

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 13 of 18

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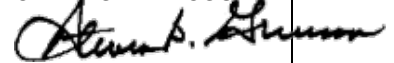
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DISTRICT COURT

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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

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WEDNESDAY, MARCH 30, 2022

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RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 11

17

18

APPEARANCES

19

For the Plaintiffs:

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

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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

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None

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Las Vegas, Nevada, Wednesday, March 30, 2022

[Case called at 8:56 a.m.]

[Outside the presence of the jury]

MR. SHARP: Your Honor --

THE COURT: Okay. We're on the record.

MR. SHARP: Thank you, Your Honor. There's an issue with regard to Ms. -- Mrs. Sweet that I want to make you aware of. And I'm going to show you -- I'm going to just to provide to you the deposition testimony of Shelean Sweet. And so let me just --

THE COURT: Thank you.

MR. SHARP: Let me just [indiscernible] the -- what the issue is. Ms. Sweet was -- Mrs. Sweet was designated as a 30(b)(6) representative on a number of subject matters. Two of which were the appeals, and the utilization management audits. She testified that those beyond her day-to-day roles. In the course of her preparation for a 30(b)(6) deposition, she spoke to two people; Kimberly Johnson and a Pam Smith, to gain knowledge of the appeals and utilization management audits. She testified that she relied upon those discussions to form the information that she was going to tell me in the deposition. When I asked her to tell me what was discussed between Ms. Johnson and Ms. Smith, she was instructed not to answer on attorney-client privilege.

Now, to -- I mean I'm not saying that Mr. Gormley or anybody did anything wrong. Mr. Gormley was present during these

1 conversations. But my point is they asserted the attorney-client
2 privilege. That was a decision they made. And so, therefore, they can't
3 under established law in the state of Nevada use the privilege as both a
4 sword and a shield. So I was spoken with Mr. Roberts, and basically my
5 position -- I understand she's not speaking about a peels.

6 MR. ROBERTS: She is not going to speak --

7 MR. SHARP: Okay.

8 MR. ROBERTS: -- about appeals.

9 MR. SHARP: We don't have to worry about the appeals
10 issue. In terms of the utilization management audits, I don't -- if she
11 wants to refer to a procedure within Exhibit 14 and say, "We have those
12 procedures, I'm aware the audits take place because, like Ms." -- "you
13 know, Nurse Amogawin said, 'We prepare the file for the auditors.'"
14 That's all fair game. But the minute she starts talking about what is
15 reviewed, what kind of results she gets, what kind of feedback she gets
16 back, that's precisely the area that I was going to examine when it came
17 to the audits.

18 Now, there's -- in discussions with Mr. Roberts, who said,
19 "well, she has personal knowledge about certain other aspects," which
20 she may or may not have, but the point being is her entire -- you can't
21 unring the bell. I mean her entire knowledge of utilization management
22 audit process is based upon her discussion with Ms. Smith. I mean --
23 and I was prohibited from exploring that discussion.

24 So I think under established law, you can't use the privilege
25 as a sword and a shield. Now, I don't know that you need to make a

1 ruling specifically right now, but I'm just alerting you that if I have an
2 objection, I think this is significant such that my -- the objection needs to
3 be heard outside the presence of the jury because, in my view, if they're
4 allowed to violate Nevada standards for using privilege as a sword and a
5 shield, that could create a reversible error.

6 So just so you're aware. I don't know how you want to
7 handle that.

8 THE COURT: Well, Mr. Roberts?

9 MR. ROBERTS: Thank you, Your Honor. Mr. Sharp alerted
10 me alerted me to the portions of the deposition transcript that he just
11 discussed with the Court yesterday. And I did review them overnight.
12 As he acknowledged, the meetings weren't just with Shelean Sweet and
13 other employees; it was a prep session that involved and was conducted
14 by Mr. Gormley. So I do think his assertion of the privilege was arguably
15 proper.

16 But regardless, no motion to compel was brought to get the
17 information. And so we're left the assertion of the privilege as a shield.
18 And I agree, we can't use it as a sword. And I would draw to the Court's
19 attention that she's not going to be here as a 30(b)(6) testifying to what
20 she learned in her investigation and her discussions with other
21 employees. She's going to be here solely to testify to what she knows
22 based on her own personal knowledge because she does it as part of her
23 everyday work.

24 So I don't think we even get to this issue as long as she
25 doesn't attempt to go beyond her personal knowledge and talk about

1 processes that she is not involved in and that she relied upon other
2 employees for understanding of them in the 30(b)(6) process.

3 THE COURT: Ms. Sweet's not going to be able to testify as to
4 anything that she relied upon in discussing with other people. At the
5 deposition on page 48, line 18, Mr. Sharp said, "Okay. What did
6 Ms. Smith tell you," question mark. Mr. Gormley responded, "Objection.
7 Form." I think that invades the attorney-client privilege during the
8 preparation discussion, Mr. Sharp, so I'm going to instruct the witness
9 not to answer."

10 Mr. Sharp did not ask what conversations the witness had
11 with Mr. Gormley. Mr. Sharp asked, quote, "What did Ms. Smith tell
12 you?" end quote. "Mr. Gormley's directed the witness not to answer,
13 and so she's got going to be able to testify to it at the time of trial."

14 MR. SHARP: So want to -- I want to be clear because she
15 said anything related to the creation of the medical policy, appeals
16 review, and UM compliance are not my areas of responsibility."

17 So I don't see how it's fair for her to come in and say, "Well,
18 now I have personal knowledge about UM compliance because I was" -- I
19 was deprived of being able to probe what knowledge she has
20 individually versus what Ms. Smith told her.

21 THE COURT: She's got going to be able to testify if she
22 doesn't have personal knowledge.

23 Do you want this, Mr. Sharp?

24 MR. SHARP: Yeah.

25 THE COURT: I highlighted it, but --

1 MR. SHARP: Thank you, Your Honor.

2 THE COURT: Are the parties ready for the jury?

3 MR. ROBERTS: Your Honor, could I have just a couple of
4 minutes with the witness to make sure she understands the Court's
5 ruling and doesn't inadvertently share anything that she learned from
6 others?

7 THE COURT: Of course. Do we need a break, or can you just
8 do it really quickly?

9 MR. ROBERTS: I think just like two minutes.

10 THE COURT: That's fine.

11 MR. ROBERTS: Thanks. Actually, Your Honor, now that I
12 think about it, I may have to just ask her about the topics I was planning
13 to discuss with her and make sure I don't ask her about a topic she
14 doesn't have personal information on. So --

15 MR. SHARP: Your Honor, that is -- this is --

16 MR. ROBERTS: Okay.

17 MR. SHARP: -- not fair. That is -- first all of 30(b)(6) is a tool
18 for discovery. And for that -- for him to be able to say she's speaking on
19 behalf of the corporation when I was prohibited from exploring her
20 knowledge, I mean I'm going to object to any reference to her being a
21 corporate representative.

22 THE COURT: I think he was just saying that he's going to
23 check his notes and make sure --

24 MR. SHARP: I'm sorry.

25 THE COURT: -- that he himself doesn't step out of bounds.

1 MR. SHARP: I apologize, everybody.
2 MR. ROBERTS: Yes.
3 MR. SHARP: I apologize to --
4 MR. ROBERTS: That's it.
5 MR. SHARP: -- Your Honor.
6 MR. ROBERTS: I --
7 MR. SHARP: I apologize to the Court.
8 THE COURT: That's okay. It's a misunderstanding.
9 MR. ROBERTS: Yes, I won't do that.
10 MR. SHARP: Okay.
11 THE COURT: So do you need more time?
12 MR. ROBERTS: I think it may take up to five minutes, maybe
13 two or three. So I -- certainly no more than four or five.
14 THE COURT: To look over your notes and to talk to her?
15 MR. ROBERTS: Yes.
16 THE COURT: That's fine.
17 MR. ROBERTS: Thank you, Your Honor.
18 THE MARSHAL: All the jurors are here now, Judge.
19 THE COURT: All right. It's going to be a few minutes.
20 THE MARSHAL: Okay.
21 [Court and Marshal confer]
22 [Mr. Roberts exits the courtroom]
23 [Pause]
24 [Recess taken from 9:07 a.m. to 9:11 a.m.]
25 [Outside the presence of the jury]

1 THE MARSHAL: The Court is now to session. The Honorable
2 Judge Nadia Krall presiding.

3 THE COURT: Thank you, please be seated.

4 Are the parties ready for the jury?

5 MR. ROBERTS: Yes, Your Honor.

6 MR. SHARP: Yes, Your Honor.

7 THE COURT: Thank you.

8 THE MARSHAL: All rise for the jury.

9 [Jury in at 9:12 a.m.]

10 THE MARSHAL: Okay. All the jurors are present.

11 THE COURT: Thank you.

12 Do the parties stipulate to the presence of the jury?

13 MR. ROBERTS: Yes, Your Honor.

14 MR. SHARP: Yes, Your Honor.

15 THE COURT: Thank you. Please be seated.

16 Mr. Roberts, will you call your next witness?

17 MR. ROBERTS: Yes, Your Honor. The Defense re-calls
18 Ms. Shelean Sweet to the stand.

19 DIRECT EXAMINATION

20 BY MR. ROBERTS:

21 Q Good morning, Ms. Sweet.

22 A Good morning.

23 THE CLERK: Do you want me to swear her in or no?

24 MR. ROBERTS: Oh.

25 THE WITNESS: Oh.

1 THE COURT: We'll just swear her in. It's been so long.

2 MR. ROBERTS: Sure.

3 THE CLERK: Ms. Sweet, could you please stand and raise
4 your right hand? Thank you.

5 SHELEAN SWEET, DEFENDANT'S WITNESS, SWORN

6 THE CLERK: Thank you. Will you please state and spell your
7 first and last name for the record?

8 THE WITNESS: Sure. Shelean Sweet, S-H-E-L-E-A-N; last
9 name, S-W-E-E-T.

10 THE CLERK: Thank you.

11 BY MR. ROBERTS:

12 Q All right. Let's try it again. Good morning, Ms. Sweet.

13 A Good morning.

14 Q So with the Plexiglas, it can be hard to hear you. The
15 device --

16 A Okay.

17 Q -- with the lights in front of you is the microphone.

18 A Okay.

19 Q So if you can lean into that --

20 A Sure.

21 Q -- when you talk, a little bit to make sure that we get your
22 voice loud and clear. Okay?

23 A Thank you.

24 THE COURT: And take turns speaking, please, so you're not
25 speaking over each other. Make sure you take turns.

1 THE WITNESS: Okay. Thank you.

2 THE COURT: Thank you.

3 MR. ROBERTS: Yes.

4 BY MR. ROBERTS:

5 Q Do you understand you need to wait until I finish my
6 question completely?

7 A Yes, sir.

8 Q Okay. And I'll try to do the same for you. Okay, ma'am?

9 A Okay.

10 Q When you testified before, when you were called in the
11 Plaintiff's case, they just sort of jumped into the questioning. What I'd
12 like to do first is to give the jury a little bit more of your background,
13 experience, education, and what qualifies you to do your job that you're
14 doing now for Sierra Health and Life. Okay?

15 A Sure.

16 Q So let's start with your education. Where did you go to
17 undergraduate school?

18 A To UNLV.

19 Q And what -- did you get a degree when you were there?

20 A Yes.

21 Q What was your degree in?

22 A Nursing.

23 Q And after you obtained your undergraduate degree, did you
24 go to school further?

25 A Yes.

1 Q And what did you do then?

2 A I went to the University of Phoenix in the San Diego campus
3 for a master's degree in nursing and a master's degree in business
4 administration with a healthcare management focus.

5 Q And did you obtain those degrees?

6 A Yes.

7 Q When you graduated from University of Phoenix with your
8 dual master's degrees, what was your first employment?

9 A I'm thinking back. I was going to school full time and
10 working full time. So just a moment as I think back to -- so after I
11 finished school, I started working at Alvarado Hospital as a case
12 manager. That was my first job after finishing graduate school.

13 Q And you indicated that you were working full time while you
14 were attending the University of Phoenix?

15 A Correct.

16 Q And what work did you do while you were obtaining your
17 master's?

18 A So I moved to San Diego, and I started working at Scripps
19 Hospital, East County, as a medical-surgical floor nurse as well as
20 telemetry. Then I started graduate school. And I moved on from the
21 hospital to the VA Hospital over there in San Diego and worked on the
22 stepdown ICU unit there. After that, I worked as a home healthcare
23 nurse focusing on palliative care for HIV and oncology patients.

24 Q How many years altogether did you work as a nurse in a
25 clinical setting?

1 A So between the -- I started -- when I first finished graduate --
2 or finished my bachelor's degree at UNLV, I started at Valley Hospital
3 here. So it's about, I want to say, five to seven years or seven and a half.
4 I'm sorry. I'm having a hard time doing math on the stand. I apologize
5 for that.

6 Q Okay. No problem.
7 So about seven years?

8 A Yes.

9 Q And where -- what does that bring us to? About 2004?

10 A Yes.

11 Q Okay. And what did you do in 2004?

12 A In 2004 I moved back to Las Vegas and started working for, I
13 guess it's HPN or United Healthcare as a case manager slash discharge
14 planner at Desert Springs Hospital.

15 Q And what were your duties and responsibilities in that
16 position?

17 A I would review medical records to determine whether
18 someone was ready to leave the hospital or if they were receiving
19 appropriate care in the hospital. I would review those records with the
20 physicians as well as the medical directors, talk to patients about their
21 discharge plans, make arrangements for those discharge plans, and just
22 overall coordination of care.

23 Q How long were you in that position?

24 A For approximately two years.

25 Q What did you do next?

1 A I was promoted to a senior case manager, and in that role
2 would work more closely with the hospital gathering records from
3 outpatient to determine if there were quality of care concerns or what
4 have you that led to the inpatient admission. And also work as a liaison
5 between the hospitalists and the case managers just kind of finetuning
6 discharge plans and such.

7 Q Thank you. How long were you in that position?

8 A About a year and a half.

9 Q What did you do after that?

10 A I was promoted to a RN manager over an inpatient team.
11 Basically the same team that I started out, over the same functions that I
12 started out. It would be case manager and discharge planning functions.

13 Q Did you have any additional duties and responsibilities when
14 you became an RN manager?

15 A Yes. Oversight of the clinical team, managing the clinical
16 review process with the hospitalists and the medical directors,
17 identifying system issues that could be corrected, and implementing
18 corrective action plans, or participating in groups to improve the quality
19 of care.

20 Q Thank you, ma'am. How long were you in that position? Do
21 you recall?

22 A About two to three years.

23 Q Okay. What did you do after that?

24 A I made a lateral transition to the prior authorization
25 department as an RN manager.

1 Q And approximately what year was that?

2 A Around 2000- -- late 2011.

3 Q What were your duties and responsibilities when you moved
4 into preauthorization review at that time? As an RN manager still?

5 A Yes. Initially just the responsibility for the clinical review
6 team, and then duties were added as I was promoted.

7 Q How long did you remain in that position as a manager
8 before you were promoted next?

9 A I want to say two to two-and-a-half years.

10 Q And when you received a promotion, what position did you
11 take?

12 A Associate Director of Preservice Review.

13 Q Okay. What -- how were your duties changed when you took
14 that promotion?

15 A I was given the responsibility of the transplant case
16 management team as well as the intake and notification process in
17 addition to the clinical review process.

18 Q And did you receive another promotion shortly after that?

19 A Yes. In approximately 2015, I was promoted to the Director
20 of Preservice Review.

21 Q The jury has seen the preauthorization request in this case
22 for Mr. Eskew's proton beam therapy in February of 2016. What position
23 did you hold at that time?

24 A I was the Director of Preservice Review.

25 Q Okay. And tell us about what your -- the scope of your duties

1 and responsibilities were as the Director of Preservice Review?

2 A In addition to the day-to-day management, compliance
3 management, I became responsible for more participation in -- in a
4 broader scope of project -- projects as well as a higher level of
5 accountability and more review of reporting and [indiscernible], and how
6 it impacted the overall health plan performance.

7 Q Now, just to clarify, were you supervising the preservice
8 review for Sierra Health and Life at that time?

9 A Yes.

10 Q Were you also supervising preservice review for any other
11 affiliates?

12 A Yes. All affiliates associated with our business unit. So the
13 HPN and other lines of business.

14 Q And HPN is Health Plan of Nevada?

15 A Yes.

16 Q Is that an HMO?

17 A Yes.

18 Q As the Director of Preservice Review, did that include
19 overseeing the prior authorization process?

20 A Yes.

21 Q And is that part of the utilation -- utilization management
22 process?

23 A Yes.

24 Q What was your understanding of the purpose of utilization
25 management?

1 Q And what does the intake team do?

2 A The intake team performs a data entry function into our
3 documentation system called Facets. They take in any information the
4 request submitter provides. So the CPT codes, any medical records, any
5 narrative that they would like to provide. They enter that information
6 into the system. From there, they review a list of services --

7 Q Well, let -- let me --

8 A Oh, okay.

9 Q Let me stop you there and ask one quick question before you
10 move on. Is the intake team authorized to approve claims?

11 A Search and Services, yes.

12 Q And what types of services would those be?

13 A Services that are on a list of services that they can approve.
14 And that list is reviewed on a regular basis.

15 Q Okay. And what happens after it comes to the intake team?
16 Where does it go next?

17 A So if they can approve, then they'll generate an approval
18 letter. If they cannot approve, then they will send that case to a clinical
19 review team.

20 Q Okay. So the intake team can approve. If they cannot
21 approve, they send it to the clinical care review team?

22 A Yes.

23 Q And what are the duties and responsibilities of the clinical
24 care review team?

25 A The clinical care review team will review a service based on

1 the network requirements, whether a provider is in network or out of
2 network, and the medical necessity of the service codes that are listed
3 based off of the information provided in the case. And they'll also --
4 they'll review that information in relation to applicable medical policies.

5 Q Okay. And the jury heard a deposition reading yesterday
6 from Lou Ann Amogawin. Do you know a Nurse Amogawin?

7 A Yes.

8 Q And what team was she on?

9 A She was on the clinical review team.

10 Q What were your expectations of someone in her position
11 when they received a preauthorization request like this one from the
12 intake team?

13 A I would -- expect a nurse to review the medical information
14 that was provided, review that information against any medical criteria
15 or medical policy, the requirements for a particular service, and to make
16 a determination if it could -- if the medical records actually matched up
17 with the requirements in the medical policy. If those requirements did
18 not match, she -- excuse me -- she could send that case on to a medical
19 director for review. However, you know, many cases do match medical
20 policy criteria, and she could approve at her level, identify which policy
21 she used for the approval, and then send that case back to the intake
22 team to generate a letter.

23 Q So she can send it back for approval. And if she could not
24 approve, what would she do?

25 A She would complete a summary of the case just based off of

1 a summary of her thoughts of what -- why she's sending it to the medical
2 director, and then forward that on to medical director review for his
3 decision, or her decision.

4 Q So if she could not approve, it would go to the medical
5 director, correct?

6 A Correct.

7 Q And as part of that process, what would you expect her to
8 review prior to sending it on to the medical director?

9 A So it would be the same -- the same review that she would
10 be expected to review if she was approving it. So she would still look at
11 the network status of the provider, the medical records, and then the
12 medical policy, and then she would provide a summary of her review for
13 the medical director.

14 Q Would you expect the nurse to also review the agreement of
15 coverage?

16 A She would have good knowledge of the agreement of
17 coverage, and she wouldn't necessarily review it word for word prior to
18 sending it to the medical director because it would be a medical
19 necessity review.

20 Q With regard to the clinical care review team, was there any
21 training that those nurses would have to undergo before they could
22 perform that function?

23 A Yes.

24 Q Could you tell the jury briefly about that?

25 A Sure. So the training for the clinical care review RNs, it starts

1 off with the basic lines of business, which lines of business have out of
2 network, and that's part of the agreement of coverage type review. It's
3 been of their benefits. Do they have out of network benefits or not. It
4 progresses on with various levels of service. So they might start out
5 with radiology review, then they'll move on to maybe pain injections and
6 things like that. And they'll progressively move through various levels of
7 service and then get signed off on competency before moving on to the
8 next level of service.

9 They are trained on note entry, how to send cases, whether it be to
10 the MD for review or back to the CAC for review, they're trained on
11 maybe what questions to ask. And it's always reinforced if you don't
12 understand something, we're all here to answer your questions. So
13 that's reinforced throughout the process. After they move through all of
14 the steps of training, there is a test that is issued just to make sure that
15 they actually pass the test.

16 And then once they pass the test, they are released to review. And
17 then it's not like they're expected to review a full, you know, load of
18 cases their first day out of training; it's just expected that as they become
19 more familiar with criteria, more familiar with benefits and case review,
20 that they're volumes will increase.

21 And that's the process. You know, just time to time things come
22 up for question, and that's part of your training too. We're all learning
23 every day, you know, based off of what cases come across.

24 Q And is there any additional oversight beyond that for someone just
25 starting out in the role?

1 A There is an -- in addition to just maybe initial training, the
2 whole team is tested annually on their use of criteria. This is a NCQA, or
3 National Committee of Quality Assurance Requirement. So we take this
4 annual test. We are required to pass with a 90 percent of accuracy just
5 to make sure that we are still reviewing cases appropriately.

6 Q So if the clinical care review team does not approve the
7 request, you indicated it goes to the medical director. Did you oversee
8 the medical directors performing this function when you were the
9 Director of Preservice Review?

10 A Yes. The oversight of the decision-making process, including
11 medical director decisions, was under my responsibility.

12 Q And did you know Dr. Ahmad at that time?

13 A Yes.

14 Q Were you his supervisor?

15 A Yes.

16 Q What were your expectations of a medical director
17 performing review in this function after receiving a request from the
18 clinical care review team?

19 A So he would review the summary that the nurse provided in
20 addition to reviewing the medical records against the medical policy, and
21 then would provide his decision.

22 Q And did the medical director at this time have the discretion
23 to approve a preauthorization request?

24 A Yes, he did.

25 Q And if the medical director decided to approve a request,

1 what would he do then? Where would he send the approval to?

2 A He would summarize his case findings, you know, and if
3 there were notes related to an exception, or what have you, that would
4 be documented in his findings. That note would be sent to the RN for
5 completion of the case, to forward on to whoever's going to generate the
6 letters, or what have you.

7 Q So that would go back to the clinical care review team?

8 A Correct.

9 Q So what if the medical director determined that he was not
10 going to approve the claim? Did he have authority to deny the claim?

11 A Yes.

12 Q And if the medical director decided to deny the claim, where
13 would he send that?

14 A He would send it back to the clinical care review team.

15 Q Okay. Now, let's follow that denial. If the clinical care review
16 team received a denial from medical director, what were they expected
17 to do with that denial?

18 A So they would complete the denial decision, enter that into
19 the system, and then forward that on to the adverse determination team.

20 Q And what was the responsibility of the adverse
21 determination team?

22 A They would review the notes in the case. Any -- they would
23 review the notes in the case, the medical records, and what have you,
24 against the medical policy. Not to make a decision but to review that
25 information to determine what -- how to draft the denial letter using

1 certain templates. And the denial letter verbiage would be based off of
2 the MD decision and what criteria was utilized. So they review the case
3 to make sure that the denial text represented the decision-making for the
4 case.

5 Q And the jury's heard about the denial library. From your
6 perspective, what was the purpose of having a denial library with over
7 300 different denial templates?

8 A Sure. So as we discussed previously, our team manages
9 multiple lines of business. So the number of denial texts was partially
10 related to, you know, various lines of business that we had. We also
11 talked about the multiple services that the RNs have to review. And any
12 of those would be subject for denial. So that multiplies the number of
13 potential denial texts as well.

14 The intent of the denial library is not just to have a text that
15 you could use for every case; it's more as a framework to say, "Here's a
16 line of business," you know, just to guide you as to what to put in there.
17 "Here's a particular service, a particular medical policy," so that when
18 some -- when one of these denial representatives, they don't have to
19 reinvent the wheel for every denial text. So it's really intended to
20 improve the efficiency of the process.

21 Q After the adverse determination team drafts the denial letter,
22 where would that denial letter go next in the process?

23 A So that letter -- the full case, including the letter, would be --
24 apologies --

25 Q Is that a new bottle of water there?

1 A I shall drink it.

2 Q Okay. Good. It's all yours.

3 A Yes. Okay. Thank you.

4 So the full case, including the letter, medical records, everything
5 that has been reviewed and rereviewed would be sent to the quality
6 control team. And it's a team of senior RNs who have had experience in
7 the department and are very familiar with compliance requirements,
8 detailed in their review. So they'll review the case for -- for appropriate
9 decision-making.

10 So they're going to look at the medical records again against
11 medical policy. They look at the RN notes and MD notes and highlight
12 any discrepancies or -- or any opportunities for improvement. They'll
13 also look at the denial text to ensure that it is understandable to a
14 member, written at a low enough grade level to where a lay -- layperson
15 could understand it. So they're looking for medical terms that are
16 unexplained and sump. If they notice any discrepancies, they'll send the
17 case back to whomever needs to correct their notes.

18 Q So that might be the clinical care review team?

19 A Correct.

20 Q Would it sometimes be the medical director?

21 A Correct.

22 Q And would it sometimes be the adverse determination team?

23 A It could be anybody who was involved in the case. Yes.

24 Q Let's go up to the top to the intake team. Does the quality
25 control team review approvals before they go out?

1 A They do not. And it's -- the heavier compliance requirements
2 are on explaining a denial and making sure that the decision is
3 appropriate. The compliance requirements for an approval is -- well,
4 before denials and approvals is -- are they timely? So there's really not a
5 compliance requirement to look at an approval.

6 Q In this case, the preauthorization request came from Dr. Liao
7 at MD Anderson. Are you familiar with that?

8 A Yes.

9 Q Who's responsibility in this group would it be to
10 communicate the denial?

11 A It would be the adverse determination team.

12 Q So after the quality control team review was completed, it
13 would come back to the adverse determination team who would then
14 communicate. Is that fair?

15 A Yes.

16 Q And do you know who the member was the adverse
17 determination team charged with communicating the denial of the initial
18 preauthorization request for proton beam therapy?

19 A Yes.

20 Q And who was that?

21 A Gustavo Guerrero.

22 Q And do you supervise Mr. Guerrero?

23 A Yes.

24 Q Did you supervise him at this time?

25 A Yes.

1 Q Has he been with the company a long time?

2 A Yes.

3 Q Could you -- do you know how long personally, or do you

4 have an estimate?

5 A I think over 20 years.

6 Q Was he there in that position when you became a supervisor

7 in 2015?

8 A Yes.

9 Q So one of the questions which has been raised during the

10 trial was to whether the people making these determinations had any

11 type of oversight. Based on your own personal knowledge and what you

12 do as the supervisor of the department, are you involved in any type of

13 oversight of these decisions?

14 A Yes.

15 Q And what type of oversight are you personally involved in?

16 A So cases are escalated to me if, let's say, there's a question

17 that really could use someone with a higher level of knowledge maybe of

18 compliance requirements, or what have you, or just maybe some

19 decision-making, there is our quality review process, and I oversee that

20 team. We -- I'm involved in internal audits.

21 Q Well, let -- let me --

22 A Oh.

23 Q -- stop.

24 A Sure.

25 MR. ROBERTS: I apologize, Your Honor. I'll do better.

1 THE COURT: Thank you.

2 BY MR. ROBERTS:

3 Q You mentioned that there were -- there's a quality control or
4 quality review process?

5 A Correct.

6 Q Instead of just listing things, can you tell the jury right -- what
7 that consists of?

8 A So the quality control process consists of oversight of the
9 clinical decision-making process. They're making sure that if a nurse is
10 sending a case for a denial, that she's not overlooked information that
11 really could make it approval -- an approval. And the quality team,
12 they're not just -- you know, they do send cases back if they recommend,
13 well, you know, something probably should be reexamined for approval.
14 They also look at the decision made by the physician to make sure it
15 actually aligns with the medical policy. So they do these individual case
16 reviews.

17 They also escalate if there is a trend. Maybe there is a provider or
18 some such who's not necessarily adhering to a standard of care. They
19 will escalate that. Or any negative -- of any other negative trend, they
20 will escalate that, you know, for maybe reevaluating training processes.
21 Maybe the team needs reeducation or perhaps a provider requires
22 reeducation.

23 So it's -- they identify multiple issues through the quality
24 process, and they also identify if anything maybe did not meet the NCOA
25 requirements or there there's a pattern that leads to untimely cases.

1 They'll identify maybe any patterns associated with that. So it's a really
2 general quality review process. They're helping us to adhere to
3 compliance requirements, let's say, before we're found to be deficient on
4 some audit. So they're helping us with day-to-day processes.

5 Q And you mentioned as part of that process the quality control
6 team. Is that the same group that you've indicated here?

7 A Correct.

8 Q And they would review the medical director's decision, the
9 clinical care review team decision and make sure it all looked right to
10 them?

11 A Yes. So they'll review individual cases. And through that
12 daily review, patterns just become apparent. And they're -- the
13 expectation is they'll escalate patterns as well.

14 Q And if they decide to escalate, who do they escalate to?

15 A It would be to myself. And if I could handle it myself, then I
16 would. If it's a systemic issue requiring involvement of other
17 departments, then I'll collaborate with other departments to address an
18 issue.

19 Q You'd mentioned the NCQA?

20 A Yes.

21 Q Are you personally involved in any processes that are
22 involved with the NCQA accreditation?

23 A Yes. Our -- our day-to-day processes are built on NCQA
24 standards. NCQA releases their standards, and the expectation is health
25 plans will review their processes to ensure that standards are met. So all

1 of our daily tasks, it's not just one big compliance standard that you just
2 wake up and meet; you have to build daily processes to meet those
3 standards. And those standards are built to ensure quality healthcare
4 services and that members are protected and receive their rights, you
5 know, through assurances. Just to add, I'll limit my involvement to UM,
6 but NCQA manages all of the teams within -- or they set standards for all
7 the teams within healthcare.

8 Q What is your understanding of what the NCQA is and what it
9 does?

10 A So what they do is ensure, not just for health plans but for
11 providers as well, that they are providing scientifically sound or
12 scientifically recommended services. So they're ensuring that those
13 services are provided. In so doing, they're managing -- it's not just
14 managing a denial process; it's managing all the processes leading to
15 any decision, and all of the processes under an insurance plan. So
16 they're really ensuring that people are receiving quality healthcare
17 services.

18 Q Is this just a marketing tool?

19 A No. No. They review things very seriously. It is a
20 collaborative process though. A health plan provides all of their policies
21 and processes. There's a walk-through with cases when they do come
22 for and audit. And there is an explanation behind decisions just to make
23 sure that it's fair for both sides. It's our industry standard. I -- you know,
24 it's how we build our processes. I --

25 Q And what is your personal involvement in that process when

1 the NCQA comes to visit?

2 A So -- and this has been -- my involvement has been even
3 since my initial transition as a manager. So we would prepare a list of
4 applicable denials. So when NCQA audits the UM team, they're asking
5 for medical necessity denials. You don't get to pick and choose. You
6 send your full universe of cases for them to randomly choose a case,
7 which is why we focus on our quality review of our denial, because
8 although they choose a small number of cases, any case could be
9 chosen.

10 So in addition to us, of course, wanting to be fair and ethical in our
11 decision-making, we have to be prepared for an extensive review of any
12 denial case by our regulating body.

13 So just getting back to our complete universe of denial cases, from
14 there what they'll do is choose 40 cases out of that particular universe, is
15 what we call it, but it's a complete list of denials. From those 40 cases,
16 what we'll do is go through each case, we have to kind of label it
17 according to the NCQA standards of what they're looking for. What
18 they're looking for is the appropriate professionals making decisions, the
19 timeliness of the case, and then multiple elements within the denial
20 letter, making sure that it's understandable and that the peer to peer
21 review's process is offered as well as all of the appeal rights. And they
22 walk through each case to make sure all of those elements are met.

23 From those 40 cases, we'll do an in-person or virtual -- at the
24 time it would be in-person. They would walk through each denial case,
25 looking at the same thing that we would look at, the medical records, the

1 medical policy, and the denial letter, to make sure that it met their
2 standards.

3 Q Is this a quick process?

4 A No.

5 Q How long does it take?

6 A Sorry. So we get the date that NCQA is coming, you know,
7 for a year. They come every three years, and they'll review 12 months
8 back. I would say it's two to three months to -- from the time that we're
9 notified, and we send that list to the time they actually complete the
10 audit and send us their findings.

11 Q Are you familiar with the NCQA guidelines?

12 A Yes.

13 Q And do you use those in your day-to-day job?

14 A Yes.

15 MR. ROBERTS: Your Honor, at this time I'd move to admit
16 the copy of the NCQA guidelines in effect at the time of the adverse
17 determination in this case, Exhibit 134.

18 THE COURT: Any objection?

19 MR. SHARP: No objection.

20 THE COURT: Exhibit 134 will be admitted into evidence.

21 [Defendants' Exhibit 134 admitted into evidence]

22 MR. ROBERTS: Audra -- let's see, could we switch over to
23 Audra?

24 UNIDENTIFIED SPEAKER: Sure.

25 MR. ROBERTS: Thank you. Could you put up the first page

1 of Exhibit 124 [sic]?

2 MS. BONNEY: 134 or --

3 MR. ROBERTS: 134.

4 BY MR. ROBERTS:

5 Q And do you recognize this as being the guidelines that you
6 personally work with?

7 A Yes.

8 Q So let's talk about the internal processes. Have you
9 implemented internal processes in your department in order to prepare
10 you for this NCQA audit when it comes in?

11 A Yes. It's a --

12 Q Yeah. Tell me what you did.

13 A So this is a continuing quality improvement just for our
14 team. And as, let's say, errors or trends arise, we'll address those to
15 make sure that we are meeting NCQA standard. Most of our operational
16 processes -- and I'd say 50/50. Most of our operational processes -- well,
17 I said 50/50 and then it went back to most. Sorry. Half of our
18 processions really are geared toward making sure decisions are made in
19 a timely fashion. So we're -- that it's a chain-link process. So each step
20 needs to be reviewed, the intake process. Are we building cases as
21 efficiently as we could?

22 I would say in approximately 2012 we moved to a web-based
23 system to improve the efficiency of the intake process and reduce the
24 amount of manual case building was that lengthened the time -- our
25 turnaround times. The sooner a case is built, the sooner it can be

1 decisioned. So we did that.

2 We looked at efficiencies within the clinical review process as
3 well, and we made some changes just in our clinical review steps in how
4 cases are summarized just to -- we don't want to -- it's not -- it's a little bit
5 more than just meeting NCQA guidelines; it's prior all. So before
6 somebody can have it, it needs to be decided. So we want to make that
7 process more efficient for members as well.

8 So we improve just various efficiencies within the clinical
9 review steps as well, maybe making templates for notes instead of
10 making everything free form so that, you know, if you do have
11 something free form to say, then you can summarize it and do it that
12 way. Just in efficiency, the denial library is actually another example
13 that an efficiency because that's -- you know, prior to that, people were
14 generating this denial text and having to go from scratch, and that would
15 delay the amount of time. Although it's an unpleasant decision, you
16 still -- you know, you don't want to have an undue delay in getting your
17 unpleasant decision.

18 So we make those processes more efficient, you know, not
19 only for members but to also meet compliance standards as well. And
20 for the quality of our denial, that's a continuous quality improve process
21 as well. So the interpretation of what denial text meets standards can be
22 subjective for the NCQA auditors, or our internal quality review team,
23 even for myself. So there is continuous, we call it, tweaking of our denial
24 text to make sure that it is as understandable as we can get it. It's a -- it's
25 a summary of a complex process, as, you know, this is probably the fifth

1 explanation of the process.

2 So imagine being, you know -- to generate denial texts, we
3 want to make sure that it is understandable. Which is why we have a
4 collaborative process where people with raise concerns or suggest to
5 their teammates this or that could be better.

6 Q Thanks very much. Do you agree with the statement, if
7 someone else had said it in the courtroom, that this whole process was a
8 rig system set up to deny as many claims as possible, do you agree with
9 that?

10 A Not at all.

11 Q Tell the --

12 A Not at all.

13 Q -- jury why you don't agree.

14 A I don't agree with it because -- I'll just start with the NCQA
15 standards. It's there to make sure that people receive scientifically
16 supported services. The process to review those services is using
17 medical criteria that's based on science. I mentioned our collaborative
18 process. Sometimes, you know -- certainly there is a denial if an
19 exception is not warranted. But sometimes there are exceptions that
20 would warrant an exception. And we discuss that. I -- we spend our day
21 explaining and examining to make sure that we're taking the best
22 decision for our members. It's not just compliance. We are an insurance
23 plan serving members.

24 So our discussions center around what's our best decision. If it's a
25 denial, then it ends up being a denial because, you know, compliance

1 standards are not met. However, if it's an approval, you know, we're --
2 we're certainly open to that as well.

3 Q Did you limit the time that medical directors could spend on
4 review of a preauthorization request?

5 A No.

6 Q Did you have any productivity quotas?

7 A No.

8 Q Did you pay medical director's incentives for denying claims?

9 A No.

10 Q The jury saw an acknowledgment that was signed by
11 Dr. Ahmad. Is that something that was generated by your department?

12 A It is generated by our UM compliance team. They send out
13 the -- I want to make sure I have the title right -- attestation for no
14 incentives -- something -- it's a document stating that we are not
15 incentivized to deny. And it's sent out to the entire team. Every year we
16 sign off.

17 Q Based on your experience as the director of this department,
18 do you provide anyone in this entire process with an incentive to deny
19 claims?

20 A No.

21 Q It's come up whether that Dr. Ahmad was eligible for a bonus
22 in his current position. In his position at the time he reviewed this
23 preauthorization request in this case, was he a full-time or a part-time
24 medical director?

25 A He was a part-time.

1 Q And as a part-time medical director, was he eligible for any
2 type of bonus?

3 A No.

4 Q The jury has seen that Dr. Ahmad worked through a firm
5 called MBO. Do you know MBO?

6 A Yes.

7 Q What does MBO do?

8 A They're a group of manages medical directors as part of a
9 contract with United Healthcare.

10 Q Did contract medical directors have the same duties and
11 responsibilities as full-time medical directors?

12 A Yeah. The same responsibilities as far as reviewing cases,
13 yes.

14 Q Did MBO have any ability to influence Dr. Ahmad's medical
15 decisions?

16 A To the best of my knowledge, no.

17 MR. ROBERTS: That's all I have. Thank you, Your Honor.

18 THE COURT: Thank you, Mr. Roberts.

19 Any follow-up, Mr. Sharp?

20 CROSS-EXAMINATION

21 BY MR. SHARP:

22 Q Good morning, Mrs. Sweet.

23 A Good morning.

24 Q I just have a few questions. First of all, did you understand
25 that Dr. Ahmad was also running a practice -- a medical practice?

1 A Yes.

2 Q And, in your experience -- you have a lot of experience in the
3 nursing area -- full-time practitioners tend to be pretty busy?

4 A Yes.

5 Q Fair?

6 A Yes, fair.

7 Q And I apologize. That was my fault because I had stopped
8 before I finished my question. So --

9 A Sorry.

10 Q -- I didn't mean to interrupt you.

11 A Okay.

12 Q I understand from your testimony that the goal of the
13 company is to make the denial letter as understandable as possible?
14 And those might be my words. But is that a fair characterization?

15 A Yes.

16 Q And in this particular case, from -- at least the expectations
17 from Sierra Health and Life that you know, the denial letter conformed
18 with that? Is that your position?

19 A Yes.

20 Q Okay. There were three people that we've heard that were
21 basically involved in -- you testified about they were involved in the
22 preservice claim here, and the first one you had mentioned, I believe --
23 and I may not be going in correct order -- was Ms. Amogawin, right?

24 A Correct.

25 Q And you -- you know Ms. Amogawin?

1 A Yes.

2 Q And she testified yesterday about the policies and
3 procedures as she understood them. And you probably don't know that,
4 but I'm just representing to you to preface my question. It -- is it your
5 memory that nurse -- that Ms. Amogawin fulfilled all of the expectations,
6 as you understand them, from Sierra Health and Life?

7 A Yes.

8 Q Now, the second person is Mr. Guerrero. And the same
9 question. With respect to this preservice claim, did Mr. Guerrero fulfill
10 all of the expectations, as you understood them, from Sierra Health and
11 Life?

12 A Yes.

13 Q And then the third person is Dr. Ahmad. The same question.
14 From your understanding, did Dr. Ahmad fulfill all of the expectations, as
15 you understand them, from Sierra Health and Life?

16 A Yes.

17 Q And so we can leave this courtroom today with the
18 understanding that from your expectation, as you understand them from
19 Sierra Health and Life, any preservice claim that went through the
20 process that you and Mr. Roberts discussed will receive the same
21 fairness and impartiality that Mr. Eskew received; is that correct?

22 A Yes.

23 Q Thank you.

24 MR. SHARP: I have no further questions.

25 THE COURT: Thank you, Mr. Sharp.

1 Any follow-up, Mr. Roberts?

2 MR. ROBERTS: Yes.

3 REDIRECT EXAMINATION

4 BY MR. ROBERTS:

5 Q Are you aware that Dr. Ahmad had some typos in his initial emails?

6 A Yes.

7 Q And what do you do if someone makes a typo? Do you fire
8 them?

9 A No. No.

10 Q Do you think that -- do you know if any of those typos or
11 errors that occurred during the process actually made it into the final
12 letter that went out to MD Anderson?

13 A No, they did not.

14 Q So did the process work?

15 A Yes.

16 Q Thank you.

17 MR. ROBERTS: Nothing further, Your Honor.

18 THE COURT: Thank you, Mr. Roberts.

19 Mr. Sharp, any follow-up?

20 MR. SHARP: No further questions, Your Honor.

21 THE COURT: Thank you. Ms. Sweet, you're excused.

22 THE WITNESS: Thank you.

23 THE COURT: Thank you.

24 THE MARSHAL: Okay. All done for the jurors?

25 THE COURT: Thank you.

1 THE WITNESS: Can I just slip out?

2 THE COURT: Yes. Thank you.

3 MR. ROBERTS: Your Honor, as we discussed yesterday, we
4 have a few more statutes we were going to ask the Court to take judicial
5 notice of. I don't think we need to do that right here. And if the Court
6 will allow me to reserve my right to -- to that outside of the presence, the
7 Defendant rests its case.

8 THE COURT: Thank you.

9 Ladies and gentlemen, we are going to adjourn for the day.
10 The Court has to meet with the attorneys. Your time is valuable, so we'll
11 let you go. And then you will come back Monday at 9 a.m.

12 During the interim, you are instructed not to talk with each
13 other or with anyone else about any subject or issue connected with this
14 trial. You are not to read, watch, or listen to any report of or
15 commentary on the trial by any person connected with the case or by
16 any medium of information, including, without limitation, newspapers,
17 television, the Internet, or radio. Do not conduct any research on your
18 own relating to this case, such as consulting dictionaries, using the
19 Internet, or using reference materials. Do not conduct any investigation,
20 test any theory of the case, recreate any aspect of the case, or in any
21 other way investigate or learn about the case on your own.

22 You're not to talk with others, text others, Tweet others,
23 Google issues, or conduct any other kind of book or computer research
24 with regard to any issue, witness, party, or attorney involved in this case.
25 You're not to form or express any opinion on any subject connected with

1 this trial until the case is finally submitted to you.

2 So we'll return Monday at 9 a.m. Thank you so much.

3 THE MARSHAL: Okay. All rise for the jury.

4 [Jury out at 10:02 a.m.]

5 [Outside the presence of the jury]

6 THE COURT: Okay. Counsel, in about 15 minutes, just come
7 on back and then we'll discuss jury instructions.

8 MR. SHARP: Your Honor, we do have a motion that we're
9 going to make on the first element, a Rule 50 motion. And so what I
10 would propose -- Mr. -- first of all, Mr. Roberts and I would like to discuss
11 the jury instructions to see if we can reach further resolution on those
12 names. And then I've -- I'll give Mr. Roberts a copy. And then I would
13 just -- you know, we can come back in and deal with the directed verdict
14 at the same time.

15 It has -- this hasn't been filed. I haven't had a chance to alert
16 my staff to file it. So if that -- if that would be appropriate with
17 Your Honor, that's --

18 THE COURT: So you want a break first to discuss the jury
19 instructions?

20 MR. SHARP: The jury instructions, and then we can come
21 back after the Defense has had an opportunity to review the pleading,
22 you've had an opportunity to review the pleading, and we can deal with
23 that issue. And I think it will be more efficient. But --

24 THE COURT: How much time do you need?

25 MR. SHARP: To discuss? Probably 40 minutes maybe.

1 MR. ROBERTS: Yeah. That would be fine. So about 45
2 minutes.

3 THE COURT: Okay. Just let the marshal know when you're
4 ready.

5 MR. SHARP: Okay. Thank you.

6 MR. ROBERTS: And, Your Honor, as long as we're still on
7 the record, my wonderful paralegal has reminded me that I failed to
8 follow the guidelines I set for myself. So to the extent it's still necessary,
9 I'd move to publish the deposition of Matthew Palmer and the deposition
10 of Lou Ann Amogawin. I may have forgotten to ask to publish those
11 before I presented them to the jury.

12 MR. SHARP: We probably should do the same thing for
13 Dr. Liao [indiscernible] we'd ask for that.

14 MR. ROBERTS: So --

15 MR. SHARP: So I have no objection.

16 MR. ROBERTS: That should have been part of the record.

17 THE COURT: Okay. All three are granted.

18 MR. ROBERTS: Thank you, Your Honor.

19 THE COURT: Thank you.

20 All right. Off the record?

21 MR. ROBERTS: Yes, Your Honor.

22 [Recess taken from 10:04 a.m. to 1:22 p.m.]

23 [Outside the presence of the jury]

24 THE COURT: Counsel.

25 MR. ROBERTS: Good afternoon, Your Honor.

1 MR. SHARP: Good afternoon, Your Honor.

2 THE COURT: Good afternoon. Do you want to address the
3 motion first or the jury instructions?

4 MR. SHARP: How every you would like to proceed.

5 THE COURT: We can do the motion first.

6 MR. SHARP: Okay. You know, I don't have much to add
7 beyond what's in the brief pleading. I don't take this lightly and for the
8 first time I've ever moved for a judgement notwithstanding the laws to
9 the Plaintiff. But at some point when an insurance company admits that
10 it never relied upon the insurance policy, the claim denial is clear on its
11 face, there's no reference to the insurance policy. At some point the law
12 has to say you can't deny a claim. There's no case probably in the Court
13 that says an insurance company can deny a claim without every
14 considering the terms of the insurance contract. And, I mean, with that
15 I'll leave it at that unless you have any questions.

16 THE COURT: No questions, thank you.

17 MR. ROBERTS: Thank you, Your Honor. I'd like to just start
18 with the high points of the evidence that we've offered on this issue,
19 specifically the agreement of coverage at section 5 says, "This section
20 tells you what services are covered under this plan. Only medically
21 necessary services are considered to be covered services." That is a
22 clear and unambiguous statement that a service is not covered unless
23 it's medically necessary.

24 We then go to the denial letter, which is attached at Exhibit 5,
25 page 33 is the relevant portion where the insured was provided the

1 reason for the determination. "The reason for a determination is based
2 upon UnitedHealthcare Inc. medical policy for proton beam radiation
3 therapy coverage is denied. Your provider asked for proton beam
4 radiation therapy."

5 And then if we go -- I don't want to read it all and waste the
6 Court's time. But the key conclusion here is, "This type of radiation
7 therapy is considered unproven and not medically necessary for treating
8 lung cancer." So a clear provision in the contract that says medically
9 necessary is the only thing that's covered and a clear statement it's
10 being denied because it's not medically necessary.

11 In addition, the rationale is given because there's limited
12 clinical evidence that directly compares proton beam therapy with other
13 types of radiation therapy. Current published evidence does not allow
14 for any definitive conclusions about safety or efficacy of proton beam
15 therapy to treat your condition. Meeting the requirements of the
16 industry and state law for clear and simplistic explanation.

17 Then we go back to the definition of medical necessity in the
18 contract, which is contained at -- hold on just a second. 4, page 64.

19 THE CLERK: Exhibit 4?

20 MR. ROBERTS: Exhibit 4, page 64.

21 THE CLERK: Thank you.

22 MR. ROBERTS: And this is the definition of medical
23 necessity. So the denial letters cites to medical necessity. The insured
24 can then go to medical necessity, which is there are three bullet points.
25 Consistent with the diagnosis and treatment of the insured's illness or

1 injury, the most appropriate level of service that can be safely provided
2 to the insured. So -- and those are and, they're conjunctive.

3 So the question is, is it -- does it meet the requirements of
4 state law and the terms and conditions of the contract that tells someone
5 it's not medically necessary because it hasn't been proven safe and the
6 contract says, it's not medically necessary unless it can be safely
7 provided, and that current published evidence doesn't allow for
8 conclusions about safety or efficacy.

9 So then does the reliance on this clinical evidence, the
10 scientific evidence does that comply with the contract? Well, the
11 contract specifically says: "In determining whether a service or supply is
12 medically necessary, SHL may be -- may give consideration, meaning
13 the contract allows to them to give consideration to reports and peer
14 reviewed literature, evidence based reports and guidelines published by
15 national professional organizations that includes supporting scientific
16 data."

17 The medical policy clearly does that, cites all the type of
18 evidence which the contract specifically says, we may rely upon. Based
19 on the contract and the denial letter alone it has created at least an issue
20 of fact for the jury as to whether the proton beam therapy was medically
21 necessary and therefore was within the definition of covered services in
22 the contract.

23 The motion also cites to Dr. Owens, and I agree that Dr.
24 Owens got a little loose with his language, but I think I cleared that up on
25 redirect where he clarified that he didn't mean to say that proton beam

1 therapy is a covered services. He meant to say it was potentially
2 covered. And that if it was not medically necessary, for example in this
3 case because we contend proton beam for lung cancer is not medically
4 necessary that it would not be a covered service. So I do think there's an
5 issue of fact for the jury here on covered service, Your Honor, to the
6 extent we're not entitled to judgement as a matter of law on that issue.
7 Thank you, Your Honor.

8 THE COURT: Thank you, Mr. Roberts.

9 MR. ROBERTS: And if -- Court have any questions?

10 THE COURT: The Court doesn't have any questions.

11 MR. ROBERTS: Okay. Thank you, Your Honor.

12 THE COURT: Any rebuttal Mr. Sharp?

13 MR. SHARP: Yeah. I mean, the only -- the thing -- the two
14 point -- three points I guess I would make is, first, Mr. Roberts' statement
15 is not evidence, and the undisputed evidence is no one considered the
16 actual terms to the insurance contract. They had a duty to do so both
17 under the definition of medically necessary as well as under section 3.
18 That did not happen.

19 And the whole point of requiring an insurance company to
20 set forth the reasons for its denial is that so six years later we don't hear
21 for the first time that it was bullet point three that we denied the claim
22 upon. Bullet point three undisputably [sic] was never disclosed to Mr.
23 Eskew as a basis for the denial of his claim.

24 So the essence is they never looked at the terms in the
25 insurance policy, had they looked at the terms in the insurance policy

1 they would have realized they couldn't even have done prior
2 authorization under a fair reading of attachment B. Had they looked at
3 the -- and they never looked at the insurance policy for medically
4 necessary.

5 So they can't come in six years later and say, oh we did, we
6 got it sort of right. I mean, the law exists for reasons and when you
7 don't follow the law there's a consequence and in this case they didn't
8 follow the contract because they never denied the claim pursuant to that
9 contract. It's undeniable that the sole basis for the denial of this claim
10 was the proton beam therapy policy, which everybody agrees is not part
11 of the contract and could not be used as the sole basis for denial. And
12 with that I'll rest, Your Honor.

13 THE COURT: Thank you. Plaintiff's motion for judgement as
14 a matter of law regarding covered service is denied.

15 On the prior authorization, the testimony from the witnesses
16 was that the insurance company did not request the prior authorization,
17 it was the Plaintiff himself who submitted the prior authorization without
18 any request from the insurance company.

19 With respect to the denial, the policy says -- the insurance
20 contract, the insurance policy says, only medically necessary treatments
21 are covered. The denial letter said it's not medically necessary based
22 upon the current published evidence and the limited efficacy of proton
23 beam therapy. Dr. Ahmad is a medical oncologist who is familiar with
24 the published evidence on proton beam therapy versus IMRT.

25 So based upon that the Court as a matter of law cannot

1 grant summary judgement. It's an issue of fact whether or not the
2 proton beam therapy was medically necessary and whether or not the
3 denial of coverage was proper. That's for the jury to decide, the Court
4 just can't decide that.

5 MR. SHARP: Your Honor, with that with the jury instructions
6 what I would propose if I might be able to approach?

7 THE COURT: Yes.

8 MR. SHARP: I have a -- so we have a set of additional agreed
9 to instructions. I don't know if you'd want those at this point or if you
10 want to -- once we get everything put together we can get everything --
11 that's what I figured. So I won't add to the chaos.

12 We have a set of Plaintiff's proposed and Defendant's
13 proposed. And so I -- what I would suggest, if it's okay with Mr. Roberts
14 is we start out with the Plaintiff's. And there's some cross over with the
15 Defendant's so we can just flag that for you, so we don't have to do the
16 same thing twice.

17 MR. ROBERTS: That's fine, Your Honor. And Mr. Gormley's
18 going to be taking the lead in doing this since he's the one who's been
19 meet and conferring since before the trial started. But there are a couple
20 that I've asked him if I can jump in on with the Court's permission.
21 Thank you.

22 THE COURT: Of course. So the first one is, Plaintiff's
23 proposed jury instructions an insurers duty to evaluate and approve a
24 claim for prior authorization fairly and in good faith.

25 MR. SHARP: Yeah. And Your Honor, the argument is this

1 just a modification of pattern 11.13 to reflect that in this case the claim
2 was a prior authorization. So that's why I used approve a claim for prior
3 authorization. Otherwise it's the same as the pattern.

4 THE COURT: So just substitutes approve?

5 MR. SHARP: Yeah. I'm pulling up the pattern right now.
6 Yeah. It says -- the pattern says an insurer has a duty to evaluate and
7 pay a claim fairly and in good faith. So -- and I put in approve a claim for
8 prior authorization fairly and in good faith in lieu of pay. If you need a
9 pattern I can show it to you if it's easier.

10 THE COURT: No. You substituted pay for approve?

11 [Pause]

12 THE COURT: Mr. Gormley?

13 MR. GORMLEY: Thank you, Your Honor. On this one just
14 real briefly. It just seems like it is inviting confusion [indiscernible] the
15 agreed to standards. You know, the inquiry is whether Sierra Health and
16 Life had a reasonable basis for the denial. Then this instructions says
17 Sierra Health and Life had a duty to evaluate and approve a claim fairly
18 and in good faith. It seems like it's just a different way of stating the
19 other test, which seems unnecessary and will only lead to confusion.

20 THE COURT: Which is the other one you're referring to Mr.
21 Gormley?

22 MR. GORMLEY: Just the elements that we used in the
23 preliminary instructions and that the parties are still in agreement on,
24 which just a second element Sierra Health and Life -- it's whether Sierra
25 Health and Life had any reasonable basis for its denial.

1 THE COURT: The Court doesn't have that in front it. The
2 Court can't evaluate your objection without knowing what that other
3 instruction says.

4 MR. GORMLEY: Sorry, Your Honor.

5 MR. SHARP: I believe I have the pre instructions.

6 MR. ROBERTS: Audra printed those out for me. Didn't you,
7 Audra?

8 THE COURT: Madam clerk has them.

9 MR. SHARP: I think Mr. Gormley is referencing the fourth
10 pattern.

11 THE COURT: The, in order to establish a breach of the
12 implied covenant of good faith and fair dealing. Is that what you're
13 referring to Mr. Gormley?

14 MR. GORMLEY: Correct.

15 THE COURT: That one doesn't say this sentence.

16 MR. GORMLEY: I understand. I'm saying I think this one is
17 the controlling law and the -- so the one that's being argued right now
18 just says this gets to the -- I think says the same point but in a different
19 way that invites confusion.

20 THE COURT: So this is -- we'll just call this Plaintiff's
21 proposed number one. The Court is not going to issue this jury
22 instruction as it appears to conflict with the already proposed jury
23 instruction number four, which was read to the jury.

24 MR. SHARP: Okay. So the next instruction is, an insurer has
25 a duty to investigate.

1 THE COURT: So Mr. Gormley, what's your objection to this
2 one?

3 MR. SHARP: So he has -- Your Honor, if -- in the Defendant's
4 proposed it should be on the first page.

5 THE COURT: I see it.

6 MR. SHARP: Yeah. The part I bracketed is what we're
7 arguing over. The defense wants the bracketed portion.

8 THE COURT: The Court's going to adopt Plaintiff's version,
9 that that second paragraph will only invite confusion to the jury.

10 MR. GORMLEY: And just so I'm on the same page, is that the
11 paragraph that says, however, evidence that an insurer?

12 THE COURT: Yes.

13 MR. GORMLEY: Okay.

14 THE COURT: All right. the next one is, when determining
15 whether an insurer breached its duty of good faith and fair dealing you
16 should consider the information that the insurer actually relied upon
17 when it denied the claim where the information it reasonably should
18 have known through a reasonable investigation. What's your objection,
19 Mr. Gormley?

20 MR. GORMLEY: This one is another alternative one where
21 we were proposing the exact --

22 THE COURT: An honest mistake.

23 MR. SHARP: Hindsight if he can show -- I can show you
24 where theirs are if you show me their --

25 MR. GORMLEY: We're proposing your exact quote from the

1 in regards to [indiscernible] in hindsight a defendant acted with no
2 reasonable basis. The plaintiff must show that the defendant knew or
3 recklessly disregarded that there was no reasonable basis for its
4 conduct. I feel the one we're proposing is clearer and is more consistent
5 with how the courts have discussed that principle.

6 THE COURT: Is there any other jury instruction regarding --
7 because this one proposed by the Defense says that if the insurer had no
8 reasonable basis for denying the claim it was okay. So they could act
9 unreasonably?

10 MR. SHARP: Yeah. The one that they're proposing.

11 THE COURT: Is that what the parties are arguing what the
12 law says that the insurance company can act unreasonably?

13 MR. SHARP: No. I think the question is the wording between
14 -- well, let me follow up. It's the -- it is not enough to show that in
15 hindsight. I mean, that's the part that I just find confusing, that should
16 not be for a jury instruction. And that's why we proposed our
17 alternative. Which is basically the same thing, you shouldn't consider
18 evidence after February 5.

19 THE COURT: Well, the Defense proposed says, they can act
20 unreasonable, they just can't recklessly disregard.

21 MR. SHARP: So --

22 MR. GORMLEY: And --

23 THE COURT: But every other one says they have to act
24 reasonably.

25 MR. SHARP: Oh I see what you're saying. You know -- I

1 mean, Your Honor, I'm not -- I don't think -- I think we can withdraw ours
2 because I think the jury -- the elements that the jury instruction already
3 say, did they have a reasonable basis on February 5, 2016, which implies
4 what we're all trying to get at. And the confusion of more instructions
5 probably just isn't necessary.

6 THE COURT: Yes. I mean, there has to be an instruction
7 already that says they have to act reasonably, right?

8 MR. SHARP: What's that?

9 THE COURT: There has to already be an instruction that
10 says --

11 MR. SHARP: Yeah. The elements to the case are the
12 Defendant -- we have to prove they had no reasonable basis and --

13 THE COURT: So neither Plaintiff's nor Defense is going to be
14 offered because this is already a jury instruction regarding
15 reasonableness.

16 MR. SHARP: Okay. And the next instruction, I think this too.
17 Your Honor, if you -- I think it's their first defense instruction, which is an
18 honest mistake.

19 THE COURT: Yes.

20 MR. SHARP: So the Defense by my understanding is trying
21 to propose the fairly debatable type of instruction. Just because we
22 acted -- you know, we made a mistake doesn't mean we committed bad
23 faith. But this is really not -- well, one, it's not an accurate statement of
24 the law in terms of -- and it's just -- it's not a jury instruction.

25 So what we had proposed for the Defense is a fairly

1 debatable instruction, which I can show you where ours is.

2 THE COURT: Okay.

3 MR. SHARP: This line. So this is the fairly debatable that we
4 proposed, which is conformed with *Wohlers v. Bartgis* and the *Zilisch*
5 case in Arizona, which is kind of the lead case on fairly debatable.

6 MR. GORMLEY: And -- am I on mute? I can address that,
7 Your Honor, but I don't want to interrupt while you're reading, but.

8 THE COURT: Thank you, Mr. Gormley. Go ahead.

9 MR. GORMLEY: It's just our view, so the one we proposed it
10 starts with an honest mistake. It is consistent with Nevada law. It's
11 essentially right out of the *Allstate Miller* case. And also the language
12 has been reused and all the most cited to Nevada Federal District Court
13 cases discussing Nevada -- insurance bad faith law.

14 And then on their -- and I think it's a slightly different
15 instruction than the fairly debatable defense. And on their fairly
16 debatable defense instruction, I think the second sentence just again
17 invites confusion in light of the general elements of the claim because it
18 says, a denial of a claim is not fairly debatable if the insurer acted
19 unreasonably in the evaluation, investigation and processing of the
20 claim.

21 So then that sort of -- that leads to the question well, the
22 elements instruction says they need to have -- there's no bad faith if you
23 have a reasonable basis. And this one seems to be saying something
24 else. It seems to be saying that if you act unreasonably in the
25 evaluation, investigation and processing than maybe that means it's not

1 fairly debatable and then there can be bad faith and it seems to conflict
2 with the no reasonable basis inquiry.

3 THE COURT: Most of the proposed instructions are going to
4 be confusing for the jury. so this is what the Court's going to do, based
5 upon *Goodrich v. Garrison*. The jury instruction's going to be, "The
6 insurer is not liable for bad faith for being incorrect about policy
7 coverage as long the insurer had a reasonable basis to take the position
8 that it did. Bad faith requires an awareness that no reasonable basis
9 exists to deny the insurance claim."

10 MR. SHARP: Can I be heard on that?

11 THE COURT: Yes.

12 MR. SHARP: That -- first that instruction conflicts with the
13 pattern instruction on the duty to investigate because you can't have an
14 honest coverage decision if you didn't investigate. My suggestion would
15 be that neither one of these instructions take -- be put into the record
16 because the elements tell the jury we have to prove no reasonable basis
17 with knowledge of no reasonable basis. So by definition it tells the jury
18 the mere fact that there was a covered service does not get you to bad
19 faith. Any further instruction like that's just going to confuse the jury on
20 the -- on what really are three, four pretty simple issues that they can
21 decide.

22 THE COURT: Well, the Court said it's not going to offer
23 Defendant's or Plaintiff's. Instead the insurer is not liable for bad faith
24 for being incorrect about policy coverage as long as the insurer had a
25 reasonable basis to take the position that it did.

1 MR. SHARP: And was just --

2 THE COURT: Bad faith requires an awareness that no
3 reasonable basis existed to deny the insurance claims. So those are
4 reasonable basis standards which is consistent with the other jury
5 instructions.

6 MR. SHARP: But except the other jury instruction says, no
7 reasonable basis or recklessly disregard that fact. So maybe it'd be
8 easier if we -- if I could just see what the Court's proposing and then
9 propose an edit rather than waste your time.

10 MR. ROBERTS: The Defense has no objection to the Court's
11 proposed instruction, it's consistent with the law. Thank you.

12 THE COURT: So the proposed instruction is based on
13 Defendant's source authority which at lines 10 and 11 and then lines 21
14 and 22.

15 MR. SHARP: Okay.

16 MR. ROBERTS: And Your Honor, if I could clarify, I guess I
17 should say we request the Court's language.

18 THE COURT: Thank you.

19 MR. ROBERTS: Not just have no objection, we request it.
20 Thank you.

21 MR. SHARP: The next instruction is Plaintiff's where it says
22 there is law -- there is a law in the State of Nevada.

23 THE COURT: Yes.

24 MR. SHARP: And I think there's a dispute with the disputed --
25 or the insurance company basically Sierra Health and Life wants to put

1 the entire statute into the instruction instead of the two provisions which
2 were focused upon put into evidence. Which --

3 THE COURT: The Court sees that.

4 MR. SHARP: So.

5 THE COURT: Mr. Gormley, what would the point --

6 MR. GORMLEY: The model is --

7 THE COURT: -- of adding portions that are not relevant to
8 this case?

9 MR. GORMLEY: It would be -- so like the ending clause of
10 the instructions says, the presence or absence of any of these factors can
11 be basically what's considered in making a bad faith determination. And
12 so if you hold up [indiscernible] and it makes it look like it has two
13 considerations and they're going to argue we violated both, it presents a
14 different picture for the jury as opposed if you hold up a statute that has
15 15 provisions and then we can argue, look 13 of these there's no dispute
16 on, which shows that we were acting reasonably and then there's an
17 argument as to these other two. It paints a different picture for the jury,
18 and I think the absence of violations is something that we could argue to
19 the jury and warrants the entire model instruction.

20 THE COURT: The Court's not going to instruct the jury on
21 areas of the law that have no relevance to this case.

22 MR. SHARP: The next instruction, Your Honor, is substantial
23 factor. And the Defendant's --

24 THE COURT: Well, hold on. But we are going to add the one
25 sentence that says, the presence or absence of any of these factors alone

1 is not enough to determine whether the Defendant's conduct was or was
2 not in bad faith.

3 MR. SHARP: Okay.

4 THE COURT: You must consider the Defendant's conducts as
5 a whole in making this determination. So the last paragraph will come in
6 into Plaintiff's.

7 MR. SHARP: Okay. So it'll read, the violation of any
8 provision to the Nevada fair insurance practice may be evidence of the
9 breach of the duty of good faith. And then the presence or absence of
10 any of these factors is not enough to determine whether the Defendant's
11 conduct was or was not in bad faith?

12 THE COURT: Yes. You must consider the Defendant's
13 conduct as a whole in making this determination.

14 MR. SHARP: Okay. That's fine.

15 Okay. So the next one is substantial factor, two competing
16 instructions.

17 THE COURT: The Court has them.

18 MR. SHARP: Defendant's wanted to add the bracketed
19 portion in the last paragraph to the pattern instruction.

20 THE COURT: The Court's inclined to put that in.

21 MR. SHARP: In this?

22 THE COURT: Yeah. So the Court's inclined to use
23 Defendant's proposed.

24 MR. SHARP: Okay. The -- I believe the final -- well, there's
25 two issues. Your Honor, this is a proposed instruction by I think jointly

1 with the last bracketed portion the Defense does not want to put in.

2 MR. GORMLEY: Which one is this about?

3 MR. SHARP: It says, agreement of -- the agreement of
4 coverage is not -- is an insurance contract -- interpretation of an
5 insurance contract is subject --

6 MR. GORMLEY: Oh, yeah.

7 MR. SHARP: -- to legal standard.

8 THE COURT: The Courts inclined to include the bracketed
9 provision. The law is any ambiguity must be construed in favor of the
10 insured.

11 MR. SHARP: Okay.

12 MR. GORMLEY: This -- our one point on this (indiscernible)
13 Your Honor --

14 THE COURT: Yes.

15 MR. GORMLEY: -- was just to put it on the record, was that
16 we didn't think the instructions related to ambiguous interpretative rules
17 were appropriate because it's our view the contract is not ambiguous.

18 THE COURT: Well, Mr. Sharp has argued it is ambiguous, so
19 it's coming in.

20 MR. SHARP: Okay. The last instruction that we have an
21 issue over is on the punitive damage instruction. And so what -- I
22 believe what Mr. Roberts wants to put in is these definition of express
23 malice from the old patterns, which our position would be that doesn't
24 make sense because we're not asserting express malice, we're asserting
25 implied malice. Our statement of when -- I mean, it's an accurate

1 statement of implied malice.

2 THE COURT: If Plaintiff's not alleging direct malice and only
3 implied malice, then only implied malice will come into the jury
4 otherwise it would be confusing to the jury.

5 MR. ROBERTS: Your Honor, may I just make a brief record
6 on this?

7 THE COURT: Of course, Mr. Roberts.

8 MR. ROBERTS: Thank you, Your Honor. So here's where it
9 gets a little tricky. Under 42.005 it says that for a bad faith claim against
10 an insurance company the statutory definitions do not apply. And it's
11 those statutory definitions that we're essentially talking about defining
12 what is conscious disregard, you know, what is malice and that the
13 common law applies instead. So I think that the instructed case here is
14 *Countrywide Homes v. Thitchener*, 124 Nev. 725 because that was the
15 one that said, hey, NRS 42.001 enacted in 1985 changed the law and
16 substituted the statutory definitions for the common law definitions. So
17 we need to go back before 42.001 was enacted.

18 And the *Countrywide* case discussed the fact that prior to the
19 enactment of 42.001 the Supreme Court had looked twice at what is
20 malice and what is implied malice. And essentially in *Craigo v. Circus-*
21 *Circus Enterprises* cited by *Countrywide*, the court basically said malice
22 expressed or implied only means malice in fact. And implied malice is
23 conduct from which malice in fact can be inferred by the jury. So now
24 we're getting to the fact that what the Court is saying, there's only one
25 kind of malice, malice in fact. And there's actual malice. And implied

1 malice is conduct from which malice can be implied by the jury. Well,
2 the jury can't understand what implied malice is without understanding
3 what malice is. That it's an evil state of mind equivalent to the intent to
4 hurt someone.

5 And that's why I want that in, to be able to make that
6 argument and I think that argument is consistent with the common law
7 before 42.001 was enacted.

8 MR. SHARP: Can I borrow your blue book? The blue --

9 MR. ROBERTS: Oh sure.

10 THE COURT: Which page were you on, Mr. Roberts? Was it
11 741, 740?

12 MR. ROBERTS: Of *Countrywide*, Your Honor?

13 THE COURT: Correct.

14 MR. ROBERTS: It was page 740 of the Nevada Reporter,
15 page 253 of the Pacific Reporter.

16 THE COURT: Thank you.

17 [Pause]

18 THE COURT: Mr. Roberts, the Court's read that case and it --
19 really what the court was saying was that there was an issue regarding
20 conscious disregard and discusses the history and that implied malice or
21 actual malice are two separate propositions.

22 MR. ROBERTS: And Your Honor, I agree the legislator had a
23 good reason to try to clarify this. Why they created an exception for bad
24 faith I have no idea. But if you'll look the *Countrywide* case cites *Craig*
25 *v. Circus-Circus* as one of the two times the Supreme Court addressed

1 this in the common law 786 P.2d page 22, at page 23 this is what the
2 *Craig* court said.

3 "This court has consistently declared that the malice
4 contemplated by the punitive damage section is malice in fact and that
5 the phrase express or implied has reference only to the evidence in which
6 malice is established."

7 THE COURT: Yes. But this case, the *Countrywide* case says
8 that:

9 "NRS 42.001 which was enacted in 1985 accomplished the
10 two following important changes in Nevada punitive damages
11 framework. First, NRS 421.001 clarifies that implied malice is a basis for
12 punitive damages independent of express malice. Second, NRS 42.001
13 finds conscious disregard an element of both implied malice and
14 oppression which had previously not been defined by statute."

15 So based on *Countrywide* and the statutes implied malice is
16 independent of express malice.

17 MR. ROBERTS: But that's the hitch, Your Honor. 42.005 says
18 that 42.001 does not apply in insurance bad faith case, which means that
19 *Countrywide* saying this has now been cleared up and overruled by
20 statute doesn't apply in this insurance bad faith case.

21 MR. SHARP: Can I add a little context because I might be the
22 only lawyer who -- around after my age that remembers all this.

23 What happened is *Circus-Circus* and *Granite*, I can't
24 remember *Granite's* name, conflicted on the concepts of express and
25 implied malice. As a result of that the pattern instructions that were

1 developed in 10.20 expressively deals with this split and they have it as
2 an option. I can show it to you because this is exactly what where the
3 instruction comes from.

4 THE COURT: Thank you.

5 MR. SHARP: And they dealt with this issue between express
6 and implied. And you'll see in the pattern instruction is exactly where
7 my instruction comes from. And once you've read that, Your Honor, I
8 can go on.

9 THE COURT: The Court's read it.

10 MR. SHARP: So what happened in the amendment of 42.005
11 and 42.001, the intent was to add to each of the instructions under the
12 common law the concept of despicable conduct. So what the legislator
13 did is they excluded bad faith from a despicable conduct standard. So it
14 wouldn't make any sense to reach a result that the legislator's trying to
15 protect insured rights and now we somehow engaged in some sort of
16 imagination where their rights are actually lost.

17 THE COURT: The Court's going to give the Plaintiff's
18 proposed jury instruction based upon the Nevada Supreme Court case.
19 The Court finds that the *Countrywide* case is clear that it's not going to
20 require a higher burden for the Plaintiff. The Court's going to follow the
21 plain language of the *Countrywide* case.

22 MR. SHARP: So I've -- that's -- oh now we have verdict
23 forms.

24 MR. GORMLEY: Matt, what about burden of proof?

25 MR. SHARP: Okay.

1 THE CLERK: What did you say, Mr. Gormley?

2 MR. ROBERTS: Matt, Mr. Gormley thinks that we've --

3 MR. SHARP: Oh burden of proof, yes. That there's a
4 question on the breach of the implied covenant of good faith and fair
5 dealing. The Defense wants to impose a clear and convincing standard
6 acknowledged throughout the Nevada case law is, preponderance. I
7 would point to the Court *Wohlers v. Bartgis* where you have a bad faith
8 finding and there's actually a dispute over the instruction for punitive
9 damages on clear and convincing. So it would seem the logic would
10 suggest that if the Nevada Supreme Court wanted to hold bad faith to a
11 clear and convincing standard it would have done so in *Wohlers*.

12 THE COURT: What's the citation?

13 MR. SHARP: *Wohlers* is -- it's 114 Nev. 1249. And I would
14 note that I don't -- I think the Defendants were relying upon like cases
15 from Pennsylvania.

16 MR. GORMLEY: Yeah. I -- when the Court wants I can
17 address our position, but I can wait until you're done reviewing.

18 THE COURT: Thank you, Mr. Gormley.

19 Mr. Sharp, this case says that the trial court issued a clear
20 and convincing standard and that the Supreme Court affirmed that.

21 MR. SHARP: For punitive damages, which is the standard for
22 punitive damages.

23 THE COURT: Yes.

24 MR. SHARP: They're claim -- the Defense is asserting that
25 the burden of proof for bad faith is clear and convincing. There is no

1 Nevada case that supports that proposition.

2 THE COURT: Is there any Nevada case that supports the
3 proposition that it should be preponderance of the evidence?

4 MR. SHARP: Yeah. I mean, I would guess from the
5 beginning from *Peterson* [phonetic] all the way through *Wohlers*, not
6 one case suggests that anything within is a clear and convincing
7 standard. I mean, it's -- otherwise there would be no difference between
8 punitive damages and bad faith.

9 THE COURT: Does anyone have case law to support their
10 position?

11 MR. GORMLEY: I can go through my argument, Your Honor.

12 THE COURT: Yes, Mr. Gormley.

13 MR. GORMLEY: The -- so it's our position that under Nevada
14 law whether it's a clear and convincing standard or a preponderance
15 standard the bad faith is an open question. As far as I'm aware the
16 Nevada Supreme Court's never address the issue directly and so there's
17 no exact Nevada precedent to rely on for whether it's preponderance or
18 clear and convincing.

19 And then in this case I think there's a general argument why
20 the clear and convincing standard should apply. And then there's also a
21 specific argument that relates to the facts and arguments raised in this
22 case. The general is that there's multiple states across the country that
23 apply the clear and convincing evidence standard. We cited the cases
24 from Pennsylvania, Indiana, Wisconsin, Virginia that apply clear and
25 convincing evidence standard to bad faith.

1 I think that's particularly consistent and applicable for
2 Nevada because bad faith is one of the claims that features uncapped
3 punitive damages, as does defamation. And defamation the actual
4 malice inquiry, which is very similar to the knowledge and recklessness
5 regard inquiry for bad faith requires clear and convincing evidence. So I
6 think there's a similarity between those two things.

7 And then more specifically to this case in a Wisconsin
8 Supreme Court case that applied the clear and convincing evidence
9 standard it said, "Clear and convincing evidence applies to the bad faith
10 because bad faith is a species of fraud." And in this case based on that
11 evidence that was disputed in Defendant's motions in limine number
12 three related to the conversations with Janet Holland-Williams and the
13 policy that was provided in 2015, and the testimony that was elicited on
14 that issue.

15 Plaintiffs seem to be sounding their bad faith claim in a
16 theory of misrepresentation or a theory of, I think we've heard the term
17 bait and switch used before in the courtroom. And because they're
18 resting their case in that theory that seems to make the clear and
19 convincing evidence standard all the more applicable for this case.

20 THE COURT: So Mr. Gormley, what Nevada Supreme Court
21 case said it was the burden of proof was clear and convincing, what was
22 the citation?

23 MR. GORMLEY: Oh for Nevada Supreme Court there is no
24 Nevada Supreme Court case. I don't think there's a Nevada Supreme
25 Court case on point one way or the other. I don't think it's been decided

1 by the Nevada Supreme Court.

2 THE COURT: Thank you. Court's just looking at pattern jury
3 instructions.

4 MR. ROBERTS: And if I could clarify one thing said by Mr.
5 Gormley, Your Honor?

6 THE COURT: Yes.

7 MR. ROBERTS: The Nevada Supreme Court has found that
8 plaintiffs have to support fraud by clear and convincing evidence. And
9 that's *Lubbe v. Barba* 540 P.2d 115 at -- it's actually page 598 of the
10 Nevada Reporter, 91 Nevada at 598. And the argument is because other
11 courts have found that bad faith is a species of fraud that Nevada law
12 saying that you have to prove fraud by clear and convincing evidence
13 would therefore apply by implication.

14 THE COURT: Thank you. The Court's going to have to take
15 this under advisement.

16 MR. SHARP: Can I make an argument as well?

17 So in every instances that I'm aware of under the common law
18 when the Supreme Court intends to have a higher burden of proof it
19 states clear and convincing. When it doesn't it states -- or doesn't even
20 state it because it's known as preponderance. It's like saying there's no
21 case that is held that the negligent -- the burden of proof in a negligence
22 case is preponderance, it just goes without saying. And I would point
23 out that the in common law that all punitive damages the court adopted
24 a clear and convincing standard.

25 I would point out that we were are not asserting a fraud

1 claim. In fact, the Court issued granted the motion in limine that
2 restricted us from presenting evidence that coverage may have been
3 represented and such. Our bad faith case is premised principally on two
4 issues, the failure to follow the contract, knowingly failure to follow the
5 contract, the failure to investigate. Those are the two principal premises
6 behind our case. And in fact, we didn't submit to the jury on fraud for
7 purposes of punitive damages.

8 THE COURT: The Court's just looking at one more item.

9 Does anyone disagree with the proposition that substantial
10 evidence equals preponderance of the evidence? Because these other
11 jury instructions say substantial evidence. And generally substantial
12 evidence equals preponderance of the evidence. So unless the parties
13 have any case law to dispute that the Court would apply the
14 preponderance of the evidence standard based upon the fact that
15 substantial evidence is required in insurance bad faith.

16 MR. SHARP: Okay. Now the next issue, Your Honor, is the
17 proposed verdict forms. This is the Plaintiff's, and this is the
18 Defendant's.

19 THE COURT: What the Defendant's verdict form is
20 essentially asking is breaking down the elements of the cause of action.
21 But the Court's not inclined to do that. That would be quite confusing to
22 the jury on questions one, two and three and four.

23 Plaintiffs' verdict regarding the implied covenant of good
24 faith and fair dealing is much simpler because they can look the jury
25 instructions and see if Plaintiff has met those elements.

1 With respect to Defendant's number five, that is similar to
2 Plaintiffs' number two. However, in Defendant's number six the Court's
3 inclined to put that in the verdict form as it has a different standard. But
4 the parties then might want to change question one to show that it's --
5 those are two different standards.

6 MR. SHARP: So if we put on question, it should be three
7 instead of two.

8 THE COURT: Yes.

9 MR. SHARP: If we put, do you find by clear and convincing
10 evidence that punitive damages are appropriate. Is that what the Court
11 asking?

12 THE COURT: Well, we can put the whole question six as
13 question three.

14 MR. SHARP: So --

15 THE COURT: And then change question one if the parties
16 would like to put the preponderance of the evidence standard.

17 MR. SHARP: So I would just ask that if read -- question three
18 read, do you find by clear and convincing evidence that Sierra Life and
19 Health -- Sierra Health and Life acted with oppression, fraud -- or
20 oppression or malice. I mean, guilty implies even a higher standard.

21 THE COURT: The Court's inclined to do that, Mr. Sharp.
22 Do the parties want to put in question one that it's the
23 different standard of preponderance of the evidence?

24 MR. SHARP: I don't see the need for that.

25 THE COURT: Okay. All right. Any other issues?

1 MR. SHARP: No. So let me recap so we can --

2 MR. ROBERTS: Before we recap, Your Honor. Just for the
3 record and the Court asked a question and I did some quick research on
4 it. And I would submit that the reference to substantial evidence isn't a
5 reference to any particular burden of proof. And I would cite to the case
6 of *State Employment v. Hilton Hotel's Corporation* 102 Nev. 606, 729
7 P.2d 497. That case was later superseded by statute on its specific
8 holding, but it contained a footnote defining substantial evidence.

9 Footnote one, substantial evidence was well defined in
10 *Roberson Transportation Company v. PSC*, a Wisconsin case.

11 "Substantial evidence does not include the idea of the court
12 weighing the evidence to determine if a burden of proof was met or
13 whether a view was supported by the preponderance of the evidence.
14 Such tests are not applicable to administrative findings and decisions.
15 We equate substantial evidence with that quantity and quality of
16 evidence which a reasonable man could accept as adequate to support a
17 conclusion."

18 And then they -- I won't read the whole thing, but they note
19 that accordingly: "The decision of an agency may be reversed if
20 unsupported by substantial evidence in view of the entire record. And
21 submitted does not permit this court to pass on credibility or reverse
22 administrative decision because it is against the great weight in clear
23 preponderance of the evidence if there is substantial evidence to sustain
24 it."

25 So I don't think that references the burden of proof and

1 therefore, you know, would not be a basis to deny our instruction.

2 THE COURT: Mr. Roberts, the Court actually believes that
3 this case supports the Court's decision because this footnote says that
4 substantial evidence has to just be "adequate". And secondly, they talk
5 about preponderance of the evidence as well. So -- also based upon Mr.
6 Sharp's statement that if there's no higher burden then it's the regular
7 burden.

8 So the Court finds this case actually supports the Court's
9 conclusion that substantial evidence does in fact mean preponderance of
10 the evidence. And based on the fact that this court calls substantial
11 evidence "adequate", which would believe the Court to believe they are
12 referring to more of a preponderance of the evidence standard. Thank
13 you.

14 Are there any other issues?

15 MR. SHARP: Yes. But before we put the instructions on the
16 record, I just want to circle back. You were going to type out the missing
17 instruction we'll call it --

18 THE COURT: I was going to type something?

19 MR. SHARP: I wasn't paying -- I wasn't following it what you
20 -- did you guys follow what she had said, Audra?

21 MR. ROBERTS: We've hired a wonderful reporter here who
22 will be able to give us a transcript and we'll be able to compare the
23 instruction from the reading by the Court.

24 MR. SHARP: So --

25 THE COURT: Thank you, Mr. Roberts.

1 MR. TERRY: Your Honor, I object to Mr. Sharp saying that
2 you're going to type anything up.

3 THE COURT: Thank you. Thank you, Mr. Terry.

4 MR. TERRY: That is not from our side, that's suggested from
5 Mr. Sharp.

6 MR. SHARP: I just had seen her working so hard I figured
7 she was already typing it.

8 So what we will do is work to get a final set put together so
9 we can put the instructions on the record. And we'll put our objections
10 to the instructions on the record and then --

11 THE COURT: But we have been on the record.

12 MR. SHARP: I know but we haven't formally settled jury
13 instruction where you come out and say, I've, you know, established the
14 jury instruction and Mr. Sharp do you have proposed instructions to be
15 provided.

16 THE COURT: So what you're going to do then is just collate
17 them, and we'll email them --

18 THE CLERK: To me.

19 THE COURT: Yes.

20 THE CLERK: By the close of business.

21 MR. SHARP: Okay.

22 THE CLERK: On Friday so that I can print them out and get
23 copies made for the jury.

24 THE COURT: That's why we did this in here instead of in
25 chambers.

1 MR. SHARP: Okay. Well, I think I need to go through the
2 record because I have not formally -- I mean, the normal routine I go
3 through is, do you -- you know, do you agree with the instructions that
4 have been provided by this court? Do you have any objections? Yes.
5 Here are the proposed instructions I would like to add. Exhibit 1,
6 proposed instruction number one. I mean, that's what I normally have
7 done and --

8 THE COURT: Well, normally what happens is the parties
9 meet prior to trial and go over the jury instructions and have an agreed
10 upon set and have plaintiff's proposed and defense proposed and then
11 we discuss them. And so instead of spending hours while the Court
12 waited for the parties to finalize their jury instructions. The Plaintiff's
13 proposed jury instructions have had already been put on the record.

14 First was, the insurer had a duty to evaluate and approve a
15 claim for prior authorization fairly and in good faith.

16 Second, insurer had a duty to investigate a claim followed by
17 its insureds.

18 Third, in determining whether insurer breached its duty of
19 good faith and fair dealing you should consider the information the
20 insured actually relied upon when it denied the claim.

21 The Court's not giving that one. The Court is giving the first
22 two. So the Court notes for the record that Plaintiff objects and wishes
23 that jury instruction to be given.

24 The next jury instructions, it's not a breach of the implied
25 covenant of good faith and fair dealing for an insurer to deny prior

1 authorization claim if the prior authorization claim was fairly debatable.
2 The Court's not giving that instruction. The Court notes for the record
3 Plaintiff's objection.

4 The next is, there is law in the State of Nevada called the
5 Nevada Unfair Claims Insurance Practice Act. The Court notes that the
6 Plaintiff wanted their proposed and the Court is adding the last
7 paragraph of Defendant's proposed over Plaintiff's objection.

8 The next is a substantial factor jury instruction. The Court
9 notes Plaintiff's objection. The Court's not providing that instruction.

10 The next one is, if you find that Plaintiff Sandra Eskew special
11 administrator for the estate of William Eskew has proved that Sierra
12 Health and Life reached the implied covenant of good faith and fair
13 dealing you may then consider whether you should award punitive
14 damages against the Defendant. The Court's giving that instruction as
15 proposed by the Plaintiff.

16 The last one which was agreed by the parties is regarding the
17 agreement of coverages in insurance contract. However, Section five
18 was objected to by the Defense. Over the Defense's objections that
19 sections coming in.

20 Did you have any other proposed jury instructions, Mr.
21 Sharp?

22 MR. SHARP: No. I would just point out that I have not made
23 a record on the substantial factor instruction. And the added bracketing
24 is inconsistent with the Nevada laws that pertains to this case. I would
25 cite [indiscernible] where the Court talked about instances where two

1 causes can produce the same injury and a substantial factor would be
2 sufficient. The two -- what that bracketing is referencing is when there
3 are two independent injuries, not -- I mean, here there was cancer, so the
4 question is whether or not the additional actions by the insurance
5 company was a substantial factor in causing additional stress, injury, et
6 cetera. It was not offered as a but for type causation.

7 But with that I will offer no further objections.

8 THE COURT: Thank you.

9 Mr. Roberts, is there any jury instruction this court has not
10 put on the record that you objected to?

11 MR. ROBERTS: No, Your Honor. We consider the detailed
12 record that we've made as we progressed through all the instructions to
13 be adequate to preserve our objection. We have nothing further to offer.
14 If Mr. Sharp has anything further that he wants to do to preserve the
15 record we have no objection in doing in writing prior to Monday.

16 THE COURT: Thank you.

17 MR. ROBERTS: Thank you, Your Honor.

18 MR. SHARP: Thank you, Your Honor.

19 THE CLERK: Before we finish I'm still waiting on Plaintiff's
20 opening PowerPoint that you used that I asked for after openings. I
21 haven't received an email so that I can print out --

22 MR. SHARP: Oh, if you just give me email I'll send you a
23 Dropbox link.

24 THE CLERK: I gave it to your IT guy.

25 MR. SHARP: Okay. Well, we get it. Sorry about that. Okay.

1 So --

2 MR. ROBERTS: And --

3 MR. SHARP: Go ahead.

4 MR. ROBERTS: A couple things I forgot before we close.

5 And I apologize, Your Honor, I got distracted. But we previously made a

6 request for the Court to take judicial notice of several additional statutes

7 from 695G. Mr. Sharp had questioned 695G.055. We met and conferred.

8 I'm withdrawing the request for judicial notice of that section. We do still

9 request judicial notice of 695G.040, 695G.053 and 695G.110. I provided

10 this list again to Mr. Sharp and he's indicated no objection.

11 MR. SHARP: Yes. I don't have any objection.

12 THE COURT: The Court will take --

13 MR. ROBERTS: And --

14 THE COURT: -- judicial notice of 695G.040, 695G.053 and

15 695G.110.

16 MR. ROBERTS: Thank you, Your Honor. And one final thing.

17 It's my understanding that the Court has been provided with a memory

18 stick of the portions of the Palmer deposition which were played into

19 evidence, which we moved to have marked as a court's exhibit just so

20 there's a record of what was played.

21 THE CLERK: It's a CD.

22 MR. ROBERTS: A CD, okay. Very good. Thank you, Your

23 Honor.

24 THE COURT: Thank you, Mr. Roberts. Any other issues?

25 MR. SHARP: None, Your Honor.

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MR. ROBERTS: None for us, Your Honor.

THE COURT: We'll see you at 9:00 a.m. on Monday.

MR. ROBERTS: Thank you.

THE COURT: Thank you.

[Proceedings adjourned at 2:31 p.m.]

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



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Jessica B. Cahill, Transcriber, CER/CET-708