1295, 1321 Wake Forest Law Review (2013).

"In these instances, such awards already have a penal component, and using prejudgment interest to justify a higher punitive damage award than otherwise permissible is particularly problematic." *Id.* at 1321-22. Thus, "[i]mposing punitive damages as a multiplier of amounts that reflect costs of litigation effectively punishes a defendant that exercises its right to a trial on the merits...." *Id.* at 1321.

Accordingly, including a punitive interest calculation in the compensatory damages award used for comparison to the punitive damages award results in an improper double penalty.

### 2. Contract Damages Must Be Excluded From The Punitive Damages Analysis.

It is also well settled under South Dakota law that punitive damages cannot be based on breach of contract. *Schipporeit*, 775 N.W.2d at 504. Accordingly, the Court must exclude contract damages from the amount of compensatory damages used to evaluate the punitive damages award.

When contract damages and prejudgment interest amounts are removed, the amount of remaining compensatory damages is $250,000 for the deceit claim. As shown above, the deceit claim is barred as a matter of law. However, even if the Court upholds that claim, $250,000 represents the maximum amount of compensatory damages that may be used for comparison to evaluate the constitutional proprietary of the punitive damages award.

## B. Constitutional And South Dakota Guideposts Limit Any Punitive Award To $250,000, And Dictate A Substantially Lower Amount.

The Supreme Court has set three "guideposts" for an appellate court's *de novo* review of the constitutionality of punitive damage awards: "(1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Campbell*, 538 U.S. at 418; *Gore*, 517 U.S. at 575.

In addition to the Supreme Court's three guideposts, the South Dakota Supreme Court imposes additional scrutiny of punitive awards by examining the following factors: "[(1)] the amount allowed in compensatory damages, [(2)] the nature and enormity of the wrong, [(3)] the intent of the wrongdoer, [(4)] the wrongdoer's financial condition, and [(5)] all of the circumstances attendant to the wrongdoer's actions." *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 666 (S.D. 2003).

These guideposts establish that a punitive damages award in his case, if any, cannot be any greater than $250,000 and should be substantially less than that amount.

### 1. The Ratio Between Compensatory And Punitive Damages Must Not Exceed 1:1.

One of the three guideposts a reviewing court must consider is "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award." *Campbell*, 538 U.S. at 418. While the Supreme Court has declined "to impose a bright-line ratio which a punitive damages award cannot exceed...in practice, *few awards exceeding a single-digit ratio* between punitive and compensatory damages, to a significant degree, *will satisfy due process*." *Id.* at 425 (emphasis added). Moreover, "an *award of more than four times* the amount of compensatory damages might be *close to the line of constitutional impropriety*." *Id*. (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991); *Gore*, 517

U.S. at 581)(emphasis added). In fact, "[w]hen compensatory damages are substantial, then a lesser ratio perhaps *only equal to compensatory damages*, can reach the *outermost limit* of the due process guarantee." *Campbell*, 538 U.S. at 425 (emphasis added).

Dziadek was awarded $250,000 in compensatory damages and $387,511.70 in interest. App. 508. If the interest amounts are included as "compensatory" damages in the calculation (as set forth, *infra*, they should not be), the ratio of punitive damages to compensatory damages is approximately 4.3:1, which *exceeds* the point at which punitive awards approach "constitutional impropriety." The District Court erroneously characterized this ratio as "well within the Supreme Court's single digit rule and therefore weighs in favor of upholding the jury's punitive damages award." App. 490.

Because Dziadek was paid the Policy limits, there is substantial doubt as to whether there was a breach of contract and substantial doubt as to the legal viability of the deceit claim. Accordingly, this is not an egregious case.

In cases involving actual reprehensible conduct (unlike this case), this Court has remitted punitive damages awards to equal or approximate a 1:1 ratio. *See Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 798-99 (8th Cir. 2004)(remitting punitive damages award in racial discrimination case to 1:1 ratio despite "substantial evidence of egregious racial harassment"); *Boerner v. Brown &*

*Williamson Tobacco Co*., 394 F.3d 594, 602-03 (8th Cir. 2005)(remitting punitive damages award to "approximately 1:1" despite defendant's "highly reprehensible" conduct including "actively misle[ading] consumers about the health risks associated with smoking" and directly causing "a most painful, lingering death"). Nothing in this case would justify an upward departure from the 1:1 maximum ratio that should apply in cases like this where "compensatory damages are substantial." *See Campbell*, 538 U.S. at 425.

Accordingly, punitive damages should not exceed a 1:1 ratio, which in this case would be $250,000 at worst. Moreover, the other guideposts discussed below demonstrate that any punitive damages award should be substantially less than $250,000.

**2. Constitutional Reprehensibility Guideposts Dictate A Punitive Award Much Less Than The 1:1 Maximum Ratio.**

The law presumes that "a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Campbell*, 538 U.S. at 419. To assess reprehensibility, courts should consider whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial

> vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

*Id*. "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Id*.

In this case, the factors for evaluating the degree of alleged reprehensibility demonstrate Charter Oak's conduct was not "so reprehensible" as to warrant punitive damages, let alone an award of $2,750,000.

**(a) The Alleged Harm Was Only Economic.**

The alleged harm Dziadek suffered was entirely economic, not physical. The Court in *Gore* emphasized that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence." 517 U.S. at 575-76. And, in *Campbell*, the Court phrased this factor in terms of "physical as opposed to economic" harm. 538 U.S. at 419.

In *Campbell*, the Supreme Court addressed the issue of reprehensibility in the context of an insurer's actions that were alleged to have harmed its insured. *Campbell* held that "[t]he harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the [insureds]

suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them." *Id*. at 426.

As in *Campbell*, the harm suffered by Dziadek "arose from a transaction in the economic realm, not from some physical assault or trauma." *Id*. Here, as in *Campbell*, the *only damages* arguably suffered by Dziadek are economic.

The District Court nonetheless concluded, "the first factor militates slightly in favor of finding that Charter Oak's conduct was reprehensible." App. 487. The District Court relied on *Moore v. Am. Fam. Mut. Ins. Co.*, 576 F.3d 781, 790 (8th Cir. 2009), to point out that Dziadek testified she experienced anxiety, which "affected her sleep, intensified her pain, and gave her panic attacks." App. 486. But in *Moore*, the plaintiff recovered compensatory damages that *included* emotional distress damages. 576 F.3d at 788-89. Here, in contrast, the District Court correctly held Dziadek could not recover emotional distress damages. App. 491-499.

Like the plaintiff in *Campbell*, but unlike the plaintiff in *Moore*, Dziadek's *only* compensable damages in this case are for economic (not physical) harm, which weighs against a finding of reprehensibility.

### (b) There Was No Evidence Of Indifference To Or Reckless Disregard For The Health Or Safety Of Others.

Charter Oak did not act with indifference or reckless disregard to the health or safety of Dziadek. Charter Oak's limited communications with Cole in February and March 2009 did not endanger Dziadek's health or safety. And, Dziadek was never deprived of medical care since she received workers compensation benefits, which fully paid all her medical expenses. App. 1335, 585:1-4.

The District Court erroneously found this factor "weighs slightly in favor of finding reprehensibility" because Styles allegedly knew Dziadek had serious injuries. App. 487. The District Court incorrectly focused on what Styles allegedly knew about Dziadek's injuries. The undisputed evidence shows that Styles did nothing to endanger Dziadek's health or safety. Styles talked to Cole just once, and wrote two letters to him on February 12 and March 5, 2009. Styles never talked to Dziadek. Styles did not prevent medical care, for which Dziadek was covered by workers compensation. And, Charter Oak paid the full Policy limits once coverage was established.

Thus, this factor weighs against a finding of reprehensibility.

### (c) There Was No Evidence Of Repeated Misconduct.

The District Court erroneously concluded, "[T]he evidence supports finding that Charter Oak engaged in *repeated misconduct against Dziadek*," and, therefore, "the fourth factor weights [sic] moderately in favor of finding reprehensibility." App. 488 (emphasis added). The District Court based its conclusion on the limited communications between Cole and Styles in early 2009 and a vague reference to Charter Oak's "tone" at trial. App. 488. There was no reasonable factual support for the District Court's conclusion.

The evidence showed just the opposite—a lack of repeated conduct. As noted above, Styles talked with Cole once and wrote him two letters in early 2009. That is the sole conduct upon which both the breach of contract and deceit claims were based, and which was the sole predicate for the punitive damage claim.

In *Gore*, the Supreme Court addressed an automobile distributor's repetitious "nationwide pattern" of failing to disclose certain pre-delivery automobile repairs to car buyers, and observed that "repeated misconduct is more reprehensible than an individual instance of malfeasance." 517 U.S. at 576-77. Similarly, in *Campbell*, the Supreme Court analyzed allegations that State Farm was a recidivist to evaluate whether "the conduct involved repeated actions or was an isolated incident." 538 U.S. at 419. The Supreme Court rejected the plaintiff's "scant evidence of repeated misconduct of the sort that injured them." *Id*. There

was no evidence of "repeated misconduct" or "nationwide patterns" in this case.

Moreover, the District Court misapplied this reprehensibility factor. The "repeated conduct" alleged in *Gore* and *Campbell* referred to "specific instances of similar conduct by the defendant in relation to other parties," and "not to the series of unreasonable decisions various [defendant] employees made in handling the [plaintiff's] specific claim." *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 232 (3d Cir. 2005).

There was absolutely no evidence of "similar conduct" by Charter Oak in relation to other parties. This factor does not support a reprehensibility finding.

**(d) The Alleged Harm Was Not The Result Of Intentional Deceit.**

A court may also consider whether "the harm was the result of *intentional* malice, trickery, or deceit, or mere accident." *Campbell*, 538 U.S. at 419 (emphasis added). Even if the deceit verdict is upheld, it does not justify the jury's grossly excessive punitive damages award. Styles' unrebutted trial testimony established that, at most, she mistakenly overlooked Dziadek's potential UIM claim. App. 1367, 1427:7-12. Notably, Dziadek's own attorney conceded he also made a mistake. App. 1343, 721:14-722:4. Moreover, the jury found that Charter Oak did not commit fraud or breach of the implied covenant of good faith and fair dealing.

Even "conduct [that] is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the *high degree of culpability* that warrants a *substantial* punitive damages award." *Gore*, 517 U.S. at 580 (emphasis added). Moreover, "the omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good-faith basis for believing that no duty to disclose exists." *Id*.

Here, the conduct at issue, *i.e.*, the purported non-disclosure of potential UIM coverage, was based on Styles good faith understanding that the coverage question presented was whether Peterson was a liability insured under the Policy. App. 1361, 1310:10-17. This did *not* reflect a company policy or practice; it was (at most) a mistake. Thus, Charter Oak's accused conduct is "of limited offensiveness 'justifying [at most] a limited award of punitive damages.'" *Roth*, 667 N.W.2d at 667 (quoting *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 661 (8th Cir. 1995)(finding district court "erred by failing to scrutinize correctly...the level of the offensiveness of Amoco's conduct" when "there is no evidence or indication that [the employee's] conduct reflected a company policy or practice")).

Further, there was no evidence that a corporate policy or practice *caused* Styles to knowingly "withhold" material information with an intent to deceive. The unrebutted evidence established that Styles never received any bonus or incentive compensation for handling past claims. App. 1365, 1351:9-23. Dziadek did not

offer any evidence of a causal *nexus* between any executive-level policies and the claim handling responsibilities of Styles regarding this claim. In the end, Dziadek presented no evidence that Styles' alleged omission was anything other than an isolated mistake. *See Pulla*, 72 F.3d at 660 (contrasting facts in *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993)).

The District Court erroneously stated that "Dziadek introduced evidence *suggesting* that the compensation and evaluation systems *encouraged* claim handlers for Charter Oak to save the company money by reducing claim payouts" without a cite or reference to *any* evidence whatsoever. App. 489 (emphasis added). And while acknowledging "[t]here was no evidence that claim handlers were told to deceive insureds," the District Court nonetheless stated, "[i]t beggars belief that Styles, who had never met Cole or Dziadek, would intentionally deceive them about the existence of coverage *if she did not have some motive for doing so*." *Id*. (emphasis added). That alleged motive was never identified, much less proven.

The District Court engaged in circular reasoning that "the compensation and evaluation system provides the only reasonable explanation for why Styles intentionally misled Cole and Dziadek about the UIM coverage." *Id*. That is not evidence—it is speculation without evidentiary support.

Thus, the degree of reprehensibility factors establish that a punitive damages award in this case, if any, cannot be any greater than $250,000 and should be substantially less than that amount.

### 3. Comparable Civil Penalties Establish That Punitive Damages, If Any, Should Be In The Range of $25,000.

The final guidepost the Court must consider when reviewing the constitutionality of a punitive damages award "is the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases.'" *Campbell*, 538 U.S. at 428 (quoting *Gore*, 517 U.S. at 575).[3]

By "civil penalties," the Supreme Court was referring to civil statutory penalties, and not to punitive damage awards in other civil cases. *Gore*, 517 U.S. at 583 ("reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord substantial deference to *legislative judgments* concerning appropriate sanctions for the conduct at issue'")(quoting *Browning-Ferris Indus. Of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989)(O'Connor, J., concurring in part and dissenting in part))(emphasis added). Indeed, in *Campbell*, the Supreme Court's analysis was limited to comparing the

[3] The District Court erroneously stated that "Charter Oak does not argue that the punitive damages award is excessive or improper under the Supreme Court's third guidepost." App. 491. In fact, Charter Oak made that very argument. App. 454-456.

civil statutory sanction under state law to the punitive damage award. 538 U.S. at 428.

While there is no civil or criminal penalty that is directly applicable to the conduct alleged in this case, this Court may consider South Dakota statutes relating to insurance regulatory matters, such as SDCL § 58-4-28.1 (authorizing money penalty not to exceed $25,000 for an insurer in a case in which the director of the Division of Insurance has the power to suspend the certificate of authority of any insurance company) and SDCL § 58-4A-7 (authorizing civil penalty not to exceed $5,000 for first fraudulent insurance act) which provide for civil penalties of $25,000 and $5,000. These penalty amounts are dwarfed by the $2,750,000 punitive damage award in this case. *See Campbell*, 538 U.S. at 428 (when most relevant civil sanctions "[are] dwarfed by the" punitive damage award, the "analysis was insufficient to justify the award").

For these reasons, Charter Oak respectfully requests reversal of the District Court's Order and Judgment and remand with instructions for entry of judgment in favor of Charter Oak in all respects or, in the alternative, for a new trial based on manifest errors committed by the District Court.

## CONCLUSION

Judgment should be entered for Charter Oak on the breach of contract claim, which in turn requires that judgment be entered for Charter Oak on all other

claims. Alternatively, because the deceit claim is barred, Charter Oak is entitled to judgment on that claim and vacatur of the punitive damage award that is based on the deceit finding. Finally, even if the deceit and punitive awards are not reversed and vacated, the punitive damages award must not be greater than $250,000 and should be in the range of approximately $25,000.

Dated: February 13, 2017

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,700 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: February 13, 2017

s/Michael R. Cashman
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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

Laura Dziadek,

Appellee,

vs.

The Charter Oak Fire Insurance Company,

Appellant.

## VIRUS FREE CERTIFICATE

I, Michael R. Cashman, certify that the .pdf file of Appellant's Brief and Addendum was scanned for viruses and is virus free.

Dated: February 13, 2017

s/Michael R. Cashman
Michael R. Cashman

## CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: February 13, 2017

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