

In the Supreme Court of Nevada

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Elizabeth A. Brown
Clerk of Supreme Court

SIERRA HEALTH AND LIFE INSURANCE
COMPANY, INC.,

Appellant,

vs.

SANDRA L. ESKEW, as special administrator of
the Estate of William George Eskew,

Respondent.

Appeal from the Eighth Judicial District Court, Clark County
The Honorable Nadia Krall, District Judge
District Court No. A-19-788630-C

JOINT APPENDIX Volume 8 of 18

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CHRONOLOGICAL INDEX

Description	Date	Volume	Page
Complaint	2/1/2019	1	1
Amended Complaint	7/15/2019	1	9
Order Denying and Granting in Part Defendant's Motion to Dismiss	7/23/2019	1	26
Answer to Amended Complaint	7/29/2019	1	28
Defendant's Motion in Limine No. 3: Pre-Contract Communications Concerning Coverage	12/29/2021	1	45
Defendant's Motion in Limine No. 6: New York Proton Center	12/29/2021	1	54
Defendant's Motion in Limine No. 17: Litigation Conduct	12/29/2021	1	62
Notice of Withdrawal of Claims	1/14/2022	1	69
Stipulation and Order to Dismiss Claims Under NRS 41.085	1/18/2022	1	72
Pre-Trial Hr'g Tr. Feb. 10, 2022	2/10/2022	1	81
Pre-Trial Hr'g Tr. Feb. 11, 2022	2/11/2022	1	153
Joint Pre-Trial Memorandum	2/22/2022	2	231
Joint Pre-Trial Memorandum (First Supplement) (with exhibits)	2/28/2022	2	239
Trial Tr. Day 1, March 14, 2022	3/14/2022	3	400
Trial Tr. Day 1, March 14, 2022 (cont'd)	3/14/2022	4	635
Trial Tr. Day 2, March 15, 2022	3/15/2022	4	648
Trial Tr. Day 3, March 16, 2022	3/16/2022	5	866
Trial Tr. Day 4, March 21, 2022	3/21/2022	6	1067

Trial Tr. Day 4, March 21, 2022 (cont'd)	3/21/2022	7	1301
Trial Tr. Day 5, March 22, 2022	3/22/2022	7	1310
Trial Tr. Day 5, March 22, 2022 (cont'd)	3/22/2022	8	1534
Trial Tr. Day 6, March 23, 2022	3/23/2022	8	1542
Trial Tr. Day 6, March 23, 2022 (cont'd)	3/23/2022	9	1770
Trial Tr. Day 7, March 24, 2022	3/24/2022	9	1786
Trial Tr. Day 8, March 25, 2022	3/25/2022	10	1982
Trial Tr. Day 9, March 28, 2022	3/28/2022	11	2219
Trial Tr. Day 10, March 29, 2022	3/29/2022	12	2429
Trial Tr. Day 11, March 30, 2022	3/30/2022	13	2602
Trial Tr. Day 12, April 4, 2022	4/4/2022	14	2681
Trial Tr. Day 13, April 5, 2022	4/5/2022	14	2847
Trial Ex. 4: Insurance Policy	3/16/2022	15	2909
Trial Ex. 5: Proton Beam Request	3/16/2022	15	3011
Trial Ex. 6: Medical Compliance Denial Library, Excerpted	3/22/2022	15	3070
Trial Ex. 7: MBO Partners Labor Invoice (3/29/2016)	3/16/2022	15	3073
Trial Ex. 8: N.Y. Proton Center Materials, Excerpted	3/22/2022	15	3074
Trial Ex. 9: Photos of W. Eskew	3/23/2022	15	3097
Trial Ex. 13: Coverage Review Policies & Procedures	3/22/2022	15	3099
Trial Ex. 24: Medical Policy, PBRT (10/01/2015)	3/16/2022	15	3105
Trial Ex. 31: Medical Policy, PBRT (07/01/2019)	3/25/2022	16	3131

Trial Ex. 54: Dr. Ahmad Labor Invoice Spreadsheet	3/16/2022	16	3150
Trial Ex. 71: N.Y. Proton Center Website Materials	3/25/2022	16	3166
Trial Ex. 73: Eskew Case History	3/22/2022	16	3195
Trial Ex. 75: Medical Policy, IMRT (10/01/2015)	3/16/2022	16	3200
Trial Ex. 133: Dr. Liao Article, J. Clinical Oncology (07/1/2018)	3/21/2022	16	3223
Trial Ex. 160: MD Anderson IMRT Planning Note, Excerpted	3/21/2022	16	3225
Trial Ex. 161: MD Anderson PBRT Planning Note, Excerpted	3/21/2022	16	3227
Trial Ex. 189: Proton Therapy Med. Journal Article (02/01/2008)	3/21/2022	16	3229
Notice of Entry of and Order Regarding Defendant's Motions in Limine	3/17/2022	16	3240
Defendant's Motion for Judgment as a Matter of Law	3/30/2022	16	3253
Defendant's Proposed Jury Instructions	3/30/2022	16	3266
Verdict—Phase One	4/4/2022	16	3310
Jury Instructions—Phase One	4/4/2022	16	3312
Verdict—Phase Two	4/5/2022	16	3353
Jury Instructions—Phase Two	4/5/2022	16	3354
Notice of Entry of and Judgment Upon Jury Verdict	4/18/2022	17	3362
Defendant's Renewed Motion for Judgment as a Matter of Law	5/16/2022	17	3370

Defendant's Motion for a New Trial or Remittitur	5/16/2022	17	3391
Defendant's Post-Trial Ex. 14: Emotional Distress Awards Chart	5/16/2022	17	3419
Defendant's Post-Trial Ex. 15: Pain and Suffering Awards Chart	5/16/2022	17	3424
Defendant's Post-Trial Ex. 16: Punitive Damages Awards Chart	5/16/2022	17	3430
Notice of Entry of and Order Granting in Part and Denying in Part Defendant's Motion to Retax	6/9/2022	17	3436
Plaintiff's Opposition to Defendant's Motion for a New Trial or Remittitur	6/29/2022	17	3453
Plaintiff's Opposition to Defendant's Renewed Motion for Judgment as a Matter of Law	6/29/2022	17	3483
Defendant's Reply in Support of Renewed Motion for Judgment as a Matter of Law	7/20/2022	17	3512
Defendant's Reply in Support of Motion for a New Trial or Remittitur	7/20/2022	17	3530
Minute Order Denying Defendant's Motion for a New Trial or Remittitur	8/15/2022	17	3553
Minute Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law	8/15/2022	17	3555
Notice of Appeal	9/14/2022	17	3557
Plaintiff's Motion for Entry of Express Findings as Required by <i>Lioce v. Cohen</i>	10/6/2022	18	3560

Plaintiff's Motion to Consider Motion for Entry of Express Findings as Required by <i>Lioce v. Cohen</i> on an Order Shortening Time Basis	10/7/2022	18	3608
Order Shortening Time	10/7/2022 10/18/2022	18	3616
Defendant's Opposition to Motion for Entry of Express Findings as Required by <i>Lioce v. Cohen</i>	10/13/2022	18	3620
<i>Lioce</i> Hr'g Tr. October 18, 2022	10/18/2022	18	3632
Notice of Entry of and Findings and Conclusions as to Allegations of Attorney Misconduct	10/24/2022	18	3639
Notice of Entry of and Amended Judgment Upon Jury Verdict	10/24/2022	18	3659
Notice of Entry of an Order Denying Renewed Motion for Judgment as a Matter of Law	10/24/2022	18	3667
Notice of Entry of and Order Denying Motion for a New Trial or Remittitur	10/24/2022	18	3677
Amended Notice of Appeal	10/31/2022	18	3687

ALPHABETICAL INDEX

Description	Date	Volume	Page
Amended Complaint	7/15/2019	1	9
Amended Notice of Appeal	10/31/2022	18	3687
Answer to Amended Complaint	7/29/2019	1	28
Complaint	2/1/2019	1	1
Defendant's Motion for a New Trial or Remittitur	5/16/2022	17	3391
Defendant's Motion for Judgment as a Matter of Law	3/30/2022	16	3253
Defendant's Motion in Limine No. 17: Litigation Conduct	12/29/2021	1	62
Defendant's Motion in Limine No. 3: Pre-Contract Communications Concerning Coverage	12/29/2021	1	45
Defendant's Motion in Limine No. 6: New York Proton Center	12/29/2021	1	54
Defendant's Opposition to Motion for Entry of Express Findings as Required by <i>Lioce v. Cohen</i>	10/13/2022	18	3620
Defendant's Post-Trial Ex. 14: Emotional Distress Awards Chart	5/16/2022	17	3419
Defendant's Post-Trial Ex. 15: Pain and Suffering Awards Chart	5/16/2022	17	3424
Defendant's Post-Trial Ex. 16: Punitive Damages Awards Chart	5/16/2022	17	3430
Defendant's Proposed Jury Instructions	3/30/2022	16	3266
Defendant's Renewed Motion for Judgment as a Matter of Law	5/16/2022	17	3370

Defendant's Reply in Support of Motion for a New Trial or Remittitur	7/20/2022	17	3530
Defendant's Reply in Support of Renewed Motion for Judgment as a Matter of Law	7/20/2022	17	3512
Pre-Trial Hr'g Tr. Feb. 10, 2022	2/10/2022	1	81
Pre-Trial Hr'g Tr. Feb. 11, 2022	2/11/2022	1	153
Joint Pre-Trial Memorandum	2/22/2022	2	231
Joint Pre-Trial Memorandum (First Supplement) (with exhibits)	2/28/2022	2	239
Jury Instructions—Phase One	4/4/2022	16	3312
Jury Instructions—Phase Two	4/5/2022	16	3354
Minute Order Denying Defendant's Motion for a New Trial or Remittitur	8/15/2022	17	3553
Minute Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law	8/15/2022	17	3555
Notice of Appeal	9/14/2022	17	3557
Notice of Entry of an Order Denying Renewed Motion for Judgment as a Matter of Law	10/24/2022	18	3667
Notice of Entry of and Amended Judgment Upon Jury Verdict	10/24/2022	18	3659
Notice of Entry of and Findings and Conclusions as to Allegations of Attorney Misconduct	10/24/2022	18	3639
Notice of Entry of and Judgment Upon Jury Verdict	4/18/2022	17	3362

Notice of Entry of and Order Denying Motion for a New Trial or Remittitur	10/24/2022	18	3677
Notice of Entry of and Order Granting in Part and Denying in Part Defendant's Motion to Retax	6/9/2022	17	3436
Notice of Entry of and Order Regarding Defendant's Motions in Limine	3/17/2022	16	3240
Notice of Withdrawal of Claims	1/14/2022	1	69
<i>Lioce</i> Hr'g Tr. October 18, 2022	10/18/2022	18	3632
Order Denying and Granting in Part Defendant's Motion to Dismiss	7/23/2019	1	26
Order Shortening Time	10/7/2022 10/18/2022	18	3616
Plaintiff's Motion for Entry of Express Findings as Required by <i>Lioce v. Cohen</i>	10/6/2022	18	3560
Plaintiff's Motion to Consider Motion for Entry of Express Findings as Required by <i>Lioce v. Cohen</i> on an Order Shortening Time Basis	10/7/2022	18	3608
Plaintiff's Opposition to Defendant's Motion for a New Trial or Remittitur	6/29/2022	17	3453
Plaintiff's Opposition to Defendant's Renewed Motion for Judgment as a Matter of Law	6/29/2022	17	3483
Stipulation and Order to Dismiss Claims Under NRS 41.085	1/18/2022	1	72
Trial Ex. 4: Insurance Policy	3/16/2022	15	2909

Trial Ex. 5: Proton Beam Request	3/16/2022	15	3011
Trial Ex. 6: Medical Compliance Denial Library, Excerpted	3/22/2022	15	3070
Trial Ex. 7: MBO Partners Labor Invoice (3/29/2016)	3/16/2022	15	3073
Trial Ex. 8: N.Y. Proton Center Materials, Excerpted	3/22/2022	15	3074
Trial Ex. 9: Photos of W. Eskew	3/23/2022	15	3097
Trial Ex. 13: Coverage Review Policies & Procedures	3/22/2022	15	3099
Trial Ex. 24: Medical Policy, PBRT (10/01/2015)	3/16/2022	15	3105
Trial Ex. 31: Medical Policy, PBRT (07/01/2019)	3/25/2022	16	3131
Trial Ex. 54: Dr. Ahmad Labor Invoice Spreadsheet	3/16/2022	16	3150
Trial Ex. 71: N.Y. Proton Center Website Materials	3/25/2022	16	3166
Trial Ex. 73: Eskew Case History	3/22/2022	16	3195
Trial Ex. 75: Medical Policy, IMRT (10/01/2015)	3/16/2022	16	3200
Trial Ex. 133: Dr. Liao Article, J. Clinical Oncology (07/1/2018)	3/21/2022	16	3223
Trial Ex. 160: MD Anderson IMRT Planning Note, Excerpted	3/21/2022	16	3225
Trial Ex. 161: MD Anderson PBRT Planning Note, Excerpted	3/21/2022	16	3227
Trial Ex. 189: Proton Therapy Med. Journal Article (02/01/2008)	3/21/2022	16	3229
Trial Tr. Day 1, March 14, 2022	3/14/2022	3	400

Trial Tr. Day 1, March 14, 2022 (cont'd)	3/14/2022	4	635
Trial Tr. Day 2, March 15, 2022	3/15/2022	4	648
Trial Tr. Day 3, March 16, 2022	3/16/2022	5	866
Trial Tr. Day 4, March 21, 2022	3/21/2022	6	1067
Trial Tr. Day 4, March 21, 2022 (cont'd)	3/21/2022	7	1301
Trial Tr. Day 5, March 22, 2022	3/22/2022	7	1310
Trial Tr. Day 5, March 22, 2022 (cont'd)	3/22/2022	8	1534
Trial Tr. Day 6, March 23, 2022	3/23/2022	8	1542
Trial Tr. Day 6, March 23, 2022 (cont'd)	3/23/2022	9	1770
Trial Tr. Day 7, March 24, 2022	3/24/2022	9	1786
Trial Tr. Day 8, March 25, 2022	3/25/2022	10	1982
Trial Tr. Day 9, March 28, 2022	3/28/2022	11	2219
Trial Tr. Day 10, March 29, 2022	3/29/2022	12	2429
Trial Tr. Day 11, March 30, 2022	3/30/2022	13	2602
Trial Tr. Day 12, April 4, 2022	4/4/2022	14	2681
Trial Tr. Day 13, April 5, 2022	4/5/2022	14	2847
Verdict—Phase One	4/4/2022	16	3310
Verdict—Phase Two	4/5/2022	16	3353

1 Q And what company do you have listed in that square?

2 A UnitedHealthcare Services, Inc.

3 Q And is that an insurance company?

4 THE COURT: Mr. Flood, can you hear us?

5 THE WITNESS: I heard it. May I have a second?

6 THE COURT: Yes.

7 THE WITNESS: I would have to consult a different report that
8 I pulled, a different exhibit to my report. It would be reflected on the
9 AMS credit report that I pulled on United Health Group and Sierra and so
10 forth. So it's in a different document, I think, as far as the licenses, which
11 of these companies actually have a license and their license number is
12 listed in a separate report.

13 BY MR. ROBERTS:

14 Q Okay. So as you sit here today, you can't tell the jury
15 whether UnitedHealthcare Services, Inc., is a licensed insurance
16 company?

17 A Right. The noted [indiscernible] is their federal employer ID
18 number that we can use that to find their -- the payroll records that I
19 talked about before -- I should say Department of Labor records. So they
20 don't have a -- an indication of the license number. And I do want to
21 check something, though. I just give me -- bear with me. Maybe these
22 appear later.

23 Yes, they do. Okay. When you -- if you look at way down in here
24 where Sierra shows up, they have their insurance NAIC number
25 published. So this particular org chart does do that. So yes, the lack of

1 an NAIC number on there, I can say we don't have to go to any other
2 documents. It's not a licensed insurer. It's an intermediary holding
3 company.

4 Q Okay. Thank you, sir. Let's follow that arrow at the top right
5 of the page over to the next page.

6 MR. ROBERTS: And Audra, can you put up the next page,
7 which is page 39 of the same exhibit?

8 BY MR. ROBERTS:

9 Q And here, we're going to blow up and look, in the top of this
10 page is that same entity that was at the top right of the previous page,
11 right? UnitedHealthcare Services, Inc.?

12 A That's right.

13 Q And you've also got Sierra Health Services, Inc., there,
14 correct?

15 A Yes.

16 Q In the red block?

17 A Right.

18 Q And then, you've got Sierra Health and Life Insurance
19 Company, Inc., the Defendant in this case, under that red block, right?

20 A Yes. And you see the NAIC number. That's their insurance
21 license, so they're a licensed insurance company.

22 Q Okay. And as we've gone down, that's the first licensed
23 insurance company in the organizational chart leading to the Defendant
24 in this case, right?

25 A Well, it's the first one in my red boxes. Yes.

1 Q And is it fair to say --

2 A There's some --

3 Q -- that Sierra Health and Life Insurance Company, Inc., is not
4 directly owned by UnitedHealthcare Services anymore?

5 A Well, that's false in a sense. They're all 100 percent. If you
6 notice in the lower right-hand corner of each box, and keep in mind,
7 these are audited financials. And the lower right-hand box, it says 100
8 percent. And then, you have 100 percent all the way on up. Okay? So
9 all the way up to United Health Group at the top. So that -- there's an
10 unbroken chain of one company owns 100 of the other, that company
11 owns 100 of the other, that company owns 100 of the other, that
12 company owns 100 -- this is classic control group, an insurance company
13 control group.

14 Q So I'm not going to ask you, sir, to testify as to whether you
15 personally want to disregard all the corporate forms listed in this chart.
16 I'm only asking if Sierra Health and Life Insurance Company is directly
17 owned by UnitedHealthcare Services, Inc., or are there intermediate
18 companies listed in these charts?

19 A I think I described it. It's intermediary -- ownership through
20 intermediaries. Yeah.

21 Q And UnitedHealthcare Services, Inc., owns UnitedHealthcare,
22 Inc., correct?

23 A Yes.

24 Q And it is UnitedHealthcare, Inc. that owns Sierra Health and
25 Life; is that correct?

1 A Well, it actually owns Sierra Health Services, Inc., which
2 Sierra Health Services, Inc., owns Sierra Health and Life Insurance, Inc.

3 Q Okay. So there are two corporations in between?

4 A Well, there's actually four because you have to count
5 UnitedHealthcare Services. So Sierra Health Services, UnitedHealthcare,
6 Inc., UnitedHealthcare Services, Inc., and then finally, United Health
7 Group. So there's actually, I count them four. It's four --

8 Q Four if you include the ultimate parent.

9 A Yeah. Right. It's four levels of [indiscernible]. Right.

10 MR. ROBERTS: Okay. Audra, could we go to the next page,
11 page 40?

12 BY MR. ROBERTS:

13 Q And this is a continuation of other companies that are owned
14 by UnitedHealthcare Services, Inc., correct?

15 A Yes.

16 Q And one of those at the top right is Optum, which we've been
17 discussing, correct?

18 A Yes.

19 Q And Optum is not an insurance company, correct?

20 A Right.

21 Q Is it your understanding that Optum owns providers of
22 medical care?

23 A Right. Yes.

24 Q Let's follow the right arrow over to page 47, to where we find
25 Optum. Did I follow that over correctly to Optum as in the organizational

1 charts?

2 A Yes. You skipped over several pages that were things that
3 had -- companies who don't interest us. And yes, you got to the right
4 spot.

5 Q Right. So I skipped six pages where you didn't have any red
6 blocks, right?

7 A Right. It was just a bunch of other subsidiaries.

8 MR. ROBERTS: Okay. Audra, can you kind of blow that up a
9 little bit?

10 BY MR. ROBERTS:

11 Q So let's look right up here at the first red block. And Optum,
12 Inc., owns Optum Health Holdings, LLC; is that correct?

13 A Right.

14 Q And then, Optum Health Holdings, LLC, owns Collaborative
15 Care Holdings, LLC; is that correct?

16 A Could you shrink the -- the page up a little bit? Yes. Okay.

17 Q Now, let's follow the line under Collaborative Care all the
18 way over here and get to the first square on the top right of the page. Is
19 it fair to say Collaborative Care is 100 percent owner of that entity? It's a
20 ProHEALTH entity. Can you read that?

21 A Right. Yes.

22 Q And then, ProHEALTH owns another entity, which owns
23 another entity, which ultimately leads to the ProHEALTH Proton
24 Management, correct?

25 A Well, those other entities are siblings from the standpoint of

1 ProHEALTH Proton Center Management because of the line off to the
2 right. So in other words, ProHEALTH Medical Management is the
3 intermediary parent for ProHEALTH Proton Center.

4 Q Okay. Now, we've gotten to the proton beam center which
5 you told the jury about. Does ProHEALTH New York Proton
6 Management, LLC, own 100 percent of the New York Proton Center?

7 A It owns 33 percent. One third, as I said before.

8 Q Let me make sure you understand my question. Does it own
9 the center, or does it own 33 percent of the company that has a contract
10 to manage the center?

11 A It owns 33 percent of a corporation called New York Proton
12 Management LLC, and it -- ProHEALTH Proton Center, at least according
13 to the State of New York documents, manages the New York Proton
14 Center -- New York Proton Management LLC.

15 Q So the company that is affiliated with United Health Group
16 owns 30-some percent of the company that manages the center. Is that
17 fair?

18 A No. The company [indiscernible] the center is ProHEALTH
19 Proton Center Management, and 100 percent all the way on up the chain,
20 United Health at the top, owns and controls Proton -- excuse me,
21 ProHEALTH Proton. All right? So ProHEALTH Proton is 100 percent.

22 THE COURT: Counsel, it's 5:00 p.m. We need to take our
23 evening recess.

24 THE WITNESS: ProHEALTH Proton --

25 THE COURT: Mr. Flood, we're --

1 MR. ROBERTS: I'm happy to continue tomorrow, Your
2 Honor.

3 THE COURT: All right.

4 MR. ROBERTS: Thank you.

5 THE COURT: Mr. Flood, it's 5:00 p.m. here. We need to take
6 our evening recess. So we're going to resume tomorrow at 9:00 a.m.

7 Ladies and gentlemen, you are instructed not to talk with
8 each other or with anyone else on about any subject or issue connected
9 with this trial. You are not to read, watch, or listen to any report of or
10 commentary on the trial by any person connected with the case or by
11 any medium of information, including without limitation newspapers,
12 television, the internet, or radio.

13 You are not to conduct any research on your own relating to
14 this case, such as consulting dictionaries, using the internet, or using
15 reference materials. You are not to conduct any investigation, test any
16 theory of the case, recreate any aspect of the case, or in any other way
17 investigate or learn about the case on your own. You are not to talk with
18 others, text others, tweet others, Google issues, or conduct any other
19 kind of book or computer research with regard to any issue, party,
20 witness, or attorney involved in this case. You are not to form or express
21 any opinion on any subject connected with this trial until the case is
22 finally submitted to you because if you do, we'd have to start this
23 process all over again.

24 So we will resume tomorrow at 9:00 a.m. And just for
25 scheduling purposes, the Court had to set a couple emergency hearings

1 for Thursday morning, so we're not going to start until 10:45 on
2 Thursday, just so you're aware. We don't want you to wait. Your time is
3 valuable. Thank you.

4 [Jury out at 5:02 p.m.]

5 THE COURT: We had a few emergency matters come up that
6 we had to set for Thursday.

7 MR. ROBERTS: You don't get out of seeing me, Your Honor.

8 THE COURT: Yeah. Thank you. Looking forward to seeing
9 you twice on Thursday. You're part of the reason we have to push trial.
10 So Mr. Sharp can blame you later.

11 MR. ROBERTS: I accept the blame.


12 THE COURT: All right.

13 THE COURT RECORDER: Going off?

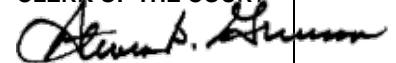
14 THE COURT: Yeah.

15 [Proceedings adjourned at 5:03 p.m.]

16
17
18
19
20 ATTEST: I do hereby certify that I have truly and correctly transcribed the
21 audio-visual recording of the proceeding in the above entitled case to the
22 best of my ability.

23 

24 Maukele Transcribers, LLC
25 Jessica B. Cahill, Transcriber, CER/CET-708



1 RTRAN

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DISTRICT COURT

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CLARK COUNTY, NEVADA

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SANDRA ESKEW, ET AL.,

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Plaintiff,

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vs.

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SIERRA HEALTH AND LIFE
INSURANCE COMPNAY, INC., ET
AL.,

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Defendants.

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BEFORE THE HONORABLE NADIA KRALL
DISTRICT COURT JUDGE
WEDNESDAY, MARCH 23, 2022

15

16

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 6

17

18

APPEARANCES

19

For the Plaintiffs:

MATTHEW L. SHARP, ESQ.
DOUGLAS A. TERRY, ESQ.

20

21

For the Defendants:

D LEE ROBERTS, JR., ESQ.
RYAN T. GORMLEY, ESQ.
PHILLIP NELSON SMITH, JR., ESQ.

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RECORDED BY: MELISSA BURGNER, COURT RECORDER

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

Testimony4

WITNESSES FOR THE PLAINTIFFS

ELLIOTT FLOOD

Continued Cross-Examination by Mr. Roberts 4

Redirect Examination by Mr. Sharp 10

Recross Examination by Mr. Roberts..... 18

STEPHEN PRATER

Direct Examination by Mr. Sharp 20

Cross-Examination by Mr. Roberts 132

Redirect Examination by Mr. Sharp 170

TYLER ESKEW

Direct Examination by Mr. Terry 179

Cross-Examination by Mr. Smith 204

WILLIAM ESKEW, JR.

Direct Examination by Mr. Terry 228

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX OF EXHIBITS

FOR THE PLAINTIFFS

MARKED

RECEIVED

2		62
3		63
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FOR THE DEFENDANT

MARKED

RECEIVED

None

1 Las Vegas, Nevada, Wednesday, March 23, 2022

2

3 [Case called at 9:06:16 a.m.]

4 THE COURT: Morning, everyone.

5 MR. ROBERTS: Good morning, Your Honor.

6 THE COURT: Please be seated. Are the parties ready for the
7 jury?

8 MR. ROBERTS: Yes, Your Honor.

9 [Jury in at 9:07 a.m.]

10 THE MARSHAL: All jurors are present.

11 THE COURT: Thank you. Do the parties stipulate to the
12 presence of the jury?

13 MR. ROBERTS: Yes, Your Honor.

14 MR. SHARP: Yes.

15 THE COURT: Thank you. Please be seated. Mr. Roberts, go
16 ahead.

17 MR. ROBERTS: Thank you, Your Honor.

18 ELLIOTT FLOOD, PLAINTIFFS' WITNESS, PREVIOUSLY SWORN

19 CROSS-EXAMINATION CONTINUED

20 BY MR. ROBERTS:

21 Q Good morning, Mr. Flood.

22 A Good morning.

23 Q Can you hear me okay?

24 A Yes.

25 Q Great. Let's pick up where we left off yesterday talking about

1 the organizational structure as you found it when you researched the
2 United Health Group. Okay.

3 A Okay.

4 MR. ROBERTS: Your Honor, at this time, I'd ask permission
5 to display a simplified organizational chart from Mr. Flood's report,
6 marked as Exhibit 195, page 6.

7 THE COURT: Any objection, Mr. Sharp?

8 MR. SHARP: No, Your Honor.

9 THE COURT: Request is granted.

10 MR. ROBERTS: Thank you, Your Honor.

11 THE CLERK: What exhibit is that? Is it already admitted?

12 MR. ROBERTS: Exhibit 195, page 6, just for demonstrative
13 purposes only.

14 THE CLERK: Thank you.

15 MR. ROBERTS: If you could just blow up the chart at the
16 bottom of the page, Audra.

17 BY MR. ROBERTS:

18 Q Okay. Can you see that, Mr. Flood?

19 A Yes.

20 Q And because all those charts that you found in the
21 government filings were so complicated, did you prepare this to simplify
22 things for the jury?

23 A Sure.

24 Q And looking at the very top box, is that United Health Group?

25 A Yes.

1 Q And then directly under that, what entity is that?

2 A That's United Healthcare Services.

3 Q Okay. And UnitedHealthcare Services is the parent of both
4 UnitedHealthcare Inc. and Optum Inc.; is that correct?

5 A Yes.

6 Q And is it fair to say that under UnitedHealthcare Inc., that's
7 the insurance company side?

8 A Correct.

9 Q And under Optum Inc., that is the healthcare provider side. Is
10 that fair?

11 A Yes.

12 Q And then flowing down from Optum, ultimately, you get to
13 ProHEALTH, which is the manager of the New York Proton Beam Center;
14 is that correct?

15 A Yes.

16 Q Okay. Yesterday, Exhibit 8 was admitted. You told Mr.
17 Sharp that was one of the documents you relied on, correct, from the
18 Public Health and Health Planning Council of the State of New York?

19 A Correct.

20 MR. ROBERTS: Okay. Audra, could you put up Exhibit 8,
21 page 146? And just blow up the top for me if you could so we could read
22 it as well as it could be read.

23 BY MR. ROBERTS:

24 Q All right. Where did you obtain this document, sir?

25 A This came from attorneys. They sent it to me to see

1 if -- provided according to public records, and I -- that's what I did.

2 Q Okay. So you didn't find this yourself, the attorney sent it to
3 you.

4 A Right. They sent it to me with the mission of doing the
5 examination of the public records to see if that confirmed the
6 information in here that ProHEALTH was affiliate and that owned 33
7 percent of the -- it was a 30-30 percent subsidiary of -- excuse me. Well,
8 to confirm the basic facts that we went over yesterday.

9 Q And did you confirm that this is an authentic public record of
10 the State of New York?

11 A No. I did not. However, it is consistent with [indiscernible]
12 records.

13 Q Okay. And you have no reason to believe anything in here is
14 not accurate, correct?

15 A As far as the corporate structure goes, the subsidiaries of
16 United Health, this could -- that appears to be correct.

17 Q Okay. And this document is dated February 4, 2015; is that
18 correct?

19 A Yes.

20 MR. ROBERTS: Okay. Audra, could you go to the
21 description, the top column on the left and get that as big as you can for
22 Mr. Flood?

23 BY MR. ROBERTS:

24 Q Remember yesterday when I asked you who owned the New
25 York Proton Center?

1 A Yes.

2 Q And that is not any affiliate of United Health Group, right?

3 A It's listed as a subsidiary on the form 10-K of United Health
4 Group.

5 Q So let's look up here at what the exhibit says, Exhibit 8, 146,
6 at the top. Right under here on description. Do you see that, sir?

7 A Right.

8 Q "The New York Proton Center, Inc., NYPC, a to-be-formed
9 New York not for profit corporation, was contingently approved to
10 construct and operate a proton beam center." Do you see that?

11 A Yes.

12 Q So it's fair to say that according to this record, the center was
13 owned by a New York not for profit corporation, right?

14 A New York Proton Center, Inc. was to be a not-for-profit
15 corporation. This is 2015. The subsequent 10-Ks that I found listed it as
16 a subsidiary of United Health Group. That's the SEC filings that are
17 audited and need to be correct under Sarbanes-Oxley. Otherwise,
18 the -- big trouble for the firm and the accountants that file that with the
19 SEC.

20 Q So let's go --

21 A Which is what the stock market relies on. So yeah, it -- at the
22 beginning, that was to be formed as a nonprofit, but it ended up being
23 listed as a subsidiary on the 10-K, which is the report of profit and loss of
24 the United Health Group.

25 Q Let's go down to the bottom column, sir.

1 A That was in later years. That was after 2015.

2 MR. ROBERTS: Audra, could you go to the bottom of that
3 column?

4 BY MR. ROBERTS:

5 Q And at this time in 2015, the New York Proton Center was
6 composed of three hospital members, right? So that was going to be
7 owned by three hospitals, Memorial Hospital for Cancer and Allied
8 Diseases, the Mount Sinai Hospital, and the Montefiore Medical Center,
9 correct?

10 A That's what it says. It looks like --

11 MR. ROBERTS: And could we go to the next column, Audra,
12 over to the right --

13 THE WITNESS: I beg your pardon?

14 MR. ROBERTS: -- up at the top.

15 THE WITNESS: I missed the question.

16 BY MR. ROBERTS:

17 Q No question is pending, sir. I'm just moving over, as you can
18 see, to the top of the page again, looking at the left-hand column where
19 the New York Proton Center proposed to enter into an administrative
20 services and license agreement with New York Proton Management,
21 LLC, correct?

22 A I see where it says that, yes.

23 Q And then, this is what you just told the jury at the beginning
24 here, the proposed members of the New York Proton Management, LLC,
25 include the ProHEALTH Proton Center Management, LLC, which is a

1 subsidiary of United Health Group, correct?

2 A Right.

3 Q And they were proposed to own 33.63 percent of the
4 company that would manage the Proton Beam Center, right?

5 A Yes. Yes.

6 MR. ROBERTS: Nothing further, Your Honor. Thank you.

7 THE COURT: Thank you. Any redirect?

8 MR. SHARP: Thank you, Your Honor.

9 REDIRECT EXAMINATION

10 BY MR. SHARP:

11 Q Mr. Flood, if you could go to that same page, Exhibit 8 at
12 page 146. Mr. Roberts was asking you about the structure of the New
13 York Proton Center Management. Are you there, sir?

14 A Yes. Yes, I'm there.

15 Q So could you read to the jury the second sentence -- the first
16 sentence in the paragraph begins with management. And the second
17 sentence, if you could read that.

18 A Are you talking about the paragraph on the right-hand side of
19 the page?

20 Q Yeah. Yes. Yes, I am.

21 A Well, it's, "NYPM will own or lease the hard assets of NYPC,
22 including the building improvements, medical equipment, business
23 equipment, furniture, and fixtures."

24 Q And NYPM is -- one of its investors is ProHEALTH Proton
25 Center Management?

1 A Right.

2 Q And then, could you read the sentence right below, or where
3 it has ProHEALTH Proton Center Management, 33.63? Could you read
4 the sentence right below that?

5 A "ProHEALTH, an affiliate of United Health Group, Inc., will be
6 NYPC's manager."

7 Q So from your understanding as an expert in insurance
8 industry financial matters, does that indicate to you that the Proton
9 Center Management, the UHC company, will operate the New York
10 Proton Center?

11 A Yes.

12 Q Now -- I'm sorry.

13 A That's what manager -- that's what manager means.

14 Q Now, sir, you were asked a series of questions by Mr.
15 Roberts yesterday about the corporate structure of United Health Group.
16 Remember that?

17 A Yes.

18 Q And as part of our request, you reviewed annual statements
19 that Sierra Health and Life had filed with the NAIC; is that right?

20 A Correct.

21 Q Can you explain to the jury what the NAIC is?

22 A There are 50 insurance commissioners in the United States,
23 one for each state. The insurance commissioners have -- they're elected
24 or appointed by the governor of each state. The 50 members of the
25 NAIC are the 50 top chief regulators of the 50 states. And the National

1 Association of Insurance Commissioners does things like publish model
2 acts, model accounting rules, in order to get some uniformity because
3 insurance is a national business, and we don't want every state going off
4 on a different tangent.

5 And so everyone agrees that the NAIC will publish standard
6 financial forms and standard accounting and audit rules, manuals, and
7 so forth that we use in insurance accounting when we're preparing our
8 financial statements.

9 Q Now, is it fair to say that regulators, insurance regulators,
10 across the country rely upon the truth of what's put in the annual
11 statement?

12 A Yes. They're sworn to under penalty perjury by the top three
13 officers of the corporation and they're audited by independent audit
14 firms.

15 Q So yesterday, you were asked a series of questions about the
16 corporate structure of UnitedHealthcare Group. And Mr. Roberts had
17 said something like you were disregarding the legal formalities. Do you
18 recall that testimony generally?

19 A In general, but not specifically.

20 Q Now, you had said that based upon your analysis of the
21 annual statements filed with the NAIC that United Health Group was 100
22 percent owner of both the Optum arm and the insurance arm, which
23 includes Sierra Health and Life. Why do you say that?

24 A It's reflected on both the financial statements filed with the
25 NAIC and the 10-K filed with the SEC.

1 Q As part of your work in this case, did you also review the
2 Form 5500s?

3 A Yes. However, that is the location of the employees within
4 the corporate structure as opposed to the corporate structure itself.

5 Q Nonetheless, that's another governmental filing that
6 corporations make?

7 A Correct.

8 Q Just like the annual statement, you have to make it in a
9 truthful manner.

10 A Yes. And they're subject to audit as well and the audit
11 reports are also part of the documents that are available from the U.S.
12 Department of Labor, which is the custodian of the employee records for
13 pension plans.

14 Q According to the Form 5500s that you reviewed, did Sierra
15 Health and Life report any employees to the Department of Labor?

16 A No. No. When I found -- I went over that yesterday. There
17 were 150-some-odd-thousand employees at the parent, the top level of
18 United. Then one of the Optum -- Optum had zero, but one of the Optum
19 subs had 3,300 or something like that.

20 Q So can you tell the -- you were also asked some questions
21 about Sierra Health and Life and its corporate structure, reporting to -- I
22 think it was Sierra Health Services. Do you recall that testimony
23 generally?

24 A Yes.

25 Q So what is AM Best?

1 A It's a credit rating agency. Insurance companies --

2 MR. ROBERTS: Your Honor, I object to any line of
3 questioning regarding the credit rating or financials at this point in the
4 trial.

5 THE COURT: Mr. Sharp?

6 MR. SHARP: Well, he's -- I'm not asking about any financial
7 information with respect to AM Best, but Mr. Roberts opened the door to
8 imply that Sierra Health and Life is not relying upon United Health Group
9 to conduct business and that's the purpose of the AM Best.

10 MR. ROBERTS: Your Honor --

11 MR. SHARP: I'm not asking any information relative to that.

12 MR. ROBERTS: We aren't disputing Sierra Health and Life is
13 a 100 percent owned subsidiary of United Healthcare. My comment
14 yesterday only went to the fact that it is a separate corporation under
15 Nevada law.

16 THE COURT: The objection is overruled.

17 BY MR. SHARP:

18 Q So Mr. Flood, just tell the jury generally -- I mean, I guess the
19 easiest way is why -- what is it that AM Best does for insurance
20 companies conducting business?

21 A Well, without getting into any numbers, I'll just describe in
22 general what AM Best is. It's an industry source. They go to the
23 insurance companies annually and they do kind of a very comprehensive
24 review of the company's operations and finances, which I'm not going to
25 get into numbers. But they do this review. I was the head auditor of our

1 company, interim auditor, chief audit executive. I was present during the
2 AM Best examination of our company.

3 And then, they give a letter grade to the company. A, B, C, you
4 know. And this is very important to insurance companies. You know,
5 United Healthcare receives AM Best credit report, which has the
6 numbers in it, but I won't mention them. But it then derives a letter
7 grade. And the letter grade is a way of assurance that the company is
8 financially solid and how solid are they.

9 And so if you get an A, as an insurance company would like to
10 have, then when the agents are selling your insurance, they can say this
11 is an A-rated company, which means it's financially solid according to
12 AM Best, and that you can then have more comfort that they'll be there
13 at the time of claims.

14 Q So --

15 A The financial -- the decision made in the New York records
16 indicated they looked at financial status and they wanted someone
17 backing them, that United had been questioned by the financial analysts
18 in this report as to whether their -- they had negative working capital, for
19 example. And that was explained. And I quoted that in my report, and
20 that comes from Exhibit 8, where there's the financial solidity of the
21 participants and the owners and operators of the proton center the
22 regulator wants before they grant approval, which they did. They want
23 to see what the financial condition is.

24 So having seen that, I also checked AM Best, verified the numbers
25 there. And you know, that's the process.

1 Q Mr. Flood, I want to just get back to AM Best. And if you
2 could go to your report at page 8 and look at the third -- I think it's the
3 next to the last bullet point at the bottom.

4 A Correct. I'm seeing it.

5 Q And this quote that you have is a representation that Sierra
6 Health and Life made to AM Best, or based upon those representations,
7 AM Best made certain conclusions.

8 A We're maybe not -- we're maybe looking at the wrong bullet.
9 The bullet I'm looking at talks about the New York regulator document,
10 which is Exhibit 8. And --

11 Q No, it's in -- okay, go to page 8, bullet point 3. It begins with
12 United Health Group.

13 A All right. I'm sorry. I was looking at the wrong -- okay.
14 "United Health Group has a high level of financial flexibility and
15 resources to support the individual entities if needed."

16 Q Yes. And that's from AM Best?

17 A Correct. That's why they're -- not mentioning the numbers,
18 because they have a long report with numbers but we're not getting into
19 that yet. But that was one of their conclusions in getting to the A rating
20 that United got.

21 Q So -- and you had talked to the jury about the fact that in
22 your review of the New York regulators, they considered as well the
23 financial of United Health Group?

24 A Right. They attached some financial statements and they
25 used that to sort of rebut a concern about the negative working capital.

1 And they explained that in that -- that bullet, that last bullet there.

2 Q Yeah. And so --

3 A And the footnote.

4 Q -- there's lots of corporations within this big corporation,
5 United Health Group. But is it fair to say that the ultimate parent for both
6 ProHEALTH Management, New York Proton Center, and Sierra Health
7 and Life are United Health Group?

8 A I'm afraid I didn't understand the question.

9 Q So is the ultimate parent company for Sierra Health and Life
10 United Group -- United Healthcare Group?

11 A Yes.

12 Q Okay. Is the ultimate parent company of ProHEALTH Proton
13 Center Management United Health Group?

14 A Yes.

15 Q So would it be fair to say that outside of this courtroom and
16 in this business -- in the business world, Sierra Health and Life and
17 Proton -- ProHEALTH Proton Center Management rely upon and use
18 United Health Group to conduct business?

19 A That's the industry practice, is that the grade is given to the
20 entire group, and they consider the assets of the whole group because
21 they're all under joint management. And so they feel comfortable that
22 this group has the resource. And that's used by agents, by -- when you
23 take down competitors, by Wall Street, and by all the various entities,
24 regulators.

25 Everyone understands that an insurance company group is

1 financially, you look at the entire group for the financial strength of any
2 of the subsidiary companies. They have access to the assets of the
3 parent because the parent is not going to flush a subsidiary down. It
4 would give them a huge black eye and affect their credit rating, so they
5 don't --

6 MR. ROBERTS: Your Honor, I'm going to object to this as
7 non-responsive and speculative.

8 THE COURT: Hold on.

9 MR. SHARP: I mean, I was just going to cut him off.

10 THE COURT: Okay.

11 MR. SHARP: It's just hard with the BlueJeans technology
12 because he can't see me.

13 BY MR. SHARP:

14 Q So Mr. Flood, let me just conclude this. If your analysis of
15 the publicly available documents is incorrect, I suppose we'll hear from a
16 United Healthcare employee later on in this trial. Is that fair?

17 MR. ROBERTS: Object to the form of the question. It's
18 argumentative.

19 MR. SHARP: Withdrawn.

20 MR. ROBERTS: One follow-up, Your Honor.

21 THE COURT: All right.

22 RECROSS-EXAMINATION

23 BY MR. ROBERTS:

24 Q Mr. Flood, you read one sentence, second to last bullet point
25 on page 8 of your report. Could you read the second sentence in that

1 bullet point? The first sentence was, "United Health Group has a high
2 level of financial flexibility." Do you recall reading that?

3 A Yes.

4 Q Could you read the rest of that bullet point to the jury?

5 A "In addition, United Health Group maintains internal lines of
6 credit for its insurance subsidiaries, short-term borrowing needs that are
7 actively utilized by a number of the statutory entities."

8 Q So the companies like Sierra have a line of credit they're able
9 to draw down on from the parent company, is that fair?

10 A Arranged by the parent. I forgot to talk about banks before in
11 my list of industry players. The banks will extend credit to the -- a
12 subsidiary based on the credit of the parent.

13 MR. ROBERTS: No further questions, Your Honor.

14 THE COURT: Thank you.

15 MR. SHARP: No questions, Your Honor.

16 THE COURT: Thank you. Mr. Flood, you're excused. Thank
17 you.

18 THE WITNESS: Thank you.

19 THE COURT: Mr. Sharp, will you call your next witness?

20 MR. SHARP: Yes, Your Honor. Mrs. Eskew calls Stephen
21 Prater to the stand.

22 THE COURT: The clerk will swear you in and then you'll state
23 and spell your first and last name for the record. She's right here.

24 STEPHEN PRATER, PLAINTIFFS WITNESS, SWORN

25 THE WITNESS: I do.

1 THE CLERK: Could you please state and spell your first and
2 last name for the record?

3 THE WITNESS: Yes. Thank you. My name is Stephen,
4 S-T-E-P-H-E-N, Prater, P-R-A-T-E-R.

5 DIRECT EXAMINATION

6 BY MR. SHARP:

7 Q Good morning, Mr. Prater.

8 A Good morning.

9 Q Can you tell the jury what you basically have done for your
10 career, your professional career?

11 A Yes. I have spent my whole entire professional career
12 studying insurance law and practice in California and Nevada and
13 around the country. I've worked as a professor, adjunct professor,
14 lecturer, and I've worked in the industry. I can give you the background
15 if you'd like further details.

16 Q Well, before I go into that background, I want to -- I would
17 like to orient the jury.

18 [Pause]

19 MR. SHARP: Okay. Could you pull up Exhibit -- from the jury
20 instructions, the fifth page? From the jury instructions that --

21 UNIDENTIFIED SPEAKER: I don't have if I have that in my --
22 sorry. I don't know if I have that.

23 MR. SHARP: Okay. Can we do this?

24 [Pause]

25 BY MR. SHARP:

1 Q Okay. I don't know how visible that is, but these are the jury
2 instructions. Okay. Mr. Prater, I'm just going to kind of lead this
3 through. But before opening statements, the jury was given
4 pre-instructions. Okay?

5 A Okay.

6 Q And the first -- and this is -- and you're familiar with the
7 implied covenant of good faith and fair dealing?

8 A Yes, I am.

9 Q And we're going to get into the details of that later on. The
10 first element is the proton beam therapy was a covered service under the
11 terms of the agreement of coverage.

12 MR. ROBERTS: Your Honor, I object to the witness
13 explaining the law to the jury.

14 MR. SHARP: I haven't asked him to explain anything.

15 THE COURT: At this point, the objection is overruled.

16 BY MR. SHARP:

17 Q Are you here to assist the jury with regard to the first
18 element?

19 A Yes, I believe I am.

20 Q The second element is Sierra Health and Life had no
21 reasonable basis for its February 5, 2016, denial of the prior authorization
22 claim. Do you see that, Mr. Prater?

23 A I do.

24 Q Are you here to assist the jury on that element?

25 A I am.

1 Q The third element is that Sierra Health and Life knew or
2 recklessly disregarded the fact that there was no reasonable basis for the
3 February 5, 2016, denial of the prior authorization claim. Are you here to
4 assist the jury on the third element?

5 A Yes.

6 Q Now, let's go back to kind of address your experience, sir, in
7 the insurance industry. So if you could kind of -- I'm just going to start
8 out, I guess at the beginning. Do you have a college education?

9 A Yes, I do.

10 Q And where did you get that education?

11 A I graduated from San Jose State University in 1976 with a
12 Bachelor of Arts degree in sociology. I obtained a master's in criminal
13 justice administration in 1978. I was also working on a master's degree
14 in psychology, but I never finished it. Instead, I transferred to the law
15 school at Santa Clara University School of Law, where I graduated with a
16 doctorate, a juris doctorate in law in 1988.

17 Q And I don't know if the jury may be having the same
18 problem, but they may have a problem hearing you. The microphone is
19 right down there.

20 A This is it; I presume.

21 THE CLERK: Yes. Maybe just lean forward a little more.

22 THE COURT: She just said lean forward a little more.

23 THE WITNESS: Okay. Sorry.

24 BY MR. SHARP:

25 Q So did you receive any distinctions or anything like that at

1 law school?

2 A Yes, I did.

3 Q And what was that?

4 A Well, I graduated cum laude from law school.

5 Q And what does that mean?

6 A Top ten percent.

7 Q After law school, what drew you to the insurance industry?

8 A I grew up in an insurance family. My father was an executive
9 for Allstate Insurance and was an executive for a brokerage company.
10 And I was always interested in people's problems relating to insurance
11 and the intricacies of insurance law and practice. So I've been working
12 in it for almost 40 years.

13 Q And have you been employed by insurance companies?

14 A Yes.

15 Q And tell us a little bit about that.

16 A For seven years, I was employed by the Allied group of
17 companies in Santa -- headquartered in Santa Clara, California. The
18 Allied group of companies owned and operated a number of subsidiary
19 corporations that designed, marketed, and sold health insurance
20 primarily around the country. We primarily operated in the western
21 states. This was in 1981 through 1988. I was hired as general counsel.
22 Ultimately, vice president, general counsel, and then senior vice
23 president, general counsel.

24 So I was there seven years working full time as well as
25 teaching at the same time and doing other activities.

1 Q So let's -- you led into your teaching. Why don't you tell the
2 jury a little bit about that?

3 A I was hired as an adjunct professor at San Jose State when I
4 was 25. I worked there for two years. And then I was hired in 1983/84
5 school year to work at Santa Clara University Law School to teach the
6 only course on insurance law and practice. I taught there -- I was a
7 member of the faculty for 30 years.

8 I resigned in 2013 because of Parkinson's disease. I couldn't get to
9 school anymore and hold the books and do the work. So I've been
10 consulting primarily since then. But I taught insurance law and practice
11 for 25 years at Santa Clara University School of Law. I was an adjunct
12 professor. I retired as a distinguished lecturer in law.

13 Q And as a law professor on insurance, have you become
14 familiar with industry standards for claims handling?

15 A Yes. I've been active all my career in training claims
16 handlers for insurance companies, for the major insurance companies.
17 I've trained their handlers and talked at seminars and conventions,
18 national, state, and local conventions for insurance company people that
19 handle health insurance claims.

20 Q And what are some of the insurance companies that you
21 have consulted with to train claims handlers?

22 A Most of the major ones. I had a contract for several years for
23 21st Century, 20th Century. I trained the claims handlers at Berkshire
24 Life. I trained the claims handlers at Mass Mutual. I trained the claims
25 handlers at CSE. I was a training officer for ten years for an insurance

1 company called Civil Service Employees Insurance Company, which was
2 organized by firemen and police and does business in the western
3 United States.

4 I had a phone in my office for ten years where the claims people
5 could call me and ask for direction and advice. I had a dedicated phone
6 line for them. And I've done training for Blue Cross Blue Shield. A lot of
7 agents come to the National Association of Insurance Commissioners or
8 the National Association of Health Organizations, you know, and I've
9 spoken at some of those conferences. And so I've met all kinds of
10 people throughout my career on both sides of the fence.

11 Q Have you worked with any Departments of Insurance?

12 A Yes. Very closely with the California Department of
13 Insurance in formulating and designing their Fair Claims Practices
14 regulations, which set forth standards for handling claims fairly and in
15 good faith that are well known and understood by people handling
16 insurance claims or should be.

17 Q And just so we're clear that we call it the Department of
18 Insurance. What is that entity responsible for?

19 A For regulating the business of insurance.

20 Q And is the business of insurance considered highly
21 regulated?

22 A Yes, it is, because of the public interest involved. It's a very
23 important business in our society that greatly affects the public interest.
24 And so it's very heavily regulated.

25 Q And you were talking about the California Department of

1 Insurance, and here in Nevada is the Nevada Division of Insurance.

2 A Yes.

3 Q Same function, they regulate insurance companies?

4 A The best that they can. They don't have big budgets.

5 California has the biggest budgets. New York has a big budget. But I
6 suspect Nevada doesn't have a very big budget. And when you're trying
7 to regulate an insurance industry that has 25 cents out of every
8 American dollar in their bank account, it takes a lot of people. And the
9 departments of insurance don't have a lot of people, so they delegate it
10 out. And juries regulate insurance companies, in my opinion, more than
11 anybody else.

12 Q So is the part of the insurance regulation structure a promise,
13 really, on the part of the insurance company that they're going to follow
14 the laws applicable in a given state?

15 A Well, I always put it this way. To be engaged in the business
16 of insurance is a privilege. And you get a license and certificate of
17 authority to engage in the business. And along with the license and
18 privilege to sell promises in exchange for money comes responsibility to
19 follow the rules and regulations. Especially those applicable to claims
20 handling, because that's the time the person finds the true value of the
21 policy is at the time of the claim. You know, it's easy to pay it up front.
22 But at the time of claim is when the rubber really meets the road, and
23 you see if what you bought is worth what you get.

24 Q So have you had experience writing insurance policies?

25 A I -- at Allied in my early years, I was involved in helping to

1 draft health insurance policies and brochures and marketing materials
2 because we had an agency force. And we operated through independent
3 agents, as well. So we traveled around Nevada, California, Arizona, and
4 elsewhere on a regular basis and distributed marketing materials. So I
5 was involved in the point of sale marketing materials as well as the
6 helping with design of the policies for health insurance and the booklets
7 and the AOCs and everything.

8 Q And have you consulted or were you part of -- is California
9 asked -- have you been part of developing policies in California with
10 regard to health insurance?

11 A The Department of Insurance or for insurance companies?

12 Q Well, no, for the government.

13 A Oh. Yeah, the Department of Insurance consults with me on
14 a regular basis. Most of the work I've done -- I've been an expert for the
15 Department of Insurance on several of their matters where they go
16 against out of state carriers that don't follow the rules. So I've testified
17 as an expert for them and worked as a consultant for many years.

18 But the main thing I do for them is work on what's called their Fair
19 Claims Practices regulations, which were created by the NAIC, which you
20 just heard about, and adopted by every state in the nation, including
21 Nevada. And so there's certain -- like ten commandments or rules or
22 standards that we know we can't break, otherwise we can get into
23 serious trouble. And I help the Department of Insurance regulate
24 insurance companies that violated those standards and I help them write
25 some of the regulations to come up with the standards.

1 Q So the standards that we're going to talk about today, are
2 those only, like, limited to Nevada? Is the -- I mean, how does it all
3 work?

4 A The standards that I believe you're going to ask me about
5 and that I talked about in my report are well known and understood by
6 those engaged in the insurance business. And they have to be
7 understood in order to do your job fairly and honestly vis a vis a
8 policyholder.

9 Q So are the same or similar standards that exist in California,
10 for example, exist in Nevada?

11 A Yes. Very similar. Almost identical.

12 Q Now, as I understand it, talking to you, you were appointed
13 by the California governor to develop a health insurance policy for
14 teachers. Can you talk a little bit about that?

15 A Well, that was many years ago, maybe 10 or 15 years ago
16 now. I don't recall. But I was appointed by the California Secretary of
17 State to the HEART Commission, the Health Executive Advisory Review
18 Team, to create a health insurance plan for 600,000 active teachers in
19 California.

20 Q So is it fair to say, Mr. Prater, that you've, through your
21 30-plus-year career, that you've become familiar with how insurance
22 companies operate?

23 A Yes. I spend all of my time and energy and I've written about
24 it and spoken about it and testified about it on a regular basis. That's
25 really pretty much all I've done other than pro bono work. A lot of my

1 practice these days is -- and throughout my career has been pro bono
2 work where I help insureds for free to recover money that I think they're
3 entitled to recover that they've been wrongly withheld. And I've helped
4 hundreds of people recover millions of dollars, and I do it for nothing.
5 I've had the pleasure of doing that my whole career. I've helped
6 hundreds of people and I think I've only charged two or three my whole
7 career.

8 Q Well, now let's talk about that a little bit, because you
9 are -- you have over the years been a retained expert.

10 A I'm sorry?

11 Q You -- over the years, you've been an expert witness.

12 A Yes.

13 Q And tell us a little bit about that.

14 A Yes. I've been retained -- I'm -- I look at a lot of cases. The
15 carriers send me cases. Insurance companies send me cases. Lawyers
16 send me cases. They ask me to review them. And if I agree with the
17 case or the principals or if I want to talk about them, I'll agree to testify.
18 But that's usually less than about ten percent of the cases that I review.
19 Mostly, I review and consult.

20 But your specific question again?

21 Q Well, I think you answered it. Obviously, you're here today --

22 A Oh, yeah. My testimony. I've testified in about 25 states in
23 the country over the last 35 years. So I've testified in almost 100 jury
24 trials and other hearings and administrative hearings and various sorts
25 and in about 20 to 25 different states, including Nevada on several

1 occasions.

2 Q And in Nevada, have you testified for insureds?

3 A I testified in one trial for an insurance company and one trial
4 for an insurer.

5 MR. SHARP: Jason, if we could pull up the second slide to
6 the PowerPoint?

7 BY MR. SHARP:

8 Q So Mr. Prater, I have in front of you -- I have a crude drawing
9 of basically an insurance operation. Can you explain what this is
10 showing to the jury?

11 A Well, I think what it purports to show is some of the
12 departments in an oversimplified way of an insurance company so you
13 can understand the different functions within an insurance company. I
14 used to divide it up into four pieces of pie, but I can understand what's
15 going on here.

16 One of the segments of the insurance company is an underwriting
17 department, where they decide who to sell the policy to. You know,
18 health insurance companies know that there's a risk that smoking causes
19 greater claims. And so they'll charge more typically for smoking. So in
20 underwriting that, take an application, they ask a series of questions, and
21 they decide whether they want to take you as an insured or not. They
22 also are involved in developing products that marketing takes out to the
23 community and tries to sell and get people to buy. So there's point of
24 sale and marketing materials.

25 The actuaries are the ones that crunch the numbers, and they

1 study the relationship between smoking and lung cancer and come up
2 with prices, so the underwriters know how much to charge for a policy,
3 whether it's auto, homeowners, health insurance, it doesn't matter. The
4 actuaries crunch the numbers and help determine how much to charge.

5 Utilization management is a new -- a relatively new kid on
6 the block. It's come around since the '80s, mid-'80s, early '90s, where
7 utilization management is starting to creep into the insurance world.
8 And a lot of the utilization management functions of the insurance
9 company disregard the insurance rules, and I think that's wrong and
10 improper and I'm here to talk about that today.

11 The claims department --

12 MR. ROBERTS: Objection. Non-responsive. Move to strike.

13 THE COURT: If you could just --

14 MR. SHARP: I'll just ask a new question.

15 BY MR. SHARP:

16 Q So let's go -- let's start with the claims in this simplified chart.

17 A Okay.

18 Q What does the claim department do?

19 A The claims department's job is to deliver on the promise, to
20 carefully read the policy that was issued and sold to the insured and
21 understand what the coverages were that were promised and then to
22 deliver on the promise. Claims department's job is to deliver on the
23 promise, not to be concerned about profits.

24 Marketing, underwriting, actuaries, they can be concerned about
25 profits and profitability. Claims people cannot be concerned about

1 profitability. They have to deliver on the promise and be unconcerned
2 about finances.

3 Q And in this case, Sierra Health and Life defines the
4 preauthorization as a preservice claim?

5 A Yes. This insurance policy at issue in this case considers a
6 preservice request for proton beam to be a claim. It's a claim for benefits
7 under the policy. So it's the same as a claim after the services are
8 performed. It's just one that's a preservice claim because the services
9 hadn't been approved yet.

10 Q So the utilization management portion as regards to this
11 case, they're performing the claim function?

12 A Well, yeah. The utilization management in this case is the
13 preservice utilization. There's usually a preservice, concurrent, and
14 post-service. There's three different kinds of utilization review. This is
15 the first kind, which deals with the request for benefits under the
16 contract. And they're supposed to act fairly and in good faith in
17 response to that claim.

18 Q So the preservice -- or the people handling these preservice
19 claims, they have the same obligation to fulfill service, not profit?

20 A Absolutely. It's a claims function to decide on coverage. Is it
21 covered or isn't it? That's a claims decision.

22 Q And you're familiar in this case -- well, you've heard of Dr.
23 Ahmad?

24 A Yes.

25 Q And you were -- did you listen to his testimony via

1 BlueJeans?

2 A I watched it, yes.

3 Q Yeah, you just watched. Sorry.

4 A Yeah.

5 Q And did you hear that he participates in a bonus plan?

6 A I did.

7 Q What kind of -- and from an industry standard perspective,
8 what kind of concern does that pose to you?

9 MR. ROBERTS: Objection, Your Honor. Dr. Ahmad testified
10 that he currently is in a bonus plan. There was no testimony he was in
11 one at the time of this decision in his role reviewing these claims as a
12 medical director.

13 THE COURT: Mr. Sharp?

14 MR. SHARP: Well, I think they opened the door to all of the
15 things that he does in the appeals and currently sitting on the appeals
16 board. I mean, that was testimony they elicited. It wasn't something Mr.
17 Terry elicited. So I think that opened the door on that.

18 MR. ROBERTS: And beyond the scope of his report, Your
19 Honor. There's nothing in any of his three supplements on this issue.

20 MR. SHARP: Well I mean, the purpose of listening to the
21 testimony, I mean, I don't know how we could have had a report based
22 on something they elicited on their own during trial.

23 THE COURT: The question will be allowed. It will just be
24 limited to the fact that he gets bonuses now in appeals, not when he was
25 medical director.

1 THE WITNESS: Okay.

2 BY MR. SHARP:

3 Q So why does his bonuses -- or does the bonus system
4 provide any concern to you?

5 A Bonus systems for people making claims decisions are
6 improper in the business of insurance. You can't pay claims people
7 bonuses because they -- it creates an inherent conflict of interest. And
8 they have a quasi-fiduciary relationship where they have to act fairly and
9 in good faith and deliver on the promise without regard to profitability or
10 the bottom line of their bonus.

11 And if you give claims people a bonus, they're smart. They figure
12 it out that if the company makes money, you make money, and your
13 bonus is bigger. And you can't have that in their head when they're
14 fairly and adequately and honestly adjusting a claim. It's not proper.

15 MR. ROBERTS: Move to strike as beyond his expert report.
16 Brand new opinions. We had no opportunity to get a witness, Your
17 Honor.

18 THE COURT: It's overruled. It's based upon the fact that Dr.
19 Ahmad testified it at trial.

20 BY MR. SHARP:

21 Q So what I'd like to do, sir, is kind of move to the concepts of
22 insurance. I mean, the -- you know, the general concepts and principals
23 of insurance. Okay?

24 A Okay.

25 MR. SHARP: Jason, could you go to -- I think it's the next

1 slide.

2 BY MR. SHARP:

3 Q And could you go -- kind of go through the principles of
4 insurance, if you will?

5 A Sure. Insurance is unlike other sales contracts or agreements
6 you might enter into because it's the sale of a promise, an important
7 promise that if you pay us premium today, when and if something
8 covered happens, occurs in the future, we'll be there for you. It's an
9 intangible. It's a promise.

10 You know, you go to the grocery store, and you want to buy
11 groceries. You look at them, you taste them, you pick them up, you take
12 them home, and you eat them, and you get something for your money
13 right away. With insurance, you pay money in exchange for a promise,
14 and you just trust that they'll fulfill it. You have no way to make them
15 fulfill it because they control the checkbook.

16 With a -- you buy a chair or a widget or a piece of fruit, you can
17 touch it, take it home and eat it. But you can't do that with insurance.
18 You just hope and pray. Usually, you throw it in a drawer, and you hope
19 and pray you don't need it. But if you do, that's when you're entitled to
20 be treated fairly and in good faith.

21 Q Let me just ask you a question that's a follow-up on that.
22 Can anybody just start up an insurance company? Like, just go down to
23 the Secretary of State and start opening an insurance company?

24 A Well, there's a lot of requirements. I'm not an expert on
25 starting -- I've started insurance companies, but I'm not an expert on it.

1 But I know there's a lot of regulatory work that you have to go through.

2 Q But generally speaking, you need a certificate of authority
3 for --

4 A Oh, yes.

5 Q And that's what I was getting at.

6 A Oh, yeah. Yeah. A license. A license is called a certificate of
7 authority and the insurance departments usually issue it after
8 scrutinizing the enterprise.

9 Q So let's go to the second principle, an insurance company is
10 aware that an insured buys insurance for protection, peace of mind, and
11 security. Well, I think -- I mean, if you need anything else. You've kind of
12 dealt with that.

13 A Yeah, I dealt with that. I think in the first one, I think I
14 covered that.

15 Q How about the third one, an insured is often vulnerable and
16 dependent on the insurance company? Can you give us an idea of what,
17 from an industry standards perspective, why that's important?

18 A Well, we train claims handlers to know and understand that
19 they are dependent on us. We control the checkbook. We have to follow
20 the unfair claims practices and rules and regulations of the state we're
21 operating in or the nation, whatever the case may be. And we know that
22 the people are often vulnerable. And especially with health insurance,
23 people are sick. You know? They're filing a claim. They're not trying to
24 get a new car or a new house, they're just trying to get treatment for
25 their body. That's what we call no secondary gain motivation.

1 With health -- with a car, you'd wreck your car, sometimes
2 you get a new one. With a house that burns down, sometimes you get a
3 new one. But with health insurance, you don't get anything for it. You
4 just get maybe treatment to save your life, if that's what you're looking
5 for. So it's not likely to be fraud. There's not likely to be somebody
6 trying to get proton beam treatment for -- when they don't need it, you
7 know. So it's a factor that you have to consider with health insurance
8 that makes it unique.

9 MR. SHARP: Can we go to the next slide, Jason?

10 BY MR. SHARP:

11 Q So I'd like to talk to you about the next principle. The
12 insurance company is the expert on its insurance policy, you know,
13 processing the required authorization requests. So I just want to focus
14 on the first part, the insurance company is an expert on its insurance
15 policy. Is that something that's commonly known?

16 A Yeah. Yes. Insurance policies, it's well known and
17 understood, are oftentimes complex in their phraseology. But the
18 insurance companies design them and issue them as they see fit. They
19 issue them on a -- usually a take it or leave it basis. You don't negotiate
20 your health insurance or your -- the terms and conditions, the words.
21 They create the forms.

22 They're the experts on it. They have the duty to create it plainly,
23 clearly, and honestly and conspicuously so that the average person
24 understands what is involved. It's not often the case, but that's the
25 obligation of the insurance company to try to do that and make it

1 understandable to the average, ordinary applicant for insurance.

2 Q Who writes the --

3 MR. ROBERTS: Objection, Your Honor. Legal conclusion.

4 THE COURT: He's already answered the question.

5 MR. SHARP: I think it was premised on an insurance industry
6 standard. I mean, we're not --

7 THE COURT: The question has already been fully answered.
8 That's the reason why the objection is being overruled.

9 MR. ROBERTS: Thank you, Your Honor.

10 BY MR. SHARP:

11 Q Okay. So in the insurance industry, from an insurance
12 industry standard perspective, who writes the insurance policy?

13 A The insurance company or the people that have been hired
14 to do it.

15 Q With regard to the second part of that, and we're here about
16 a prior authorization request and the processing of a prior authorization
17 request, why would an insurance company be an expert from an
18 insurance industry standard perspective?

19 A Well, it's considered a claim under the policy, and they write
20 the terms and conditions of the claim and when and if it's payable and
21 under what circumstances. They draft all the language.

22 Q And the next point, the denial of a prior authorization request
23 can result in the insured not obtaining treatment recommended by
24 insured's treating doctors. From an insurance industry standard
25 perspective, is that something, like, Sierra Health and Life should

1 understand?

2 A Absolutely. I mean

3 Q And why?

4 A Again, it boils down to something as simple as they control
5 the checkbook. You can't make them write a check if they don't want to
6 write a check. You can't make them approve a claim or request for
7 coverage unless they want to improve it. So it's -- they have all the
8 power. And with that power comes the responsibility to follow the rules.

9 Q Now, these standards that we're -- or these principles we are
10 discussing, is it just applied to health insurance?

11 A All insurance. All insurance. These principles basically apply
12 to all lines. Health insurance, definitely. Life, health, disability, personal
13 lines, auto. Workers' Compensation has some unusual rules. And
14 there's -- there's 21 different classes of insurance in California, so there's
15 some nuances in different classes. But for the most part, these general
16 principles and rules apply. They certainly apply here, and they apply
17 across the nation with insurance policies.

18 Q So like, we have prior authorization requests here today.

19 A Right.

20 Q We could have the same principle when it comes to an auto
21 claim?

22 A No, no. Prior authorization, you don't request on an auto
23 claim. That's unique to medical.

24 Q No, no. What I'm saying is are -- you're talking about
25 principle with respect to prior authorization. That's why we're here

1 today, that the concept of an insurance company being an expert on the
2 policy, and it's processed for handling claims, that applies, you know,
3 whether I'm filing an auto claim, disability claim. It doesn't matter.

4 A Yeah. You have to follow the same general rules and
5 standards with regard to the different claims. And I think that answers
6 your question.

7 Q So if we get into this case, you've read Dr. Liao's deposition.

8 A Yes.

9 Q And there's been some indication in this court that -- well, let
10 me just have you explain this. I mean, insurance companies should not
11 expect the treating doctor to be an expert on the terms of the insurance
12 policy. Is that a principle of insurance?

13 A Yeah. And doctors generally are not insurance experts. And
14 so you don't expect them to be experts on the policy.

15 Q Let's go to the next. So before we address that, I want to talk
16 to you about what have you reviewed in this case to form your opinion?

17 A I've reviewed thousands of pages of documentation,
18 including the depositions of these various parties involved with the
19 handling of this request for coverage. I've reviewed the insurance policy
20 thoroughly, the EOC, as they call it in this case, which is a term often
21 used for a group insurance policy. This is a group insurance policy
22 issued to a group representative. So they don't get an individual policy
23 in the name of the Eskews. They get coverage under a group. And it's
24 called a certificate of coverage or an agreement of coverage.

25 So I reviewed that carefully. I reviewed the depositions of several

1 of the people involved. There was about three or four banker's boxes of
2 documents that I reviewed, including the documents produced by United
3 Healthcare in discovery, the deposition testimony of the insured's wife,
4 and others.

5 Q So let's talk -- continue the -- are there certain industry
6 standards for fair claims handling?

7 A There are.

8 Q Now, let me go back to the ELMO. This is the preliminary
9 jury instruction that was provided to the jury before opening statement.
10 I think it's the third instruction. And it reads, "In every insurance
11 contract, there is an implied covenant of good faith and fair dealing that
12 neither an insurance company nor an insured will do anything to injure
13 the rights of other parties to receive the benefits of the agreement." And
14 as part of the insurance industry standards, are insurance companies
15 generally aware of the implied covenant of good faith and fair dealing?

16 A If not, they have to be in order to do their business properly.
17 Yes. The answer is yes. Most reasonable insurance companies are
18 aware of the principle. They train their people on the implied covenant
19 of good faith and fair dealing. And then, you must train claims
20 decision-makers on that duty in order for them to do their job fairly.

21 Q Now, the instruction continues. It talks about the relationship
22 of an insured to an insurer as one of special confidence and akin to that
23 of a fiduciary. And we kind of dealt with that concept already from an
24 industry standard perspective. Is that right?

25 A Yes, I think so. It's a heightened obligation of trust because

1 of the selling of a promise in exchange for money, which is unique to
2 this business.

3 Q And then, it continues, "This special relationship exists in
4 part because insurance companies are well aware consumers contract
5 for insurance to gain protection, peace of mind, and security against
6 calamity." And we've talked about that concept as well --

7 A Right.

8 Q -- from an insurance industry standard perspective.

9 A Yes. And it's always in my teaching and training, at the
10 beginning of my teaching and training, these concepts, to make sure that
11 they're -- you retrain -- we had a saying in the insurance business. You
12 have to retrain your people every week because you got to make sure
13 their mindset stays focused on their obligation.

14 Because sometimes as a claims' handler, say for an auto
15 claim or you know, a homeowner's claim, they -- every day, they get told
16 it's an expensive camera install, and maybe it's a cheaper one, and they
17 can get a little cynical. And they can get a little distrustful and a little
18 mean. And so you have to train them and remind them that
19 policyholders are mostly honest and they're seeking to obtain the benefit
20 that they pay the premium for. And you have to act in good faith, and
21 you have to follow the rules of good faith in order to fulfill that promise.

22 Q Now, the next sentence continues, "To fulfill its implied
23 covenant of good faith and fair dealing, an insurance company must give
24 at least as much consideration to that interests of the insured as it gives
25 to its own interests." And is there an insurance industry standard to

1 fulfill this requirement?

2 A Yes, there is.

3 Q Is that generally referred to as equal consideration?

4 A Equal or greater, often referred to as. In some states, it says
5 you must give at least as much consideration and some states say equal
6 consideration. The concept is the same. When you're evaluating a claim
7 or a request for benefits in this case, you have to make sure that you
8 give the insureds an opportunity to present fully their side of the story
9 and that you have people that are equipped to understand that story and
10 make a right decision under the policy.

11 They have to understand in this case, for example, the medicine
12 involved, to a certain degree, and they have to understand more
13 importantly, in my perspective, the insurance principles involved. The
14 duty of good faith and fair dealing and the regulations or codes of
15 conduct that apply to their activities.

16 Q And have you taught insurance company claims handlers
17 about the equal consideration?

18 A I did it on a regular basis, as I said. For CSE, I was their
19 training officer. I did it for other carriers on a contract basis where they
20 brought me into training. Their whole claims department, they wanted
21 them to get reoriented to the principles, the basic principles of acting
22 fairly and in good faith. And so I've offered my services to do that on
23 occasion. Not recently because of my illness. But you know, prior.

24 Q Now, we've been talking generally about insurance industry
25 standards, and you talked about statutes, regulations. Where else do

1 these industry standards develop from?

2 A Well, they come from the insurance industry itself. The
3 insurance industry adopted in the '50s, '60s, '70s, a series of fair claims
4 practices, rules, and regulations. Kind of like the ten commandments.
5 There's really 16, but there's basic standards of conduct, like you know,
6 you shall not misrepresent important policy provisions. You shall
7 not -- you must adopt and implement reasonable procedures for
8 handling claims.

9 You have to affirm or deny coverage, and if you deny coverage,
10 you have to point out where in the policy it says it's denied. And you
11 have to read the -- more importantly, at the outset of the claim or request
12 for coverage, you have to put on what I call good faith eyeglasses and
13 you have to read the insurance policy as a document that sells promises
14 so that when there's a coverage agreement, you have to read it broadly.
15 Where there's an exclusionary limitation on coverage, you have to read
16 it narrowly against you.

17 If there's any lack of clarity in an exclusion or limitation, it's the
18 insurance company loses. If it's ambiguous or capable of more than one
19 interpretation in the policy, the insurance company loses. The insured
20 wins that battle because the insurance company drafted the contract.

21 Q Mr. Prater, I want to kind of also come back to does some of
22 the standards that we're here to talk about today, did they also develop
23 from case law that developed by court system?

24 A The National Association of Insurance Commissioners, the
25 case law. Yeah, there's decades of case law in Nevada and elsewhere

1 around the country that establishes the duty of good faith and fair
2 dealing.

3 Q And in the course of your career in studying industry
4 standards, have you familiarized yourself generally with the case law?

5 A Yes, I have.

6 Q So I want to go through -- or I have in front of you
7 three -- where our caption is insurance industry standards for claims
8 handling. Do you see those three?

9 A I do, yes.

10 Q Are those standards for handling claims?

11 A Yes, they are.

12 Q So let's go through the first one. The insurance company
13 should pay a claim unless it has a proper reason in the insurance policy
14 to do so. Tell the jury what the standard is with regard to this.

15 A I've always trained claims handlers my whole career. But an
16 insurance company's claims handler's responsibility is to pay all covered
17 claims or approve all covered claims that are honestly made as early as
18 possible without unnecessary delay. So the obligation is when you get a
19 claim come in or request for coverage like we have in this case, you have
20 to approve it unless you have a reason, a valid and good reason not to
21 approve it.

22 And then if you decide not to approve it, you have to articulate and
23 detail the reasons and document it and investigate it and make sure that
24 you've given -- you can demonstrate from the claim file or the activity
25 logs that you gave the insured's interests at least as much consideration

1 as you gave your own. It has to be objectively verifiable. It has to be
2 written down. There's a saying in the claims departments, if it's not in
3 the file, it didn't happen. So we make sure that people document things
4 so that we understand their reasoning because if it didn't -- if it's not
5 documented, then who knows why they did what they did?

6 Q And is that something you teach insurance companies?

7 A Yes. In fact, that the regulation and standard in every state
8 that the claims file has to contain all in those documents and work
9 papers. And so it's you can reconstruct. The Department of Insurance
10 might want to come in and check up on a claim. And so the Department
11 of Insurance requires as a condition of having a license that you maintain
12 a claim file that you can reconstruct the activities, what happened on a
13 particular claim. So you can see the date and time and who did what
14 and why.

15 And so the insurance commissioner can see. And then if there's a
16 denial of the claim, so that a jury can see after the claim comes to a jury,
17 if it ultimately ends up there, so you can see what the basis was for their
18 decision. That's why there's documentation requirements.

19 Q Now, we have the second bullet, which is the standard to
20 consider -- for an insurance company to consider its insured's interests
21 at least equal to its interests. And we've addressed that.

22 A I think so, yes.

23 Q So the next concept that we -- the next standard that we have
24 in front of is the insurance company should conduct a prompt, fair, and
25 thorough investigation and evaluation of the request. Whether it's a

1 claim or a request for prior authorization. So what I want you to talk
2 about, because we're introducing two new concepts, an investigation
3 and an evaluation. So could you explain this third standard here?

4 A Yeah. Let me start by saying that if you decide to make the
5 decision to approve a claim, which is most claims that come in these
6 days -- or in the health insurance world, they're small claims. And so
7 they're paid by computer, and they're approved automatically. It's when
8 you have the bigger claims that sometimes you have a duty to
9 investigate because you want to deny the claim as submitted. If a claim
10 or a request for coverage is submitted and the carrier is going to approve
11 it, they don't have to investigate anything. They've approved it. They've
12 said go forward, get the treatment, you're covered.

13 But if they want to deny a request for coverage, they have to have
14 a sound basis for it at the time they do it, and they have to articulate it in
15 the denial letter which sets forth all the reasons. You can't leave
16 anything out, which means you have to investigate and be able to
17 demonstrate that you've considered the insured's interests at least equal
18 to your own and that you -- that they've said, you know, if there's
19 doctor's records that you need, then you go get the doctor's records.
20 You ask for it. You pick up the phone.

21 You know, that's your -- it's an insurance company claims
22 handler's job to go out and investigate and gather information to support
23 its position if it's going to deny. If it's going to pay, no problem. Don't
24 investigate, just approve, which happens with the majority of claims.
25 But if you don't want to pay, you have to follow the rules to the T, and

1 document it and have a sound basis for it. And it has to be reasonable
2 and fair and just.

3 Q In your expert opinion, is it widely known within the
4 insurance industry that an insurance company should conduct a prompt,
5 fair, and thorough investigation?

6 A Absolutely. It's every insurance company claims handler that
7 is trained properly will tell you that they know that like the back of their
8 hand.

9 Q And is that something that you train claim handlers about?

10 A Yes. And it's well set forth in the law in every state. I mean,
11 it's universally known and understood.

12 Q And is there some kind of exception that health insurance
13 companies engaging in utilization management don't have to conduct a
14 prompt, fair, and thorough investigation and evaluation?

15 A No. If they're going to deny a claim, they better have a
16 sound basis for it and they better have conducted a full, fair, and
17 thorough evaluation. Otherwise, they're guilty of bad faith.

18 MR. SHARP: Jason, if we could go to the next slide.

19 BY MR. SHARP:

20 Q So we did -- now I've got some more standards for fair
21 claims handling for health insurance.

22 A Correct.

23 Q But generally speaking, the standards that we're listing
24 before the jury, that applies to all insurance?

25 A Yeah. All insurance claims. Yes.

1 Q So I mean, like for example, is there a standard within an
2 insurance company who's conducting utilization management should
3 give the treating doctor's opinion respect and weight?

4 A Well, I think that goes without saying that a treating doctor
5 has an advantage. They've put their hands on the patient. They're
6 interested in the wellbeing of the patient and getting them well. Paper
7 review doctors like Dr. Ahmad and other people that work in the United
8 Healthcare system as medical reviewers, they don't ever see the patient.
9 They never touch them. They never look at them. In many cases,
10 they're not qualified to do so if they did.

11 Q And so we have a treating doctor's opinion, because that's
12 specific in this particular case. But let's say we had a, I don't know,
13 home that burned down and the structural engineer is saying that this is
14 the repair that needs to be done.

15 A Right.

16 Q He's been retained by the insured. In that context, what's the
17 insurance company supposed to do with regard to the insured's expert?

18 A Well, you reasonably -- you look at it reasonably and
19 consider it fairly. You know, nobody gets to decide it on their own. The
20 treating doctor doesn't decide everything on their own. The appraiser in
21 your case, or the person doing the work for the homeowner's care
22 doesn't decide it on their own. You weigh and you balance information
23 when you're making your claims decision. You have to --

24 Q So if a homeowner's insurance company came to you and
25 said I'm not going to consider the opinions of the insured's structural

1 engineers in my example, what would your response be?

2 A Well, I think you need to consider it. You need to give the
3 insured's interests equal consideration. So if they have a structural
4 engineer that has evidence that supports their position, you need to give
5 it full and fair consideration. Doesn't mean it's controlling. Just means
6 you have to give it full, fair, reasonable consideration.

7 Q And then, the next standard says the insurance company
8 must diligently search for and consider evidence that supports coverage
9 of the requested treatment. Is that an industry standard?

10 A It is. That's, again, giving the insured's interests at least as
11 much consideration as you give yourself. It's looking for and
12 considering evidence and soliciting information that might support the
13 insured's claim instead of just looking for reasons to deny the claim,
14 which some carriers do, and some adjusters do, which is improper. You
15 can't look for reasons to deny it. You're supposed to have a good faith
16 focus. You're supposed to have an eye towards looking for coverage as
17 opposed to looking for loopholes or ways to escape coverage.

18 Claims people should -- coverage decision-makers should never
19 look for loopholes or ways to escape coverage. They should look for
20 ways to affirm coverage if at all possible.

21 Q And so in my example earlier about the homeowner's claim,
22 I mean, same concept. If the insurance company were to disregard the
23 insured's structural engineer, what would your concern be?

24 A Well, you can't. I think I've established that. You can't
25 disregard it. That wouldn't be fair and proper. It doesn't mean the

1 structural engineer wins the day or creates coverage by his or her
2 opinion. What it means is you have to investigate and consider that
3 evidence in support of as much as you're looking for evidence to not
4 support.

5 Q So for example, like, there's this concept of diligently
6 searching for and considering evidence. In my homeowner's example,
7 would a reasonable insurer that didn't understand an opinion by the
8 structural engineer request additional information?

9 A Well, they'd hire outside experts.

10 Q And --

11 A Yeah. They would -- they would hire -- if they didn't
12 understand something that came in, the claims person's job is to go up
13 the chain to their supervisor and say, I don't understand something or
14 there's evidence that something exists that might support the insured's
15 claim, and then go out and get it.

16 Q And they could request that additional information from the
17 structural engineer, correct?

18 A That's one way they can get it.

19 Q So let's go to the third one. And is there an industry
20 standard that an insurance company should interpret the insurance
21 policy fairly and objectively?

22 A Yes. That's critical. That's the first step in an insurance claim
23 or request for coverage is to look at the policy at issue. Because
24 everybody has different policies and there's many different policies that
25 exist. And terms and conditions are often different. The other thing that

1 you want to check out as a claims handler, ask questions about, which is
2 routinely done, is if there are any point-of-sale promises made by an
3 agent or broker or a brochure or anything that was given to them that
4 might have misled them or led them to believe something that may not
5 be true. So because --

6 MR. ROBERTS: Objection. Non-responsive. Goes to the law
7 of Nevada and the Parol evidence rule.

8 MR. SHARP: I'm not sure -- anyway, I'll rephrase.

9 BY MR. SHARP:

10 Q There are industry standards as to how one should interpret
11 an insurance policy, right?

12 A Yes, there are.

13 Q And is one of those -- so yesterday, the jury heard the
14 concepts of coverage versus exclusions.

15 A Yes.

16 Q And so could you briefly explain to the jury what we're
17 talking about, a coverage provision versus an exclusion provision?

18 A Sure. We're required as claims people to interpret coverage
19 provisions broadly. You know, if there's any uncertainty or ambiguity in
20 the language, you rule in favor of the insured. You rule against yourself.
21 Generally. And if the claims handler doesn't know how to do that, they
22 check upstream and they get the answers that they need.

23 But exclusions or limitations are narrowly construed. So if there's
24 an exclusion or limitation on coverage, something that takes away the
25 promise, is not clear, plain, conspicuous. You know, you can't put an

1 exclusion under a heading that says additional benefits included and put
2 an exclusion in there. You can't do it that way. You have to make your
3 exclusions really tight, clear, plain, and conspicuous because if they're
4 ambiguous, you're going to lose.

5 And so the claims handler needs to analyze the actual policy
6 coverage because that's the document in which the coverage arises.
7 And they have to be trained to do that using these coverage broad,
8 exclusions narrow, ambiguities, we lose. They have to understand those
9 basic principles in order to adequately and fairly do their job.

10 Q So for example, if in this courtroom, two different employees
11 from Sierra Health and -- or from United Healthcare or Sierra Health and
12 Life came into this court and gave two different interpretations about a
13 particular provision in the contract, would that be an example of an
14 ambiguity?

15 A It sounds like an ambiguity to me. If different people had
16 different reasonable constructions of the same language, that's the
17 nature of ambiguity. And that's why carriers have to draft them
18 precisely. They draft a contract. They're the experts. It's their job to do
19 it properly. If they don't or if their agent leads somebody to believe
20 something is covered that might not be true, you know, you have to take
21 that into consideration. You have to weigh and balance it as a claims
22 handler before you can make a decision to deny.

23 Q And in the context of my example, you have two separate
24 interpretations. What would a reasonable insurer following reasonable
25 standards, which interpretation would they apply?

1 A They would adopt, in your hypothetical, the one that favored
2 the insured.

3 Q And that's a known industry standard?

4 A Yes. If you don't do that, you end up in front of a jury and
5 you don't want to be there if you can avoid it if you're an insurance
6 company.

7 Q Now, let me go back to do you teach insurance claims
8 handlers and insurance people how to interpret the insurance policy?

9 A Yes.

10 Q And is it common in the insurance industry for there actually
11 to be manuals and such telling people how to interpret the policy?

12 A Yes.

13 Q Did you see any of that information in this case?

14 A I don't recall exactly what I saw in terms of manuals in this
15 case. I saw some procedure memorandums, but nothing that I would
16 consider a comprehensive claims handling manual and certainly nothing
17 that trains their claims handlers on good faith and fair dealing, which is
18 an extreme deviation from the standard of care in the industry. No
19 training on good faith and fair dealing for their medical directors who
20 make the coverage decisions. None.

21 MR. SHARP: Jason, can we go to the next slide?

22 BY MR. SHARP:

23 Q So on the next slide, is there an industry standard that an
24 insurance company should not misrepresent facts or insurance policy
25 provisions to its insured?

1 A Yes. That's universally recognized as, well, the first ten
2 commandment rule of insurance is that you cannot make -- or you
3 cannot misrepresent pertinent facts or insurance policy provisions
4 relating to the coverages at issue. This is the way it's exactly worded.

5 Q Now, the next two provisions -- the next two standards that
6 we have up here are more specific to health insurance, right?

7 A Yes.

8 Q And so the first standard is within health insurance
9 companies, whether it's a preservice claim or a claim, and it's based on
10 medical necessity, is there an industry standard that the insurance
11 company should not deny the request unless its doctor that denies the
12 request has the training and expertise to provide the requested
13 treatment?

14 A I -- I wouldn't word it exactly that way. What I would say is
15 that if you're going to deny a request for a preauthorization of coverage
16 and you've got a well-qualified doctor like Dr. Liao, that you better make
17 sure that the person on the other side understands the medicine because
18 of the importance of what's being requested. Proton beam treatment for
19 cancer, you -- if you're going to have a doctor summarily say nope, it's
20 not medically necessary, then they better have the education,
21 background, training, experience, certification, working knowledge,
22 clinical experience in order to be able to stand toe-to-toe with a doctor.

23 So if need be, they can get on the phone and talk to the doctor and
24 ask Dr. Liao questions. But if you don't have the training and experience
25 as a doctor and you're making the coverage decision, you can't get on

1 the phone and meaningfully talk to the insured's doctor and get their
2 side of the story. So you have to make sure the person is a peer. I
3 believe that peers should be talking to peers. And you know, if you have
4 a decision based on a medical doctor that's a, you know, proton
5 radiation oncologist, you should have a radiation oncologist that
6 understands the techniques and either by practice or education can give
7 a good faith balance to the equation.

8 Q And is that testimony by you consistent with the industry
9 standards for claims handling that we've been discussing today?

10 A I believe it is. I believe that before you can overrule the
11 opinions of a treating doctor and reject their recommendation for
12 coverage, that you would have to have a sound basis for it. And sound
13 basis would include having a competent person reviewing it.

14 MR. SHARP: Oh, we ready for a break?

15 THE COURT: Yes.

16 MR. SHARP: Thank you.

17 THE COURT: Ladies and gentlemen, we're going to take a
18 15-minute recess and come back at 10:45. During the recess, you are
19 instructed not to talk with each other or with anyone else about any
20 subject or issue connected with this trial. You are not to read, watch, or
21 listen to any report of or commentary on the trial by any person
22 connected with the case or by any medium of information, including
23 without limitation newspapers, internet, television, internet, or radio.

24 You're not to conduct any research on your own relating to
25 this case, such as consulting dictionaries, using the internet, or using

1 reference materials. You're not to conduct any investigation, test any
2 theory of the case, recreate any aspect of the case, or in any other way
3 investigate or learn about the case on your own. You're not to talk with
4 others, text others, tweet others, Google issues, or conduct any other
5 kind of book or computer research with regard to any issue, party,
6 witness, or attorney involved in this case. You are not to form or express
7 any opinion on any subject connected with this trial until the case is
8 finally submitted to you. So we'll come back at 10:45.

9 [Jury out at 10:31 a.m.]

10 [Outside the presence of the jury]

11 THE COURT: Issues outside the presence?

12 MR. SHARP: I don't have anything.

13 MR. ROBERTS: Your Honor, we would just, you know, I've
14 been trying not to repeat our objections at every moment, but we've
15 reviewed our motions in limine on the scope of this testimony as in
16 violation of the Rapid (phonetic) Law. Particularly, the *G. v. Murray*
17 citation in our brief, where the expert cannot testify as to his legal
18 conclusions. He can testify to the industry standards, but he cannot
19 testify as to whether the facts of this case justify the legal conclusion that
20 the insurer acted in bad faith. Thank you, Your Honor.

21 MR. SHARP: I don't believe Mr. Prater has said that. I've tied
22 the testimony to industry standards. I've put forth the jury instruction.
23 You've already instructed the jury on the law. If Mr. Prater is -- I just
24 think he's not offering a legal conclusion. He's not said anybody has
25 committed bad faith.

1 MR. ROBERTS: It's in his report, Your Honor. And if they
2 don't offer it, then that's great. But our motion to limit his testimony to
3 exclude that legal conclusion was denied, so I just wanted to bring it to
4 the Court's attention that we -- we aren't waiving it.

5 MR. SHARP: He never offered an opinion in his report that
6 Sierra Health and Life acted in bad faith. That has never happened. And
7 so he's testifying consistent with industry standards, I believe consistent
8 with what Your Honor had instructed on the motion in limine, so.

9 THE COURT: The motion in limine wasn't completely denied.
10 We went over that piece by piece.

11 MR. ROBERTS: Okay.

12 THE COURT: And so --

13 MR. SHARP: Yeah. I've been -- I think he's been in
14 compliance with it.

15 THE COURT: Yeah.

16 MR. ROBERTS: I don't.

17 THE COURT: Mr. Prater was not allowed to testify as to legal
18 conclusions. But the Court did not just summarily deny your motion, Mr.
19 Roberts. I know there was a lot of motions, but my recollection is that
20 we parsed that out very slowly for hours.

21 MR. SHARP: Yeah. And we stipulated that he is not
22 testifying that they acted in bad faith, or he will not offer that opinion.

23 MR. ROBERTS: And I know the Court only denied it because
24 my objection was late, but I think he did offer some legal conclusions.
25 He volunteered them because they were non-responsive to the question

1 and I didn't know it was coming.

2 MR. SHARP: Well, maybe you and I can go through those. I
3 don't have the benefit of live feed as you have. So why don't you and I
4 go over those at the break and we'll address them?

5 THE COURT: All right. Sounds good, Counsel. So we'll
6 come back in 11 minutes.

7 MR. ROBERTS: Thank you, Your Honor.

8 [Recess taken from 10:34:49 AM to 10:49 AM]

9 Las Vegas, Nevada, Wednesday, March 23, 2022

10
11 [Case called at 10:49 a.m.]

12 [Outside the presence of the jury]

13 THE MARSHAL: Court come to order. Back on the record.

14 THE COURT: Please be seated. Are the parties ready for the
15 jury?

16 MR. ROBERTS: Yes, Your Honor. But I did want to tell you
17 that Mr. Sharp and I met and conferred over the break, and the objection
18 that I had to the question was the witness's testimony that insurance
19 companies have a duty to create plainly and honestly and conspicuously.
20 And my -- my objection was the use of the word duty as it implies that
21 it's a legal duty. I've got no objection to the witness testifying that the
22 standard of care requires or what the standard of care is. Just duties and
23 obligations are -- could be read as matters of law, and -- and I think we're
24 clear on that.

25 MR. SHARP: I've asked -- I've asked Mr. Prater to refer to

1 industry standards.

2 THE COURT: All right.

3 MR. SHARP: So --

4 THE COURT: Thank you. All right.

5 MR. ROBERTS: Thank you, Your Honor.

6 THE COURT: Thank you.

7 THE MARSHAL: All rise for the jury.

8 [Jury in at 10:51 a.m.]

9 THE MARSHAL: All jurors present.

10 THE COURT: Thank you . Do the parties stipulate to the
11 presence of the jury?

12 MR. SHARP: Yes, Your Honor.

13 THE COURT: Mr. Roberts? Mr. Roberts?

14 MR. ROBERTS: Yes, Your Honor.

15 THE COURT: Okay.

16 MR. ROBERTS: I apologize.

17 MR. SHARP: May I proceed, Your Honor?

18 THE COURT: Yes, Mr. Sharp.

19 BY MR. SHARP:

20 Q So Mr. Prater, there's some other industry standards that we
21 can discuss as -- as we go along with your testimony. But I think at this
22 point I'd like to transcend into the case -- this case itself.

23 A Okay.

24 Q And we had displayed the industry standards to the jury that
25 we've dealt with today. In your opinion, did Sierra Health and Life follow

1 those standards?

2 A Not any of the standards we've discussed so far.

3 Q Okay. So did you review the plan benefit information that I
4 have in front of you as Exhibit 1?

5 A I did, yes.

6 Q And in the course of your review, did you see -- were you
7 provided other insurance policies from Sierra Health and Life?

8 A I believe there were two or three different versions that I
9 looked at that I can recall.

10 MR. SHARP: Your Honor, may I help the --

11 THE COURT: Yes.

12 MR. SHARP: -- assist the witness?

13 BY MR. SHARP:

14 Q Mr. Prater, I have shown you Exhibit 2 which is -- is that
15 another copy of an agreement of coverage?

16 A Yes.

17 Q And have you reviewed that document in the course of
18 forming your opinions that you will provide to the jury today?

19 A Yes, I have.

20 Q And based upon the materials that you have reviewed, is it
21 your understanding that that was the plan benefit that was provided by
22 Ms. Holland-Williams to Mrs. Eskew?

23 A That's my understanding.

24 MR. SHARP: Your Honor, move for the admission of Exhibit
25 2.

1 THE COURT: Any objection?

2 MR. ROBERTS: No objection, Your Honor.

3 THE COURT: Exhibit 2 will be admitted into evidence.

4 [Plaintiffs' Exhibit 2 admitted into evidence]

5 BY MR. SHARP:

6 Q Now, Exhibit 3 could you go to that, sir?

7 A Okay.

8 Q Is Exhibit 3 another agreement of coverage that you
9 reviewed?

10 A It appears to be, yes.

11 Q And is it your understanding that that agreement of coverage
12 was produced by Sierra Health and Life in this case?

13 A I believe that is correct.

14 Q And was represented to be the agreement of coverage that
15 was provided to Mr. Eskew by Sierra Health and Life?

16 A That's my understanding.

17 MR. SHARP: Move for the admission of Exhibit 3.

18 MR. ROBERTS: Objection. Incomplete document,
19 foundation.

20 MR. SHARP: They produced it. I don't -- I don't know what
21 the foundation would be. They produced it.

22 MR. ROBERTS: There was an incomplete production which
23 we later supplemented with the complete document. Under the motion
24 in limine on litigation conduct and discovery, this should be excluded.

25 MR. SHARP: Your Honor, that is -- he knows that's not

1 correct. They produced -- their client produced Exhibit 3, represented it
2 as Mr. Eskew's agreement of coverage that was provided to him. And
3 then when they realized that there was a portion of that agreement that
4 didn't have a key portion of the case, they changed their position. So the
5 jury should be allowed to evaluate it. It has nothing to do with litigation
6 conduct.

7 THE COURT: It's overruled. Exhibit 3 will be admitted into
8 evidence.

9 [Plaintiff's Exhibit 3 admitted into evidence]

10 BY MR. SHARP:

11 Q So would you please -- why don't -- could you please give
12 the jury -- is there a concept called delivery of the policy?

13 A I'm sorry?

14 Q Is there a concept in insurance called delivering the
15 insurance policy?

16 A Yes.

17 Q Can you explain to the jury what that means?

18 A Yes. It's incumbent upon the insurance company to make
19 sure that the policy is actually delivered to the insured in some manner.
20 You have to make sure -- there's requirements in the industry in every
21 state that there's delivery requirements. Before you can enforce
22 conditions, it has to be delivered to the insured somehow.

23 Q So in the course of your evaluation in this case, did you
24 consider whether the insurance policy was formally delivered to Mr.
25 Eskew?

1 A I had questions about it, and I raised them in my deposition.
2 I'm still not sure it was timely delivered. I don't believe I saw proof of
3 delivery from the carrier because the -- it was so near the time in 2016, it
4 was February 2016, and I didn't see delivery. It's possible -- it concerned
5 me that perhaps it hadn't been printed up yet for the new year. It wasn't
6 properly issued and delivered. I raised it as a concern, but it's not
7 controlling on any of my opinions.

8 Q But this is a concept, though, like basically Insurance 101,
9 and the insurance company should know how to deliver an insurance
10 policy to its members?

11 A Yeah, you have --

12 MR. ROBERTS: Objection. Relevance given his conclusion
13 that it's not relevant to anything or his opinions.

14 THE COURT: It's overruled.

15 THE WITNESS: Yeah, I --

16 THE COURT: He said it wasn't controlling.

17 THE WITNESS: Yeah, exactly. I mean to imply that it wasn't
18 relevant. I said it wasn't controlling. Exactly. Thank you.

19 MR. SHARP: Okay. Jason, can you pull up Exhibit 1? Or no,
20 Exhibit 2. Excuse me. And just the front -- first page and compare it to
21 Exhibit 4, front page.

22 BY MR. SHARP:

23 Q Okay, sir, so page 1 of Exhibit 1 is a cover page that says,
24 "My solution and agreement of coverage." Do you see that?

25 A Which exhibit?

1 Q Exhibit 1.

2 MR. SHARP: Jason, can you pull that up? And then go --
3 we're going to go to the next exhibit.

4 THE WITNESS: Okay.

5 MR. SHARP: We'll just pull them up together if you can. I
6 want -- I want this pulled up, William Eskew, from Exhibit 4. And then
7 compare that over to "my solution and agreement of coverage."

8 BY MR. SHARP:

9 Q So Exhibit 4 was produced by Sierra Health and Life during
10 the course of this trial or this lawsuit. Is that your understanding?

11 A Yes, that's my understanding.

12 Q And is it typical when a policy is actually delivered that it has
13 the insured's name on it?

14 A Yes.

15 Q And is it typical for insurance companies to keep track
16 internally of whether or not an insurance policy was delivered to the
17 insured?

18 A Yes.

19 Q So applying basic industry standard principles, if the
20 agreement of coverage was physically delivered to Mr. Eskew, Sierra
21 Health and Life should have proof of that?

22 A Physically delivered?

23 Q Or delivered, whether it's --

24 A Mailed?

25 Q Yeah, mailed, whatever.

1 A Yeah, usually mailed or given to the -- sometimes they send
2 it to the agent to give to the client. And I notice this is an individual
3 policy not a group policy. I misspoke earlier. It doesn't matter. It
4 doesn't change my opinions.

5 Q Okay. Okay.

6 A Because it was [indiscernible].

7 Q Now, let's go back to Exhibit 1 and just -- we have "my SHL
8 solution to the agreement of coverage." Do you see that?

9 A Yes.

10 Q And so is it typical when insurance companies are selling
11 policies to have what's called like a form policy that they can show the
12 insured?

13 A Very common.

14 Q Is that different than the policy that actually is delivered to
15 the insured?

16 A It shouldn't be.

17 Q But I mean, in terms of like physical document?

18 A It won't have an address and an issue -- issuing page usually.
19 It's just an exemplar copy of the policy if the insured requested it, or the
20 agent provides it.

21 Q So you reviewed Ms. Holland-Williams' deposition
22 testimony?

23 A Yes, I did.

24 Q And who is she?

25 A She's a licensed and appointed insurance agent for this

1 insurance company. She's been an agent of theirs for 30 years. She has
2 a contract with them, so she is the one that sought out and found this
3 particular plan and offered it for sale to the Eskews.

4 Q Now, so the fact that -- and it's your understanding that Ms.
5 Holland-Williams provided Exhibit 1 to Mrs. Eskew?

6 A In my understanding and my recollection is is that Mrs.
7 Eskew was looking for a policy that would be the Cadillac or the best
8 available coverage she could buy because her husband had cancer. And
9 so she told the agent, my husband has cancer. We want him to go to
10 MD Anderson. I've been researching it. I want a policy that I can go out
11 of state, go out -- go out of the borders of Nevada to get treatment.

12 And the agent looked around and said there's only one PPO plan,
13 which I'll define in a minute if they don't know what that is, but only one
14 plan in the state that allows you to go out of state and that's this one.
15 And so she gave -- she gave her an exemplar copy of the policy because
16 she didn't know if proton beam was covered. So apparently, she called
17 the insurance company, and they had a conversation --

18 MR. ROBERTS: Objection, Your Honor. Non-responsive and
19 also violates the parole evidence rule as his narrative has continued.

20 MR. SHARP: Maybe if -- I'll re-ask the question, but it
21 certainly didn't violate parole evidence. But I'll ask the --

22 BY MR. SHARP:

23 Q Let's just deal with this first because we'll get more of the
24 detail about it from Ms. Holland-Williams. But my end point would be
25 basically can an insurance company say well, hey, we just delivered the

1 form policy to you before you got the insurance, so we don't have to
2 deliver a formal policy once you buy the insurance?

3 A No. They would issue a formal policy once they issued the
4 coverage.

5 Q So --

6 MR. SHARP: Jason, you can take those slides down.

7 BY MR. SHARP:

8 Q Now, you had mentioned a PPO.

9 A Yes.

10 MR. SHARP: Jason, can you pull back up Exhibit 4, page 1.

11 BY MR. SHARP:

12 Q So --

13 MR. SHARP: And if you could just highlight this first part
14 right here, Jason.

15 BY MR. SHARP:

16 Q So the -- the coverage it reads is for the commercial PPO
17 product line in Nevada effective May 12, 2014.

18 A Right.

19 Q Do you see where I'm at?

20 A Yes.

21 Q Okay. And that's from Exhibit 4. Can you explain to the jury
22 what a PPO product is?

23 A Sure. A PPO product stands for preferred provider
24 organization. It's the Cadillac of insurance policies for health insurances.
25 It's the top of the line. It's the best kind of coverage you can get, and she

1 bought the platinum, the top of the level PPO coverage, the most
2 expensive. And it means that you can go to any doctor or any hospital
3 anywhere in the world and get treatment. You're not -- you don't -- you
4 don't have to stay -- like an HMO in Nevada, you don't have to stay at --
5 to certain doctors. You can go to any doctor anywhere in the world and
6 get treatment.

7 It may not be covered, but you're free to choose your doctors,
8 you're free to choose your hospitals. That's why she was -- and she --
9 she sought it out specifically so she could go to the Houston Cancer
10 Center for treatment for her husband, and that's what she needed. And
11 this apparently was the only policy in the state at that time that was
12 available that would allow her to do that.

13 Q And when -- so let me ask a couple points after that. There
14 has been some indication in this courtroom that the fact that Mr. Eskew
15 didn't receive a separate referral from a Las Vegas doctor had some
16 significance in this case, and I'd like you to comment upon that. Whether
17 it has any significance.

18 A No significance.

19 Q And why is that?

20 A Because you don't need to seek a referral. You can go
21 directly.

22 Q So was Mr. Eskew doing anything improper under the terms
23 of the agreement of coverage by going to see MD Anderson?

24 A No, he wasn't. And keep in mind that the PPO contract is an
25 insurance policy.

1 Q So let's know kind of --

2 A Compared to a HMO like Kaiser which doesn't issue
3 insurance policies. It's a health maintenance organization. A PPO is
4 actually an insurance contract, and that's why they use the word
5 insurance all the time when they talk about the coverage.

6 Q So let's talk about a couple of the concepts of a PPO. You
7 have in network. Is that a -- is that a benefit available under a PPO?

8 A Yeah. Typically with a PPO, the way it works is you have a
9 financial incentive to use the network doctors. So they pay more on your
10 claim if you go to the doctors that are on their list or in their books. But
11 you can go elsewhere, and they still will pay something if it's covered.
12 So the freedom to go anywhere you want to go like MD Anderson is one
13 of the unique features of the PPO, and one of the reasons she bought it
14 specifically, to go to MD Anderson. And it covers MD Anderson.

15 Q And based upon your review of the documents, is it your
16 understanding that MD Anderson was an in-network provider?

17 A Yes, they were a plan provider. They -- I looked at their bills
18 and the discounts taken, and they took discounts for being a PPO in-plan
19 provider. Or maybe not in-plan specifically for the plan. I wasn't sure.
20 But they are a contracted provider, and they meet the definition of in-
21 plan provider in the policy itself.

22 Q So one of the ways an insurance company can legitimately
23 control costs is they enter into contracts with healthcare providers?

24 A Right. The healthcare providers sign a contract with the
25 insurance company to -- to accept discounted fees. And so if the non-

1 PPO contract, the people that -- the doctors and hospitals that aren't
2 members of the PPO do get the higher payment level, they get paid less
3 because they don't have a contract. It's because the doctors agreed in
4 advance to take a discount. And that goes with the PPO providers, but a
5 PPO allows you to go anywhere. In this case, it was a PPO institution.
6 And I don't really think that was the issue, level of coverage here. They
7 denied it totally.

8 Q So --

9 MR. SHARP: Okay. Jason, why don't you take that down.

10 BY MR. SHARP:

11 Q So sir, I want to -- I want to go through some of the -- Mr.
12 Prater, let me help you with that.

13 A I got it.

14 Q You sure?

15 A Yeah. Thank you.

16 Q Okay. So Mr. Prater, I want to -- I want to go now to some of
17 the provisions within the agreement of coverage that pertain to your
18 analysis of this case, okay?

19 A Okay.

20 Q And I'd like to -- to do that --

21 MR. SHARP: So let's pull up -- Jason, let's start with pulling
22 up page -- Exhibit 4, page 38. So let's go first just to section 3. 3 and 3.1
23 is fine.

24 BY MR. SHARP:

25 Q And Mr. Prater, applying the good faith eyeglass test, can

1 you -- I'd like you to kind of run through some of these provisions and
2 explain to the jury from an industry standard perspective what you're
3 seeing.

4 A I think it would be easier to start from the first page because
5 that ties into my opinions on the fourth page. If you have the first page
6 you can pull up.

7 Q First page of?

8 A Agreement of coverage.

9 Q The what?

10 A I mean, I can talk about this, but it might be more difficult --
11 easier to understand if we start on page 1.

12 MR. SHARP: Okay. Let's go to -- hold on, Jason, we have
13 different page numbers that we're working off of. Go to page 33 of
14 Exhibit 4.

15 BY MR. SHARP:

16 Q Is that what you're asking for, Mr. Prater?

17 A Yes.

18 Q Okay. So --

19 A Highlight the third paragraph, "This AOC."

20 Q So tell us what -- tell us what the significance is of that.

21 A This starts out by telling the insured that the AOC and the
22 attached benefit schedules will tell you about your benefits, rights, and
23 duties as an SHL insured. They also tell you about SHL's duties to you.

24 Q And in addition to those duties in the contract, are there
25 obligations of good faith and fair dealing according to industry standards

1 on the -- on the part of SHL?

2 A Yes, that's right in the all the -- the entire contract.

3 Q Okay. So what provision would you like to go to next?

4 A Look at the next provision on page 1, the next -- not the next
5 paragraph. The one at the top of the second column. This is very
6 important because it tells the insured, "Please carefully review your AOC
7 and your attachment B, services requiring prior authorization, to
8 determine which services require prior authorization under the plan."

9 So it tells you to look at the AOC and attachment B to see what's --
10 to determine what services require prior authorization. That's this plan,
11 the prior authorization plan. So naturally, the first thing I do is look for
12 Exhibit B.

13 Q Okay. So in the Exhibit 4, which is the policy that was
14 produced by Sierra Health and Life in this case --

15 MR. SHARP: If you go to page 79, Jason.

16 BY MR. SHARP:

17 Q And is this the attachment you're referring to?

18 A Yes.

19 Q Okay. And you -- if you could let -- what do you -- what do
20 you -- would you like to discuss with regard to attachment B?

21 A Attachment B says, "In order to be covered" -- at the top. "In
22 order to be covered, requested services must be medically necessary as
23 determined by the plan and not otherwise excluded under the AOC."
24 And then you look for the coverage where laboratory and x-ray services,
25 which would be the category for proton beam, and it says that you have

1 to go through prior authorization for all those -- look at laboratory and --
2 yeah, yeah, yeah. Laboratory and x-ray services according to the
3 contract --

4 Q Hold on, Mr. Prater, you're shaking next to the --

5 A Oh, sorry. That's my Parkinson's.

6 Q That's okay.

7 A "Complex radiology including but not limited to CT scans,
8 MRI scans," et cetera, et cetera, "and IMRT, intensity-modulated radiation
9 therapy." It does not require under Exhibit B prior authorization for
10 proton beam therapy. The contract by its own terms does not require
11 prior authorization for proton beam therapy. It does require it for IMRT,
12 but not for --

13 Q So what's the significance of this -- of this absence of proton
14 beam therapy in terms of an industry standard? Okay, it doesn't show it,
15 so what?

16 A It tells me that a reasonable claims handler at the -- up front
17 would look at the policy and say to the insured you don't need to go
18 through authorization, you don't need to -- you can skip this step. You
19 have a green light. You know, we're not going to guarantee coverage,
20 but you can go get the treatment. There's no pre-authorization
21 requirement for proton beam therapy. It's not required by Exhibit B or
22 the policy.

23 Q Now, within Exhibit 2, which is the policy -- the form policy
24 that was given to Mrs. Eskew, did you see attachment B?

25 A I did not.

1 Q And in the first policy that was produced by Sierra Health
2 and Life did you see attachment B?

3 A It was missing.

4 Q And what's the significance of -- of those things?

5 A I -- I hesitate to opine on that.

6 Q Okay.

7 A I hate to think the worst. I hope it was just an accident.

8 Q Okay. I'll --we'll accept that. What provision would you like
9 to next discuss with the jury?

10 A Go to the second page.

11 Q Of?

12 A And the table of contents.

13 Q So that's page --

14 A One -- page 2.

15 Q Hold on. We're just working off of different bates stamped
16 numbers, Mr. Prater, so --

17 A Okay. Well, it simply says attachment --

18 Q Well, we'll -- we'll get there. It just takes -- I just have to find
19 the bates stamp number.

20 JASON: I got it.

21 MR. SHARP: You got it? Thank you, Jason.

22 BY MR. SHARP:

23 Q Okay. We have --

24 MR. SHARP: Okay. If you go to page 34, please, of Exhibit 4.

25 BY MR. SHARP:

1 Q Okay. We have the table of contents now in front of
2 everybody. What would you --

3 A Down at the bottom where it says, you know, this is the table
4 of contents which you're all familiar with and it says attachment B
5 should be there which is listed as "services requiring prior authorization."
6 So if the service is not listed in attachment B as requiring prior
7 authorization, they shouldn't put it through prior authorization. They
8 shouldn't require it. They shouldn't deny a claim based on it. It has no
9 place because it's not required by the policy for proton beam.

10 Q Okay. In the course of -- of how a reasonable insurer would
11 evaluate this request for prior authorization that was made on behalf of
12 Mr. Eskew, what is the next policy provision you'd like to share with the
13 jury?

14 A Let's go to the managed -- the one that you were at, the
15 managed care section, Section 3.

16 MR. SHARP: So that's going to be at page 38, Jason, of
17 Exhibit 4.

18 THE WITNESS: And if you could highlight the beginning of
19 section 3 or the whole section 3, 3.1 and 3.

20 BY MR. SHARP:

21 Q Okay. For a reasonable insurer evaluating a prior
22 authorization request what in your view is the significance of this
23 provision?

24 A Well, it talks about their managed care program, and it talks
25 about we know which services require prior authorization. And the

1 clause -- when you read the paragraph in its entirety, it talks about the
2 plan providers and the -- the insurance company working together and
3 that the -- all plan providers, you know, the point of this section is simply
4 to say that MD Anderson is a plan provider for the insurance company.
5 And the doctors know that in order to get paid at the higher level, they
6 have to try to get it pre-authorized. That doesn't have anything to do
7 with the patient and their rights under the contract.

8 The doctor wants to get paid at the higher rate, so they go through
9 the managed care program, and they agree to participate in it, and
10 there's boilerplate language that suggests the insured agreed to
11 participate in that, but Exhibit B says they don't have to participate in
12 this. It's not required for proton beam. And so a reasonable claims
13 handler at the outset would read the policy and see exhibit B doesn't
14 require prior authorization for proton beam.

15 So we get a green light. Go get your proton beam. I don't believe
16 they would have denied it if he would have gotten it because they can't.
17 They don't have a right to under the policy in my opinion.

18 Q So let me ask you just with that 3.1 in front of you, there's
19 been some testimony --

20 MR. SHARP: And I want to -- Jason, I want to deal with the
21 second sentence.

22 BY MR. SHARP:

23 Q "The managed care program helps direct care to the most
24 appropriate setting to provide healthcare in a cost-effective manner." Do
25 you see that --

1 A Yes.

2 Q -- Mr. Prater?

3 A Yes.

4 Q And there's been some indication in this courtroom that that
5 provision required Dr. Ahmad to make a decision based upon which
6 procedure was cheaper, and I'd like you to comment upon that.

7 MR. ROBERTS: Objection. Mischaracterizes my questions.

8 THE COURT: Sustained. You can rephrase the question.

9 MR. SHARP: All right.

10 BY MR. SHARP:

11 Q Let me get -- let me say it this way. There's been some
12 indication that Dr. Ahmad had an obligation to approve IMRT over
13 proton beam therapy because it was less expensive based upon the
14 provision I have highlighted. So from an industry standard perspective,
15 I'd like you to comment on that.

16 A Well, the level of care issue in a health insurance policy like
17 this has to do with the setting in which care is provided not the quality of
18 the treatment. The most appropriate treatment is not necessarily the
19 cheapest one. But the -- the setting can be -- you can save money
20 legitimately as a health insurance company by saying to somebody in
21 the hospital you can only spend three days in intensive care. We'll
22 review it if you need more.

23 Two days in the hospital and then go to outpatient or go to a rehab
24 facility or go to a hospital -- a hospice program if you -- instead of taking
25 up a hospital bed. I mean, there's ways that they adjust the benefits

1 based on the setting in which you receive benefits. And there's less --
2 it's more expensive to get care in an emergency room than it is in an
3 outpatient setting, for example. So that's level of care.

4 MR. SHARP: And let's go also to -- Jason, if you could go
5 back. I want to pull up section 3.4 right here. Okay.

6 BY MR. SHARP:

7 Q And so from a reasonable insurance company viewpoint, can
8 you comment upon 3.4?

9 A 3.4 again reminds the insured -- tells the insured if you want
10 to see what services require prior authorization, look at attachment B.
11 That's the services requiring pre-authorization, and proton beam is not
12 there.

13 Q And --

14 A IMRT is. Proton beam is not.

15 Q Can I direct you to that last sentence where it says, "the
16 attachment B services requiring prior authorization list is subject to
17 change periodically and may be modified at any time without
18 notification." I'd like you to comment upon that provision from a
19 reasonable insurance claims handling perspective.

20 A A reasonable insurance company would know that they
21 cannot do anything like that in their sole discretion whenever they want
22 to, or it would make the contract of insurance illusory. You know, if they
23 can change the list any time they want to or change the coverage of
24 what's or not in a document that's not part of the policy or the -- is not
25 sufficient to do so and there's no notice to the insured, in the industry we

1 know that you can't just change things as you want to. These decisions
2 to change things or documents is always subject to an implied covenant
3 of good faith and fair dealing.

4 Q And is a reasonable -- would a reasonable insurer know that?

5 A Oh, yeah.

6 Q So what is the next provision, sir, that would assist you in
7 explaining your opinions to the -- to the jury?

8 A 4.1.

9 Q 4.51?

10 A 4.1

11 Q 4.1.

12 MR. SHARP: That's -- Jason, that's going to be at page 39 of
13 Exhibit 4.

14 BY MR. SHARP:

15 Q Okay. Why don't you explain to the jury what we're -- what
16 we're looking at here?

17 A This talks about how to obtain covered services, and it tells
18 the insured what condition services are available to them. And it says
19 that the insureds are entitled to receive benefits for the expenses
20 incurred in connection with the covered services shown in section 5,
21 which I'm sure we'll talk about in a minute, and the attachment A,
22 benefits schedule, subject to all the terms and conditions, et cetera.

23 At the bottom, the second bullet point is what I want to point out.
24 It says, "These covered services are available only if and to the extent
25 they are specifically authorized through SHL's managed care program as

1 applicable." We already know that it's not applicable. It doesn't have to
2 be authorized through their managed care program. They should have
3 never gotten to the mangled care program that they call managed care.
4 And they should have just told him he can go get his proton beam
5 therapy.

6 Q In the -- let me -- I'm sorry I didn't mean to cut you off.
7 Should the people within the utilization management program that are
8 implementing this managed care program be trained upon the insurance
9 policy?

10 A Yes. The coverage decision maker, Dr. Ahmad, who's
11 making the coverage decision, and he made it clear, I'm making the
12 decision under the insurance policy, and in my opinion, he doesn't have
13 the requisite qualifications or experience or training to do that.

14 Q And in your --

15 A If he were to read it, he wouldn't even understand what he
16 had to do.

17 Q And in your opinion, as a -- looking at this from a reasonable
18 insurer engaging in reasonable claims handling practices, would an
19 insurer know what's in its insurance policy?

20 A They're held to know of it; and if they don't, ignorance is no
21 excuse.

22 Q Okay. Sir, what is the next provision you'd like to discuss to
23 the jury?

24 A Again, reiteration and pounding in of the point on page 8,
25 covered services, section 5.

1 Q Okay. If we go to -- that's at page 40 of Exhibit 4?

2 A Right.

3 MR. SHARP: And section 5, Jason. Thank you.

4 BY MR. SHARP:

5 Q Okay. So what would you like to -- to point out to the jury
6 here?

7 A The first line. "This section tells you what services are
8 covered under this plan. Only medically necessary services are
9 considered to be covered services." So this is the coverage grant part of
10 the policy where they give the grant and make the promise it has to be
11 broadly construed in favor of the insured if there's any uncertainty or
12 ambiguity in the industry standard.

13 And so you look at section 5.2, you see physician services, et
14 cetera. But the relevant coverage here, the coverage [indiscernible] are
15 concerned about is 5.1a.

16 MR. SHARP: Jason, that's going to be at Exhibit 4, page 43.
17 And it's going to be right down here.

18 THE WITNESS: This is the portion of the policy that covers,
19 specifically by name, therapeutic radiology services which is the proton
20 beam therapy that was proposed. This says, "Diagnostic and therapeutic
21 covered services when prescribed by the insured's physician," which we
22 know has occurred here, "and authorized by the managed care
23 program."

24 We know that it doesn't have to be authorized by the
25 managed care program because it's not listed on Exhibit B. So a fair

1 reading of the policy would say forget the managed care program. It
2 doesn't apply at the outset of this claim. Didn't need to -- didn't need to
3 happen. It was a needless adversarial hurdle. A roadblock put in the way
4 of the insured that shouldn't have happened.

5 So there's this specific coverage there. And then if look at the
6 schedule A which I can just tell you lists the same basic thing, but there's
7 no -- should we look at the schedule A which is part of the policy which
8 lists the benefits? Let's see.

9 BY MR. SHARP:

10 Q Do you want -- do you want us to pull that up, sir, or --

11 A I think it shows another place where it shows that therapeutic
12 radiation is covered. I think it's in A, but I'm sure we'll come to it. The
13 coverage grant is in 5 --

14 Q Well, we can -- we can -- we can locate that at a break.

15 A Okay.

16 Q What other provision would you like to discuss with the jury?

17 A 2 -- 10.5.

18 MR. SHARP: Okay. Jason, I'll find that. That's at page 53,
19 Jason, Exhibit 4.

20 BY MR. SHARP:

21 Q And what provision within section 10 would you like to --

22 A 10.5.

23 MR. SHARP: So that's the next page, Jason. Page up. There
24 we go.

25 BY MR. SHARP:

1 Q So sir, I have in front of you "10.5 interpretation of AOC" and
2 what would you like to --

3 A It makes it clear that the laws of Nevada, the laws of good
4 faith and fair dealing apply to this interpretation of this plan.

5 Q So from an industry perspective, a reasonable insurer would
6 understand that in order to fulfill their obligations to Mr. Eskew, they
7 should comply with Nevada law?

8 A They have to. It's -- the interpretation of the plan is governed
9 by Nevada law, and Nevada law includes the law of good faith and fair
10 dealings.

11 Q Sir, I want to -- I want to ask you something right here. In
12 one of the earlier documents we were showing to the jury, there was a
13 reference to NCQA.

14 A Right.

15 Q Can you tell the jury what NCQA is?

16 A NCQA is an insurance industry sponsored non-profit
17 organization that came into being in about 1990 or thereabouts. It stands
18 for National Commission on Quality Assurance. It's an organization
19 where -- it does a lot of good things, but it's an industry organization for
20 the most part that's evolved over the last couple of decades. And it's not
21 the law. It's not Nevada law. It's something that you pay --

22 MR. ROBERTS: Objection to legal conclusion.

23 THE COURT: Hold on. What's the objection?

24 MR. ROBERTS: He -- legal -- he just volunteered a legal
25 conclusion.

1 THE COURT: The objection is sustained.

2 BY MR. SHARP:

3 Q Let me just rephrase it. On an industry perspective, would a
4 reasonable insurer understand that whatever criteria NCQA has or does
5 not have, the insurance company still needs to follow the laws of the
6 State of Nevada?

7 A Absolutely.

8 Q Okay. What's the next provision you'd like to show us or --

9 A 10.8. "Nothing contained in the AOC shall be deemed to
10 restrict an insured in exercising full freedom of choice in the selection of
11 a hospital, skilled nursing facility, physician, or provider for the care or
12 treatment of an illness or injury." Again, emphasizing the PPO aspect of
13 the case. You can go anywhere.

14 Q What would -- what would the next provision you'd like to
15 talk about, sir?

16 A 10.11. This is what's called an entire agreement provision of
17 an insurance policy. It says that this AOC, which is the policy, "including
18 attachment A and any other attachments, endorsements, riders, or
19 amendments to it, the insurance enrollment form, health statements,
20 insured identification card, and all other applications received by SHL,
21 constitutes the entire agreement between the insured and SHL."

22 The importance of this clause is that the medical policies upon
23 which they based their denial in this case are not part of the policy. The
24 medical policies that are relied on by United Healthcare and Dr. Ahmad
25 to deny coverage are not even part of the policy. They're -- they're

1 moving targets. They're not integrated. They're not part of the policy.
2 They should not control coverage.

3 Q And would a reasonable insurer implementing a fair and
4 impartial utilization management program understand that?

5 A They should, yes. In other words, if something is not part of
6 the insurance policy, you can't use it as a basis to deny coverage. If you
7 don't --

8 Q And that's an industry standard?

9 A Yeah, you got to tell people what their coverage is. You can't
10 make it illusive and say we cover -- we're selling you an accident policy,
11 and we're going to cover you for accidents, and then you have an
12 accident, and they say oh, we got a side document that defines accidents
13 that's not part of the policy. It says accidents are things that happen if
14 you don't have any other sickness or disease, you know. You can't do
15 that.

16 Q And that's an industry standard?

17 A That's an industry standard.

18 Q Okay. Sir, is there -- what else would you like to talk to the
19 jury about in terms of this insurance policy?

20 A In -- in that same paragraph, the second paragraph, the first
21 line, I could just read that. It reiterates the same point. "This policy,
22 including the endorsements and the attached papers, if any, constitutes
23 the entire contracted insurance." Again, contracted insurance. This is an
24 insurance policy, and the standards and practices in the insurance
25 industry apply.

1 Q What provision would you next like to apply?

2 A 10.19. This is because it's gone through their process, which
3 it shouldn't have gone through in the first place in my opinion. It says
4 that if you get a notification of an adverse benefit determination and it
5 says, "If you receive an adverse benefit determination, you will be
6 informed in writing of the following," bullet point number one, "The
7 specific reason or reasons for upholding the adverse benefit
8 determination.

9 Two. Reference to specific plan provisions on which the
10 determination is based." And then -- and then there's two -- the bullet
11 points at the bottom. The second -- the second to the last one and the
12 last one relate to my opinions. "These" -- "these things are required to
13 be given in the adverse benefit determination." I could read it, but -- do
14 you --

15 Q No, that's fine.

16 A -- want me to read it?

17 Q If you'd like to read it if you think it's --

18 A I don't think it's necessary. In other words, the importance of
19 this to me is that it comports with the standard and practice of the
20 industry. If you're going to deny a claim, you have to set forth in detail
21 the reasons and point to the specific policy language which requires the
22 person denying the claim to know the policy language and then know
23 how to read and interpret it. It's a prerequisite or you can't do the job.
24 Dr. Ahmad said -- well, are we going to get to specific testing?

25 Q We're going to get to the specifics --

1 A Okay.

2 Q -- I'm just trying -- we're just laying the groundwork in terms
3 of the good faith --

4 A And I think my point is, is if this comports with the standard
5 and practice in the industry, is if you're going to deny a claim, you're
6 going to have to say why and you're going to have to point to the
7 specific language of the policy upon which the denial is based, so they
8 can meaningfully appeal it and so they know what the reason is. It's
9 logical.

10 Q Okay. Let's go to the next provision that you'd like to
11 discuss.

12 A Adverse benefit determination in the glossary is defined 13.1.

13 Q That's on page 4?

14 A Yeah.

15 Q Exhibit -- page 59 of Exhibit 4.

16 A It just defines what an adverse benefit determination is. It's
17 just fills in the blank. And if you look at 13.14 it'll tie together. Look at
18 13.14. Go ahead and give them a chance to read that if they haven't. I
19 don't need to read it out loud I don't think.

20 It just defines what an adverse benefit determination is. And look
21 at 13.14, "The claim for benefits means a request for plan benefit or
22 benefits made by an insured in accordance with the plans of appeal
23 procedures, including any pre-service claims, requests for prior
24 authorization and post-service claims, request for benefit payment."

25 This makes it clear in this policy that the request for

1 preauthorization for proton beam therapy in this case was -- is a claim
2 and it must be handled fairly as a claim, not just a vague request. But it's
3 a claim for benefits that has to be investigated if you're going to deny it
4 and you have to follow the standards and practices in the industry of
5 good faith.

6 Q So let me follow up on that. From a perspective of a person
7 who's an expert in reasonable claim with reasonable insurance practices,
8 if anyone were to suggest in this courtroom that because it was a
9 preauthorization claim that Sierra Health and Life didn't have to conform
10 with any of the standards that we discussed earlier. What would your
11 response be?

12 A That would be false. It's a claim under the insurance policy
13 and it has to be respected and treated as any other claim under the
14 insurance policy would be. And we have to follow the standards and
15 rules that I discussed earlier.

16 Q Okay. Sir, what would the -- what is the next provision that
17 you'd like to show the jury?

18 A I think the next provision is on -- is 13.66, which is the
19 definition of medically necessary in the policy.

20 Q Would you -- it's hard for everybody to see because of the
21 spacing, so what we've been doing is pulling up portions of this
22 provision.

23 A That's fine. Those -- that's a good start.

24 Q So why don't -- so from a person who's an expert on
25 insurance industry practices, including for fair interpretations of policy,

1 why don't you tell us about how do you apply this definition of medically
2 necessary?

3 A Well clearly you look at the definition itself and you read it in
4 a way that fits into the coverage promises in a way that favors the
5 insured if there's any uncertainty. Medically necessary means that
6 service or supply needed to improve a specific health condition or to
7 preserve the insured's health, which we know that the proton beam is
8 for.

9 And then it says, and which as determined by SHL is -- the
10 determined by SHL, does not mean they can do it in their sole discretion.
11 Does not mean they have the unfettered absolute right to do it however
12 they want to do it, or the policy would be worthless. It would be a
13 losery.

14 Q So they would have to -- when you say --

15 A They have to be reasonable. They have to be fair. They have
16 to have a basis for their decision. They have to act fairly.

17 Q In accordance with the industry standards that we've been
18 discussing today?

19 A Industry standards and applicable law. I mean, they're
20 intertwined, the law and the standards are inextricably intertwined with
21 insurance, so you have to consider both.

22 Q Okay. Next --

23 A It says --

24 Q Continue, sir.

25 A -- so the three criteria for determining whether something's

1 medically necessary under the policy is, is it consistent with the
2 diagnosis and treatment of the insured illness or injury? I don't think
3 there's any question of that in this case. The doctor that recommended
4 it, it was -- clearly it was consistent with the diagnosis and treatment. It's
5 not trying to get a new car and new house; it's trying to get treatment for
6 cancer with the some of the latest technology.

7 Number two the second bullet point, it has to be the most
8 appropriate level of service, which can safely be provided. And I would
9 opine that that level of service relates to inpatient, outpatient. You know,
10 those things we talked about earlier.

11 And the third requirement, not solely for the convenience of the
12 insured, provider and the hospital. Well, there's no way that Mr. Eskew
13 was undergoing proton -- wanted to undergo proton beam for his
14 convenience. So he meets all the conditions.

15 Q What -- can you give us an example of what, from an
16 industry standard perspective, what the third bullet would apply to?

17 A Well, some people like to go in and, you know, get surgery
18 done or whatever done and, you know, stay in a luxury single room
19 hospital when they can get it done on an outpatient basis or something
20 similar. And for convenience, you know, it's -- there's no way that I think
21 the insurance company would claim that it's not solely for the
22 convenience of the insured. That it was -- he was only getting proton
23 beam for his convenience.

24 Q Is that kind of like an example. I mean, you used to hear like
25 a doctor delivering a baby at teatime, so they did a C-section instead of

1 normal delivery.

2 A I don't know if that would -- the details --

3 Q That might be a little extreme, but --

4 A Yeah.

5 Q -- is that the concept?

6 A I don't think anybody would debate or dispute that he was
7 not getting it for his convenience as that would be reasonably read. You
8 know, if a word or a phrase insurance policy is not defined the standard
9 in the industry is to give it the average ordinary meaning from an
10 average ordinary insurance perspective. Plain ordinary meaning of
11 words if they're not defined clearly is the way that we have to interpret
12 them as claims people.

13 Q So you --

14 A There's no way this was insurance convenience, the cancer
15 therapy.

16 Q You heard Dr. Ahmad's testimony on Wednesday?

17 A Yes, I saw it.

18 Q And in that testimony there is suggestion by Dr. Ahmad that
19 bullet point two authorized him to approve or deny proton beam therapy
20 versus IMRT based upon which service was less expensive, do you recall
21 that?

22 A I recall he talked out of both sides of his mouth. He said on
23 the one side that he didn't consider cost and then when he was asked
24 questions by defense counsel he said he did consider costs.

25 Q Okay. Let's just talk about the testimony via Mr. Roberts. Is

1 the interpretation that Dr. Ahmad offered from a person as an expert in
2 the insurance claims practice a reasonable interpretation?

3 MR. ROBERTS: Objection to form.

4 THE WITNESS: Yeah. I don't understand the question.

5 MR. ROBERTS: Request that the witness comment on the
6 credibility of another witness.

7 THE COURT: He doesn't understand the question.

8 MR. SHARP: It was a bad question. Every -- nobody
9 understood it. Okay.

10 BY MR. SHARP:

11 Q Would you comment upon the interpretation offered by Dr.
12 Ahmad from the perspective of an industry standard expert?

13 MR. ROBERTS: Same objection, Your Honor. He can give
14 his own interpretation; he can't comment on Dr. Ahmad's.

15 THE COURT: Overruled.

16 THE WITNESS: Yeah. Specifically what Dr. Ahmad said that
17 you want me to comment on?

18 BY MR. SHARP:

19 Q On the fact that appropriate level of service means I can
20 consider which service is less?

21 A Not true.

22 Q Why?

23 A I disagree. Level of service is always referred to and relates
24 to inpatient, outpatient, hospice, hospital, you know, level of care, how
25 many days you can stay. It's a concept within the managed care industry

1 that doesn't, you know, that doesn't include or take into consideration
2 the individual costs. And Dr. Ahmad didn't consider the costs.

3 Q Okay. So let's go continue on the definition of medically
4 necessary.

5 A Yeah. And then it goes on to state, those are the criteria for
6 medically necessary. Those are the three and I believe they're satisfied
7 in this case. And if they were acting reasonably, they would've
8 determined that that was the case for the reasons I've already stated.

9 In going on it says, "In determining whether a service or supply is
10 medically necessary", it says, "SHL may give consideration to any or all
11 of the following". And then it lists a number of things. It says, "We
12 might consider other things in determining medical necessity. Our
13 policy says there's three things that are required", which I think are
14 satisfied.

15 And then it says, "We might consider other things", and then it lists
16 all kinds of things, including the last thing, "other relevant information
17 obtained by SHL." Well that means they can consider anything and put it
18 in a document outside of the policy and say, well, we based our decision
19 for no coverage based on medical necessity based on our medical policy
20 bulletins that we change from time to time, which aren't part of your
21 policy. And somehow that means it's not medically necessary because
22 we have a document outside the policy that changes all the time? I think
23 that's unreasonable for an insurance company to take that position on an
24 insurance policy.

25 Q So would it be fair to say whatever SHL considers in terms of

1 these bullet points --

2 A Right.

3 Q -- they do so in a manner consistent with the industry
4 standard for fair claims investigations?

5 A Right. They can consider what's reasonable and what's fair
6 and they can balance it against everything if they want to do that and
7 deny the claim. They can research it, they can investigate it, but they
8 better do that before they deny it.

9 You notice one thing that's missing in terms of they're saying what
10 we may consider? Cost. There's no category for cost. They're not
11 telling the insured they're considering cost, so at the extent that they're --
12 he's secretly considering cost, it's not even one of the things they say
13 they might consider.

14 Q Okay. So do you have anything else to offer about this
15 provision?

16 A 13.87.

17 Q That's the next page. Exhibit 4, page 65.

18 A It makes it clear again that, "A pre-service claim means a
19 claim for benefits under the plan with respect to which terms and
20 condition received the benefit in whole or in part on approval of the
21 benefit in advance of obtaining medical care".

22 So again, just reminding us that this policy, unlike other policies
23 that I've reviewed, make it absolutely crystal clear that the pre-service
24 claim is a claim. And claims have to be responded to in a certain way in
25 accordance with the standard and practice in the industry in good faith.

1 And they were not here. I think we can go to Exhibit A, if we can find it --
2 find that in the benefit schedule again, which enhances the insured's
3 belief and coverage.

4 Q So you want to go to attachment A?

5 A Let me see if I can find it. The benefit schedule, which is part
6 of the contract. Page 6 of exhibit -- the benefits schedule A, which is part
7 of the contract. It's bates stamp SHL2660.

8 Q So that's going to be Exhibit 4, page 74. And what would
9 you like to explain to the jury with regard to Exhibit 4, page 74?

10 A It includes the reference to the fact that other diagnostic --
11 look at the other diagnostic box and try to enlarge that. Oh I made an
12 arrow; I touched the screen. Can I -- how do I get that off there? I guess
13 it doesn't matter.

14 THE COURT: I think you can touch it twice on the right. Yes.
15 The lower right corner. Bottom right corner. Touch it twice.

16 THE WITNESS: I'm putting more arrows.

17 THE COURT: He'll help you.

18 THE WITNESS: All right. You think my Parkinson's would
19 help for that. Oh okay. Thank you.

20 THE MARSHAL: All right.

21 THE WITNESS: Thank you.

22 THE MARSHAL: You're Welcome.

23 THE WITNESS: Under the title -- this is kind of a benefit
24 schedule that lists the general categories of coverage under the policy,
25 and it says, "other diagnostic and therapeutic services". And you can see

1 that therapeutic radiology is included. It doesn't say, but not proton
2 beam or anything to that effect.

3 Therapeutic radiology broadly interpreted as a coverage
4 grant as part of the coverage promises, means proton beam therapy. It's
5 state of the art. It's more expensive, yes. But they're entitled to get it
6 under the Cadillac policy that she bought.

7 BY MR. SHARP:

8 Q So let me kind of follow up on that point. If Sierra Health and
9 Life wanted to exclude proton beam therapy from coverage, could they
10 have done so?

11 A If permitted by the state. Some states wouldn't allow it. If
12 the state allows it and there's no other legal restriction they can clearly
13 and plainly exclude it if they wanted to. Generally that's what they
14 would do if they are permitted to do so.

15 Q So they would write a specific exclusion within the
16 agreement of coverage?

17 A Or they would say in the schedule B in this case, you have to
18 get preauthorization for proton beam, just like you do for IMRT. They
19 would tell the insured up front that you got to get an authorization and
20 have a basis to put it through that series of hoops in the first place.

21 Q Yeah. But we're talking two different concepts and I want to
22 make sure the jury understands this. So we were talking -- you were
23 talking about attachment B, but I'm just talking about the provision of
24 exclusions to coverage. SHL assuming the state authorized it could have
25 put an exclusion that said, we don't cover proton beam therapy?

1 A Yes.

2 Q But they didn't do that in this case?

3 A No.

4 Q And so what's the significance of the fact that they did not
5 include an exclusion for proton beam therapy?

6 A There's broad coverage that includes coverage for proton
7 beam and there's no applicable exclusion and limitation. There's just
8 these weasel words in the middle of the policy that stated we might have
9 other documents that we look at that determine coverage, but they're not
10 part of the policy. And so -- and we can change them whenever we want
11 to. But it's not a very safe and secure place.

12 Q Let me also follow up with a couple points. You said -- you
13 made a comment about whether the state would approve it. Did you
14 mean the applicable state insurance division or commissioner?

15 A State insurance commissioner or the legislature. Many
16 states have said that you cannot exclude proton, you have to treat it like
17 IMRT.

18 Q So let's just take the first example and I just want to ask you,
19 is it typical that insurance companies file their policies for approval with
20 the insurance commissioner?

21 A It depends, different states have different rules on that.

22 Q Okay.

23 A There's some scrutiny, but not a lot of scrutiny. There's so
24 many insurance policies being sold, and the insurance departments are
25 so small, so underfunded they can't possibly review every word in an

1 insurance policy. They do their best. They're hardworking people, but
2 there's not a lot of them. And there's a lot more insurance policies than
3 there our people. So they review them. Some states require file and use
4 some --

5 MR. ROBERTS: Your Honor, I object. He's speculating and
6 nonresponsive again.

7 MR. SHARP: I don't think he was speculating.

8 MR. ROBERTS: He's speculating as to what the Nevada
9 Department of Insurance reads and doesn't read when the policy is filed
10 for approval.

11 MR. SHARP: He did not say that. But anyway, let me
12 rephrase it.

13 BY MR. SHARP:

14 Q Let's just get back -- I mean, look is it -- is the fact that an
15 insurance policy may be approved by a governmental entity, does that
16 affect how an insurance company has to act in conforms with industry
17 standard?

18 A It depends on the law of a particular state.

19 Q But in terms of Nevada, are you aware of anything that
20 would say, oh, we approve -- we have this policy approved; therefore,
21 you know, we can do whatever we want?

22 A No. I'm not aware of anything that says that. And the policy
23 still subject to the implied covenant of good faith and fair dealing no
24 matter what the department of insurance says.

25 Q So -- okay. Is there any other provision within the insurance

1 policy?

2 A I think that generally touches on the insurance policy
3 provisions that I wanted to discuss that relate to my opinions in this
4 case.

5 Q So sir, now that we've gone through the insurance policy,
6 I'd like to turn to the actual prior authorization in this review in this case.
7 Is that fair?

8 A Sure.

9 Q So in your analysis to determine whether Sierra Health and
10 Life acted consistent with industry standards, what did you do?

11 A I reviewed the claims file, including the denial letter. I
12 reviewed the policy. I reviewed all the deposition testimony of the
13 witnesses that were involved that was -- that were taken and provided to
14 me. So I carefully studied the information that was provided, and I
15 reached my opinions based on that and my education, my background,
16 my training and my experience

17 Q So Exhibit 5.

18 MR. SHARP: Could you pull that up?

19 BY MR. SHARP:

20 Q If you look down at the bottom it's got -- this is Exhibit 5,
21 page 1, but the bottom it's got that SHL320. Do you see that, sir?

22 A Yes.

23 Q So when you say claim file, you're referring to Exhibit 5?

24 A That's included in the claim file, yes.

25 Q Okay. So what would you like to first discuss with the jury

1 with regard to the actual handling of this pre-service claim?

2 A Well, I can describe the process that they went through.

3 Q Sure.

4 A If you'd like me to do that?

5 Q Well, whatever you think would assist the jury.

6 A Okay. Let me just do it from my memory.

7 The basic process date, request for coverage was submitted by MD
8 Anderson and it came to UnitedHealthcare, and it went to a nurse. And
9 the nurse looked at the medical policy. She didn't look at the insurance
10 policy, she looked at their in-house, I call it secret medical policy because
11 it's not part of the insurance policy and the average person wouldn't
12 know that it's there.

13 And so the nurse looked at the medical policy and it said the
14 proton beam coverage and it listed a couple of specific things that it's
15 approved for, three or four things as I recall. And then it said, but it's not
16 approved for all of the other treatments of cancer, including but not
17 limited to it and then it lists a whole bunch of things, including lung
18 cancer.

19 So she is the first step in the claims review process. She looks at it
20 and she says, it's not one of the three approved. So she can't -- if it was
21 one of the three approved, she could have approved it and that would be
22 the end of it. If it was one on the list by name, she would've approved it
23 and Dr. Ahmad would've never seen it. He doesn't see the approvals;
24 she approves the three categories.

25 Q So what's the next step after --

1 A Well --

2 Q -- [indiscernible]?

3 A Then -- yeah. Basically she approves it. If she can't approve
4 it, then she has to review it to a medical director to make the coverage
5 decision under the policy. That was Dr. Ahmad. So she sent it up to Dr.
6 Ahmad and Dr. Ahmad looked at the same medical policy. He did not
7 review the insurance policy. He does not have the skill or training to
8 review the insurance policy.

9 He knows nothing about the obligations of good faith and fair
10 dealing. He's not equipped to deal with it, nor is he equipped based on
11 what I've heard on the medicine to deal with the medicine, because he's
12 not a radiation oncologist, he's a medical oncologist. He doesn't know
13 anything about proton beam. He's never seen the machine. He's never
14 seen it work. He knows nothing about it.

15 So on the medical side he's question -- has questionable
16 qualifications to stand toe to toe to give equal consideration to the
17 medical side of the equation. And in the insurance side, he has no skill
18 whatsoever. But he looks at the medical policy and he says -- he sees it.
19 It says deny and he spends a few minutes on it. And he does lots of
20 cases every day, day in and day out.

21 Q So --

22 A And he denied it and then he sent it off to adverse
23 determination team.

24 Q So let me stop you there before we get to the adverse benefit
25 determination, if you don't mind.

1 A Okay.

2 Q We've had a couple questions. First of all, I mean, look, is it
3 some kind of -- I mean, Dr. Ahmad's a doctor. So is there some kind of
4 industry standard that says because he's a doctor denying and accepting
5 claims that he doesn't have to be trained on the industry standards for
6 fair claims handling?

7 A I don't believe that exists that -- there's no exemption exists
8 for as your question suggests. He's making a claims decision under an
9 insurance policy. He has to be trained on how to make good faith claims
10 decisions under insurance policies if he's going to be the one that make
11 the -- that makes the decision.

12 Q Would a reasonable insurer utilizing a reasonable utilization
13 management program assure that the medical directors that are
14 accepting or denying claims are trained on the duty of good faith and fair
15 dealing?

16 A They should. It doesn't happen at this company from what I
17 can tell, but it must happen in my opinion.

18 Q And should they be trained on the industry standard for fair,
19 thorough and objective investigations?

20 A Yes. And if they don't want to train the medical director to
21 do it, they have to have a claims person in that spot that gets the initial
22 claim that is trained. And then if they want a medical opinion from Dr.
23 Ahmad for whatever it's worth, they can refer it out to him for his
24 opinion. But I would submit to you that Dr. Dr. Ahmad's opinion and Dr.
25 Liao's don't match up. And when you have a duty of good faith and fair

1 dealing, you have to give equal consideration. How can Dr. Liao and Dr.
2 Dr. Ahmad match up? How can Dr. Ahmad ever overrule Dr. Liao from a
3 medical necessity standpoint?

4 Q So let me follow up with two points. I mean, we've been
5 talking about the good faith eyeglasses, the industry standards for
6 objective interpretation of the policy for equal consideration, for
7 investigations. Should a reasonable insurance company utilizing --
8 conducting utilization management in the State of Nevada have
9 somebody in the decision making process train on the industry
10 standards we've been discussing --

11 A Within the insurance, absolutely. It's an insurance policy.

12 Q And based upon your review of the policy or of the materials
13 in this case, did that happen? Is there anybody within this structure that
14 we're going to discuss today?

15 A No. They just focused on the medical policy, which they can
16 change at their whim, as they see fit. And they just even say, we might
17 consider something else and then they kind of vaguely describe it. But
18 it's not clear and plain and should not operate as an exclusion for
19 coverage under this policy in my opinion.

20 Q And the fact that there was nobody within this chain, the
21 group of people that we're going to talk about this afternoon, none of
22 those people were trained on the duty of good faith and fair dealing and
23 the industry standard. Is that something based upon your industry
24 experience that would be known by an insurance company?

25 A They know that they need to do it, or they reasonably should

1 know because it's an insurance policy, it's simple.

2 Q And the fact that they didn't, would that rise to a conscious
3 disregard for the insured's rights?

4 MR. ROBERTS: Objection. Calls for legal conclusion.

5 MR. SHARP: It's not a legal conclusion. It's an ultimate
6 issue, but it's not a legal conclusion.

7 THE COURT: Overruled.

8 THE WITNESS: I believe it would. I believe the evidence is a
9 conscious disregard for the insured's rights and reasonable expectations
10 of coverage.

11 THE COURT: All right. We're going to take lunch break.
12 Ladies and gentlemen, we'll come back at 1:00 p.m.

13 During the break you are instructed not talk with each other
14 or with anyone else about any subject or issue connected with this trial.
15 You're not to read, watch or listen to any report of or commentary on the
16 trial by any person connected with the case or by any medium of
17 information including without limitation newspaper, television, internet,
18 radio.

19 You're not to conduct any research on your own relating this
20 case such as consulting dictionaries, using the internet or using
21 reference materials. You're not to conduct any investigation, test any
22 theory of the case, recreate any aspect of the case or in any other way
23 investigate or learn about the case on your own. You're not to talk with
24 others, text others, tweet others, google issues or conduct any other kind
25 of book or computer research with regard to any issue, party, witness or

1 attorney involved in this case. You're not to form or express any opinion
2 on any subject connected with the trial until the case is finally submitted
3 to you.

4 So we'll return at 1:00 p.m.

5 THE MARSHAL: Okay. All rise for the jury.

6 [Jury out at 12:01 p.m.]

7 THE COURT: Are there any issues we need to address
8 outside the presence of the jury?

9 MR. SHARP: None by the Plaintiff.

10 THE COURT: Thank you, Mr. Sharp.

11 MR. ROBERTS: None, Your Honor. Thank you.

12 THE COURT: Thank you, Mr. Roberts.

13 MR. SHARP: And you said 12:00 o'clock?

14 THE COURT: 1:00.

15 MR. SHARP: 1:00 o'clock, sorry.

16 [Recess taken from 12:02 p.m. to 1:01 p.m.]

17 THE MARSHAL: Back on the record.

18 THE COURT: Thank you. Please be seated. Are the parties
19 ready for the jury?

20 MR. ROBERTS: Yes, Your Honor.

21 MR. SHARP: Yes, Your Honor.

22 MR. ROBERTS: I was paying attention that time, Judge.

23 THE COURT: Oh thank you. The Court appreciates it.

24 THE MARSHAL: All rise for the jury.

25 [Jury in at 1:01 p.m.]

1 THE MARSHAL: Okay. All jurors are present.

2 THE COURT: Thank you. Do the parties stipulate to the
3 presence of the jury?

4 MR. ROBERTS: Yes, Your Honor.

5 MR. SHARP: Yes, Your Honor.

6 THE COURT: Thank you. Please be seated. Mr. Sharp, go
7 ahead.

8 MR. SHARP: Thank you, Your Honor.

9 BY MR. SHARP:

10 Q Mr. Prater, when we took our break we were just entering the
11 period of the prior authorization claim. So I'd like to bring up to you
12 Exhibit 5, page 22.

13 MR. SHARP: And Jason, if you -- man I really screwed up my
14 numbers on that. Oh, okay. It's going to be -- go to page 9.

15 JASON: Page 9?

16 MR. SHARP: Yes.

17 BY MR. SHARP:

18 Q And sir, have you seen this urgent prior authorization request
19 before?

20 A Yes, I have.

21 Q And so from an insurance industry standard perspective,
22 how should a reasonable insurer evaluate the information that's
23 contained both within the letter and attached to the letter?

24 A Well, in light of the principle that we talked about, about
25 giving equal consideration, they should review it carefully and see if it

1 supports the insured's claim and makes a difference.

2 Q And let me ask something, if a -- we talked about this where
3 a question arises regarding the need for additional information. What
4 does a reasonable insurer do when they need additional information?

5 A They reach out and ask for it. They pick up the telephone.

6 Q And --

7 A The medical director calls the other doctor, assuming they
8 have the expertise or experience to do that.

9 Q There's been some indication in this trial that Sierra Health
10 and Life is critical of MD Anderson for not supplying comparative studies
11 between the IMRT and the proton beam therapy. So I'd like you to
12 comment about that from the perspective of what a reasonable insurer
13 would do.

14 A They would investigate. They would reasonably know that
15 there was -- that information was available and if they thought it was
16 something that they should consider they should pick up the phone and
17 ask for it, gather it.

18 Q It -- is the treating doctor, or in this case the treating entity
19 MD Anderson, are they responsible for the investigation of the claim?

20 A Absolutely not.

21 Q And was there anything prohibiting Sierra Health and Life
22 from asking for things like comparative studies?

23 A No. They could call and ask for whatever they want to ask
24 for.

25 MR. SHARP: So let's go to page 2, Jason, on Exhibit 5. And

1 if you could pull up the -- this February 4th note from Lou Ann
2 Amogawin.

3 BY MR. SHARP:

4 Q Now Mr. Prater, have you seen this email before in your
5 evaluation?

6 A Yes.

7 Q And so I'd like for you to comment upon the reasonableness
8 of the investigation as reflected in Dr. Ahmad's email.

9 A Well, there's no investigation suggested by Dr. Ahmad's
10 email at all, other than him saying it doesn't need the current policy, the
11 medical policy, it's not part of the insurance policy. So that's what he
12 looked at, he looked at the medical policy and he said it was excluded
13 and he said it's not covered and that's all he needed to do.

14 Q But Dr. Ahmad says, well, I looked at the medical records.
15 Did you see any evidence in your review of the file that Dr. Ahmad
16 looked at, considered or analyzed the medical records?

17 A None. In fact the contrary is true. If he had looked at the
18 medical records and reached out to look at them or analyze them, he
19 would have made note in the claim to the effect that he looked at the
20 medical records in my opinion. He should have if he looked at them.

21 Q Now you're experienced in teaching claims handlers how to
22 document files, right?

23 A Yes.

24 Q And so what would one normally see if there was actually an
25 analysis of the medical records from MD Anderson?

1 A I would expect to see some reference to that fact and some
2 conclusion based on their review of the records.

3 Q Now there's been some indication by Dr. Ahmad that he
4 considered medical literature. Is there anything in your review of the file
5 that would suggest he did that?

6 A No.

7 MR. SHARP: Let's go to Exhibit 5, page 6. And if we go to
8 this February 4th note.

9 BY MR. SHARP:

10 Q This is the second email that Dr. Ahmad sent at 4:20 p.m. on
11 February 4th, and did you review this email?

12 A I did, yes.

13 Q And can you comment upon the reasonableness of the
14 evaluation in this email?

15 A Well, it's the same as the last documentation, it's basically
16 saying that he compared the request against the current medical policy
17 and said it doesn't meet the requirements and therefore it's not covered,
18 and it's denied.

19 Q So there was --

20 MR. SHARP: Okay. Now let's go to page 5 Exhibit -- page 5
21 now. And then we pull up this February 5, 2016.

22 BY MR. SHARP:

23 Q So this is the third email Dr. Ahmad sent communicating the
24 denial and can you speak to the reasonableness of the investigation and
25 the evaluation as reflected in this email?

1 A It's the same as the other emails. He doesn't reflect that he
2 looked at anything additional or considered anything other than the
3 current HPN/UHC medical policy.

4 Q So --

5 A Not the -- this is not the insurance policy; this is the medical
6 policy that he looked at.

7 Q So is there any indication that -- if you could -- the
8 mediastinal tumor, I cannot pronounce that name. Does that indicate
9 where the portion I've highlighted with the mediastinal tumor, does that
10 indicate that the medical records were reviewed and analyzed by Dr.
11 Ahmad?

12 A It doesn't seem to be a very comprehensive reflection of the
13 medical records that were submitted. What two words? There's a lot
14 more than that.

15 Q And based upon your review of the claim file, Exhibit 5, do
16 you have an opinion as to what Sierra Health and Life relied upon to
17 deny this prior authorization?

18 A It's crystal clear --

19 MR. ROBERTS: Objection. Calls for speculation.

20 THE COURT: Overruled.

21 THE WITNESS: Yeah. It's crystal clear to me that the only
22 thing that Dr. Ahmad looked at was the medical policy. That's the only
23 thing he considered, the only thing he was probably capable of
24 considering given his lack of clinical knowledge and his lack of insurance
25 knowledge.

1 Q Going -- not let me follow up on that. Would it be --

2 MR. SHARP: Well no, let's just go to the -- let's go to the
3 denial letter and that's Exhibit 5, page 11. Hang on, not 11. Page 33.
4 Exhibit 5, page 33.

5 BY MR. SHARP:

6 Q Sir, in the course of your evaluation in this case have you --
7 did you review the denial letter that Sierra Health and Life sent to Mr.
8 Eskew?

9 A I did.

10 Q And I'd like you to explain your thoughts of this denial letter
11 in relation to the industry standard.

12 A Okay. First of all let me talk about before I say what it says
13 and tell you what I think it says and where it's deficient. I'd like to tell
14 you how it came into being, because I think the process or the manner in
15 which they created the denial letter is important to understand.

16 After Dr. -- after, you know, their medical director reviews the claim
17 and denies it and he signed -- the name that's signed on, Dr. Ahmad on
18 page 3, it goes to an adverse determination team to create the denial
19 letter. It went to a man named Gustavo Guerrero who's been with the
20 company almost 20 years and he created the denial letter. He's not a
21 lawyer, he's not a trained claims handler, he's not a doctor, he's a
22 clerical person, a clinical person that just does denial letters from what I
23 can tell.

24 He said he did the denial letter here based on a template, it's a
25 form letter. He used a canned paragraph; they have a whole bunch of

1 canned paragraphs in what they call their denial library. They don't have
2 an approval library with paragraphs approving claims, they only have a
3 denial library denying claims. So he picked from the paragraphs, and he
4 customized, and he cut and paste it and he put them into the letter.

5 Then when he finishes the letter with some modifications, if it's
6 modified by his supervisor that he's not aware of, it goes to medical
7 directors supposedly for approval, but the evidence suggests that it
8 never goes back to the medical director. It's not signed by the medical
9 director, it's a signature stamp affixed on the denial letter by somebody
10 other than the medical doctor that supposedly did the coverage decision.

11 Q So let me just stop you there. Is it consistent with the
12 industry standards for fair claims handling to have a form letter such as
13 you've described in this case as reflected in Exhibit 5?

14 A It's a dangerous practice because the letter has to be tailored
15 to this specific policy and specific facts and circumstances at issue. In
16 this case, you know, he was asked in his deposition did you include all
17 the reasons for denial in your letter. And he said, that's not my job. I
18 don't know whose job it is, but it has to be somebody's job to spell it out.
19 He just picked paragraphs out of the denial library, pasted them into
20 document. It never goes back to Dr. Ahmad for his review or signature,
21 somebody else affixes the signature stamp and Dr. Ahmad never even
22 reviews the letter before it goes out. I think that's a bad practice.

23 Q Now you -- in your practice as an insurance expert you had
24 occasions to assist insurance companies in adopting policies and
25 procedures?

1 A Yes. I've written them.

2 Q And would it be fair to say based upon your experience that
3 the people that developed this policy were in upper management?

4 A You mean Mr. Guerrero is not acting on his own?

5 Q That's what I'm trying to get out.

6 A Yeah. I'm sure that's true.

7 Q People that develop this practice of using the denial library?

8 A No. That's a companywide practice I'm sure.

9 Q And would it be fair to say based upon your practice and the
10 industry standard that the use of the denial library as it's presented in
11 Exhibit 5, is that in conscious disregard for the rights of the insured?

12 A Yes.

13 Q Okay. So -- go ahead, sorry. I interrupted you, go ahead and
14 continue to talk about the denial letter.

15 A Well, the other thing that I was concerned about, since he's
16 assigned the task of writing the denial letter, Dr. Ahmad just sends the
17 email, it's denied, he comes up based on his training whatever that
18 might be to draft the denial letter. And then it goes off to somebody else
19 or at least somebody else affixes the signature stamp. And then when
20 he was asked in his deposition, well, did you include all basis for denial,
21 were you specific or something like that. He says, that's not my job. I
22 just cut and paste denial letters. I couldn't believe it and I think it's a bad
23 practice and I think it needs to change.

24 Q And these practices that -- I mean, we're -- you're talking
25 about Mr. Guerrero. Are you critical of Mr. Guerrero or the people that

1 put this practice into play?

2 A No. I think he's doing his job as he understands it. I don't
3 think he knows about the duty to -- or the responsibility in the industry to
4 set forth in particularity. He's not reading the policy; he doesn't know
5 that it requires or doesn't require. I don't think he's expected to. He just
6 -- he's just part of the machine and, you know, it works in such a way as
7 it's intended by its corporate, you know, executives in my opinion.

8 Q So the people that put this -- from your perspective as an
9 insurance industry expert, the focus of your criticism is the people that
10 put this process into play?

11 A Absolutely. I don't even blame Dr. Ahmad. I mean, I think
12 he's just got blinders on, and I think all the medical directors are trained
13 just to look at one thing and they don't really care if they had experience
14 in the medicine at issue. Dr. Ahmad testified that any medical director
15 can deny any claim because they can read the policy bulletins. It makes
16 no sense. It's not good faith consideration of the insured's interests.

17 Q So from a reasonable insurance company practice your
18 criticism is to the corporate wide philosophy and practices of this
19 company?

20 A Yes. I think this shows -- reflects the corporate practice and
21 procedure and the testimony confirms it because they're not admitting
22 they did anything wrong. They said they did it the way they were trained
23 to do it and there's no remorse. It's going to continue unabated.

24 Q Now how is that insurance companies take into account
25 things like in this particular case we're talking about treatment for

1 cancer. How should a reasonable insurance company take that into
2 account when they adopt corporate policies?

3 A Well, I would hope they would take into account the fact that
4 the person is suffering from a serious terminal disease and, you know, is
5 reaching out for help and trying to get whatever they're entitled to under
6 their contract, and they would respect that. And they would put it
7 through a fair process, not a denial letter.

8 Q Sir, continue. Is there any -- about the denial letter?

9 A Well, I think when you look at it on its terms I have some
10 comments to make about it. It's --

11 Q Would you like us to pull any portion of that?

12 A Yeah. Pull up the first paragraph.

13 "Mr. Eskew, we reviewed health care services requested for
14 coverage." This again, it's insurance coverage, it's not coverage under a
15 medical policy, it's not coverage under Managed care, or NCQA, or
16 URAQ or anything else. It says, "we were requested to respond to a
17 coverage under the terms of your health benefit plan to determine if they
18 are covered as defined in your plan document", which means he has to
19 read it. He can't say we're terminating your coverage based on your
20 plan document and he's never even read the thing.

21 "We received your request to cover it and we've determined the
22 requested services are not covered and here's the details of our
23 determination." Now this is where they're supposed to spell out with
24 specificity what the details are so you can meaningfully respond.

25 "We have determined that proton beam radiation is/are not

1 covered." And then it talks about the terms of the proposed treatment.
2 And then it says, "The reason for our determination is based upon the
3 UnitedHealthcare Inc. medical policy for proton beam". And his
4 coverage is denied. That's the reason, it's based on their medical policy
5 that they can change at any time they want to.

6 Q So based upon an expert in the insurance industry, do you
7 have an opinion as to whether Sierra Health and Life even considered
8 the terms of the insurance policy in the evaluation of this claim?

9 A I know they didn't. I know that the person who made the
10 decision said he never read it, didn't consider it and it was irrelevant to
11 him, the insurance policy. He just focused on the medical policy, but the
12 denial letter says, we've reviewed your insurance policy. It's a
13 misrepresentation of the truth. It's forbidden by the industry standards;
14 you can't do that. You can't misrepresent pertinent facts or policy
15 provisions relating to coverages at issue.

16 MR. ROBERTS: Objection. Move to strike. His comment on
17 the credibility of other witnesses and the truthfulness of other witnesses.

18 THE COURT: Overruled.

19 THE WITNESS: And then the denial letter goes on to state,
20 "This type of radiation therapy is considered unproven and not medical
21 necessary". Well, I think they've heard evidence that it is considered
22 proven, and it was medically necessary for treating lung cancer.

23 MR. ROBERTS: Objection. Beyond the scope of his
24 expertise.

25 THE COURT: Mr. Sharp?

1 MR. SHARP: Yeah. I mean he's commenting from the
2 position of a reasonable insurance claims handling.

3 THE COURT: Overruled.

4 MR. ROBERTS: Your Honor, may we approach?

5 THE COURT: Yes, Mr. Roberts.

6 MR. ROBERTS: Thank you, Your Honor.

7 [Sidebar at 1:21 p.m., ending at 1:27 p.m., not recorded]

8 BY MR. SHARP:

9 Q Okay. Mr. Prater, based upon your review of the claim file
10 and your expertise in reviewing claims file and applying the facts to the
11 terms of the insurance policy, do you have a comment upon the
12 reasonableness of the statement in this case, that radiation therapy is
13 considered unproven and not medically necessary for treating lung
14 cancer?

15 MR. ROBERTS: Objection. Beyond the witness's expertise.

16 THE COURT: Overruled.

17 THE WITNESS: I think the evidence that I reviewed -- the
18 weight of the evidence that I reviewed suggests that it is considered
19 proven, and it is medically necessary, and it is medically appropriate
20 treatment.

21 THE COURT: Hold on, hold on. The jury's going to disregard
22 any statements by the witness regarding his opinion of medical
23 necessity. Mr. Prater, you're instructed not to discuss whether you
24 believe it was medically necessary.

25 THE WITNESS: Okay.

1 THE COURT: Thank you.

2 MR. SHARP: He can testify as to whether it was medically
3 necessary under the terms of the policy.

4 THE COURT: Discussing that, but not his opinion on whether
5 it was medically necessary.

6 MR. SHARP: Okay.

7 BY MR. SHARP:

8 Q So under the terms of the policy with respect to medically
9 necessary, do you have an opinion as to the reasonableness of the
10 position set forth, there is limited clinical evidence that directly compares
11 proton beam therapy with other types of radiation therapy?

12 A Well, I think as I indicated before this morning, I feel that they
13 met the conditions under the policy for medical necessity. I'm not
14 talking about it from a medical standpoint, I'm talking about the policy
15 requirements, the three requirements for medical necessity. I think the
16 evidence is overwhelming that he satisfied those conditions.

17 Q Okay. Is there anything else you'd like to comment upon on
18 this portion of the denial?

19 A Yes. On the second page when it says, "our clinical staff
20 reviewed the case, and his services are not eligible expenses". The
21 clinical staff that they're referring to I think is Dr. Ahmad. I don't know
22 who else was involved, only Dr. Ahmad from what I can tell.

23 And then it says, "We will not cover any excluded service,
24 treatment, item or supply even if it is recommended or prescribed by a
25 physician or other health care professional or is the only available

1 treatment for your condition". And it says, "Please refer to the sections
2 of your plan document on limitations and exclusions". From an
3 insurance standpoint that's not sufficient. You can't just say go look at
4 your exclusion section and see if any of them apply. You have to call out
5 the specific exclusion and why, you know. If doesn't meet the prong of
6 medical necessity then you have to say why, which prong doesn't it
7 meet.

8 There's three tests for medical necessity under the contract, which
9 he never read. If it was level of service, then say it's level of service. If
10 it's whatever the other two criteria are then spell it out. You have to be
11 specific, you can't just say, refer to your plan document exclusions. Even
12 the policy says it should even be told the particularity and the standard
13 in the industry is it should be told with particularity.

14 So it requires them to investigate and evaluate before they take a
15 position. And then when they take a position they have to set forth the
16 basis for the position so that you can respond meaningfully, so they
17 can't come back later and say, oh there's -- it was prong three or prong
18 two. You know, you have the right to know at the time of denial.

19 And then finally the next sentence I wanted to point out in the next
20 paragraph, "compliance with the members -- compliance by the member
21 with SHL's manage care program is mandatory". No. It's not. It's not
22 mandatory because it's not listed on Exhibit B. It's not required proton
23 therapy to go through the process. If they had read their own contract
24 they'd see that it's not required to go through Managed Care. It didn't
25 deserve a denial and that's my opinion on that subject.

1 Q Anything else that you want to deal with in the denial letter?

2 A No.

3 Q I have a couple questions about -- that I want to follow up on.
4 First of all, is there anything within the denial letter to indicate that there
5 could have been additional information that MD Anderson or Mr. Eskew
6 could provide to change the company's position?

7 A I didn't see that kind of detail.

8 Q And so if for example the insurance company wanted
9 comparative studies, what would be the industry standard to
10 communicate that in the denial?

11 A In the denial?

12 Q Well, in other words would they ask for that information
13 either before -- we already dealt with that. But now we're at the denial
14 and they say, okay, if we only had these comparative studies, should that
15 be set forth?

16 A If that was part of the basis for denial.

17 Q In other words --

18 A Whatever the basis for denial should be spelt out. And I
19 think it's fair the basis for denial was their medical management policy.

20 Q And from an insurance industry standard perspective, why is
21 that insurance companies want to specifically identify and explain to the
22 insured why the claim is being denied?

23 A Because they're obligated to do so under the standards and
24 practices in our industry and so that an insured can meaningfully
25 respond. And if you're missing information, get them the information.

1 Or if there's something that they need or didn't get, they'll tell you what
2 it is that they need. Or if it's a specific exclusion, you know, there's a lot
3 of exclusions in insurance policies. They can't just say see the
4 exclusions, you know, it's not covered. They have to say which one and
5 why to a particularity and they promise that in the policy, and it's
6 required by the standard of practice and fairness in our industry.

7 MR. SHARP: I'd like to go to page 5 of -- let's see. Go to
8 page 35 of Exhibit 5. Well, I want to go Dr. Shamoon Ahmad.

9 BY MR. SHARP:

10 Q So Dr. Ahmad's signature stamp appears on this letter, do
11 you see that?

12 A Correct.

13 Q And in the course of evaluating this claim did you evaluate
14 NRS 695G.150?

15 A I believe I did. I don't recall the number exactly. Is that -- I
16 think I have copies of it, if you want me to look at it or do you want to
17 show it to me, and I can tell you?

18 Q Yeah. Let me -- it might be quicker if I just pulled it up and
19 you can tell --

20 MR. SHARP: Your Honor, I'd like the Court to take judicial
21 notice of NRS 695G.150.

22 THE COURT: Any objection, Counsel?

23 MR. ROBERTS: No objection, Your Honor.

24 THE COURT: The Court will take judicial notice.

25 MR. SHARP: Can you pull that -- I think it's page 2 of the

1 statute.

2 BY MR. SHARP:

3 Q There we go. Sir, I'm showing you what's NRS 695G.150 and
4 if you could just take a moment and review and have you reviewed this
5 statute before?

6 A Yes.

7 Q Okay. I'd like to go through the provisions of this statute.
8 And why don't you just explain to the jury from a prospective of an
9 insurance industry claims handling expert what we're seeing here?

10 A It talks about the authorization process to deny coverage
11 basically and it have several requirements.

12 Q And it says the decision to not authorize coverage. So first it
13 says, "Each managed care organization shall authorization coverage of a
14 health care services that has been recommended for the insured by a
15 provider of health care within the scope of his or her practice if that
16 service is covered by the health care plan of the insured unless", and
17 then it has two conditions --

18 A Right.

19 Q -- right?

20 A Yes.

21 Q So I'd like to go down to -- the first one says, the decision to
22 not authorize coverage is made by a physician, do you see that?

23 A Yes.

24 Q And then Part B, "Possesses the education, training and
25 expertise to evaluate the medical condition of the insured"?

1 A Correct.

2 Q And I'd like you to comment upon the reasonableness of an
3 insurance company who relies upon Dr. Shamoon Ahmad to deny a
4 claim involving proton beam therapy in relation to Section B.

5 A Well, it's clear that the statute on its face requires that the
6 person making the decision have not only the license to practice
7 medicine in Nevada, but in Section B to possess the education, training
8 and experience and expertise to evaluate the medical condition of the
9 insured. There's no doubt in mind that Dr. Ahmad that evaluated this
10 and made the coverage decision does not have the requisite experience,
11 education, training to evaluate the medical condition of the insured.

12 And it's clear from his deposition and from his testimony in this
13 trial he's not a proton beam specialist, he's a medical oncologist. He's
14 not a proton radiation oncologist or radiation oncologist at all. He
15 doesn't know how to do it and he's never done for any of his patients,
16 any kind of radiation therapy other than consulting as part of a team.

17 He doesn't possess the certifications or the education necessary to
18 be able to have a meaningful conversation with Dr. Liao with whom he
19 should be reaching out to ask questions, but according to Dr. Liao he
20 wouldn't understand if they were talking about it anyway, so.

21 Q Did you see anything in the file -- or in the documents you
22 reviewed that would suggest that Sierra Health and Life had adopted
23 specific policies to make sure that someone like Shamoon Ahmad is
24 evaluating the request that he's not -- doesn't have the training or
25 education to evaluate?

1 A That's not their business practice. They just -- if it's a
2 licensed physician that's good enough for them to deny.

3 Q And it says -- it continues in Part C it says, "has reviewed the
4 available medical documentation, notes of the attending physician, test
5 results and other relevant medical records of the insured". Did I read
6 that correctly?

7 A Yes.

8 Q And do you have -- did you see any evidence that section C
9 from a reasonable insurer's view has been complied with?

10 A It doesn't appear to me based on everything that I've
11 reviewed that he spent much time on the claim at all, 12 minutes I think
12 was estimated. And it's not likely in my opinion that he reviewed
13 medical records or other relevant medical information. He didn't talk
14 about it in the claim file, he doesn't perhaps have the ability to criticize it.
15 And so he just -- again, I think it's clear by now that he focused on the
16 medical policy. That's all he looked at. That's his blinders put on him by
17 his employer. Look at this and nothing else. And they write a letter
18 saying we've considered all this, and we've been fair, but it's in my
19 opinion not true.

20 Q So if somebody were to come up in this trial and suggest
21 that only a physician can make a decision about whether or not a claim
22 should be denied for medical necessity. Just follow my example so far.
23 Would that mean -- just accept that proposition. Would that mean that
24 the doctor doing the denial doesn't have to be trained on the obligations
25 of good faith and fair dealing and reasonable claims handling practices?

1 A It's critical that the decision maker that covers decision
2 making be trained on that because they're making the ultimate decision.
3 And denials are hard to overcome. You can appeal them sometimes if
4 you think you can do it, but it's very unlikely to be successful in my
5 opinion.

6 Q And let me follow up on that. If you had experience in the
7 area of, you know, of evaluating insurance appeal systems and dealing
8 with those systems?

9 A I don't think it changes the result in very many cases. I think
10 if it's not on their list as a covered service that the chances of getting
11 around it, even the procedure that the process that they have for
12 handling these kinds of requests suggests that it will not get full fair
13 review. It will just get denied and redented. They didn't appeal so we
14 don't know for sure. But I can see the way the system works, and I know
15 that on the appeal of UnitedHealthcare they appellant people are also
16 asked to look at the medical policy and say, does it fall within the
17 medical policy or not, yes or no. They focus on the medical policy
18 because they can change it.

19 And so if this was an expensive procedure or some new innovated
20 procedure that might be medically necessary, it might be appropriate, it
21 might be desirable. The insured might want it and the insured's doctor
22 might want to give it to them. They can say it's experimental or it's
23 unproven and we say so therefore it is and, you know, no coverage.

24 Q So --

25 A I think it's very unfair.

1 Q So there's been some suggestion in the courtroom that Dr.
2 Liao or Mr. Eskew should bear some responsibly for not filing an appeal.
3 I'd like you to comment on that.

4 A In my opinion an appeal in this case or most cases the way
5 they have the system set up would be an exercise in futility. It would not
6 get him anywhere because they use the -- they use more of a peer on
7 appeal, they use more of a peer qualified person on appeal as I
8 understand it at UnitedHealthcare. But even that person focuses
9 myopically on the health care policy at issue, and he's asked the
10 question, do you see any reason to deviate from the health care policy.
11 And if they say, no. They go onto their next case.

12 These reviewers are working out of their homes around the
13 country. There's lots of them. And they do 30, 40, 50 files a day every
14 day. 20, 30 -- I mean, huge turnovers and so it's inconceivable to me that
15 anybody's claim for preauthorization gets any serious consideration. It
16 just gets handled pursuant to their expedite policies.

17 They basically keep the doctors in their place. They can control the
18 doctors by not saying they're not going pay for it and they can keep the
19 patient from getting treatment that they may be entitled to under their
20 policy and just say no because they have all the power. And it's hard to
21 overcome that in my opinion.

22 MR. SHARP: So I'd like to go back, Jason, to the PowerPoint
23 where we had broken off -- Your Honor, may I approach Mr. Sanders?

24 THE COURT: Yes.

25 BY MR. SHARP:

1 Q Sir, we had stopped off on the insurance industry standards
2 and I just want to make sure that we've dealt with all the standards that
3 you're here to testify about. And the third bullet point, is there a
4 standard within the insurance industry consistent with this duty in good
5 faith and fair dealing that an insurance company should not deny the
6 request on the basis of its corporate medical policy?

7 A Yes.

8 Q And you've discussed that today?

9 A I think I have. The only thing I would add to what I've already
10 discussed is you can consider a corporate medical policy. You can use it
11 as a guideline, that's what it's intended to be, a guideline to educate
12 providers of health care and, you know, provide information. And you
13 can use it as a tool. And you can use it as something that you consider.
14 But you can't make it the sole determiner of coverage. You have to read
15 the policy with good faith eyeglasses. You have to see what's covered
16 and what's not covered.

17 I mean, sometimes insurance companies make mistakes, and issue
18 policies with mistakes on them. You have to honor those mistakes if
19 that's the case. It's not the case here, but that's why you have to read
20 and interpret the policy at the outset by somebody who's trained to do it
21 because if they made a promise to you, or you, or you about coverage
22 and you had a brochure and you had a policy that said it's covered.

23 If they just resorted to external documents that aren't part of the
24 policy to deny your claim, they're not considering your side of the story.
25 And not giving you equal consideration, they're not being fair, they're

1 not interpreting the policy as it needs to be interpreted with good faith
2 eyeglasses. They skipped that step. They issue a policy that made
3 promises and then they apply this methodology which is geared towards
4 denial of claims and denial of coverage, denial of care. It controls
5 doctors and it controls choice by the insured. It's troubling.

6 MR. SHARP: So let me go back, because there's one point I
7 forgot about, Exhibit 5. It we go to page 20. This is the proton beam
8 therapy policy that was in Exhibit 5. And if we could pull up instructions
9 for use. And it says --

10 Jason, if you could start the --

11 BY MR. SHARP:

12 Q Drawing your attention, sir, to the terms of the enrollee's
13 document, e.g., certificate of coverage, summary plan description, and
14 Medicaid state contract. May differ greatly from the standard benefit
15 plans upon which this medical policy is based. It says in the event of a
16 conflict, the enrollee's specific benefit document supersedes this medical
17 policy.

18 A That's what I've said.

19 Q So the people, whomever they are, that adopted the medical
20 policy, it'd be fair to say, from a reasonable insurance company's
21 perspective, were aware that the governing instrument is the agreement
22 of coverage?

23 A It's clear everywhere, in the agreement, in these documents.
24 Everybody agrees that -- and the witnesses in the deposition agreed that
25 the policy -- the insurance policy at issue controls. The insurance policy

1 at issue controls, not URAC, not NCQA, not external documents. You
2 can consider all of those things, but you must consider the fundamental
3 things first, which is reading and interpreting the policy in good faith.

4 Q And --

5 A And giving the insured the benefit of the bargain that they
6 paid the premium for in exchange for the promise.

7 Q And the insured, from your perspective, is that the insurance
8 industry expert would have the right and expectation to believe that an
9 insurance company is going to follow the insurance company?

10 A Absolutely.

11 Q And so, the -- is it correct that the procedures that UHC and
12 Sierra Health and Life adopted to implement this medical policy was
13 done in a manner that people implementing the policy disregarded the
14 insurance contract?

15 A It's clear to me that they disregarded it. They didn't even
16 consider the insurance policy.

17 Q And whomever established that policy that we've been
18 discussing here today, is it your opinion, would have acted in conscious
19 disregard for the act of rights of the insured such as Mr. Eskew?

20 A Yes.

21 MR. SHARP: Okay. Jason, let's go back to PowerPoint.
22 That's page -- let's see. Next page.

23 BY MR. SHARP:

24 Q Okay. So we have -- this is our standard, Mr. Prater, that if it
25 denies the request, the insurance company should promptly explain the

1 basis in the insurance policy relied upon to deny the request?

2 A Yes. And I think that's been talked about.

3 Q Okay. The prior authorization file, is it industry-standard or
4 an insurance company acting fairly and in good faith such that the prior
5 authorization file should contain all information regarding the
6 investigation into and the reasons for denying or approving a request for
7 prior authorization?

8 A It should contain some indication as to the rationale for the
9 decision. If they review and consider medical information, I would
10 expect to see more detail than what I've seen in this file, which leads me
11 to believe they didn't read and consider it, which I already believe,
12 because they've admitted it in deposition that they really haven't looked
13 at the medical policy.

14 MR. SHARP: Jason, can you go back to the jury instructions?
15 I think it's number 5.

16 [Counsel confer]

17 BY MR. SHARP:

18 Q Sir, I just want to -- I want to sum up the opinion. Is it your
19 opinion that the prior authorization submitted on behalf of Mr. Eskew
20 was a covered service under the insurance policy?

21 A Yes.

22 Q And is it your opinion that Sierra Health and Life acted
23 without any reasonable basis when they denied the claim on February 5,
24 2016?

25 A It is.

1 Q And that, based upon industry standards as you implement
2 them and as you know them, is it your opinion that Sierra Health and Life
3 knew or recklessly disregarded the fact that it had no reasonable basis to
4 deny the claim?

5 A Yes.

6 Q And is it your opinion that conduct in the denial of the claim,
7 as we discussed today, was done with a conscious disregard for Mr.
8 Eskew's rights?

9 A It's my opinion that they either consciously disregarded or
10 they were recklessly indifferent.

11 MR. SHARP: Your Honor, no further questions.

12 THE COURT: Mr. Roberts.

13 MR. ROBERTS: Thank you, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. ROBERTS:

16 Q Mr. Prater, you testified this morning that one of the things
17 you enjoyed was working for free, helping insureds get benefits from
18 insurance companies, right?

19 A That's true.

20 Q You're not working for free in this case, right?

21 A That's correct.

22 Q And you're making 750 an hour for your time?

23 A That's my standard rate for everything that I do for insurance
24 companies or insureds and lawyers.

25 Q Okay. And fair to say that, at the time of your deposition,

1 you probably bill about 50,000 bucks?

2 A I gave you the number of hours. I don't recall what it was,
3 but that wouldn't surprise me.

4 Q All right. And how much time have you spent on it since
5 then?

6 A I watched the 2 days of video, and I probably spent another
7 10, 15 hours getting ready for trial, and then I flew out here. So probably
8 another 30 or 40 hours.

9 Q Total?

10 A In addition to the hours that I already gave you.

11 Q Okay. So --

12 A Whatever that was.

13 Q So, ballpark \$75,000?

14 A Ballpark, yeah. That sounds about right.

15 Q And you talked about working for insurance companies
16 some. But in litigation, you've given us a list of cases over the last four
17 years since, I think, 2016?

18 A Yes.

19 Q And that was cases where you testified in a deposition or in
20 court, correct?

21 A Correct.

22 Q And there's only 1 out of that 14 that was for an insurance
23 company, correct?

24 A Where I was retained by the insurance company. Yes.

25 Q And you mentioned that you'd done two cases previously in

1 Nevada, and one was for an insurance company, right?

2 A Correct.

3 Q But we'd have to go all the way back to the 1990s to find the
4 case for an insurance company, right?

5 A Well, that's testifying in trial. I work on cases all the time as a
6 consultant. I rarely testify at trial. So every --

7 Q Sir, there's no question pending. Thank you. Your lawyer
8 can follow up and let you --

9 A Okay. I thought I was being responsive.

10 Q -- follow up anything you --

11 THE COURT: Stop. Stop. One at a time. Thank you.

12 BY MR. ROBERTS:

13 Q In the introductory portion of your testimony, you said that
14 the actuaries are the ones that crunch numbers and study the
15 relationship between smoking and lung cancer and come up with prices,
16 so the underwriters know how to charge in their policy. The actual -- and
17 you said that the insurance company, they take an application and
18 decide whether they want to take you as an insured or not. Do you recall
19 that testimony?

20 A Yeah. The underwriting department makes the decision as to
21 who they want to insure. They accept you or they don't accept you.
22 With health insurance, we know that there's -- you have to accept
23 everybody with preexisting conditions, but that has not always been the
24 case.

25 Q Okay. You're -- have you read the application for insurance

1 in this case --

2 A Yes, I have.

3 Q -- filled out by the Eskews?

4 A Yes.

5 Q And did -- was Mr. Eskew required to disclose his 30-year

6 smoking history?

7 A I don't believe so. No.

8 Q And did the actuators get to consider that?

9 A The actuators?

10 Q Yes.

11 A Actuaries.

12 Q Actuaries. Sorry. Actuaries.

13 A The actuaries in this case, I don't know what they considered.

14 I was talking generally about what actuaries do. It's a department within

15 the insurance company.

16 Q And you're familiar with the Affordable Care Act and its

17 provisions, right?

18 A Oh, boy. That's a loaded question. That's hundreds of pages

19 long and thousands of pages of regulations, but I'm generally familiar

20 with it.

21 Q Okay. And it's --

22 A The [indiscernible].

23 Q -- one of the important pieces of legislation to cover the

24 insurance industry for medical care in recent years, right?

25 A Yeah. It's a great piece of legislation. And it has its

1 drawbacks, and it's not bad. As you know, it's debated politically back
2 and forth. And it's going to be revoked and stuff, but it's settled down a
3 little. And I'm familiar with it.

4 Q Okay. Now under the terms of the Affordable Care Act, and
5 this is probably a big one you're familiar with, isn't it true that Sierra
6 Health and Life had no discretion to choose not to insure Mr. Eskew
7 because of his preexisting lung cancer?

8 A True. In other words, you -- with health insurance now, you
9 can go to any carrier with preexisting health conditions. Otherwise, he
10 couldn't have gone anywhere, because he had several preexisting health
11 conditions. In the old days, he wouldn't have got health insurance
12 anywhere except through a high-risk insurance pool. Today, you can
13 get coverage with anybody any place with a preexisting condition
14 because of Obama Care or the Affordable Care Act.

15 Q So at least as to his smoking and his preexisting condition,
16 your testimony this morning that insurance companies take an
17 application, ask a series of questions, and decide whether they want to
18 take you as an insured or not, that's not true in this case, is it?

19 A Well, it's not relevant in this case. I was describing,
20 generally, how an insurance company underwriter works and how an
21 application is usually solicited. It's not relevant here or there, his
22 eligibility. He was clearly eligible. It's after he got the policy and the pre-
23 policy sales that I was concerned about, the agent/broker
24 representations.

25 Q So it's not relevant here and it's not true here?

1 A It's not necessarily -- it's not relevant. It's not an issue in the
2 case.

3 Q Why didn't you tell us about this morning if it wasn't an issue
4 in the case?

5 A I was responding to a question, answering generally was an
6 insurance -- I saw the circle of the insurance company and asked about
7 the different departments. And so, I described what the departments do.
8 And that's true. I stand on my testimony. I didn't say it applied to this
9 case or I didn't say that it was an issue involving this case, which has
10 been accepted for the insurance.

11 MR. ROBERTS: Court's indulgence just a second, Your
12 Honor.

13 THE COURT: Of course, Mr. Roberts.

14 MR. ROBERTS: I need to grab a binder.

15 BY MR. ROBERTS:

16 Q You walked the jury through a number of provisions in
17 Exhibit 4. And I'd like to just point out a few of those and ask you a
18 couple questions.

19 A Okay.

20 MR. ROBERTS: Audra, if you could go to Exhibit 4, page 64,
21 please. Let's go to page 38 first. Okay. Section 3, managed care.

22 BY MR. ROBERTS:

23 Q And you talked about section 3.1 with Mr. Sharp. Do you
24 remember that?

25 A Yes.

1 Q And the part here where it says the managed care program
2 helps direct care in the most appropriate setting to provide healthcare in
3 a cost effective manner. Is it your testimony that, under this provision,
4 the insurance company cannot consider whether a more costly treatment
5 is being requested that has absolutely no additional proven medical
6 benefits over less costly treatment?

7 A Well, it would depend on the facts and circumstances in the
8 particular case. This says the managed care program helps direct cost to
9 the most appropriate setting to provide it in a cost effective manner.
10 Remember the denial letter said that we don't consider cost. And so,
11 which is it?

12 Q Sorry?

13 A You know, the question is when you look at the coverage
14 section, when you're presenting a coverage claim, they talk about what
15 they -- where they're required to have medically necessary treatment
16 and what they may consider. It doesn't say cost anywhere that -- what
17 they may consider.

18 Q Well, sir, in the medical -- I mean in the insurance industry --

19 A Yeah.

20 Q -- isn't it widely known and generally accepted that
21 something is not medically necessary if it costs more than a cheaper
22 treatment and provides no additional benefits over that cheaper
23 treatment?

24 A I don't agree with that at all. It's -- you know, we're talking
25 about appropriate care and treatment here. And cost is not a factor in

1 the care. It may be behind the scenes, you know, something that's
2 considered when they reach their medical -- when they create their
3 medical management policies, but it's not something that should be in
4 the forefront of their mind of the person making the coverage decision.
5 And Dr. Ahmad says he doesn't consider the cost. Although when you
6 asked him, he said he does. But in his deposition and in direct, he said,
7 you know, no, I don't.

8 Q Right. But you said it would be considered in setting medical
9 policies, correct?

10 A I'm sure they consider cost, because insurance companies
11 are bottom line driven. This is the largest insurance company in the
12 world, you know. They're the eighth largest company in the world. They
13 consider cost and save you money at every turn. But you have to do it
14 fairly and honestly and in good faith.

15 Q And isn't the public policy of the state of Nevada one that
16 encourages managed care insurance?

17 A The public policy in Nevada and in most states is not to
18 waste money needlessly, but it's also -- the public policy is also to honor
19 contractual obligations, limit insurance policies, and act in good faith.
20 That's the public policy. And it's public policy not to use external
21 documents to take away coverage. It's your promise in an insurance
22 policy that there's shifting sand that can change at whim. They're not
23 part of the contract. That's not -- that's against public policy.

24 Q And there's nothing wrong with a public policy that
25 encourages insurance companies not to waste money needlessly, right?

1 A Well, I'm sure -- I think it's a good thing not to waste money
2 needlessly, but I think it's a better thing to pay what you owe and
3 approve what you should approve, no matter what the cost.

4 Q Let me ask you a broad question, which may be hard for you
5 to answer, but let me try.

6 A Okay.

7 Q I want you to assume that the proton beam therapy
8 requested for Mr. Eskew for his pipe of non-small cell stage four
9 metastasized cancer was not covered by the policy and was not
10 medically necessary. I want you to assume that.

11 A That's hard for me to assume.

12 Q I thought it would be.

13 A Yeah, very difficult.

14 Q If you assume that is true, does any of the other stuff today
15 matter? Mr. Eskew wasn't entitled to free services that weren't covered
16 under his policy just because of some got you, because you think some
17 sentence wasn't put in a claim file that should have been.

18 A That's kind of an outrageous question and statement. It
19 totally disregards the standards and practices in the industry. I mean
20 just because you maybe guessed right at the end of the day and it
21 wouldn't have helped him doesn't mean he wasn't entitled to a cure, a
22 curative intent, a chance at life, you know, with the latest technology.
23 The policy gave him the right. And UnitedHealthcare had no basis to
24 take it away other than cost driven behind the scenes stuff that's not part
25 of the contract.

1 Q And, sir, I mean I know you want to preach to the jury, and I
2 know you got your agenda, but I'm asking you my question. Do --

3 MR. SHARP: Object, Your Honor. That was -- he knows
4 that's inappropriate. He asked a loaded question, and he got a loaded
5 answer. And that's --

6 THE COURT: Overruled.

7 BY MR. ROBERTS:

8 Q I want you to assume that the proton beam treatment is not
9 covered and is not medically necessary. In that case, none of this other
10 stuff matters, does it?

11 A Again.

12 Q If the decision was right, none of this other stuff matters.

13 A Totally disagree. Totally disagree. Absolutely 100 percent
14 disagree. The manner in which the insurance company handles claims
15 matters, because it's not only what they do to this person, it's what they
16 do to the next person. And as long as they're able to do it without
17 repercussions they'll keep doing it, and it's bad.

18 Q Isn't it true, sir -- we looked at this section 3.1 in Exhibit 4.
19 Mr. Sharp also admitted through you Exhibit 3, which was a version of
20 the agreement of coverage that was missing on the attachments, right?

21 A Correct.

22 Q This provision is in both Exhibit 3 and Exhibit 4, right?

23 A True.

24 MR. ROBERTS: So, Audra, could you go to page 39.

25 BY MR. ROBERTS:

1 Q And this defines covered services. And you reviewed them
2 with Mr. Sharp, right?

3 A Yes.

4 Q And isn't it true that under the language of the policy of
5 insurance, that the mere fact that covered services are prescribed by a
6 duly licensed provider does not mean they're a covered service?

7 A True. In other words, the provider's, you know, prescription
8 for the -- request for the coverage does not dictate coverage. You have
9 to weigh and balance the equities and the fairness and the issues and the
10 policy and all the things I talked about today with a good faith focus.

11 Q So the mere fact that Dr. Liao prescribed the service, the
12 proton beam therapy, doesn't automatically mean it should have been
13 covered in your opinion?

14 A Not based on that fact solely by itself. That's right. It should
15 be reasonably considered, and somebody with requisite experience -- or
16 somebody that can intelligently talk to her about it, beget her rationale,
17 should have been included in the investigation. But when she says it's --
18 I want it doesn't mean she gets it. She's, you know -- she has a contact
19 with United Healthcare as a doctor. She's required under the contract
20 with them to provide certain information. It's not part of the insured's
21 problem. It's part of the doctor and the hospital and the church company
22 relationship. They have obligations of their own separate and apart to
23 what the insured is entitled to.

24 Q And under the contract, there's an and here, that they're
25 prescribed by a duly licensed provider and specifically authorized

1 through SH, an all managed care program, as applicable -- if applicable,
2 right?

3 A Right. And I've already opined that it's not applicable.

4 Q And the third prong is at the top of the next column,
5 medically necessary as defined in this agreement of coverage, right?

6 A Correct. I agree.

7 Q So even if they're prescribed by Dr. Liao, they've got to be
8 medically necessary in order to be covered. You agree with me on that
9 so --

10 A Yeah. But you can't read the one clause in the abstract. You
11 have to read the policy as a whole. And I think it's clear that they should
12 have never put it through the process in the first place. They don't read
13 their policy to see that it doesn't even require managed care according
14 to the terms of the contract as written and delivered.

15 Q And when you say the terms of the policy don't require
16 managed care, what you're really saying is they don't require
17 preauthorization as a condition to have this be a covered service?

18 A Correct. In this case, it's a preauthorization claim, which
19 equals a claim. And it's entitled to the same good faith consideration as
20 a claim after the fact. If she had had the services and submitted the
21 claim, they'd still have to act fairly and in good faith. If he had paid out
22 of his own pocket, had the money to do that, you know, then it would
23 still be a covered service, in my opinion, under the contract.

24 Q So you've reviewed a bunch of documents in this case?

25 A Yes.

1 Q Then you're familiar with most of the exhibits the jury has
2 seen based on your watching the court so far?

3 A Yes.

4 Q And maybe I've missed something. But could you point me
5 to the document that you have reviewed where Sierra Health and Life
6 told Mr. Eskew or Dr. Liao or anyone else that they require to seek
7 preauthorization for this service in order for it to be a considered
8 coverage?

9 A Well, the denial letter said that it's mandatory. When they
10 denied the claim and said it's mandatory, you go through our process,
11 that's not true. I mean it kind of tells them hey, you didn't go through
12 the process, or you did, and it's -- that's it. It's mandatory.

13 Q Okay. So that's the only thing you're relying on?

14 A No. There's other things as well, sir.

15 Q What other things, sir?

16 A What specifically your question and I'll key it in my mind to
17 tell you things.

18 Q Thank you. Could you point me to any piece of evidence,
19 deposition testimony you've read, a document you've seen, where prior
20 to Dr. Liao submitting a request for preauthorization, anyone at Sierra
21 told her or the Eskews that they require to seek preauthorization for this
22 treatment?

23 A I don't recall seeing that.

24 MR. ROBERTS: Now if we can pull up 4, page 65, at the top
25 of the right-hand column, 13.89.

1 BY MR. ROBERTS:

2 Q And this is the description of prior authorization in the
3 agreement of coverage, right?

4 A Let me get to 13.89. Yes.

5 Q So 13.89, prior authorization means a system that requires a
6 provider to get approval from Sierra Health and Life before providing
7 nonemergency healthcare services to an insured for those services to be
8 considered covered services.

9 A Right.

10 Q Right. So in this case, based on your review of Exhibit B, you
11 would agree with me that Sierra never took the position in the contract
12 or any other document that Mr. Eskew was required to seek
13 preauthorization for the proton beam treatment in order for it to be
14 considered a covered services?

15 A Well, except for his reference to the denial letter. One of the
16 bases for denial is that it's mandated that you go through this process,
17 which it's not.

18 Q So talking about before the request, before they decided to
19 submit this request on their own.

20 A The --

21 Q Is there anything in the contract requiring them to do that?

22 A In this contract that requires them to do that?

23 Q Yes.

24 A Submit it for preauthorization?

25 Q Correct.

1 A No, it's not required to be submitted for preauthorization.

2 Q Okay. So it's not required, and they were not told to do it
3 before they did it, right?

4 A Dr. Liao is required in her contract -- medical contract with
5 United Healthcare to do certain things. I haven't reviewed her contract
6 with United Healthcare, but I'm very familiar with them. And they will
7 require doctors who want to get paid -- see, she's submitting the request
8 because she wants to get paid at a higher level. She wants an in-plan
9 benefit. The PPO pays more --

10 MR. ROBERTS: I'm going to object as nonresponsive, Your
11 Honor.

12 THE COURT: Sustained.

13 BY MR. ROBERTS:

14 Q Sir, I may have missed some evidence. Could you point me,
15 you know, to your file or binders or anything else up there, and show me
16 a copy of the contract between UnitedHealthcare and Dr. Liao?

17 A I have --

18 Q I've never seen such a thing.

19 A I've seen many contracts between providers and
20 UnitedHealthcare, a large healthcare --

21 Q I have too, sir.

22 THE COURT: Hold --

23 BY MR. ROBERTS:

24 Q Can you show me the one with Dr. Liao?

25 THE COURT: Hold on. We can only speak one at a time.

1 There will be no interrupting of one another in this case. Is that
2 understood?

3 MR. ROBERTS: I'll try to do better, Your Honor. I'm sorry.

4 THE COURT: Go ahead.

5 BY MR. ROBERTS:

6 Q Isn't it true, sir, yes or no -- isn't it true -- well, let me
7 rephrase it differently. Yes or no. Have you ever seen a contract from
8 Dr. Liao, United Healthcare, or Sierra Health and Life?

9 A Not that I recall.

10 Q Have you seen in the records any indication that such a
11 contract exists?

12 A In the records?

13 Q Yes.

14 A I don't recall seeing a reference to the fact that a contract
15 between her and United Healthcare exists in the records.

16 Q So going back to the fact that they voluntarily decided to
17 submit a request for preauthorization, isn't it true that sometimes
18 insureds like Mr. Eskew want the determination of whether their -- these
19 benefits that they're seeking are covered before they incurred, so they
20 aren't left holding the bill and finding out after the services are rendered
21 that they're not covered?

22 A Yes, sometimes people do seek it out.

23 Q And is it your testimony that United should have refused to
24 comply with that request to seek preauthorization, so they would know if
25 they're covered when they got the request that wasn't required by the

1 contract?

2 A I think I made it clear. My testimony is they should have told
3 the insured at the outset that proton beam does not require
4 authorization. And it's important to note it's very -- also clear in these
5 documents and in the authorization itself that an authorization by United
6 Healthcare does not guarantee payment. So the fact that you get an
7 authorization early -- you have to go through this process, this maze of
8 preauthorization when it's not required is a road block.

9 But even if they said it's approved and they said it's approved, they
10 still reserve the right to deny it. Preauthorization does not equal a
11 guarantee of coverage. In fact, it's right on the preauthorization. I think
12 you'd agree with me that if it's preauthorized does not mean they're
13 going to pay the claim. It just means they can tell the insured deny and
14 you got to appeal.

15 Q So if United had done -- if Sierra Health and Life had done
16 that, said we're not going to rule on your request because it's not --
17 you're not required to submit it under the contract, then after the
18 services were incurred, after Mr. Eskew gets the bill for proton beam
19 therapy, then he would have found out if it was covered?

20 A He wouldn't get the bill. It would go to -- MD Anderson
21 would -- the bill was adjusted, and PPO discounts were taken. And he
22 would get an in-plan benefit versus an out-of-plan benefit. The difference
23 may be in dollars, but I don't know the numbers. I haven't calculated
24 them.

25 Q And could you remind me where the evidence is showing

1 that MD Anderson was an in-network provider --

2 A You can see it on --

3 Q -- in Sierra Health and Life?

4 A You can see it on the bills in the file that I reviewed. There's
5 several pages of medical bills where they take adjustments. And you
6 can look. An in-plan provider is defined as a -- look at 13.82. Plan
7 provider means a provider who has an independent contract or
8 agreement with SHL to provide certain covered to insureds. It's very
9 generic. And MD Anderson has a contract with -- as a plan provider with
10 United Healthcare, because it's one of the national -- it's the best cancer
11 center in the world. And I'm sure that United Healthcare wouldn't miss
12 an opportunity to take discounts on bills as it did in this case. And they
13 can only do that for plan providers. Only plan providers that are in-plan
14 somehow in their complicated network get the discounts -- get the
15 discounts [indiscernible]. Non-plan providers do not have discounts.

16 Q So when you say you've reviewed medical bills, you're
17 talking about for the IMRT, correct?

18 A Yes. And it showed me that they took discounts off that as
19 well. He didn't get the proton beam, obviously.

20 Q Obviously. And Sierra Health and Life fulfilled its obligation
21 to pay for the IMRT that was covered?

22 A I assume so. I don't -- I haven't heard otherwise.

23 Q Okay.

24 A And proton beam was also covered.

25 Q But assume that United -- or Sierra Health and Life had said

1 we're not going to make this determination now. It's not recovered. You
2 can take your chances after the treatment.

3 A They wouldn't say that.

4 Q And assume further that it was found to not be covered
5 services after the treatment was received. In that case, if that
6 determination was upheld, the Eskews would have been left holding the
7 bag for proton beam, right?

8 A I don't agree with that. I don't agree that they could have
9 rejected the coverage after the fact or before the fact. I think the policy
10 clearly provides coverage for the requested treatment. The end.

11 Q So you don't think it provided any benefit to the Eskews for
12 United to consider the preauthorization request that they voluntarily
13 submitted?

14 A They should have said you have a green light to proceed.
15 And they should have given the coverage parameters. And they should
16 have, if asked, talked about how much they would pay. But they never
17 got to that point, because they rejected it wholesale out of the gate
18 based on a preauthorization request, based on a hidden exclusion and a
19 medical policy that's not part of the contract. That's the bad thing.

20 So, you know, everything hits a fork in the road, you know. They
21 sent them down the road this way towards medical authorization, and he
22 didn't get the treatment that he wanted the last part of his life. He was
23 entitled to it. And they sent him down the road of managed care and
24 then wrote him a denial letter, which is incomplete and unfair and
25 deceptive. And then they said you can appeal it.

1 But the -- Dr. Liao said they never change their mind, which I know
2 is a true experience. And, you know, so they sent him down the road to
3 hell instead of down the road that he was entitled to go down, in my
4 opinion. And I know that's a strong statement, but I feel strongly about
5 the case.

6 MR. ROBERTS: Objection. Nonresponsive.

7 THE COURT: Sustained.

8 BY MR. ROBERTS:

9 Q You testified that you've reviewed the contract of therapeutic
10 service -- therapeutic radiation as a covered service, right?

11 A Yes.

12 Q But you would agree with me that therapeutic radiation was
13 not a covered service if it was not medically necessary?

14 A I don't agree with that. Again, the medical necessity
15 determination, the way it's made by United Healthcare is it's in its sole
16 discretion. They get to make it up and put it on paper. It's not part of the
17 contract. So medically necessary is a moving target. What's medically
18 necessary to UnitedHealthcare one day might not be the next day. You
19 can't put any trust in that. The question doesn't make any sense to me.

20 Q So just to be clear, you're saying that there's nothing in the
21 contract that says therapeutic radiation is only covered if it's medically
22 necessary?

23 A Well, they blend medical necessity into a lot of parts of the
24 contract, as determined by SHL. But it doesn't say as fairly determined
25 by SHL. It's just -- UnitedHealthcare's position is clear. If they say it's

1 not medically necessary, that's all that they consider. And it's based on
2 their insertion of literature, medical literature, into the medical policy
3 bulletins that they create that are different from other carriers, and they
4 change from time to time. And you have no way of knowing what they
5 are when you buy the policy unless it's -- UnitedHealthcare says you can
6 go online and find them. I tried to go online and find them. I couldn't
7 find them. And why should an insured have to go online to find part of
8 their policy. It doesn't make any sense to me.

9 Q Medical necessity is in the contract, right?

10 A Yeah. It's defined and talked about in several places.

11 Q Thank you. You've given a lot of opinions to the jury today.
12 And I know you're a lawyer, right?

13 A I am a lawyer, but I don't litigation. I don't have a litigation
14 practice. I've never litigated for either side.

15 Q And you've read a lot of case law?

16 A Read lots of case law in my life.

17 Q You would agree with me that, in this case, the Court is
18 going to instruct the jury on the law?

19 A Absolutely.

20 Q And if anything the Court tells the jury is the law of the state
21 of Nevada, the jury should follow that and not whatever your
22 testimony --

23 A 100 percent.

24 Q -- may have been that was [indiscernible]?

25 A 100 percent agree.

1 MR. ROBERTS: Audra, can we put up 13.66? It's on page
2 464.

3 BY MR. ROBERTS:

4 Q You went over the three bullet points here with the jury?

5 A Yes.

6 Q And the second bullet point, the most appropriate level of
7 service which can be safely provided to the insured. Have you seen
8 other medical necessity policies with similar language?

9 A I've seen lots of policies -- health insurance policies with
10 similar language, but it's never the same. It's never identical.

11 Q And isn't it true that the most appropriate level of service
12 which can be safely provided to the insured means that a procedure is
13 not medically necessary if a less expensive procedure is available that
14 will do the same thing and the more expensive procedure is not
15 available?

16 A I totally disagree with that. And if that was the basis for Dr.
17 Liao's decision, he should have pointed it out and had a basis for it. I
18 totally disagree with that. When you buy a Cadillac insurance policy,
19 platinum PPO plan, doesn't mean you get, you know, Volkswagen
20 treatment. You know, the insured here was entitled to proton beam
21 therapy. It was his last step to save his life. He was denied it wrongfully,
22 in my opinion. He was entitled to it under the contract.

23 Q So if -- you're an expert on insurance in Nevada, right?

24 A Yes.

25 Q Are you familiar with the Medicaid services manual of the

1 state of Nevada?

2 A I don't do a lot of work in Medicaid or Medical, because it's
3 governed by a whole different set of laws and mandatory laws. And so, I
4 don't deal in -- I do private insurance contracts for the most part.

5 Q So you wouldn't know whether the Nevada Medicaid service
6 manual used a level of service in conjunction with whether a more
7 conservative or less costly treatment is available?

8 A I wouldn't know that, but I know that UnitedHealthcare didn't
9 consider that or research that before they wrote the denial letter. It
10 sounds like something the lawyer is creating after the fact.

11 Q And have you reviewed the medical policy in this matter?

12 A Oh, yes.

13 Q Okay.

14 A Several versions of it.

15 MR. ROBERTS: Go back to that same slide, Audra.

16 BY MR. ROBERTS:

17 Q And in addition to the statement in the policy that proton
18 beam therapy was not proven for lung cancer --

19 A Oh, the medical policy. Yes.

20 Q Yes, the medical policy.

21 A Thank you.

22 Q Did the medical policy also contain summaries of peer
23 review literature studying the efficacy of proton beam therapy for non-
24 small cell lung cancer?

25 A I don't recall specifically. I know that Dr. Liao's authority

1 relied on -- by -- on some of these documents, but I don't recall
2 specifically.

3 Q You don't recall?

4 A No.

5 MR. ROBERTS: Audra, could you go down to the bottom half
6 of 13.66, in [indiscernible]?

7 BY MR. ROBERTS:

8 Q So you would agree with me that it'd be proper under the
9 contract for Sierra Health and Life to give consideration to the likelihood
10 of a certain service, proton beam therapy, producing a significant
11 positive outcome?

12 A Yes. They can use that document for guidance, the medical
13 policy document for guidance as one piece of the puzzle but not to
14 determine -- answer the problems that are presented by a claim.

15 Q Under the second bullet point, would you agree with me that,
16 under the contracted insurance, Sierra Health and Life may give
17 consideration to reports and peer review literature?

18 A Yes.

19 Q And if the medical policy supplied summaries of reports from
20 peer reviewed literature to Dr. Ahmad to assist him in this decision, that
21 would be contemplated and allowed by the contract, right?

22 A Well, it's -- these medical policies contain some reference to
23 peer reviewed opinions. Like I said, you can use them for guidance, but
24 they're not to determiner of coverage. They're only guidance, and they
25 say that on their face. These are only guidance. They're not controlling.

1 The policy controls. So you can consider lots of things in relation to
2 handling a claim or request for authorization. But they would never
3 write a denial letter saying we're not going to pay for this because, you
4 know, we decided that this other treatment is cheaper, and we don't
5 want to pay for it. I mean they wouldn't be that transparent.

6 It's kind of hidden in weaselly words how they actually operate.
7 It's external documents that change often, that form the basis for their no
8 coverage or no -- you can't go forward position. Then they put the
9 roadblock up, say not approved, and there's -- they don't even tell you
10 specifically why. And that enables you to come in now and make up all
11 these reasons why, because they didn't say why. They just said medical
12 policy, no.

13 Q You done?

14 A I'm done.

15 MR. ROBERTS: Objection. Move to strike. Nonresponsive.

16 THE COURT: Overruled.

17 BY MR. ROBERTS:

18 Q Mr. Prater, isn't it true that Sierra Health and Life, under the
19 contract, can give consideration to evidence-based reports and
20 guidelines published by nationally recognized professional organizations
21 that include supporting scientific data?

22 A They may consider that, yes.

23 Q And did the medical policy relied upon by Dr. Ahmad in this
24 case include summaries of evidence-based reports and guidelines
25 published by nationally recognized professional organizations?

1 A It had references to it that were picked by United Healthcare
2 for inclusion in their medical policy. Yes. It didn't include all the relevant
3 literature. I think Dr. Liao has written 300 and something articles that
4 weren't referenced in there on efficacy on proton beam treatment for
5 lung cancer and other things. So it's a selective group of things that
6 United Healthcare puts into its medical policy that aids it in denying care
7 that's entitled to be paid -- or should be approved, in my opinion.

8 THE COURT: Counsel, we're going to take our 15-minute
9 recess.

10 Ladies and gentlemen, you are instructed not to talk with
11 each other or with anyone else about any subject or issue connected
12 with this trial. You are not to read, watch, or listen to any report of
13 commentary on the trial by any person connected with the case or by
14 any medium of information, including without limitation, newspapers,
15 television, the internet, or radio. You're not to conduct any research on
16 your own relating to this case, such as consulting dictionaries, using the
17 internet, or using reference materials. You're not to conduct any
18 investigation, test any theory of the case, recreate any aspect of the case,
19 or in any other way investigate or learn about the case on your own.

20 You are not to talk with others, text others, tweet others,
21 Google issues, or conduct any other kind of book or computer research
22 with regard to any issue, party, witness, or attorney involved in this case.
23 You're not to form or express any opinion on any subject connected with
24 this trial until the case is finally submitted to you.

25 So we'll come back at 2:45.

1 THE MARSHAL: All rise for the jury.

2 [Jury out at 2:28 p.m.]

3 [Outside the presence of the jury]

4 THE COURT: Counsel, by the Court's calculations, we're
5 about two days behind schedule. Are there any witnesses the parties do
6 not plan on calling?

7 MR. SHARP: No. I think, Your Honor, you'll be happy to
8 know we are ahead of schedule. We should, depending on how Mr.
9 Prater's cross is, we feel very confident we're going to finish our case
10 tomorrow.

11 Do you agree, Mr. Terry?

12 MR. TERRY: Yes.

13 THE COURT: Well, you had said that you were going to call
14 Holland-Williams, Guerrero.

15 MR. SHARP: Yeah. No. It's all been -- we've withdrawn all
16 those. We're not going to call those witnesses. So I can tell you we
17 have, after Mr. Prater, we just have the Eskews.

18 THE COURT: Okay.

19 MR. SHARP: So Tyler Eskew, BJ is what they call him, BJ
20 Eskew, and Sandra. And those are our last three witnesses.

21 THE COURT: So you're not calling Ms. Holland-Williams?

22 MR. SHARP: Not calling her.

23 THE COURT: And you're not calling Mr. Guerrero?

24 MR. SHARP: Mr. who?

25 UNIDENTIFIED SPEAKER: Guerrero.

1 THE COURT: Guerrero.

2 MR. SHARP: Yeah. We're not calling Mr. Guerrero. We're
3 not calling Ms. Holland-Williams.

4 THE COURT: What about Ms. Sweet?

5 MR. SHARP: They're going to bring her back in their case in
6 chief.

7 THE COURT: And you're not calling Ms. Amogawin?

8 MR. SHARP: That's correct.

9 THE COURT: Okay. That would put you on schedule then,
10 because you were supposed to finish Thursday.

11 MR. SHARP: Yeah. I mean I'm pretty certain we will finish
12 tomorrow, our case.

13 THE COURT: Okay.

14 Mr. Roberts, are there any witnesses you plan on not calling?

15 MR. ROBERTS: Not at the moment, Your Honor. There are
16 some that we're considering, but we need to wait until they rest their
17 case to make our final decisions. But if -- we'll do everything we can to
18 make sure we meet our schedule.

19 THE COURT: All right.

20 MR. ROBERTS: And if that necessitates cutting someone,
21 we'll do that.

22 MR. SHARP: And, Your Honor, it was pointed out to me by
23 others that we are calling Christina Armington. But it's the same thing.
24 We're going to get all four of those done tomorrow.

25 THE COURT: Okay.

1 MR. SHARP: Or we -- we have them ready to go today. Mr.
2 Tyler Eskew and BJ Eskew are waiting. So --

3 THE COURT: All right. So we'll come back in 10 minutes,
4 counsel.

5 MR. ROBERTS: Thank you, Your Honor.

6 MR. SHARP: Thank you, Your Honor.

7 [Recess taken from 2:31 p.m. to 2:46 p.m.]

8 THE MARSHAL: Come to order. Back on the record.

9 THE COURT: All right. Are the parties ready for the jury?

10 MR. ROBERTS: Yes, Your Honor.

11 THE COURT: Please be seated.

12 [Pause]

13 THE MARSHAL: All rise for the jury.

14 [Jury in at 2:47 p.m.]

15 THE MARSHAL: Jurors are all present.

16 THE COURT: Thank you. Do the parties stipulate to the
17 presence of the jury?

18 MR. ROBERTS: Yes, Your Honor.

19 MR. SHARP: Yes, Your Honor.

20 THE COURT: Thank you. Please proceed, Mr. Roberts.

21 MR. ROBERTS: Thank you.

22 BY MR. ROBERTS:

23 Q Mr. Prater, we're still looking at 13.66 of the contract and just
24 -- I don't think I've asked the question for this. You'd agree with me that
25 13.66 on medical necessity was also in Exhibit 3 the partial agreement of

1 coverage?

2 A I would agree.

3 Q So we discussed that under the contract Sierra Health and
4 Life may give consideration to reports and peer reviewed literature,
5 evidence based reports and guidelines. And then the next bullet point
6 you would agree that under the contract Sierra Health and Life may give
7 consideration to professional standards of safety and effectiveness that
8 are generally recognized in the United States for diagnosis, care and
9 treatment?

10 A Yes.

11 MR. ROBERTS: Okay. Audra, could you pull up Exhibit 24?
12 And go to the first page first.

13 BY MR. SHARP:

14 Q This is the proton beam radiation therapy medical policy in
15 effect at the time Dr. Ahmad made his decision, correct?

16 A I'll accept your representation.

17 Q Okay. Now when we were talking just before the break you
18 couldn't recall specifically about the peer reviewed literature as I
19 remember, right?

20 A Well, I know that there is peer reviewed literature in the body
21 of the policy, the medical policy.

22 Q Okay. And so that peer reviewed literature applies directly to
23 lung cancer, right?

24 A According to those terms, I'm not a medical doctor so I didn't
25 review -- I don't understand the literature myself, so I wouldn't review it

1 personally.

2 Q So you would not have reviewed the literature to determine
3 if the peer reviewed journals referenced in the literature supported the
4 reasonableness of a medical director's determination of medical
5 necessity?

6 A Not from a medical standpoint, of course not. I'm not a
7 medical doctor.

8 Q Okay. Thank you, sir.

9 MR. ROBERTS: Audra, could you go to page 13? And if you
10 could highlight the bottom half of the page.

11 BY MR. ROBERTS:

12 Q You would agree with me that the section summarizing the
13 peer reviewed literature and other medical literature is here starting at
14 page 13, right?

15 A I don't know. It's a lengthy document, I don't have it
16 memorized. But I'll accept your representation.

17 Q So looking at an AR -- excuse me, AHRQ's systematic review,
18 do you see that?

19 A Yes.

20 Q Do you know what that acronym stands for?

21 A No, I don't.

22 Q Do you know if that is an agency of the Department of Health
23 and Human Services?

24 A I don't.

25 Q "An AHRQ systematic review evaluated the comparative

1 effectiveness of local nonsurgical therapies in patients with non-small
2 cell lung cancer. Proton beam radiation therapy was one method
3 reviewed."

4 MR. ROBERTS: Going down to the last sentence, Audra.

5 BY MR. ROBERTS:

6 Q "Overall evidence was insufficient to reach conclusions about
7 the relative effectiveness and safety of the interventions in terms of
8 overall survival, cancer specific survival, local control, quality of life,
9 symptomatic relief and toxicities." Do you see that?

10 A Yes.

11 Q You have no reason to doubt that is correct, do you?

12 A I don't have an opinion one way or another. I wouldn't be
13 qualified to answer the question because I'm not a medical doctor.

14 Q So before the break you speculated that maybe this didn't
15 include all of the literature that it should have included, didn't you?

16 A Well, I know it doesn't because there's a lot of literature and
17 Dr. Liao herself has written 300 and some articles and she's the worlds
18 authority and I think there's a cite to one or two of her articles.

19 Q So you disagree with the testimony of Dr. Chang here before
20 this jury, did you listen to that testimony?

21 A Yes, I did. I watched it.

22 Q Did you hear him agree that this clinical evidence section of
23 the policy regarding lung cancer contains reference to peer reviewed
24 literature?

25 A I would defer to Dr. Chang, he's a doctor, I'm not.

1 Q Did you hear him agree that he did not identify any published
2 peer reviewed article or study that the UHC proton policy should have
3 cited here and did not?

4 A I don't recall the testimony one way or another.

5 Q But you wouldn't disagree with Dr. Chang, would you?

6 A No. I'd defer to him on the medical policy.

7 Q Okay. And did you hear him testify that he did not have an
8 opinion that the policy was missing any material clinical evidence?

9 A I don't recall that.

10 Q You wouldn't disagree with that then, would you?

11 A I'd defer to him, whatever he said I defer to him on the
12 medical policy.

13 Q And did you hear Dr. Chang testify that he had reviewed
14 these, and he didn't find that any of these summaries of the peer
15 reviewed literature were inaccurate?

16 A I don't recall exactly what he testified to, but again I would
17 defer to him.

18 Q And you wouldn't disagree with him?

19 A No. I would have no basis to disagree with him.

20 Q And you agree with me that Sierra Health and Life was
21 allowed to consider this peer reviewed literature in making their
22 determination of medical necessity?

23 A Well, medical necessity definition which we discussed says
24 they may consider a number of things including peer reviewed literature
25 and may consider --

1 Q Including this?

2 A Yeah. Well, whatever that peer reviewed literature is they
3 can consider it. It doesn't mean it's controlling.

4 Q One more provision of the contract I want to go back to.

5 MR. ROBERTS: Audra, if you could pull up page 54 of Exhibit
6 4. Article 10.19 at the beginning.

7 BY MR. ROBERTS:

8 Q You talked about this with Mr. Sharp. Notification of an
9 adverse benefit determination. Do you recall that?

10 A Yes.

11 Q And it starts out, "If you receive an adverse benefit
12 determination you will be informed in writing of the following".

13 MR. ROBERTS: And if we could go to the bullet points on the
14 next page, Audra.

15 BY MR. ROBERTS:

16 Q And this list of bullet points is what the contract requires that
17 Sierra Health and Life provide to Mr. Eskew upon an adverse
18 determination, right?

19 A It says that they will be informed in writing of those following
20 things. It may require more, but it says you'll be informed of these
21 items.

22 Q So let's look particularly at the last two bullet points here.
23 The agreement of coverage states that, "Sierra Health and Life will
24 provide Mr. Eskew in writing a statement that any internal rule,
25 guideline, protocol or other similar criteria that was relied on in making

1 the determination is available free of charge upon the insured's request".

2 Do you see that?

3 A Yes.

4 Q So therefore the contract obviously contemplated that
5 United's coverage decision could be based in part or in whole upon an
6 internal rule, guideline and protocol or other similar criteria?

7 A No. It said not in -- you said in part or in whole, that's
8 contrary to everything I testified to today.

9 Q You would agree that they could rely upon one?

10 A No. They can consider it. And they can consider it for
11 whatever weight it's worth. But if they self-create it and change it at
12 whim, I suggest here it's not worth a whole bunch.

13 Q So you understand that additional medical research is being
14 done all the time, right?

15 A Yes. Medical research is done all the time.

16 Q Okay.

17 A I agree with that.

18 Q So if a study was done in 2017, is it your opinion that United
19 should ignore the new studies and any updates and new information
20 that becomes available and never change their policy?

21 A No.

22 Q It's reasonable to change policies as science gives us new
23 information, right?

24 A It is indeed. To consider the policies, to consider the studies,
25 but not to make them the controlling factor. You have to do the other

1 things first that I talked about this morning.

2 Q So you would take this contract language and you'd X out
3 relied upon, and you'd put consider?

4 A Well, this is a statement that if they rely on these medical
5 policies you're entitled to a copy of them, and law requires that. If you're
6 going to do an adverse benefit determination you have to give them the
7 right to get the basis of it. But the average ordinary insured doesn't
8 know about the secret policy. I mean, it's buried in deceived lettering.
9 You know, they're not going to know. It doesn't point in the denial letter
10 that we denied based for this reason on the medical policy or based on
11 which prong of the medical policy, it's just very generic. It's -- you know,
12 the average ordinary person wouldn't know what to do with that in my
13 opinion. Except for the, we denied it, send me your policy, you know.

14 Q The next bullet point says, "If the adverse benefit
15 determination is based on medical necessity or experimental
16 investigation or unproven treatment or similar exclusion or limit, either
17 an explanation of the scientific of clinical judgement or a statement that
18 such explanation will be provided free of charge," right?

19 A Yes.

20 Q And you'd agree with me in this case, the adverse benefit
21 determination was based on medical necessity and included the
22 determination that the treatment they requested was still considered
23 experimental, right?

24 A Well, the denial letter speaks for itself. We talked about it, I
25 criticized it and I told you what I thought was wrong with it and I stand

1 by that.

2 MR. ROBERTS: Audra, if you could go Exhibit 5, page 54. A
3 copy of the denial letter. Down here in the box, last bullet point.

4 BY MR. ROBERTS:

5 Q Does this clearly and unambiguously tell them, the Eskews or
6 Mr. Eskew in particular and Dr. Liao based upon UnitedHealthcare Inc.
7 medical policy for proton beam radiation therapy coverage is denied?

8 A Yeah. That's no question about that. That's the basis of the
9 denial, that proton beam therapy policy, I agree.

10 Q Right. Which contains all that peer reviewed literature, right?

11 A It contains some peer reviewed literature, yes. References,
12 there's thumbnail sketches, not the literature itself but just summaries.

13 Q And then it goes on and it follows with the conclusion,
14 "Current published evidence is not allowed for any definitive conclusions
15 about the safety and efficacy of proton beam therapy to treat your
16 condition." Do you see that?

17 A Yes.

18 Q And that's very consistent, in fact that's very exactly what
19 that AHRQ systemic review of the literature said in 2015, isn't it?

20 A I think we've established that I don't know what the AHRQ is.
21 It's a medical -- that's a medical doctor consideration. The medical
22 policy is for medical doctors; I'm an insurance expert.

23 Q But you do know that the policy talked about the reasons for
24 denial, contemplated that denials can be based on these reasons in the
25 bullet points and told United what they had to do?

1 A I disagree. I think I've already testified that I think the denial
2 letter was woefully inadequate and insufficient and didn't conform to the
3 standard practice in the industry. It's not specific enough, it's too
4 generic. It doesn't cite the specific exclusions, doesn't cite to why it's not
5 medically necessary. It just says it's not medically necessary, which
6 enables the carrier to come along later and say, well this is reason it's
7 not medically necessary. It's because of the literature, it's because of
8 this, it's because of that.

9 I mean, you have to say because of the literature or because of the
10 specific reason and cite to the specific exclusion or the specific bullet
11 point with specificity the denial letter has to be written, not generically.

12 MR. ROBERTS: So Audra, if we can go to the next page,
13 page 55. Two thirds of the way down, "the member will be provided."

14 BY MR. ROBERTS:

15 Q You would agree with me that the denial letter indicates that,
16 "The member will be provided upon request and free of charge
17 reasonable access to and copies of all documents, records and other
18 information relevant to the request. In addition, the members entitled to
19 an explanation of the scientific basis or clinical judgement used in
20 making our determination. This includes a copy of any internal rules,
21 guidelines or protocols used in make the no coverage decision."

22 A Right.

23 Q So you would agree that they were told, you've got the right
24 free of charge to ask for a copy of our internal policies and guidelines
25 that we relied upon?

1 A After they've already denied the claim.

2 Q Yes.

3 A Which doesn't do any good.

4 MR. ROBERTS: And Audra, going back to Exhibit 4, page 55.

5 BY MR. ROBERTS:

6 Q Under the agreement of coverage -- under what Sierra Health
7 and Life is required to do after they deny the claim, last two bullet points.
8 "Provide a statement that such explanation will be provided free of
9 charge."

10 A Yeah.

11 Q So when we said we'll give you a copy of our policy that
12 supports our determination with a copy of all the summaries of peer
13 reviewed literature that support our decision and we'll give it to you free
14 of charge, that complied with section 10.19 of the agreement of
15 coverage, correct?

16 A It says what they're going to do, but after they've already
17 denied it. So a little late to give them the information the decision was
18 based on.

19 MR. ROBERTS: Okay. That's all I have, Your Honor. Thank
20 you.

21 THE COURT: Thank you. Any redirect, Mr. Sharp?

22 REDIRECT EXAMINATION

23 BY MR. SHARP:

24 Q Mr. Prater, I have a few follow up points. There was some
25 questioning by Mr. Roberts regarding this concept of a plan, whether

1 UAC was a plan provider or not. Do you remember that testimony
2 generally?

3 A No.

4 Q Whether --

5 A Oh in plan provider, or out plain provider?

6 Q Yeah, yeah. In plan, out plan.

7 A Yes, I'm sorry. I do remember.

8 Q And you've reviewed the testimony in preparation for your
9 opinions or forming your opinions of Ms. Holland-Williams and Mrs.
10 Eskew. And can you explain to the ladies and gentlemen of the jury
11 what transpired, what Mrs. Holland-Williams indicated regarding
12 whether UHC was the plan provider?

13 A She did some research because they wanted to check it out
14 to see if MD Anderson was a plan provider. And the agent for the
15 insurance company checked it out and determined that she was -- they
16 were plan provider. It didn't say that they covered proton, they -- the
17 agent wouldn't know. It did say that they were an in plan provider,
18 which meant that you could go there freely and without reservation you
19 can go there and seek treatment. It doesn't mean it's going to get paid
20 for or covered, but it means he had the right to go there.

21 Q And you confirmed that UHC was an in plan provider by
22 looking at the bills and there was discounts provided?

23 A I know with experience and yes.

24 Q So -- now also there was some testimony regarding the -- I
25 think Mr. Roberts characterized it as the insured, Mr. Eskew voluntarily

1 sought prior authorization. Do you require -- do you recall that
2 testimony?

3 A Yes.

4 Q So the first question I want to know is, in the policy that was
5 provided to Mrs. Eskew is attachment B included?

6 A No.

7 Q And attachment B so we remember is defying what types of
8 treatments are required to be subject to prior authorization?

9 A Correct.

10 Q And would then the first policy that produced by Sierra
11 Health and Life, is attachment B in that policy?

12 A Yeah. I believe it was not.

13 Q So if we go to --

14 MR. SHARP: Jason, if you could bring up Exhibit 4, page 38.
15 And if we could go to under the managed care program requirements. I
16 want to pull this part up.

17 BY MR. SHARP:

18 Q And the second bullet point says, "It is the insured's
19 responsibility to verify prior authorization has been obtained for any
20 covered services requiring prior authorization and to comply with all
21 other rules of the SHL's managed care program." Did I read that
22 correctly?

23 A Yes.

24 Q Does that sound like a voluntary process?

25 A I'd have to find it in the -- it doesn't sound like it -- they're

1 trying to put a responsibility on the insured for any covered services
2 requiring prior authorization, but this didn't require authorization.

3 Q And so your point is when the prior authorization came in
4 Sierra Health and Life had a responsibility to tell MD Anderson and Mr.
5 Eskew prior authorization wasn't required?

6 A Yeah. When the request for prior authorization came in
7 because it's not required for -- if you fairly read the contract, it's not
8 required, and so that should end it right there. You shouldn't have to put
9 him through the process. And then if they had to -- when they had to
10 have the procedure as they were entitled to do, I would submit to you
11 that after they submitted the claim the carrier would have no way denied
12 this claim. He would have had his coverage.

13 Q Now --

14 A They denied it out of the gate summarily and then they make
15 you climb over the hurdles to try and get the coverage back and you
16 don't just get it back that easy.

17 MR. ROBERTS: Objection. Nonresponsive. Move to strike
18 as speculative.

19 THE COURT: The latter part of the statement will be struck.

20 MR. ROBERTS: Thank you.

21 MR. SHARP: So if we could go to Exhibit 4, page 65.

22 THE WITNESS: Which number?

23 BY MR. SHARP:

24 Q And it's -- I'm going to go to -- it's page -- it's 1389, so if you
25 have the policy, it'll be SHL2651.

1 A Yes.

2 Q And this section prior authorization, Mr. Roberts asked you a
3 series of questions which seemed to infer that Sierra Health and Life was
4 doing a favor to Mr. Eskew by denying the proton beam therapy on a
5 prior authorization basis. Do you remember he was asking you about
6 payment and if a service is provided it's still subject to medically
7 necessary review?

8 A I recall generally the discussion.

9 Q So the one sentence Mr. Roberts didn't refer to is this last
10 sentence, "prior authorization is not an agreement to pay for a service."

11 A Yeah. That's repeated in several places that prior
12 authorization is really just set up as a way to screen out claims and keep
13 claims from coming in the door at all. And if they deny you have to
14 overcome it and go through their process. But it's not an agreement to
15 pay. It doesn't guarantee you anything.

16 If you get the prior authorization doesn't mean they're going to pay
17 for it. They could still not pay for it and then say, see prior authorization
18 doesn't mean we're going to pay for it. They can come up with another
19 reason. That's why the denial letter has to be so specific, so we know
20 what their reasons are.

21 Q So -- now do you recall Mr. Roberts going through each of
22 the elements within medical necessary that may be considered?

23 A Yes.

24 Q Is there any evidence that Ms. -- that Dr. Ahmad actually
25 considered any of those elements?

1 A No. Other than the policy, the medical policy. It looks like he
2 focused on that solely and completely.

3 Q And Mr. Roberts was asking about, or Sierra Health and Life
4 was asking about all of these, you know, the medical literature within the
5 medical policy.

6 A Yeah.

7 Q Is there any evidence within the claim file that Dr. Ahmad
8 considered any of that evidence?

9 A There's not.

10 Q And so you mentioned several times about -- well, I'll just
11 strike that.

12 MR. SHARP: If we go to Exhibit 24. And let's go to page --
13 well, let's start out at Exhibit 5 and 13, please. Go to 6. Go to 6 first.
14 Page 6 of Exhibit 5. And if we can just pull up this email.

15 BY MR. SHARP:

16 Q And on the denial email from Dr. Ahmad he references NCCN
17 guidelines for radiation therapy version 2016 --

18 A Yeah.

19 Q -- do you see that?

20 MR. SHARP: Jason, if you could go to Exhibit 24, which is
21 the proton beam radiation therapy. And if you could go to page 15.
22 And if you go down this is --

23 BY MR. SHARP:

24 Q Now this medical literature Sierra Health and Life didn't ask
25 you about, so if you go to NCCN. And the policy says, "NCCN states that

1 the use of more advance technology such as proton therapy is
2 appropriate when needed to deliver curative radiation safely in patients
3 with non-small cell lung cancer". Did I read that correctly?

4 A Yes.

5 MR. SHARP: And if we go back to Exhibit 5 at 13, please.
6 And pull up right here.

7 BY MR. SHARP:

8 Q And this is the note -- a note from Dr. Liao and you reviewed
9 that note, right?

10 A I did, yes.

11 Q And her goal of treatment is curative?

12 A Correct.

13 Q So if Dr. Ahmad had really reviewed the medical literature as
14 reported by UnitedHealthcare then considering equal consideration,
15 would have approved the claim?

16 A He never considered that in the balance. He would have
17 considered it as a piece of the puzzle.

18 Q And that evidence would have been the --

19 A Helpful to the case that the insured was making for proton
20 beam. They were trying to spare the critical organs next to the
21 cancerous tumors --

22 Q Okay.

23 A -- contained in the lungs as I understand it. And they wanted
24 to use the focus beam rather than the scatter beam radiation, which
25 made sense. But I'm not a medical doctor. I read the medical doctor's

1 testimony and I agree that it made sense for him to have the chance at
2 that treatment.

3 Q So that's -- and so -- and Mr. Roberts asked you a lot of
4 questions about what Dr. Chang did or did not say. It is your recollection
5 that Dr. Chang testified that proton beam therapy was a better therapy
6 for Ms. Eskew than IMRT?

7 A Yes, he did.

8 Q And you would defer to Dr. Chang on his opinion?

9 A I would.

10 Q Now there was testimony about the adverse benefit
11 determination provision and I'm not sure -- I don't have my notes as to
12 which section that is. Do you recall?

13 A Not from memory, I can look for it.

14 Q I know it's something that we went through. In any event,
15 it's not -- we can deal with that with a later witness. There was also
16 some testimony or some questioning by Mr. Roberts to suggest
17 regarding that principally in court you testify for insureds?

18 A I testified -- I'm hired by one side or the other. I call them as I
19 see them, so even though I'm hired by an insured doesn't mean I'm
20 always favoring the insured. It depends on the case. But I've testified at
21 trial in 35 years about 100 times, close to 100 times where the insureds
22 have retained me and maybe five times where the defense has retained
23 me. But there's good reason for that.

24 Q And what is that?

25 A Well, I do a lot of consulting work for insurance companies in

1 litigation and if I see problem with the file, I encourage them to settle.
2 And I have some influence with insurance companies that I work for, and
3 they listen to me generally and they settle the case. It's only when the
4 case doesn't settle that it ends up in front of a jury and then I have to
5 come and present my views, so. The work that I do is about 70 percent,
6 60 percent on cases for insureds and about 30 or 40 where I'm reviewing
7 for insurance companies, but if it's something where I see a problem, I
8 advise the insurance company to settle it or pay it and it never gets to
9 trial.

10 MR. SHARP: Thank you. I have no further questions.

11 THE COURT: Thank you. Mr. Roberts, any follow up?

12 MR. ROBERTS: No follow up, Your Honor. Thank you.

13 THE COURT: Thank you. You're excused, sir. Thank you.

14 THE WITNESS: Thank you.

15 THE COURT: Mr. Terry, will you call your next witness?

16 MR. TERRY: Your Honor, the Plaintiff calls Tyler Eskew.

17 THE CLERK: Please raise your right hand.

18 TYLER ESKEW, PLAINTIFF'S WITNESS, SWORN

19 THE CLERK: Can you please state and spell your first and
20 last name for record?

21 THE WITNESS: Tyler Eskew, T-Y-L-E-R E-S-K-E-W.

22 THE CLERK: Thank you. You may be seated.

23 MR. TERRY: May I proceed, Your Honor?

24 THE COURT: Yes.

25 MR. TERRY: Thank you.

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DIRECT EXAMINATION

BY MR. TERRY:

Q Good afternoon, Tyler. Bill Eskew is your dad?

A Uh-huh, yes.

Q All right. And you understand that you're here today to testify in the lawsuit that your mother has brought in his name?

A Yes.

Q And let's talk about who you are, a little bit about you and then we'll kind of delve a little bit more into the things having to do with this lawsuit, okay?

A Okay.

Q Are you nervous?

A Yes.

Q Okay. Have you ever testified before?

A No.

Q Okay. So tell us how old you are, Tyler?

A I'm 32.

Q Can you speak up just a little bit?

A Oh I'm 32.

Q That's better. There's -- that microphone there makes the --

A Oh okay.

Q -- sound good for the system.

A I'll get closer.

Q Okay. Where do you live?

A My address?

1 Q Do you just live here in Las Vegas?

2 A Oh, in Las Vegas, yeah.

3 Q Okay. And what do you do for a living?

4 A I'm an early childhood special education teacher for students

5 with severe special needs.

6 Q Okay. And these are pre-K kids?

7 A Yeah. Three to five years old.

8 Q And is that job that you have in the Las Vegas school district?

9 A Yes. Clark County school district.

10 Q Do you have any kids?

11 A I do, I have two.

12 Q What are their names and ages?

13 A My daughter Sophia is 10 and my son TJ is six.

14 Q Okay. Now you understand a little bit about what this

15 lawsuit is about, right?

16 A Yes.

17 Q And you understand that it has to do with an insurance claim

18 denial involving your dad's cancer treatment?

19 A Yes.

20 Q Now is it fair to say, Tyler, that you were not involved in the

21 insurance part of this situation with your dad?

22 A Yes.

23 Q And you were not involved in the buying of the insurance

24 policy or the selecting it, right?

25 A No.

1 Q And you were not involved in any interaction between your
2 family and the insurance company?

3 A No.

4 Q Do you understand that part of the lawsuit -- part of the
5 allegations in the lawsuit are that the denial of the insurance claim for
6 proton therapy caused your dad to have a different kind of radiation
7 called IMRT?

8 A Yes.

9 Q Do you know that much?

10 A Yeah.

11 Q Okay. And do you know that part of the allegations in the
12 lawsuit are that your dad having IMRT instead proton therapy caused
13 harm to him?

14 A Yes.

15 Q And do you understand that part of the allegations in the
16 lawsuit are that having -- part of the harm that he suffered was that his
17 quality of life was decreased?

18 A Yes.

19 Q Okay. Well, that's really what I want to talk to you about.

20 A Okay.

21 Q So I want to talk to you about the quality of his life before he
22 had cancer and this treatment and then the quality of his life after, okay?

23 A Okay.

24 Q I just want to give you a little idea of what we're doing here.
25 So I want to talk to you about your dad and just sort of his life and the

1 things that made his life rich or worth living before he got cancer and
2 had this treatment and so forth, okay?

3 A Okay.

4 Q So I just kind of want to start off by asking you, what kind of
5 person was he?

6 A He was the best. He was super family orientated. Loving,
7 funny, happy. Just loved to be around his family and grandkids. He
8 loved his grandkids. Him and my daughter were super close, so --

9 Q Okay.

10 A Yeah.

11 Q So was he sort of an outgoing person or more of a reserved
12 person?

13 A Oh he was super outgoing.

14 Q So how would that -- how would we know that, I mean, what
15 can you tell us about him that makes that true?

16 A He loved to talk. He talked to everybody. We couldn't go
17 anywhere without him striking up a conversation with anybody that he
18 would come across. He loved to do things and go on our little
19 adventures to the lake and trips and -- he just was a happy, fun guy.

20 Q Was he an energetic person?

21 A Very energetic.

22 Q He wasn't the kind of guy that liked to sit on the couch a lot?

23 A No. He was always doing something, always. He loved to
24 bake and do things with the kids. He was always swimming with my
25 daughter, that was like there thing. He taught her how to swim when

1 she was maybe six months old, she was itty bitty. So he was always
2 active and doing things with us.

3 Q So he liked to -- I'll come back to his -- the quality of his life
4 that had to do with his grandkids in a second. But I'm going to ask you,
5 he liked to bake?

6 A He liked to bake, yeah.

7 Q Where did that come from?

8 A I don't know, just he decided one day he liked to bake, and he
9 would bake cheesecakes and they were awful. They were awful
10 cheesecakes, but we would eat them because he tried so hard. But they
11 were not good.

12 Q Could anyone get him to stop baking these cheesecakes?

13 A No. He would never stop baking. Even his other deserts that
14 weren't cheesecake, they weren't good. But he kept baking. And he
15 would make them until he could get them right and we always told him
16 he got them right.

17 Q So was he a -- you know, some people are big into food and
18 some people --

19 A Uh-huh.

20 Q -- cannot kind of --

21 A Yes.

22 Q -- not really care one way or the other too much. It's just
23 nutrients, you know, whatever. Where did he fall in that?

24 A He was an eater. He ate everything. He ate -- except for his
25 own deserts, but he ate everything. He also loved to cook. He used to

1 love to make fried chicken, that was his favorite thing, and I still can't get
2 it right to this day. He would try everything new. We'd go to restaurants
3 just so he could try something that was supposed to be there. Or my
4 gosh he loved White Castle, which if you're not from somewhere that
5 has a White Castle it's awful, but he loves it. He was an eater.

6 Q So he liked to eat out and go out --

7 A Uh-huh.

8 Q -- and be social with his family and friends at restaurants?

9 A Yes.

10 Q It sounds like he also liked to --

11 A Cook.

12 Q -- cook himself?

13 A Uh-huh.

14 Q So was -- did family meals mean a lot to him?

15 A Oh we would have family dinner when I still lived with my
16 parents every single night. But when I moved out every Sunday was --
17 no matter what, it didn't matter what was going on we had to have our
18 family dinners. And throughout the week too we would still do them.
19 But Sunday was mandatory family dinner.

20 Q At his place, his and your moms?

21 A Yes.

22 Q So who would show up for these family dinners?

23 A Me, my mom, my dad, my brother, and my kids and
24 sometimes my aunt. Just family.

25 Q I see.

1 A Yeah. If we had friends in town or --

2 Q So your dad would be the main cook or was he --

3 A Uh-huh.

4 Q -- thought he was anyway?

5 A He was the main cook. He didn't let my mom to cook.

6 Q Okay.

7 A He was the main cook.

8 Q All right. So --

9 THE MARSHAL: Let me get a box of Kleenex for you.

10 THE WITNESS: Oh, thank you.

11 MR. TERRY: Thanks, Marshal.

12 THE MARSHAL: You're welcome.

13 BY MR. TERRY:

14 Q So you said that he was very family-oriented person and I

15 think a lot of people say that about themselves or people they know. But

16 can you tell us what evidence was there in the way that your dad lived

17 his life that would -- somebody could listen to you tell us about and

18 conclude, you know, he really was a family-oriented person? How did he

19 interact with his family in that way?

20 A As for myself I was extremely close to my dad, like definition

21 of daddy's girl. And I mean, every Christmas we had our tradition of

22 doing our Christmas shopping and we'd go -- he'd wait until two days

23 before Christmas, and we would go Christmas shopping together. He --

24 just family always came first to him.

25 Q How often did you talk to your dad?

1 A Every day. Every single day.

2 Q You at least talked on the phone every day?

3 A Yeah.

4 Q All the way up until this all happened?

5 A Uh-huh.

6 Q Yeah?

7 A Yes.

8 Q How often would you see your dad?

9 A When I moved out, I would still see him at least four times a

10 week I would say.

11 Q Okay. So let's talk about -- let's back up in time a little bit.

12 How old were you when your family moved to Las Vegas?

13 A I was 17.

14 Q Okay. And where did you move here from?

15 A We moved here from Chicago.

16 Q Okay. Were you happy to be uprooted in your senior year of

17 high school?

18 A I was not.

19 Q Okay. So why -- what's your understanding of why your

20 family moved out?

21 A I believe it was with my dad's work he had to come out here.

22 I also know that they wanted to give us a better life as well. Chicago

23 wasn't the best area for us.

24 Q Okay.

25 A They didn't want us growing up there.

1 Q So what did you dad do for a living?
2 A He was in sales.
3 Q What kind of -- what was he selling?
4 A Honestly, I don't know because he was very good about
5 separating work from home. I know he had -- it had something to do
6 with speakers.
7 Q Speakers?
8 A And sound systems.
9 Q Like speaker speakers?
10 A Maybe.
11 Q Okay. We'll find more out about that --
12 A Okay.
13 Q -- from your mother. Okay. So you got one brother?
14 A Uh-huh.
15 Q That's your only sibling?
16 A Yes.
17 Q He's William Eskew Junior?
18 A Yes.
19 Q Goes by BJ?
20 A Uh-huh.
21 Q Yes?
22 A Yes.
23 Q We'll hear from him here in a minute.
24 A Yes.
25 Q No other siblings though?

1 A No.

2 Q All right. You said that your aunt would sometimes come
3 over for family dinners, is that your mother's --

4 A Yes.

5 Q -- sister?

6 A Yes.

7 Q She lives here --

8 A Yes.

9 Q -- in Vegas as well? All right. So you told us about your two
10 children. You have a daughter Sophie or Sophia, but she goes by
11 Sophie?

12 A Yeah.

13 Q Who is now 10?

14 A Yes.

15 Q So how old was Sophie when your dad passed?

16 A She was five.

17 Q And you've got a son TJ?

18 A Yes.

19 Q Who is how old?

20 A He's six.

21 Q Was he born before your dad passed?

22 A Yes.

23 Q All right. So you mentioned that your dad and Sophie -- that
24 was his first grandchild?

25 A Yes.

1 Q And that was his little girl's little girl?

2 A Uh-huh, yes.

3 Q So tell us about the relationship that he enjoyed with his little
4 granddaughter?

5 A He was her -- basically, the only male father figure in her life.
6 So they were very, very close. He stepped right in and took care of her
7 like -- or helped me out with her just like she was his own. He spoiled
8 her rotten. He just loved her. They were very close. She struggled with
9 that a lot. They were super close. I remember a time after he had
10 passed away. It was Christmas time. And she had written him a letter
11 and put it in his Christmas stocking, that -- and I didn't know about it.
12 None of us knew about it until my mom was taking down the stockings.
13 And it said something along the lines of you know, Merry Christmas. I
14 miss you. It was really cute. So they were very, very close, very close.

15 Q So it sounds like Sophie took a lot from that relationship,
16 obviously.

17 A Yes.

18 Q But it sounds like your dad did too?

19 A Yes.

20 Q So when Sophie would come over to the house, how would
21 the two of them interact?

22 A Oh. She was like the light of his life. She -- he was -- he
23 could keep up. He could keep up with her. Like I said, they -- I mean
24 swimming, running around outside, playing. They were super close.

25 Q And they saw each other multiple times a week?

1 A Yeah. And we -- I lived with my parents half of her life. So --
2 well, at that time, until she was probably, you know, three.

3 Q Oh, I see. So --

4 A Yeah. So she was very, very close.

5 Q So you and Sophie were living with your mom and dad?

6 A Yeah, for her early life. Yeah.

7 Q Okay. So what other -- well, let me ask you about TJ.

8 A Uh-huh.

9 Q How old was TJ when your dad died?

10 A He was only a year. He turned a year at the end of January,
11 and my dad passed in early March.

12 Q Was your dad excited to have a grandson on the way?

13 A Oh, my gosh. He was so excited.

14 Q Did he ever talk about how much fun he would have with his
15 grandson?

16 A Yes.

17 Q What kinds of things would he say?

18 A Well, my daughter took after me. She's very girly. So there
19 was no, you know, fishing and all of that fun stuff. And my dad would
20 go on annual fishing trips with my brother. So I think that was a huge
21 excitement for him being able to have a little one to do the same kinds of
22 things with.

23 Q Does TJ remember him?

24 A I have pictures everywhere. And he talks about him. I'm
25 sure he doesn't fully. He was only a year old. But he'll wave at the

1 pictures and walk like just casually. So he's aware. Yeah.

2 Q All right. So you obviously know, I assume -- I said
3 obviously. No. I'll just ask you. You know the story about what
4 happened with your dad that led to him being diagnosed with cancer?

5 A I know it was when he was golfing. He loved to golf. That
6 was his thing. And he had gone golfing with my brother and his best
7 friend, who was in town and had broken his arm. And when they went
8 to the hospital, they -- the -- I want to say the ER doctor told my mom like
9 oh, you know, it broke from his cancer. And we were all like what
10 cancer. We didn't know he had cancer.

11 Q So I take it that was quite the shock to the family?

12 A Yes, it was very much so.

13 Q So how did your dad react to and try to deal with that news?

14 A My dad was always very -- he was very much like -- he was a
15 protector. He didn't want us to ever have to worry about him, ever. So
16 he told us like it's going to be fine. He was very confident that
17 everything was going to be okay and told us not to worry and that it was
18 going to be fine.

19 Q So is your mother Sandy, is she the -- sort of the glue that
20 held the family together?

21 A Oh, yeah. She's amazing.

22 Q So tell me why you say she's amazing in that way?

23 A She did everything that she possibly could have done to
24 make sure he received the best things he could have received. He just --
25 she did everything in her power to make sure he was okay. That was

1 her -- I mean I can't even put into words how much time she spent --

2 Q Helping him?

3 A -- helping him.

4 Q So you're aware that, at some point, he ended up going to
5 Houston to get treated?

6 A Yes.

7 Q To MD Anderson?

8 A Yes.

9 Q Were you aware that your mother was trying to assist in
10 getting him to the best place to be treated and all of that?

11 A Yes.

12 Q You knew that she was doing research and --

13 A Uh-huh.

14 Q -- into that kind of thing?

15 A Yes.

16 Q And that's the kind of stuff, at least some of it, that you're
17 talking about when she did everything she could to help him?

18 A Right.

19 Q Okay. So once it was sort of determined that he was going
20 to go to MD Anderson and he was going to try to get proton beam
21 therapy, you knew that, right?

22 A Yes.

23 Q Once that was determined, how did your dad feel about it?

24 A He was super hopeful. He was confident. He said he told me
25 that he was going there to -- because that was one of the places that had

1 the treatment that, you know, he needed, and that was supposed to be
2 the best. So he was ready.

3 Q He was ready to fight it?

4 A He was ready to fight it.

5 Q And you say he felt hopeful. Did you know that he thought
6 he could fight it?

7 A Yes, I believe that he was very determined to fight that, and
8 100 percent believed he could.

9 Q So, at some point, I take it, you heard about the fact that the
10 insurance company had denied the treatment that he wanted?

11 A Uh-huh.

12 Q Yes?

13 A Yes.

14 Q And you're aware that then he underwent this other kind of
15 radiation therapy done in Houston called IMRT, right?

16 A Yes.

17 Q Okay. And so, that lasted a number of weeks, right?

18 A Yes.

19 Q And then he came home?

20 A Yes.

21 Q Eventually. Were you ever -- did you ever become aware of
22 the impact that the denial of this therapy by his insurance company had
23 on him just sort of mentally and emotionally?

24 A Yes. There was a very apparent change --

25 Q You mean a change between --

1 A -- in him.

2 Q -- the time he left for MD Anderson and the time he came
3 back?

4 A Yes.

5 Q Can you describe that for us?

6 A It's almost like he went from being super hopeful to, in a
7 sense, kind of hopeless. Not hopeless but just -- yeah, hopeless. Like he
8 went out there expecting to get what he needed and didn't. And so, he
9 still was ready to fight it, but he was -- he definitely lost a little bit of that
10 hope.

11 Q Did you find that he -- his personality seemed to change in
12 the family?

13 A Yes.

14 Q Could you describe --

15 A Very much so.

16 Q -- that for us?

17 A He was not as active and outgoing. And I know a lot of it
18 also had to do with how he was feeling. He was very sick. So it was
19 hard for him. He got angry, which wasn't my dad. He wasn't angry.

20 Q When you say he was angry, what was he angry about?

21 A I think he was, one, angry that he didn't get what he needed.
22 And he was angry because he couldn't eat. And that was a huge thing.
23 He was angry that he couldn't keep up anymore. He was frustrated.

24 Q What kinds of things would you hear him say that makes you
25 think he was angry at not getting what he wanted in treatment?

1 A He -- so my understanding of it was that that's what he was
2 told by his doctors that he needed was that treatment. And then that is
3 what would have been the most beneficial for the type of cancer or
4 where it was located. And so, he was very -- he didn't understand. Like
5 he couldn't understand why, when the doctor at one of the best hospitals
6 for what he had, said that that's what he needed, and he couldn't like get
7 it. He didn't understand that, and he was angry. He would say, you
8 know, I don't understand. Like what the heck. So --

9 Q Okay. Did you see him become less outgoing with the family
10 and others after he came back?

11 A Oh yeah. I mean it got to the point where I remember
12 Thanksgiving, he -- and again, he loved to cook. He loved to cook. And
13 Thanksgiving, he didn't. And he wouldn't even come out, like, of his
14 room to eat or sit with us.

15 Q So you're talking about the Thanksgiving after he had his
16 treatment but before he passed away?

17 A Uh-huh.

18 Q Yes?

19 A Yes.

20 Q So 2016?

21 A Yes.

22 Q Okay. Was there any family trips or events that he missed
23 out on for these reasons?

24 A He missed out on my son's first birthday. He couldn't attend
25 his party --

1 Q Why not?

2 A -- or his birthday dinner. He wasn't feeling good. He
3 couldn't go. And so, we did have a dinner at his house as well to kind of
4 bring it to -- the party to him, and he wouldn't come out of the room. We
5 had a trip planned to Disney, a family trip. And we were going to go on
6 a cruise. And he, last minute, didn't go. He said he can't eat anyway,
7 and that's what you do on cruises. And he didn't have the energy. He
8 couldn't eat. So he ended up not attending that either. We were -- yeah.
9 So --

10 Q So how did the family trip work out without him?

11 A It was weird. He -- I mean the whole point of the trip was
12 because he wanted to go. And so, we went on this trip for him and the
13 kids. He wanted to bring the kids. That was his main thing is he wanted
14 to bring his grandchildren to Disney World. That was a goal of his. And
15 so, it was weird because, obviously, he made us still go. He didn't -- he
16 was like I'm not going to ruin it for the kids. Like you have to still go.
17 And so, it was weird. It was supposed to be with him, and he wasn't
18 there.

19 Q Did anybody say we're not going, and he said yes, you are?

20 A Yes. We all said we weren't going, and he's like you are
21 going . That's not an option.

22 Q Okay. So now you've mentioned a couple times here, Tyler,
23 that your dad couldn't eat?

24 A Yes.

25 Q There's been some testimony here in the trial, before you

1 came in, about your dad having esophagitis --

2 A Uh-huh.

3 Q -- following this IMRT treatment that he got instead of
4 protons.

5 A Yes.

6 Q Okay. And so, I mean I know you're not a doctor and you're
7 not a diagnostician who -- with regard to the esophagitis. But I want to
8 just talk to you about sort of the day to day manifestation of what was
9 going on with him, what you saw with him on a day to day basis, okay?

10 A Okay.

11 Q So you've mentioned that he couldn't eat and that he was a
12 big eater, and that was impacting him in some way. So when you say he
13 couldn't eat, can you describe for us what you mean by that?

14 A It started as he would always say something is stuck in his
15 throat. Always. He would always complain that something is stuck in
16 his throat. He would try to like cough it out. He would try -- this is really
17 gross. I'm sorry. But he would keep a -- we called it his puke bucket,
18 because he would keep this trashcan next to him and just dry heave
19 because he said there was always something stuck in his throat. And
20 nothing was stuck in his throat, but he said that --

21 Q It felt that to him.

22 A Yeah, all the time. And so, I know that was a big issue. He
23 would complain about -- and then he'd also -- there would be times
24 where we would cook for him. And he would tell us he ate, but his food
25 would still be there. And we're like dad, you didn't eat. But he didn't

1 want us to, I guess, worry in a sense. And I think a lot of -- that's when
2 the anger started coming out too was with us always trying to get him to
3 eat, and it hurt. He couldn't eat. And finally, he was like it hurts. I
4 cannot eat. Like it's hurting. So --

5 Q So did you ever see that change much from the time he
6 came home from MD Anderson all the way up to the time he passed
7 away?

8 A Oh, it would -- it got awful. It was bad.

9 Q It was worse at the end?

10 A It was really, really bad.

11 Q So you said that he would cough like -- try to bring
12 something up?

13 A Yeah. Like he was always trying to clear his throat. And but
14 he said it would just never -- like he said it felt like food was stuck. He'd
15 always say there's food stuck, but he didn't eat. So there wasn't food
16 stuck.

17 Q So would he try to eat? Would he end up vomiting?

18 A Uh-huh. Yes.

19 Q And that's why he had his bucket with him?

20 A His puke bucket. Yes.

21 Q His puke bucket.

22 A Yes.

23 Q Would he sometimes -- I don't know what the medical term
24 for it is, but like dry heave, like he --

25 A Yes.

1 Q -- was trying to throw up?

2 A Lots of dry heaving. It got to the point where it was mainly
3 dry heaving, because there wasn't anything left in him to throw up. So
4 there was a lot of dry heaving. And even my daughter knew. Like she
5 would take him his puke bucket if it wasn't there or -- it was pretty
6 routine.

7 Q So -- and this is the kind of thing that would go on every day?

8 A Every day.

9 Q Okay. And we're talking about like morning, noon, and night/
10 I mean if he was awake, he was struggling with things like that?

11 A Every day. All day.

12 Q From the time he got home until the time he got --

13 A From the time he woke. Even when he was sleeping at night,
14 he would cough.

15 Q Now it sounds like you guys, the family, your brother, your
16 mom, and your aunt, I'm sure, were after him to eat, right?

17 A All the time. It was like a full-time job. It was us to be on him
18 to make sure he was getting something.

19 Q People bring him things he'd like to see if they -- if he would
20 eat them?

21 A Yes.

22 Q Nothing worked?

23 A Nothing.

24 Q Now he -- did he get -- ever get anything down, ever?

25 A There was a time when -- I want to say it was when we

1 started trying to get him to drink the Ensures.

2 Q Those little shake things?

3 A Uh-huh. They're like little protein shakes. That for a -- I
4 believe for a little bit he was able to force those down as they were
5 smooth. But it was rough. He didn't -- that was the extent.

6 Q Would you find that sometimes he'd feel a little better for
7 periods of time and get more of those shakes down?

8 A There was one point in time that he was able to. I can't
9 remember when. There was one point in time that he was getting a little
10 bit more, and we also were very much on him at that time with the
11 shakes. And I think the shakes were a lot easier --

12 Q Okay.

13 A -- to swallow.

14 Q So did you see -- as a result of him being unable to eat, did
15 you see him losing weight?

16 A Oh yeah.

17 Q Now the medical records that I'm sure you'll be shown -- or
18 somebody will. He indicated that his weight fluctuated some from the
19 time he got home from Houston until the time he passed away really sort
20 of dropped off toward the end?

21 A Yeah.

22 Q So did you notice that kind of thing?

23 A Yes.

24 Q Okay.

25 A Yes.

1 Q Okay. So some better, some worse, but always no good?
2 A Yes.
3 Q All right. So what about just drinking water? Could he do
4 that very well?
5 A No.
6 Q He could not?
7 A No.
8 Q That hurt too?
9 A Yeah.
10 Q Did it cause him to --
11 A He would throw it up.
12 Q So you've told us now that your dad suffered mentally and
13 emotionally, right?
14 A Yes.
15 Q And you've told us now about the way that he suffered
16 physically?
17 A Yes.
18 Q And so --
19 MR. TERRY: And, Jason, could you pull up Exhibit 9, please?
20 THE COURT: Is that one --
21 MR. TERRY: Yeah. No. All right. Let's take that down.
22 Sorry.
23 [Counsel confer]
24 MR. SMITH: No objection.
25 MR. TERRY: Your Honor, we move the admission of Exhibit

1 9 without objection.

2 MR. SMITH: That's correct, Your Honor.

3 THE COURT: Thank you. Exhibit 9 will be admitted into
4 evidence.

5 [Plaintiffs' Exhibit 9 admitted into evidence]

6 MR. TERRY: Thank you, Your Honor.

7 Pull up 9.

8 BY MR. TERRY:

9 Q So, Tyler, this is a picture of your dad, right?

10 A Yes.

11 Q What's he doing here in this picture?

12 A We were at the lake. I actually remember that. We were at
13 the lake and my brother bought this little boat. We went out in
14 November, and we broke down, because we ran out of gas, but we
15 thought his engine blew. And we sat out there for hours in the freezing
16 cold.

17 Q In the middle of the lake?

18 A In the middle of Lake Mead.

19 Q Bill doesn't look like he's having such a bad time in this one.

20 A No. It was actually so much fun.

21 MR. TERRY: So let's go to page 2 of this exhibit, please,
22 Jason. Can you zoom in a little bit, Jason, and get a better look at Mr.
23 Eskew's face?

24 BY MR. TERRY:

25 Q So that's your dad, right, Tyler?

1 A Yeah.

2 Q So is this the way you remember him?

3 A Yes.

4 Q Smile on his face?

5 A Yes.

6 Q So would you say, Tyler, that as a result of Mr. Eskew going
7 through the treatment that he went through, the IMRT, and the -- and
8 then coming home and having these problems that you talked about, do
9 you think that it impacted his quality of life?

10 A Yes, I do.

11 Q Have you told us as much as you can in these limited
12 circumstances how that was?

13 A Yes. Yes.

14 Q And how do you feel, Tyler, about the fact that your mother
15 has brought this lawsuit in your dad's name and come all the way to this
16 courthouse and this jury in this box to stand up for him?

17 MR. SMITH: Objection. Relevance, Your Honor.

18 THE COURT: Overruled.

19 THE WITNESS: I'm super proud of her. I'm extremely proud,
20 because it's not an easy thing. But I think that that -- that she feels
21 passionate enough about it to want to change things is huge. And I think
22 my dad would be so proud of her for doing that, because it wasn't fair.
23 And no one should have to go through that.

24 BY MR. TERRY:

25 Q Thank you, Tyler.

1 MR. TERRY: That's all I have, Your Honor.

2 THE COURT: Mr. Smith, any cross?

3 CROSS-EXAMINATION

4 BY MR. SMITH:

5 Q Good afternoon, ma'am.

6 A Hi.

7 Q My name is Phillip Smith. And I'm one of the attorneys that's
8 representing Sierra, the insured. And so, as I'm sure you can imagine, I
9 do get an opportunity to ask you a couple of questions, okay?

10 A Okay.

11 Q So, you know, let me start off by telling you, on behalf of
12 myself and my colleagues, we obviously extend our condolences to you
13 for the loss of your father, okay?

14 A Thank you.

15 Q And I can imagine that you're pretty emotional today, right?

16 A Yes.

17 Q And by looking at a calendar, it appears that this is probably
18 around the -- close to the fifth anniversary of your father's death, right?

19 A We just passed his fifth anniversary.

20 Q Ma'am, so I do have a couple of questions just about one
21 thing initially. And that is have you discussed this case with anyone
22 since the trial began about a week-and-a-half ago?

23 A No.

24 Q No. Okay. Did you talk to your mom?

25 A My mom and my brother.

1 Q I'm sorry?

2 A Just my mom and my brother.

3 Q Okay.

4 A The immediate family.

5 Q When did you talk to your mom about this case, after the trial

6 began?

7 A After? I haven't. Not after.

8 Q Okay. So just to give you some context, the trial started

9 March 14th. So that would have been last Monday?

10 A No. I talked to her about parking.

11 Q Okay. Did you talk to your mom about any of the testimony

12 that's happened so far?

13 A No.

14 Q Do you watch any of the testimony on the computer screen

15 or anything like that?

16 A No.

17 Q Okay. So, ma'am, it's my understanding that you lived with

18 your parents at the Egan Crest Drive address from 2011 to 2015. Does

19 that sound about right? Excuse me. 2014.

20 A Yeah. I believe so.

21 Q Okay. And so, my understanding, you moved out of your

22 parents' house because you had your first child. And obviously, it was

23 time to move into your own apartment. Does that sound about right?

24 A Correct.

25 Q Okay. So then after 2014, which would have been before

1 your father was diagnosed with lung cancer, you weren't living with him,
2 correct?

3 A I can't recall.

4 Q Okay. Well, so if you moved out of the house in 2014 --

5 A Uh-huh.

6 Q And your father was diagnosed with lung cancer in 2015,
7 then you wouldn't have been living in the house when he was diagnosed
8 with lung cancer. Does that make sense?

9 A Okay.

10 Q Okay. So that means you weren't seeing him on an everyday
11 basis after he got diagnosed with lung cancer, correct?

12 A No. I was seeing him very, very often and sometimes on an
13 everyday basis. I wasn't living very far. It was less than a mile away.

14 Q Okay. But sufficed to say, you weren't with him 24 hours a
15 day, 7 days a week after he was diagnosed, correct?

16 A No.

17 Q No, that's not correct or no --

18 A No. That -- yes, that's correct. I was not with him 24/7 after
19 he was diagnosed.

20 Q Okay. Now obviously, we've already heard testimony that, at
21 some point, your father was diagnosed with lung cancer, and you've
22 admitted that. And so, after he got diagnosed with lung cancer, he had
23 to go see physicians to treat that cancer, correct?

24 A Yes.

25 Q And it's my understanding that you dropped him off a couple

1 of times at some of those appointments; is that right?

2 A Yes.

3 Q And it's also my understanding that, out of the appointments
4 that you dropped him off at, that you only attended one of those
5 yourself. Does that sound right?

6 A From what I can recall -- it was a long time ago and I had a
7 baby. So life was a blur, but I believe so.

8 Q Okay. Well, let me ask you this. Do you recall testifying
9 previously at a deposition back in November of last year?

10 A Was that -- if that's when the deposition was held, yes.

11 Q Okay. So I can represent to you that you were deposed in
12 November 2021. Would you have any reason to dispute that?

13 A I don't understand what you're asking me.

14 Q Okay. So I'm asking you do you remember a scenario where,
15 kind of like I'm doing today, you were asked questions by a lawyer?

16 A Yes.

17 Q Okay. Do you remember that being in November of last
18 year?

19 A Yes.

20 Q Okay. And so, if you testified back in November 2021 at your
21 deposition that you yourself only attended one of your father's
22 appointments with him, that would be correct, right?

23 A I believe so.

24 Q Okay . Sufficed to say, your memory back in November
25 would probably be better than it is today. Would that be accurate?

1 A I don't know. It's only a few months difference. I'm not sure.
2 Q Okay. But as I understand your testimony today, you don't
3 have any reason to dispute if you previously testified that you went to
4 just one of your father's appointments with him?
5 A I don't know.
6 Q You don't know if you testified to that, or you don't know if
7 it's true?
8 A I believe I went to one physically with him.
9 Q Okay.
10 A But I did bring him a couple times to appointments.
11 Q Right. And, ma'am, that was exactly what I had asked.
12 A Okay.
13 Q And so, I apologize if it wasn't clear. So just so I make sure
14 we're on the same page, it's my understanding that you took your father
15 to a couple of his appointments.
16 A Yes.
17 Q And at one of those appointments, you actually went inside
18 with him?
19 A Yes.
20 Q Okay. Do you recall that being an appointment with a Dr.
21 Clark Jean at the Comprehensive Cancer Center of Nevada?
22 A I believe it was Dr. Jean.
23 Q Okay.
24 A I don't -- yes, I believe it was Dr. Jean.
25 Q Okay.

1 A It was Dr. Jean.

2 Q And do you recall, at that appointment -- actually, the only
3 thing that you recall at that appointment, from what I understand, is that
4 Dr. Jean told your father that he needed to eat. Does that sound about
5 right?

6 A He said that he was extremely skinny at that time and that he
7 definitely needed to get some nutrition in him.

8 Q Okay. It's my understanding that that appointment
9 happened not long before he passed away and that it was just you and
10 him there?

11 A I believe so.

12 Q Okay. So if my understanding of the timeline is correct,
13 ma'am, that would have been several months after he returned from MD
14 Anderson and undergoing the IMRT treatment that you and Mr. Terry
15 talked about?

16 A I would have to think back on the timeline.

17 Q Okay. So I can represent to you that we've heard testimony
18 that your father returned from MD Anderson in March 2016. That sound
19 right?

20 A I can't remember.

21 Q Okay. That's fine. I understand.

22 A It was a long time ago.

23 Q Okay. Ma'am, you told us during direct examination that
24 after your father was diagnosed with lung cancer, he said that he was
25 going to be fine, that everything was going to be okay. Do you

1 remember that?

2 A Yes.

3 Q And can you tell us again what your understanding was the
4 reason why he said that?

5 A Because he, one, didn't want us to worry, and he told us
6 everything was going to be okay. And then he was going to go -- he told
7 us MD Anderson was one of the best cancer hospitals, and that's where
8 he was going. So us not to worry. Everything was going to be okay.

9 Q Okay. And so, you subsequently learned that he did, in fact,
10 go to MD Anderson and he began this IMRT treatment that we've heard
11 about, correct?

12 A Yes.

13 Q Now it's my understanding that after Mr. Eskew, your father,
14 began this IMRT treatment, that you, nevertheless, never had a
15 conversation with him or anyone else about what his life expectancy
16 would be as a result of that treatment; is that correct?

17 A Yeah. I mean we didn't talk about him dying. We talked
18 about him getting better. It's not something he would have wanted to
19 talk to his kids about.

20 Q Okay. I understand that. But my question was that you guys
21 never talked about that, correct?

22 A Not really, no.

23 Q And it's also my understanding that your father never told
24 you that this treatment was going to cure his lung cancer, correct?

25 A I can't remember.

1 Q Now another thing you told us during questioning by Mr.
2 Terry was that the suggestion to go to MD Anderson was not made by --
3 actually, let me rephrase that. To the best of your knowledge, ma'am,
4 it's true that the suggestion to go to MD Anderson wasn't made by any
5 of your father's physicians that were treating him here in Las Vegas; is
6 that correct?

7 A I'm not sure.

8 Q Okay. And to be clear, ma'am, you never, yourself, did any
9 research on MD Anderson, correct?

10 A No. I just knew what I was told by my parents.

11 Q And in regards to what kind of radiation treatment your
12 father wanted, you never did any research on that, correct?

13 A Not -- just what I was told by my parents.

14 Q And at that time, this would have been 2015. So by my
15 math, you would have been, what, 26, 27?

16 A Yes.

17 Q Were you teaching back at that time?

18 A During that time, 2015, I was a substitute teacher, and I was
19 in college. I was doing my student teaching and working towards my
20 degree.

21 Q Okay. Back at the time though, just to be clear, you didn't
22 know what proton therapy was, correct?

23 A I knew about it from my parents but not before that. No.

24 Q Okay. And you had never --

25 A But I knew what they told me.

1 Q I'm sorry?

2 A I knew what they told me about it.

3 Q I believe you told us that your father led you to believe that
4 the proton therapy was going to save his life?

5 A I don't remember. I just knew -- what I knew was that they
6 told him that proton therapy was what he needed for the type of cancer
7 he had. And so, that's why he was going there to do it.

8 Q But again, you never did any research yourself, correct?

9 A No.

10 Q And you never verified or were told that the IMRT would not
11 be able to cure his lung cancer as opposed to proton therapy being able
12 to cure his lung cancer, correct?

13 A I never had that conversation. No.

14 Q And you certainly weren't operating under that assumption
15 at the time, correct?

16 A I was operating under the assumption that it was going to
17 help him, whether -- I mean they told me that that's what he needed to
18 make him better. So in my mind, as his daughter, I -- that's what my dad
19 needed to make him better.

20 Q And when you say they told you that, ma'am, you mean your
21 mother, correct?

22 A My parents, yes.

23 Q Did your mother tell you whether or not she did any specific
24 research into proton therapy?

25 A I know she read up on it. And it said that -- like where -- well,

1 she read up a little -- possibly a little bit once they told her about it,
2 because I believe that that was talked about at MD Anderson, because
3 that was the doctor that said that he needed it. And so, I believe that's --
4 I'm sure she read about it. My mom was on top of it. So I'm sure she
5 read about that once told that's what he needed.

6 Q So if I understand your testimony, you're not sure. You just
7 assume that she did?

8 A I'm pretty sure she did. She did a lot of research on
9 everything that he needed.

10 Q But to be clear, she never told you anything specific about
11 any research that you assume she did, correct?

12 A I can't remember. It was a very long time ago.

13 Q Ma'am, are you yourself aware of any studies or anything
14 that establish that proton therapy is better than IMRT in curing lung
15 cancer?

16 A I am more knowledgeable a little bit, after all of this, on what
17 proton therapy does, but I don't know about the curable thing. I know
18 that it was supposed to target where he needed it to avoid the things the
19 esophagitis and things like that.

20 Q Okay. So I appreciate that answer, and I'm sorry that I have
21 to ask you again. But I just want to make sure. So the answer would be
22 no, right? You're not aware of any studies that say proton therapy is
23 better at --

24 A No.

25 Q -- curing lung cancer than IMRT, correct?

1 A I am not -- I am not sure. I don't know.

2 Q No one told you that your father would be able to beat lung
3 cancer if he got proton therapy as opposed to IMRT, correct?

4 A I never spoke with his doctors about it.

5 Q So the answer is no, no one ever told you that, correct?

6 A I think that, as a family, that's just what we thought he
7 needed. And I guess, in my eyes, when they told me that's what he
8 needed to be okay, that's what that meant was that he was going to be
9 okay.

10 Q I understand, ma'am. Now you told us initially Mr. Eskew
11 was hopeful when he first wanted to get that treatment, correct?

12 A Yes.

13 Q And you'd agree with me, ma'am, that, at some point in time,
14 unfortunately, Mr. Eskew and your mother learned that his cancer had
15 spread, correct?

16 A I know that it was in more -- like obviously, it was on his arm,
17 because he broke his arm, but I don't recall. I can't remember when we
18 found out or where it spread. No.

19 Q Okay. So kind of inherent in your answer is that you did, in
20 fact, find out that your father's cancer spread, right?

21 A Well, before we even knew he had cancer.

22 Q I understand. So as I understand the timeline, no one in the
23 family knew he had cancer, correct?

24 A Right.

25 Q Back in 2015, right? And then, unfortunately, he breaks his

1 arm while he's playing golf, correct?

2 A Yes.

3 Q Then the doctors tell him that he has cancer, right? Yes?

4 A Yes.

5 Q Okay. I'm sorry. When you shake your head up and down, if
6 you remember being told at deposition, we have to get an audible
7 answer, so the court reporter can take the answer. I promise I'm not
8 trying to be rude or insensitive, okay?

9 A Okay.

10 Q Are you okay? Do you need to take a break?

11 A Okay.

12 Q Okay. So he goes to MD Anderson, and he gets this IMRT,
13 correct?

14 A Yes.

15 Q And I know you've told us that he thought he was going to
16 get proton therapy, but he got IMRT, right?

17 A Yes.

18 Q And he told us that, to your knowledge, you don't know
19 anything that says proton therapy would have actually cured his lung
20 cancer, correct?

21 A I guess my thought was that it was going to get better. So in
22 my mind, that was him being better. I don't know what --

23 Q I understand, ma'am. And I think anyone in this courtroom
24 can understand, you know, kind of that old saying hope springs eternal.
25 I understand that. But from like a scientific perspective, you'd agree with

1 me that no one told you and, to your knowledge, no one told your father
2 that proton therapy would cure his lung cancer, right?

3 A I don't remember.

4 Q Okay. In any event, do you remember learning, at some
5 point in time, that your father's cancer had spread?

6 A No, just the time when we found out he had cancer.

7 Q Okay. So it's your testimony here today that, at no point in
8 time after your father returned from Houston, receiving that IM -- excuse
9 me -- that IMRT treatment, did you learn that your father's cancer had
10 spread to other parts of his body?

11 A I don't remember. I don't think so, but I don't remember.

12 Q Okay. Well, ma'am, would you agree with me that that might
13 be something that a person would remember, that their father goes to
14 get treatment for cancer, thinking that it's going to be cured, and then
15 several months later, finds out that the cancer has spread? You would
16 agree with me that most people would remember something like that,
17 correct?

18 A Yes. But I also -- I mean like I said, I had a newborn baby. I
19 was a full-time student. I was a single mom. I was helping take care of
20 my dad. I knew that he had cancer. And from what I recall is when he
21 came back, I don't honestly remember if it had spread, if it got bigger, if
22 it got smaller. I knew he had cancer.

23 Q Okay. I understand that. Let me ask you from this
24 perspective. Would you agree with me that, at some point shortly after
25 he returned from MD Anderson, that your father appeared to get better?

1 A Not that I can recall. No.

2 Q So it's your testimony you can't recall any point in time --

3 A At one point in time, when we were forcing him to drink
4 Ensures.

5 Q Okay. Do you remember when that was?

6 A I remember -- no. But I do remember that when he was
7 drinking the Ensures, that -- I remember that he was getting more
8 nutrients and that was a good sign. But we were also forcing him to
9 drink it. And it was not fun to do. But other than that, no. It was awful.

10 Q Okay. And so, ma'am, as I understand your testimony on
11 direct examination and now, your father's health just kind of
12 precipitously declined from the moment he got back from MD Anderson.
13 Is that your testimony?

14 A Yeah.

15 Q Okay.

16 A Like, I think he wasn't getting better. He was getting worse.
17 He had that one time where he -- we were forcing him to drink. But other
18 than that, he declined. Yes.

19 Q Okay. Do you remember how long that one period of time
20 that you recall, how long that period of, for lack of a better phrase, good
21 health or good spirits lasted?

22 A I wouldn't say good health or good spirits at all. And no, I
23 don't remember, but it wasn't long. It was brief enough for me to not
24 recall how long it was.

25 THE COURT: Counsel, could you approach?

1 [Sidebar at 4:16 p.m., ending at 4:17 p.m., not recorded]

2 THE COURT: Ladies and gentlemen, we're going to take a
3 quick five-minute recess and come back with Ms. Eskew.

4 During this time period, you are instructed not to talk with
5 each other or if anyone asks about any subject or issue connected with
6 this trial. You're not to read, watch, or listen to any report of or
7 commentary on the trial of any person connected with the case or by any
8 medium of information, including without limitation newspapers,
9 television, the internet, or the radio. Do not conduct any research on your
10 own relating to this case, such as consulting dictionaries, using the
11 internet, or using reference materials. Do not conduct any investigation,
12 test any theory of the case, recreate any aspect of the case, or in any
13 other way investigate or learn about the case on your own.

14 Do not talk with others, text others, tweet others, Google
15 issues, or conduct any other kind of book or computer research with
16 regard to any issue, party, witness, or attorney involved in this case.
17 You're not to form or express any opinion on any subject connected with
18 this trial until the case is finally submitted to you.

19 So we'll just take a quick restroom break and come right
20 back.

21 THE MARSHAL: Rise for the jury, please.

22 [Jury out at 4:18 p.m.]

23 THE COURT: We'll take a quick break and come right back.

24 UNIDENTIFIED SPEAKER: Your Honor, are we going to 5
25 today?

1 THE COURT: Yes.

2 [Recess taken from 4:18 p.m. to 4:24 p.m.]

3 THE MARSHAL: Okay. Department 4 back on record.

4 THE COURT: Could you bring the jury in?

5 THE MARSHAL: Yes. All rise for the jury.

6 [Jury in at 4:24 p.m.]

7 THE MARSHAL: Judge, all the jury is present.

8 THE COURT: Thank you. The parties stipulate to the
9 presence of the jury?

10 MR. SMITH: Yes, Your Honor.

11 THE COURT: Thank you.

12 MR. TERRY: Yes.

13 THE COURT: Thank you. Please proceed, Mr. Smith.

14 MR. SMITH: Thank you, Your Honor.

15 BY MR. SMITH:

16 Q Ma'am, I just want to go back to when you told us about you
17 being at the appointment with Dr. Jean, and Dr. Jean noted that your
18 father needed to eat. Do you remember talking about that a couple
19 minutes ago?

20 A Yes.

21 Q And I believe you told us that, to the best of your
22 recollection, that's the only appointment that you recall physically going
23 to your father with, correct?

24 A Yes.

25 Q And do you recall that during that appointment, Dr. Jean

1 would have asked him general questions about like how he was feeling,
2 how he was doing, the current status of this pain, things of that nature?

3 A I can't -- I can't remember. It was a blur.

4 Q I understand.

5 A It was a bad day.

6 Q I understand. So that was probably a poorly worded
7 question. I'm not asking you if you remember what he said. I'm just
8 asking if you can recall generally that that's what Dr. Jean would have
9 done?

10 A I can't recall that. I don't know because it was the only
11 appointment I went to, and I don't remember what he asked.

12 Q Okay. Well, how about this way? You yourself have gone to
13 a doctor on occasion, I would imagine, right?

14 A Yes.

15 Q And would you agree with me as a general proposition that
16 generally when you go see a doctor, a doctor is going to ask you
17 questions designed to kind of figure out how you feel and what's going
18 on with you, right?

19 A Yes.

20 Q And would you agree with me that as a general proposition,
21 people generally answer those questions truthfully because they want
22 the doctor to be able to help them, correct?

23 A Yes.

24 Q So you wouldn't expect the person to not tell a doctor kind of
25 everything that's going on with them when they're going to the doctor to

1 get his or her help, correct?

2 A Maybe a normal person. But no, my dad was different. He
3 didn't want anyone to see weakness. And I remember that appointment,
4 going to that one physically. And the reason why it is also a blur is
5 because I had to physically help my dad walk into that appointment,
6 which had to have been extremely hard for him having his daughter
7 have to basically carry him into that appointment. So no, I don't
8 remember if he even asked that because it was quick and it was a blur
9 because I had to carry my dad into that appointment.

10 So maybe generally they would ask that, and most people would
11 probably say yes. But until the day my dad died, he told us he was good,
12 and he told us that he was fine when he wasn't because he didn't want
13 us or anyone else to know how bad he was really feeling.

14 Q So ma'am, I can represent to you -- and as Mr. Terry brought
15 up -- that there are medical records that have been introduced into
16 evidence in this case that indicate on occasions, your father would in fact
17 tell doctors that there were certain things wrong with him. You have no
18 reason to dispute that, right?

19 A I don't know. I don't know.

20 Q Okay.

21 A I know my dad as being the tough guy who would never
22 admit anything was wrong. When he broke his arm when he had cancer
23 when he was golfing, he thought it was dislocated. He wouldn't let my
24 brother bring him at first and he tried pushing his arm back in the socket
25 before he would tell my brother that something was seriously wrong and

1 that he needed to go.

2 Q I understand.

3 A He wasn't that kind, so.

4 Q I understand that. But you have no indication, right, that
5 after he went to the hospital that he lied to the doctor about what was
6 wrong with him, right?

7 A I'm not sure what you're asking. I just said that he would. I
8 100 percent he would tell the doctor he was feeling fine even if he wasn't
9 because he would tell us he was feeling fine when we knew he wasn't.

10 Q But ma'am, you also told us that they found the cancer
11 because he went to the doctor with a broken arm, correct?

12 A Right, after. Like, I had said after he refused at first for my
13 brother to take him until he realized that it actually wasn't dislocated
14 when he tried to pop it back in the socket on the golf course. That he
15 needed to go in.

16 Q I think we can understand that, ma'am. The point I'm trying
17 to ask you is that once your father actually went to the doctor, right?

18 A Yes.

19 Q You expected -- and I think you're telling us that it would
20 make sense that he would tell the doctor what, if anything, was actually
21 wrong with him, correct?

22 A For that instance, I could see him telling the doctor yes, his
23 arm was broken.

24 Q Okay. And so you have no reason to believe -- granted, I
25 understand your point. Right. You're basically saying, my father -- you

1 know, he was a tough man. He didn't really complain about anything.
2 He didn't want us to know that anything was wrong with him in the first
3 place. Is that kind of the point you're trying to tell us?

4 A Yeah, but I don't -- even with the doctor. He -- I mean, he
5 made friends with his doctors to the point where I can see him, yeah,
6 saying. I do have reason to believe that he went into the doctor and if
7 they asked how he was feeling, he probably was like, I'm great. And he
8 would force it out and he would smile, and he would say he was doing
9 great.

10 Q Okay.

11 A And it took until that appointment that -- like, that's the only
12 appointment I went to to actually see that it was probably apparent he
13 wasn't doing great.

14 Q Understood. Given that you didn't go to any of his other
15 appointments, the medical records indicated that at his other
16 appointments, your father would actually tell the doctor things that were
17 wrong with him. You don't have any reason to believe that he would
18 make any of that stuff up or not be completely accurate, correct?

19 A No, not correct. I don't -- I feel like he 100 percent would
20 have said that he was as far -- like, the eating was a very sensitive
21 subject. And I can -- I -- he would tell everybody that he was eating and
22 that he was doing great. So if it comes to them asking how he's feeling
23 or things like that, he would absolutely say to a doctor that he was
24 feeling great.

25 Q Okay. If he told a doctor he wasn't feeling great, you have no

1 reason to believe that he wasn't being truthful, right?

2 A I don't know.

3 Q Okay. Ma'am, you also told us about your father missing
4 your son's birthday, I believe it was, right?

5 A Yes.

6 Q And you also mentioned your father missing a Disney cruise,
7 right?

8 A Yes.

9 Q And I believe you told us that the reason why he didn't go on
10 the Disney cruise was because he didn't want to go because he wasn't
11 going to be able to eat. Do you remember telling us that?

12 A I said he wasn't going to be able to eat. He didn't have
13 energy. He wasn't -- yeah. But he was angry about it.

14 Q Okay. So again, I understand your testimony --

15 A And I understand what you're saying as well.

16 Q Right. Okay. That -- so you told us -- I just want to make sure
17 it's clear because I asked for a yes or no -- I asked a yes or no question,
18 and you kind of gave us some additional information. So do you recall
19 telling us that the reason why your father did not go on the Disney cruise
20 was because he didn't want to go in so many words?

21 A He didn't just not want to go, though. He wanted to go. He
22 planned that. Like, that trip was for him and his grandbabies. He wanted
23 to go.

24 Q I understand that --

25 A But when it came down to it, I don't think he even could have

1 gotten onto the airplane, and he knew that. But that's a big -- I mean,
2 like, there's no hiding that. But at home and at doctor's appointments,
3 100 percent he would say he was feeling great.

4 Q So if I understand your testimony correctly, he didn't go on
5 this Disney cruise, based on your testimony today, because he initially
6 wanted to go but then he decided that he didn't want to go because
7 essentially he wasn't going to have a good time, correct?

8 A I don't think it's not that he didn't want to go. He couldn't go.

9 Q But it was his decision, right?

10 A Yes.

11 Q Okay. Do you remember testifying previously at that
12 deposition in November that we talked about?

13 A Yes.

14 Q Okay. Do you remember you also were under oath, right?

15 A Yes.

16 Q Kind of just like today, right?

17 A Yes.

18 Q You swore to tell the truth then as you did now, right?

19 A Yes.

20 Q Do you remember telling -- excuse me -- testifying at the
21 deposition that the reason why your father didn't go on the Disney cruise
22 was --

23 MR. TERRY: Your Honor, could we get a page and line at
24 least?

25 MR. SMITH: Well, that's kind of -- counsel, if she doesn't

1 recall the testimony, then, I will refresh her recollection.

2 MR. TERRY: Thanks for the lesson. But can we get a -- can
3 we get a page and line, please, Your Honor?

4 THE COURT: Mr. Smith, do you have the page?

5 MR. SMITH: I do, Your Honor, with the Court's indulgence.
6 It's page 55. And I'm at line 6 through 22.

7 MR. TERRY: Thank you.

8 MR. SMITH: No problem, Mr. Terry.

9 BY MR. SMITH:

10 Q Ma'am, do you recall testifying previously under oath that
11 the reason why your father didn't go on that Disney cruise was simply
12 because a doctor probably told him that it wasn't in his best interest to
13 go?

14 A I do remember that.

15 Q Okay.

16 A Actually, I do remember that. And they also said -- thank you
17 for bringing that up -- that he could have been at increased risk of
18 infection. So he decided between the eating, the energy, and the doctor.

19 Q Okay. So you're now testifying that in addition to the
20 reasons that you told us today that what you said previously was also
21 accurate?

22 A Yeah, that's --

23 Q But you would agree with me that when you were asked this
24 question a couple of months ago, you made no mention about the facts
25 that you just told us today, correct?

1 A I don't remember.

2 Q Okay.

3 A It's a lot.

4 Q Ma'am, you testified that, you know, back when you were

5 taking your father to these appointments and the appointment that you

6 went to with him with Dr. Jean that you were going through a lot. Do

7 you remember telling us that?

8 A I don't think I was going through a lot. I had a lot on my

9 plate, though.

10 Q Okay. That's fair. And I didn't mean to --

11 A Thank you.

12 Q To try and disparage what you said. But I believe you told us

13 at the time, you had just had a baby, right?

14 A Uh-huh.

15 Q Yes?

16 A Yes.

17 Q And what other things were going on in your life at that

18 time?

19 A I was a full-time student. I was a full-time mom. I had a

20 baby, had a six-year-old. I had a sick dad. I was trying to work as much

21 as I could by being a substitute. And I had a lot.

22 Q You had a lot on your plate as you told us, right?

23 A I had a lot going on.

24 Q Was that an emotional time for you?

25 A Just the aspect of everything with my dad was very hard.

1 Yeah.

2 Q You would agree with me that sometimes emotion can color
3 a person's perspective on things?

4 A Sometimes.

5 Q And you're emotional here today, correct?

6 A I am now a little bit. Yeah.

7 MR. SMITH: Court's indulgence. Judge, thank you. We'll
8 pass the witness.

9 Thank you for your time, ma'am.

10 THE COURT: Thank you, Mr. Smith.

11 MR. TERRY: No further questions, Your Honor.

12 THE COURT: Thank you. You're excused, then.

13 Mr. Terry, will you call your next witness?

14 MR. TERRY: Yes, Your Honor. Plaintiff calls William J.
15 Eskew, Jr.

16 THE MARSHAL: All right, sir. Please watch your step.
17 Remain standing and the clerk will swear you in.

18 THE CLERK: Please raise your right hand.

19 WILLIAM ESKEW, JR., PLAINTIFFS' WITNESS, SWORN

20 THE CLERK: Will you please state and spell your first and
21 last name for the record?

22 THE WITNESS: William Eskew. W-I-L-L-I-A-M E-S-K-E-W.

23 THE CLERK: Thank you. You may be seated.

24 DIRECT EXAMINATION

25 BY MR. TERRY: